

IN THE COURT OF APPEALS 07/02/96
OF THE
STATE OF MISSISSIPPI
NO. 92-KA-01048 COA

TOMMY D. DREW

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

TRIAL JUDGE: HON. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: CHRIS N. G. GANNER

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: GLENDA HAYNES

NATURE OF THE CASE: BUSINESS BURGLARY

TRIAL COURT DISPOSITION: GUILTY OF BUSINESS BURGLARY, SENTENCED TO
SERVE SEVEN (7) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE FRAISER, C.J., DIAZ, AND MCMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Tommy D. Drew (Drew) was tried and convicted of business burglary by the Hinds County Circuit

Court and sentenced to serve seven years in the custody of the Mississippi Department of Corrections as a habitual criminal. Feeling aggrieved, Drew appeals to this Court and cites two errors: (1) the trial court erred in denying his motion to dismiss for failure to afford a speedy trial and (2) the verdict was against the overwhelming weight of the evidence. Finding no reversible error, we affirm.

FACTS

Martha H. Lyell (Lyell) owned and operated the Home Kitchen, a small delicatessen located on Ridgewood Road. At approximately midnight on October 25, 1991, Lyell received a call from the Jackson Police Department (JPD) informing her that someone had broken into the Home Kitchen. JPD arrested Drew that evening in connection with the burglary. When arrested, Drew was out on parole from a previous conviction. This arrest revoked his parole, and he remained in jail until trial.

On April 9, 1992, Drew was indicted for business burglary, and trial was scheduled for August 12, 1992. Drew filed a motion to dismiss indictment for failure to afford a speedy trial on August 5, 1992. A continuance from August 12, 1992 to September 15, 1992 was granted to Drew on August 12, 1992, because his attorney was in trial on another case. On September 14, 1992, the day before trial, Drew filed another motion to dismiss for failure of a speedy trial. The motion was denied and following a jury trial in Hinds County Circuit Court, Drew was found guilty of business burglary.

DISCUSSION

1. Did the Trial Court Err in Denying

Drew's Motion to Dismiss for

Failure to Afford a Speedy Trial?

Drew contends that his constitutional right to a speedy trial was violated due to the time period between his arrest and date of trial. He further argues that this delay, exceeding eight months, greatly prejudiced his case because he was unable to recall all of the events of the night in question. He also claims the delay caused him to suffer prejudice because of great mental anxiety and concern.

The State argues that the trial court correctly overruled Drew's motion to dismiss because Drew did not prove that he suffered prejudice from the delay.

When an accused asserts a violation of his constitutional right to a speedy trial, the court must balance four factors to determine if the claim is meritorious. The four factors to be considered were established in *Barker v. Wingo*, 407 U.S. 514 (1972). The factors are: (1) length of the delay, (2) reason for the delay, (3) whether the defendant has made a timely assertion of his right to a speedy trial, and (4) whether the defendant has suffered any prejudice by the delay. *Barker*, 407 U.S. at 530.

A. Length of Delay

The right to a speedy trial attaches on the date of the defendant's arrest. *Johnson v. State*, 666 So. 2d

784, 792 (Miss. 1995). Thus, Drew's right to a speedy trial commenced on October 25, 1991, the date of his arrest. A period of 325 days elapsed between the date of arrest and the trial which ended in his conviction. The Mississippi Supreme Court has found delays in excess of eight months presumptively prejudicial. *Thorson v. State*, 653 So. 2d 876, 890 (Miss. 1994); *Spencer v. State* 592 So. 2d 1382, 1387 (Miss. 1991). Drew's 325 day delay sufficiently meets the first prong of the *Barker* test and is presumptively prejudicial. However, a delay of this nature will not, in itself, require reversal but will require a scrutiny of the remaining *Barker* factors. *Johnson*, 666 So. 2d at 792.

B. Reason for Delay

There is one period of delay attributable to the State and one attributable to the defense. A period of 166 days elapsed from Drew's arrest to the issuance of the indictment on April 9, 1992. The State has not attempted to explain the reason for this delay. Thus, this time period weighs against the State. *Rhymes v. State*, 638 So. 2d 1270, 1272 (Miss. 1994). The next period concerns the 47 days between the indictment and arraignment on May 26, 1992. The trial judge stated on the record that this was a reasonable time for having a prisoner return from Parchman for the purpose of arraignment, and this Court agrees that this time period was reasonable. Thus, this 47 day delay will not be attributable to the State or the defense. The next period was a 79 day period between the date of arraignment and the first trial date scheduled for August 12, 1992. The trial judge stated on the record that the time period between Drew's arraignment on May 26, 1992, and his trial date of August 12, 1992, was the earliest available date the case could be set following the arraignment. This period will not be weighed heavily against the State since docket congestion can furnish good cause for delay, and this time period was needed by both sides to prepare for trial. *Jasso v. State*, 655 So. 2d 30, 34 (Miss. 1995). The final time period concerns from August 12, 1992, to September 14, 1992, when a continuance was requested by and granted to the defense. This period is attributed to the defense. *Handley v. State*, 574 So. 2d 671, 674 (Miss. 1990).

