

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-01067 COA**

JERRY ELLIS

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:	09/05/96
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAN W. DUGGAN JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	BURGLARY-BUSINESS: SENTENCED AS AN HABITUAL OFFENDER TO SERVE A TERM OF 7 YRS IN THE CUSTODY OF THE MDOC
DISPOSITION:	AFFIRMED - 02/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Jerry Ellis was convicted in the Hinds County Circuit Court of burglary of a business on September 5, 1996 and sentenced to seven years in the Mississippi Department of Corrections. While awaiting trial, Ellis was incarcerated for approximately twenty months. He now appeals alleging his right to a speedy trial was violated and that the judge erred in denying his motion for a directed verdict, motion for a new trial, or in the alternative, a JNOV because there was insufficient evidence from which he could be found guilty.

FACTS

On the night of December 27, 1994, Officer Ron Sampson was on patrol right around the corner from the Kickstand Motorcycle Shop (Kickstand). When Sampson turned the corner he saw a man in the parking lot of the Kickstand carrying items of clothing with the tags still intact. Sampson pulled up behind the man. When the man turned to face Sampson, Sampson recognized him as Ellis and called him by name. Ellis dropped the clothes and ran. Other officers had been dispatched to the scene after the call had been given that the Kickstand's burglar alarm was sounding.

Officer Gil Baker found Ellis hiding in a school bus across the street from the Kickstand. Officer Jeff Gagneaux picked up the clothes that Ellis had dropped, and a Kickstand employee identified the clothing as belonging to the Kickstand.

Ellis was arrested on the night of the burglary, December 27, 1994, and was indicted on February 15, 1995. He was arraigned on March 15, 1995, and trial was set for May 24, 1995. The actual trial was not held until September 5, 1996, almost twenty months after the initial arrest.

The first continuance was from May 24, 1995 until August 1, 1995 due to Ellis's changing his mind about plea bargaining and deciding to go to trial instead. This surprised his attorney and left her unprepared to go to trial, causing her to request a continuance until August. Prior to the August 1, 1995 scheduled trial date, the defense again asked for a continuance because the defense attorney was to have surgery. The trial was continued until September 13, 1995. The record is void of any reason why the trial was not held on September 13, 1995, but it is clear that the trial was re-set for December 7, 1995. This time the trial judge rescheduled for January 24, 1996 because he was hearing another case. On January 24, 1996, the trial was again rescheduled due to another case being heard. Ellis' trial was rescheduled for March 28, 1996. Again, there is nothing in the record to indicate why the trial was not held on that day, but it was rescheduled for May 23, 1996. Prior to that date, the defendant changed attorneys, and the second attorney asked for a continuance on May 23, 1996 due to a back problem. Trial was re-set for July 23, 1996, but was again continued due to a conflict of the defense attorney. The case was finally tried on September 5, 1996.

ISSUES

I. DID THE COURT COMMIT ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO DISMISS FOR LACK OF A SPEEDY TRIAL?

A defendant in a criminal trial is guaranteed a right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution, under Section 26 of the Mississippi Constitution, and under Mississippi Code Annotated Section 99-17-1 (Rev. 1994). The period for determining whether a defendant was denied his constitutional right to a speedy trial is measured beginning at the time of formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. *Hughey v. State*, 512 So. 2d 4, 7 (Miss. 1987). The period for the statutory right is measured from the time of the accused's arraignment. **Miss. Code Ann. § 99-17-1 (Rev. 1994).**

In *Flores v. State*, 574 So. 2d 1314, 1322 (Miss. 1990), the Mississippi Supreme Court determined that the length of delay was the "triggering mechanism" for adjudicating whether a criminal defendant's constitutional right to a speedy trial had been violated. The length of the delay must also

be presumptively prejudicial in order for it to trigger the inquiry. *Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990). Although the "triggering mechanism" is the length of the delay, once the question is brought before the court, it must then weigh four factors to determine if there has, in fact, been a violation of the defendant's right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The record indicates that on December 27, 1994, Ellis was arrested for the burglary of a business. Ellis finally tried on September 5, 1996, almost twenty months after his arrest. The trial court was required, on motion to dismiss by the defendant, to examine the *Barker v. Wingo* factors to make the determination of whether Ellis had been denied his constitutional right to a speedy trial.

A. Application of the four *Barker* factors

In *Barker* the United States Supreme Court established four factors which must be "balanced" in the process of determining whether the prosecution has denied a criminal defendant's right to a speedy trial. These four factors are: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant has asserted his right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Barker*, 407 U.S. at 530. In *Stogner v. State*, 627 So. 2d 815, 818 (Miss. 1993), (quoting *Jaco v. State*, 574 So. 2d at 630), the Mississippi Supreme Court explained the process of balancing these four factors as follows:

These factors are weighed and balanced in each case according to the facts. "The weight given each necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor No one factor is dispositive."

