SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

State of Mississippi — **Plaintiff/Appellee**

vs.

DOCKET NO. 2005-CP-00175-COA
DOCKET NO. 2010-TS-02039
TRIAL COURT CASE NO. 2000-00080

One 1970 Mercury Cougar, One 1992 Ford Mustang, One Ford Mustang, $355.00 U.S. Currency, And Willie Hampton — **Defendant/Appellant**

APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL DISTRICT OF TUNICA COUNTY

REPLY BRIEF OF THE APPELLANT

WILLIE RAY HAMPTON

ORAL ARGUMENT REQUESTIED

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CERTIFICATE OF INTERESTED PERSONS

The Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Willie Ray Hampton, # 779948-011 (Defendant/Appellant)
2. Honorable Kenneth L. Thomas (Circuit Court Judge)
3. Honorable John T. Lamar (Attorney for Plaintiff/Appellee)
4. Honorable John M. Colette (Attorney for Defendant/Appellant)
5. Honorable Marvin D. Miller (Attorney for Defendant/Appellant, *Pro Hac Vice*)

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STATEMENT OF THE CASE

The government is correct to admit that after the lower court entered an order staying the discovery in the forfeiture case, dated November 28, 2000 and file-stamped November 30, 2000, Willie Hampton filed a "Replevin." Mr. Hampton's replevin is dated December 7, 2001 and file-stamped December 17, 2001.[1] (R. 6)[2] In his replevin, Mr. Hampton explicitly stated, at page seven: "Defendant assert[s], his right's (sic) to a speedy trial, and all property to be returned [that was] seized by the Tunica County Sheriff's Department." Mr. Hampton could not have made a more clear demand for a speedy trial in the forfeiture case than that.

Importantly, the December 2001 replevin was filed only five months after Mr. Hampton was sentenced in the federal criminal case on July 11, 2001, according to the government's own timeline.[3] See Govt. Br. at 4.[4] While the order staying discovery referenced both the criminal and civil federal cases, there is no evidence in the record, and the government has not claimed, that Mr. Hampton was denied discovery in the federal civil case after he was sentenced in the federal criminal case. Because that "cause of action orginate[d] from the same set of facts and circumstances" as the forfeiture action, as the lower court held in its order, the government's federal and state discovery obligations could no longer diverge by December 2001.[5]

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1 Because the content of the "Replevin," which is part of the record in the lower court, is a key aspect of Mr. Hampton's appeal, it is included in the attached supplemental appendix that is provided for ease of reference. Note that the attachments to the replevin are not included.

2 The record is hereinafter referenced as "R."

3 Mr. Hampton maintains, as addressed in his brief, that the record before this Court still does not include evidence of when the criminal proceedings concluded. See One 1970 Mercury Cougar, et al. v. Tunica County, 936 So.2d 988, 992 (¶17) (Miss. App. 2006).

4 The government's brief is hereinafter referenced as "Govt. Br."

5 The government conceded: "Hampton's claims arise from his investigation, prosecution, and subsequent conviction on federal drug charges in the Northern District of Mississippi." See Govt. Br. at 3.

Despite Mr. Hampton's demand for a speedy trial in the forfeiture case, no action was taken until December 20, 2004 when he filed a change of address with the lower court, at which time the government then filed a second "Petition for Forfeiture" without leave of court as required by Rule 15 of the Mississippi Rules of Civil Procedure. The government offered no response to this violation, but merely referenced the December 2004 petition as an "Amended Petition for Forfeiture." See Govt. Br. 2.

In its brief, the government failed to reference the numerous documents filed by Mr. Hampton in the lower court during the four year delay after the Mississippi Court of Appeals remanded for a hearing under Barker v. Wingo, 407 U.S. 514 (1972). Those documents included, for example, a motion to allow his attorney to withdraw, filed on November 16, 2007, a motion for a mandatory hearing pursuant to Rule 81(g) of the Mississippi Rule of Civil Procedure, filed on July 10, 2008, a motion to request a judicial inquiry of the lower court, filed on November 24, 2009, and a mandamus to require the lower court to rule pursuant to Rule 15 of the Mississippi Rules of Appellate Procedure, filed on February 10, 2010.[6] (R. 8-10) A Barker hearing was not scheduled until after Mr. Hampton requested a judicial inquiry. (R. 9)

Mr. Hampton also disputes the government's unsupported contention that "[b]oth parties were given the opportunity to supplement the record as requested by the Court of Appeals." See Govt. Br. at 3. Even though the lower court granted Mr. Hampton's petition for a writ of habeas corpus ad prosequendum (R. 150), and Mr. Hampton made efforts to arrange his transport to the Barker hearing (R. 146-49, 193, 198-99), he was not present, could not offer documentary evidence, and his subpoenaed witnesses, who appeared at the April 2010 hearing, which was

