

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01064 COA**

ELLISON THAMES A/K/A ELLISON L. THAMES

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	10/11/94
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	J.B. GOODSSELL
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF KIDNAPPING
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	12/30/97
CERTIORARI FILED:	2/23/98
MANDATE ISSUED:	5/14/98

BEFORE THOMAS, P.J., COLEMAN, AND HINKEBEIN, JJ.

HINKEBEIN, J., FOR THE COURT:

Ellison Thames [hereinafter Thames] was convicted in the Circuit Court of Scott County of kidnapping. On appeal Thames argues that his conviction should be reversed and rendered due to the following errors allegedly committed by the trial court:

I. DID THE STATE VIOLATE ELLISON L. THAMES' STATUTORY RIGHT TO A SPEEDY TRIAL UNDER MISS. CODE ANN. SEC. 99-17-1 WHEN IT TRIED HIM THREE HUNDRED SIXTY THREE (363) DAYS AFTER HIS ARRAIGNMENT?

II. DID THE STATE VIOLATE ELLISON L. THAMES' CONSTITUTIONAL RIGHTS TO A

SPEEDY TRIAL UNDER ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION AND UNDER THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY TRYING HIM FIFTEEN (15) MONTHS AFTER HIS ARREST?

Holding Thames' argument to be without merit, we affirm the judgment of the circuit court.

FACTS

In October of 1993 a grand jury in Scott County returned a multi-count indictment against Thames for the felony crimes of murder and kidnapping. At his October 7, 1993 arraignment Thames pled not guilty to both of these charges and was released on bond. The circuit court continued Thames' case until the February 1994 term of court at which time he was to be tried on both counts of the indictment. On February 15, 1994 Thames filed a motion to sever the charges, which was granted by the circuit court. Thames was then tried on the murder charge of which the jury found him not guilty. The circuit court ordered a continuance of his prosecution for kidnapping until the June term of court.

In June of 1994 the State and Thames joined in a motion for *nolle prosequi*, which was denied because the judge found that "the proof [was] evident and the presumption great of his guilt." The circuit court then set October 5, 1994 as the date for Thames to be tried on the kidnapping charge. On October 5, 1994 the circuit court held a hearing on Thames' motion to dismiss the kidnapping charge on the basis that his statutory right to a speedy trial had been violated. Thames' motion to dismiss was denied. Thames was then tried and convicted of kidnapping. In his motion for JNOV or new trial Thames argued that the circuit court erred in refusing to grant his motion to dismiss the kidnapping charge. This motion was also denied. It is from the circuit court's denial of this motion that the instant appeal is taken.

ANALYSIS

I. DID THE STATE VIOLATE ELLISON L. THAMES' STATUTORY RIGHT TO A SPEEDY TRIAL UNDER MISS. CODE ANN. SEC. 99-17-1 WHEN IT TRIED HIM THREE HUNDRED SIXTY THREE (363) DAYS AFTER HIS ARRAIGNMENT?

Thames argues that his right under Section 99-17-1 of the Mississippi Code to be tried within 270 days of his arraignment was violated by his October 5, 1994 trial for kidnapping. Not unexpectedly, the State contends that Thames' prosecution for kidnapping was properly continued for good cause during the time at issue, so that Section 99-17-1 was not violated. Section 99-17-1 provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." **Miss. Code Ann. § 99-17-1 (Rev. 1994)**. It is uncontested that Thames was arraigned on October 7, 1993 and not brought to trial for the kidnapping charge until October 5, 1994, 363 days later. It is also clear, however, that the circuit court continued his prosecution on several occasions after his arraignment. Accordingly, because the continuances mandated by Section 99-17-1 were granted, the only issue remaining for this Court to address is whether these continuances were based upon "good cause." Because a finding of good cause is a

finding of ultimate fact and should be treated on appeal as any other finding of fact, it will be left undisturbed where there is in the record substantial credible evidence from which it could have been made. *McNeal v. State*, 617 So. 2d 999, 1007 (Miss. 1993).

The first continuance in this case was ordered during the October 1993 term of court, at which time Thames' case was continued until the next term of court in February of 1994. Although the record does not clearly state exactly why the case was continued from the October 1993 term, apparently a trial was not possible at that time because the term of court was only two weeks long and Thames had just been indicted and arraigned at the beginning of that term. The second continuance was made in February of 1994 after the circuit court granted Thames' motion for severance of the murder and kidnapping charges. After the severance of these counts Thames was tried and acquitted of murder during the February term of court. The record reflects that the circuit court ordered a continuance of the kidnapping trial until its next term in June of 1994 because "the trial jury serv[ed] for the entire term of court." Although the jurors from Thames' murder trial would not have served at his subsequent trial for kidnapping, as the circuit court's comment suggests, we believe that the circuit court was concerned that the venire (who do in fact serve for the entire term of court) could have been prejudiced against Thames due to the voir dire they underwent prior to his murder trial. Apparently out of an abundance of caution toward empaneling an impartial jury, the circuit court chose to continue the kidnapping prosecution until a completely new venire could be obtained at the next term of court. At the next term of court in June of 1994 the circuit court was unable to try the case because of docket congestion. At that time the circuit court set Thames' kidnapping trial for a date during the next term of court in October of 1994. At the October 1994 term of the circuit court Thames was tried and convicted of kidnapping.

It is the holding of this Court that the docket congestion faced by the Scott County Circuit Court, along with the potentially prejudiced venire resulting from Thames' successful motion for severance, constitute "good cause" to support the delay in his prosecution. *See Walton v. State*, 678 So. 2d 645, 648 (Miss. 1996) (stating that docket congestion remains proper basis for good cause when supported by facts of case). There is no evidence in this case of any actions by the State to cause a delay in Thames' prosecution for kidnapping. The evidence contained in the circuit court record and the briefs of the parties clearly indicates that the delays were caused by matters beyond the control of the State or the circuit court. Accordingly, it is this Court's holding that Thames' October 5, 1994 trial for kidnapping was not in violation of Section 99-17-1 of the Mississippi Code. This assignment of error is without merit.

II. DID THE STATE VIOLATE ELLISON L. THAMES' CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL UNDER ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION AND UNDER THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY TRYING HIM FIFTEEN (15) MONTHS AFTER HIS ARREST?

On appeal Thames adds to his statutory speedy trial argument a new allegation that his speedy trial rights under the constitutions of the United States and the State of Mississippi were also violated by the circuit court's action. Because a party may not present an appellate court with different grounds for his objections than those he argued before the trial court, we will not consider Thames' claim concerning the Mississippi and United States' constitutions. *Russell v. State*, 607 So. 2d 1107, 1117

(Miss. 1992); *see also Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (holding that appellate court will not hold trial court in error on matters not presented to trial court for its consideration). The fact that Thames' new grounds for error are premised upon constitutional rights has no impact on our holding that he is procedurally barred from raising this issue for the first time on appeal. *See Fuselier v. State*, 654 So. 2d 519, 522 (Miss. 1995) (holding that, as general rule, constitutional questions not asserted at trial level are deemed waived). We do note, however, that had Thames presented convincing evidence of an error affecting fundamental rights we would address such error under the plain error rule, procedural bar notwithstanding. *Fuselier*, 654 So. 2d at 522. However, because Thames' claims (both statutory and constitutional) are without merit, we elect to stand behind the procedural bar against reviewing his unfounded allegations of constitutional violations and have instead focused our analysis solely upon the argument Thames presented to the circuit court. This assignment of error is likewise without merit.

THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT OF CONVICTION OF KIDNAPPING AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED AGAINST THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.