1. Length of Delay

In *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989), the Mississippi Supreme Court established that a delay of eight months is presumptively prejudicial, thereby triggering the inquiry into whether the defendant's right to a speedy trial has been denied. Thus because the delay in Ellis's trial was almost twenty months, it is presumptively prejudicial and triggers the examination of the remaining factors. *Id.* One factor alone is not sufficient to determine if Ellis's rights have been violated; the Court must examine and weigh the remaining factors. *Handley v. State*, 574 So. 2d 671, 676 (Miss. 1990). We must therefore balance all four factors in deciding whether Ellis is entitled to have his conviction reversed.

2. Reason for Delay

The record on this matter is not altogether clear, but it appears that the State did not request any type of delay or continuance from the date of arrest until the actual trial. As discussed above, the delays were either caused by overcrowded court dockets or due to the request of the defense. The time from arrest until the originally scheduled trial was 157 days. Normal criminal procedure was followed and there were no delays. Therefore, this period will not weigh against either party. There was a total of 217 days' delay which is attributed to the defense for a variety of reasons discussed above. There was a total of 108 days' delay which is attributed to a crowded court docket. One hundred forty-one days cannot be accounted for due to lack of a record.

Therefore, the 217-day delay will be weighed against the Appellant while the 108-day delay due to an

overcrowded court docket will be weighed lightly against the State. *Barker*, 407 U.S. at 531. The other delays will not be weighed against either party since there is no record as to the reason for the delays. Because there was over twice as much of the delay caused by the Appellant as that caused by the State and what was attributed to the State is to be weighed very lightly against the State, then this factor is weighed against the Appellant.

3. Whether the Right to a Speedy Trial Was Asserted

Ellis did not raise the issue of the State's denial of his right to a speedy trial until April 2, 1996 when he filed a motion pro se requesting that the case be dismissed for lack of a speedy trial. His attorney filed a "Demand for a Speedy Trial Motion" on April 4, 1996, which was denied by the trial judge on April 8, 1996.

While it is true that the Mississippi Supreme Court has stated that there is some responsibility on the part of the defendant to assert his right to a speedy trial, the court has also said that the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. *Flores v. State*, 574 So. 2d 1314, 1323 (Miss. 1990). Ellis did not assert his right to a speedy trial during the initial fifteen-month period between the time of his arrest in December 1994 and April 1996. *Johnson v. State*, 666 So. 2d 784, 793 (Miss. 1995), holds that even where a defendant is late in asserting his right to a speedy trial, this is not fatal to his claim. Ellis's delayed assertion of his right to a speedy trial is likewise not fatal to his claim in this case.

4. Prejudice

The United States Supreme Court has stated that prejudice to the defendant should be assessed in light of the three distinct interests which the speedy trial right was designed to protect: (1) the prevention of oppressive pretrial incarceration, (2) the minimization of anxiety and concern of the accused, and (3) the limitation of the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The only prejudice about which Ellis can complain is that he was incarcerated for twenty months.

In recent years, the Mississippi Supreme Court has treated the prejudice prong of the *Barkertest* in various ways. *Trotter v. State*, 554 So. 2d 313, 318 (Miss. 1989), held that no affirmative showing of prejudice is required in order to prove a defendant's constitutional right to a speedy trial has been denied. However, *Polk v. State*, 612 So. 2d 381, 387 (Miss. 1992), said that without a showing of prejudice, this element cannot be weighed in favor of the defendant. Recently, the Mississippi Supreme Court has appeared to require criminal defendants to demonstrate an actual impairment of their defense if their claims of denial of a speedy trial are to succeed. *See, e.g., Skaggs v. State*, 676 So. 2d 897, 901-902 (Miss. 1996); *McGhee v. State*, 657 So. 2d 799, 804 (Miss. 1995). Although the court contends that no one factor is dispositive in balancing the elements, the court continues to rely on whether or not the defendant can prove he suffered actual prejudice to his defense as a result of the delay. *McGhee*, 657 So. 2d at 806 (Sullivan, J., dissenting).

Ellis has failed to show that his defense was prejudiced by the delay. We, therefore, hold that Ellis did not incur actual prejudice from the delays discussed above.

Summary of the Issue

The first of the four *Barker* factors, length of delay, is presumptively prejudicial to Ellis because it greatly exceeds the eight-month period of delay which the Mississippi Supreme Court has declared to be presumptively prejudicial. The second factor, the reason for delay, weighs more heavily on Ellis than the State as previously discussed. The third factor, Ellis's assertion of his right to a speedy trial, cannot be weighed against the State because Ellis asserted it for the first time in April, 1996. In regards to the fourth and final factor, we hold that Ellis was not prejudiced by the delay. Therefore, we cannot weigh this factor against the State.