C. Assertion of Right to Speedy Trial

Drew asserted his right to a speedy trial by motion to dismiss on August 5, 1992, and September 14, 1992. Drew's first motion was filed only ten days prior to the trial date and his second motion was filed one day prior to the trial date. This late filing is not fatal to his claim, but it does not weigh as heavily in his favor as an earlier assertion of this right. *Johnson*, 666 So. 2d at 793.

D. Prejudicial Effect of Delay

There are three types of prejudice a defendant may suffer due to delay: (1) pretrial incarceration; (2) anxiety and concern; and (3) impairment of the defenses. *Atterberry v. State*, 667 So. 2d 622, 627 (Miss. 1995). Although the accused is not required to affirmatively prove prejudice to prevail on a speedy trial violation claim, an absence of actual prejudice weighs against the finding of a violation. *Id.*

In this case, Drew claims prejudice due to incarceration, loss of memory, anxiety and concern. With respect to his incarceration, Drew remained in custody the entire period following his arrest on October 25, 1991. When arrested, he had been on parole from a previous conviction. Parole is a privilege and not a right and can be revoked upon a showing of a "probable violation." Miss. Code Ann. § 47-7-27 (1995 Supp.). Upon being arrested, the State was within its rights to revoke Drew's

parole and keep him incarcerated. This incarceration is not sufficiently prejudicial to warrant reversal. *Taylor v. State*, No. 90-DP-01346-SCT, 1996 WL 197700, at *12 (Miss. Apr. 25, 1996). Next, Drew claims a loss of memory due to the delay which affected his defense and prejudiced his case. The State, however, claims that Drew's alleged memory loss was attributable to intoxication rather than delay. The record reflects that Drew testified during the hearing on his motion to dismiss that his memory loss was due to intoxication rather than the delay between his arrest and trial. Thus, this alleged prejudice is without merit. Likewise, Drew's other complaints of anxiety and concern do not justify dismissal. Drew has not shown any actual prejudice to his case due to the delay. This lack of actual prejudice weighs heavily against Drew in the *Barker* analysis. *McGhee v. State*, 657 So. 2d 799, 804 (Miss. 1995).

Based on the facts of this case and weighing all the *Barker* factors, and considering the totality of the circumstances, we find that Drew was not denied his right to a speedy trial.

2. Sufficiency and Weight of the Evidence

Drew challenges the legal sufficiency of the evidence to support a guilty verdict and also argues that the verdict was against the overwhelming weight of the evidence. He maintains that, because the State produced no evidence of fingerprints, fiber samples, footprints, hair samples, skin samples, or blood samples physically linking him to the crime scene, his conviction is unsupported by the evidence, and that the trial court abused its discretion in failing to overturn the verdict.

In reviewing the sufficiency of the evidence to support a guilty verdict, this Court must view all facts favorable to the State and reasonable inferences flowing therefrom as true and, if they are sufficient to support a verdict of guilty, then the question is resolved against the appellant. *Minor v. State*, 379 So. 2d 495, 496 (Miss. 1979) (citing *Warn v. State*, 349 So. 2d 1055, 1056 (Miss. 1977)). Only where the evidence is so lacking as to an essential element of the crime charged, that a fair and reasonable juror could only find the accused not guilty, will this Court reverse. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993).

The record reveals that the Home Kitchen was broken into by an intruder who shattered a side window of the restaurant. Glass shards covered the floor and there were droplets of blood found inside. Constable Jenkins testified that when he arrived at the Home Kitchen he witnessed the suspect leaving the Home Kitchen and running to the south side of the building. Constable Jenkins testified that he believed Drew was the individual he saw running from the Home Kitchen on the night in question. Additionally, witnesses testified that Drew was found hiding in a boat a few feet from the Home Kitchen and that he was covered with blood. The evidence in this case, if accepted as true by the jury, is sufficient to support a verdict of guilty without physical evidence linking Drew to the crime scene. We also find that the verdict is not contrary to the overwhelming weight of the evidence, and the trial judge did not abuse his discretion in denying Drew's motion for a new trial.

For the foregoing reasons the judgment of the Circuit Court of Hinds County is affirmed.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF BUSINESS BURGLARY AND SENTENCE OF SEVEN YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MDOC IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HINDS COUNTY.