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[6] The date of the Barker hearing far surpassed the lower court's earlier assurance to the Court of Appeals to "enter a ruling in this matter no later than November 1, 2007." (R. 44)

continued, did not reappear despite their obligation pursuant to the earlier subpoenas. Further, the lower court clearly stated: "[w]e're not here to involve ourselves with evidence". (R. Tr. 20)[7]

STATEMENT OF FACTS

Mr. Hampton notes the government's description of his "Replevin" filed in December 2001 as a document "interpreted by the Mississippi Court of Appeals as his [Mr. Hampton's] contest to Tunica County's Petition for [F]orfeiture." Govt. Br. at 4. It clearly did. It also clearly demanded a speedy trial in the forfeiture case. The government's assertion that January 31, 2005 was the "first time" that Mr. Hampton demanded a speedy trial is contrary to the record. See Govt. Br. at 4; Supp. App. at 7.[8] Only five months had lapsed after his July 2001 sentencing in the federal criminal case when Mr. Hampton filed his replevin.

In addition, the government's reference in its timeline to a June 27, 2005 lower court order denying Mr. Hampton's replevin is misleading. Govt. Br. 4. According to the record, on June 6, 2005, Mr. Hampton filed a document entitled "Notice of Writ of Replevin Pursuant [to] M.R.C.P. Rule 64." (R. 7) That was not the replevin that Mr. Hampton filed in December 2001, which was referenced by the Court of Appeals. The record entry that immediately followed the June 6, 2005 notice of replevin is the June 27, 2005 order denying replevin. (R. 7)

The government's claim that Mr. Hampton had counsel at the July 15, 2010 hearing also is contradicted by the record. See Govt. Br. at 4. As even the title page of the transcript clearly reflects, Mr. Hampton appeared pro se and the Honorable Robert Sneed Laher appeared for the appellant, but not as counsel. (R. Tr. 1) Mr. Hampton made clear that Mr. Laher "is just to

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[7] The transcript of the July 15, 2010 hearing is hereinafter referenced as "R. Tr."

[8] The Supplemental Appendix is hereinafter referenced as "Supp. App."

appear to make sure that I have a body in court." (R. Tr. 3) He was not represented by counsel, which fact the lower court clearly accepted by addressing Mr. Hampton directly, not Mr. Laher, when it was Mr. Hampton's "opportunity to speak." (R. Tr. 9) Any potential confusion was put to rest thereafter when the lower court directly asked Mr. Hampton whether Mr. Laher was his attorney, to which Mr. Hampton responded "[n]o, he's not my attorney." (R. Tr. 15)

ARGUMENT

I. STANDARD OF REVIEW.

The government erroneously recited the standard of review on appeal of the sufficiency of the evidence to support a forfeiture, which is not before this Court. See Hickman v. State ex rel. Mississippi Dept. of Public Safety, 592 So.2d 44 (Miss. 1991) ("the question before us is whether the evidence is adequate that we should uphold the forfeiture"). The question before this Court is whether the lower court erroneously denied Mr. Hampton the remand hearing under Barker v. Wingo, 407 U.S. 514 (1972), as directed by the Court of Appeals in One 1970 Mercury Cougar, et al. v. Tunica County, 936 So.2d 988, 992-93 (¶19-¶20) (Miss. App. 2006).

The standard of review of the denial of a speedy trial claim is well settled. "Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause. Flora v. State, 925 So.2d 797, 814 (¶58) (Miss. 2006) (citing DeLoach v. State, 722 So.2d 512, 516 (¶12) (Miss. 1998)). We will uphold the trial court's finding of good cause if that decision is supported by substantial, credible evidence...However, if no probative evidence supports the trial court's findings, we must reverse the decision and dismiss...Good cause is a factual finding..." Carr v. State, 966 So.2d 197, 200 (¶5) (Miss. App. 2007) (emphasis added).

This correct standard of review requires that the lower court have taken evidence, e.g., in the form of sworn testimony or the admission of documents, and made factual findings based on

that evidence. The government's avoidance of the speedy trial standard of review is indicative of the failure of the lower court to either take evidence or make factual findings. See (R. Tr. 20) (in which the lower court clearly informed Mr. Hampton: "[w]e're not here to involve ourselves with evidence"); (R. Tr. 15-16) (in which the government argued that on remand, the lower court had jurisdiction only to "present a record" on and decide the speedy trial claim, i.e., not to decide any other claim, such as the sufficiency of the evidence to support a forfeiture).