We believe the second factor is weighed more heavily against Ellis, as well as the third and fourth factors, that Ellis did not assert his right to a speedy trial until April, 1996 and that he suffered no real prejudice. We therefore reject Ellis's argument that the State denied him his right to a speedy trial. Accordingly, we affirm the court's denial of Ellis's motion to dismiss the indictment. **B. Statutory Right to a Speedy Trial**

As to Ellis's statutory right to a speedy trial, we also find no violation. **Mississippi Code Annotated Section 99-17-1 (Rev. 1994)** states that unless good cause can be shown for a delay, all offenses which have been indicted shall be tried within 270 days of arraignment. As stated previously, the causes for the delays were either caused by the defendant or due to an overcrowded court docket. Both are considered good cause for delay and not to be weighed against the State in determining whether a person's right to a speedy trial has been violated. We hold that Ellis's statutory right to a speedy trial was not violated, and we affirm the judge's refusal to dismiss the case.

II. WAS THE JURY'S VERDICT BASED ON SUFFICIENT EVIDENCE?

Ellis argues that the judge erred when he denied Ellis's motion for a directed verdict and his motion for a new trial or, in the alternative, a JNOV. Ellis, in his brief to this Court, argues sufficiency of the evidence, which springs from the trial court's denial of Ellis's motions for directed verdict and JNOV. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). However, Ellis interchangeably argues weight of the evidence also. Ellis made a post-trial motion for a new trial, which goes to the weight of the evidence, along with his motion for a JNOV. Although Ellis made motions throughout the trial concerning sufficiency of the evidence, this Court must rule on the last challenge made, which is the motion for a JNOV. This Court will, for the sake of clarity, address not only the sufficiency of the evidence, but the weight of the evidence as well.

A. Sufficiency of the Evidence

A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. *May v. State*, 460 So. 2d 778, 781 (Miss. 1984). If the judge determines that no reasonable juror could find the defendant guilty, then he must grant the motion for a directed verdict or JNOV. *Id.* If he finds that a reasonable juror could find the defendant guilty beyond a reasonable doubt, then he must deny the motion. *Id.* Here Ellis made a motion for a directed verdict at the end of the State's case and a motion for a new trial or in the alternative a JNOV after the jury returned its verdict, and the judge sentenced Ellis. As stated earlier, we must review the evidence at the last time the motion was made--the JNOV. This Court's scope is limited to the same examination as that of the trial court in reviewing the motion for a JNOV. That is, if the facts point in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty beyond a reasonable doubt, viewing

all facts in the light most favorable to the State, then it must sustain the assignment of error. *Blanks v. State*, 542 So. 2d 222, 225-26 (Miss. 1989). Of course, the opposite is also true. We may reverse the trial court's ruling only where one or more of the elements of the offense charged is lacking to such a degree that reasonable jurors could only have found the defendant not guilty. *McClain*, 625 So. 2d at 778.

In the case *sub judice*, there was legally sufficient evidence to find Ellis guilty beyond a reasonable doubt. The State made out its prima facia case by having various officers, who arrived on the scenes within minutes of the burglary, testify. They collectively testified that they saw Ellis still in the parking lot of the Kickstand with the clothes in his hand and the tags attached, that the clothes were identified by a Kickstand employee as the ones which were taken, and that Ellis ran and hid from the officers. Ellis put on no witnesses to rebut or explain any of the above facts. Because the State put forth sufficient, credible evidence, the trial judge was required to leave the final decision of guilt or innocence to the jury. We affirm the judge's ruling as to the motion for a JNOV.

B. Weight of the Evidence

The second motion the defense made was that for a new trial. This goes to the weight of the evidence and not its sufficiency. In reviewing this claim, this Court must examine the trial judge's denial of Ellis's motion for a new trial. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994). The decision of whether or not to grant a motion for a new trial rests in the sound discretion of the trial judge and should only be granted when the trial judge is certain that the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. *May*, 460 So. 2d at 781. In making the determination of whether a verdict is against the overwhelming weight of the evidence, this Court must view all evidence in the light most consistent with the jury verdict, and we should not overturn the verdict unless we find that the lower court abused its discretion when it denied the motion. *Blanks*, 542 So. 2d at 228. The proper function of the jury is to decide the outcome in this type of case, and the court should not substitute its own view of the evidence for that of the jury's. *Id.* at 226. Likewise, the reviewing court may not reverse unless it finds there was an abuse of discretion by the lower court in denying the defendant's motion for a new trial. *Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991). Upon reviewing all of the evidence presented in the light most consistent with the verdict, we find that the trial judge did not abuse his discretion in denying Ellis's motion for a new trial.

The judge, correctly finding that the State had made out a prima facia case of burglary of a business, allowed the case to go to the jury. The jury properly performed its function by drawing reasonable inferences from the evidence presented and rendering a verdict which was supported by the evidence. Therefore, we affirm the lower court's denial of Ellis's JNOV and motion for a new trial.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A BUSINESS AND SENTENCE AS AN HABITUAL OFFENDER TO SERVE SEVEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, HERRING, HINKEBEIN,

KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.