II. MR. HAMPTON HAS NOT WAIVED ANY QUESTION PRESENTED IN HIS OPENING BRIEF ON APPEAL.

The government next erroneously claimed that Mr. Hampton raised issues on appeal that were not raised in the lower court. However, the government failed to articulate what it claimed those issues were; therefore, Mr. Hampton is unable to respond to this unsupported assertion.[9] In addition, Tate v. State, 912 So.2d 919, 928 (Miss. 2005), cited by the government, related to an appeal that the trial court failed to sua sponte give a limiting instruction on evidence of a prior conviction admitted under Rule 404(b) of the Mississippi Rules of Evidence, which limiting instruction was not requested by the defendant. See Govt. Br. at 6. A sua sponte jury instruction clearly is not an issue in this appeal.

Mr. Hampton notes that the government presented two questions in its brief; the second was: "Did the Circuit Court err in holding that the forfeiture proceedings were properly conducted and that it had previously properly ordered the forfeiture." However, the government did not present any argument on this question. Nor was that the question before the lower court

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[9] Even if Mr. Hampton had raised an issue for the first time on appeal, which he did not, under Rule 28(a)(3) of the Mississippi Rules of Appellate Procedure, the Court "may, at its option, notice a plain error not identified or distinctly specified." More to the point, Mr. Hampton was not required to file a motion to reconsider to preserve for appeal any issue raised in the lower court. See e.g. 1999 Buick Century v. State, 966 So.2d 841, 842-43 (¶4) (Miss. App. 2007).

on remand, even under the government's recitation of the remand order. See Govt. Br. at 3 (quoting One 1970 Mercury Cougar, 936 So.2d at 992-93 (¶19-¶20)). Therefore, the second question presented in the government's brief is waived and not properly before this Court.

As this Court has held: "It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support..." Clark v. State, 503 So.2d 277, 280 (Miss. 1987) (citing Johnson v. State, 154 Miss. 512, 122 So. 529 (1929)). "[A]n unsupported assignment of error will not be considered." Id.; see also J.N.W.E. v. W.D.W., 922 So.2d 12, 19-20 (¶31-¶32) (Miss. App. 2005) ("[i]f the party fails to provide this support," i.e., reasons and authority in support of the argument, then the court is "not obligated to consider the assignment of error"). The government has waived the second question raised in its brief, which, importantly, is not even properly before this Court as a cross appeal. See Miss. R. App. Pro., Rule 4(a).

III. THE TRIAL COURT ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON THE BARKER V. WINGO, 407 U.S. 514 (1972) FACTORS, AT WHICH MR. HAMPTON HAD A DUE PROCESS RIGHT TO BE PRESENT.

The government's assertion that "[t]he record reflects that the Circuit Court's findings were well founded and supported by substantial evidence..." is perplexing. See Govt. Br. at 6 (emphasis added). The lower court explicitly declined to take any evidence on Mr. Hampton's request. (R. Tr. 20) The only document admitted at the remand hearing, at the request of the government, was a timeline prepared by Mr. Hampton.[10] (R. Tr. 9) Because the lower court

[10] The lower court denied the government's request to take judicial notice of its brief; that document clearly did not comport with the requirements of Rule 201(a) of the Mississippi Rules of Evidence on judicial notice.

failed to hold an evidentiary hearing, it is impossible for the court's decision to be supported by substantial evidence. See (R. Tr. 20).

In this regard, Mr. Hampton notes that the government did not challenge that a Barker hearing is an evidentiary hearing as courts have held, for example, in Jones v. Green, 946 S.W.2d 817, 826 (Tenn. Ct. App. 1996), Commonwealth v. Goldman, 496 N.E.2d 426 (Mass. 1986), and State v. Nourallah, 726 So.2d 923, 926 (La. App. Ct. 1998). As the Goldman Court explained, "there should have been an evidentiary hearing before a judge on the unreasonableness of the delay before entry of the forfeiture judgment." 496 N.E.2d at 427-28 (emphasis added). Such an evidentiary hearing did not occur on remand as directed by the Court of Appeals. See e.g. (R. Tr. 20).

Rather than respond to that precedent, the government argued that Mr. Hampton "cites no authority for this position" that "he had the right to be physically present." Govt. Br. at 7. Of course, the government's assertion is contradicted by its own argument that "Hampton's reliance on Robinson v. Hanrahan is misplaced. 409 U.S. 38 (1972)," which contention Mr. Hampton disputes. See Govt. Br. at 7. Further, State v. Golston, 66 Ohio App. 3d 423, 435 (1990), cited by the government, appealed an order that "the Public Defender's office reimburse the sheriff's department for Golston's transportation and housing to attend the forfeiture hearing." See Govt. Br. at 7.

That question is not presented in this appeal, as the order of a writ of habeas corpus ad prosequendum provided that "all costs associated with the security and transportation of Mr. Hampton from Colorado to Mississippi and back, shall be paid exclusively by Mr. Hampton. No funds shall be provided by Tunica County of the State of Mississippi for the transportation of Mr. Hampton." (R. 150) That order also held that "the Petitioner's motion is well taken and

should be granted....the Court hereby orders that the Petitioner, Willie Hampton, be allowed to attend a hearing...in Cleveland, Mississippi."[11] (R. 150)

Even under an analysis of cost, the Golston Court acknowledged that "[i]t is within the trial court's discretion...to order his [the incarcerated litigant's] presence" at a forfeiture hearing. 66 Ohio App. 3d at 435. The same occurred as to Mr. Hampton's remand hearing. The lower court exercised its discretion and granted Mr. Hampton the due process right to be present at the Barker hearing. See Poole v. Lambert, 819 F.2d 1025 (11th Cir. 1987) (reversing and remanding the dismissal of an incarcerated individual's 42 U.S.C. § 1983 action where the district court failed to evaluate all factors before denying the inmate's request for a writ of habeas corpus ad testificandum to be present at trial).

As the Fourth Circuit Court of Appeals explained in Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 111 (4th Cir. 1988), "[i]deally," an incarcerated plaintiff "should be present at the trial of his action, particularly if, as will ordinarily be true, his own testimony is potentially critical. Not only the appearance but the reality of justice is obviously threatened by his absence." "That an incarcerated litigant's right [to be present] is necessarily qualified...does not mean that it can be arbitrarily denied..." Id. at 112.

While there are factors a court must evaluate in exercising its discretion, including "whether the prisoner's presence will substantially further the resolution of the case, the security risks presented by the prisoner's presence, the expense of the prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted," the lower court in this case resolved those factors in favor of Mr. Hampton's

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[11] The petition for a writ of habeas corpus ad prosequendum argued that, as the claimant, Mr. Hampton's presence at the hearing was necessary and that his transportation in advance of the hearing was necessary "in order to prepare for trial." (R. 49)

right to be present by its order of a writ of habeas corpus ad prosequendum. (R. 150); see Muhammad, 849 F.2d at 112 (citing Ballard v. Spradley, 557 F.2d 476, 480-81 (5th Cir. 1977), which also is cited in Poole, supra.).

Because the lower court granted Mr. Hampton the right to be present, his absence at the remand Barker hearing, despite his efforts to secure transportation, violated due process under the Fourteenth Amendment of the United States Constitution, Robinson and Mullane v. Central Hanover Bank Trust Co., 339 U.S. 306, 314 (1950). (R. 146-49, 193, 198-99)

Mr. Hampton was not represented by counsel at the remand hearing. (R. Tr. 3, 9, 15) He was not physically present to offer into evidence any documents, including those identified in the exhibit list that he filed, along with a request for subpoenas and witness list, for which subpoenas were issued. See e.g. (R. 170-92). He, however, was granted the due process right to be present, and thus, had no reason to pursue an alternative to admit into evidence documents and testimony that he sought to admit, for example, as referenced in his exhibit list and subpoenas. He also did not have notice of the July 15, 2010 hearing had he sought an alternative.[12] (R. Tr. 21)

The lower court's refusal to allow Mr. Hampton to present evidence, or to require the government to present evidence, renders any factual finding unsupported by substantial, credible evidence, and thus, requires reversal. See Carr, 966 So.2d at 200 (¶5). The correctness of such a decision is exemplified by the government's disingenuous persistence that Mr. Hampton did not exert his right to a speedy trial in the forfeiture case until three years after the original Petition for Forfeiture was filed. See Govt. Br. at 8. Mr. Hampton clearly demanded a speedy trial, i.e.,

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[12] The government ignores these facts to assert that "Hampton's claim that he was entitled to an 'evidentiary' hearing on remand is baseless." See Govt. Br. at 8. It bears repeating that the government did not challenge the authority cited by Mr. Hampton that a Barker hearing is an evidentiary hearing. See Jones, 946 S.W.2d at 826; Goldman, 496 N.E.2d at 427-28; Nourallah, 726 So.2d at 926.

requested a hearing, in the forfeiture case in his replevin, filed-stamped December 17, 2001. See Supp. App. at 7; see also (R. 121-25) (memorandum in which Mr. Hampton argued the speedy trial demand made in his replevin, filed before the remand hearing).

The correctness of such a decision also is exemplified by the government's claim that "Hampton never actually articulated actual prejudice" even though "given the opportunity to explain prejudice." See Govt. Br. 8. Mr. Hampton's witnesses, who were subpoenaed to appear at the April 2010 remand hearing and not released from those subpoenas, were not present at the July 15, 2010 hearing. (R. 170-80) Mr. Hampton was denied the opportunity to examine those witnesses on what, if any, recollection they had of the seizure of the forfeited property over ten years earlier on March 21, 2000. He was denied the opportunity to present documents, for example, police reports, impound records, affidavits, depositions, and documents filed in other court proceedings, to show what, if any, evidence changed throughout the delay. (R. 188-89)

While Mr. Hampton desires the evidentiary Barker hearing ordered by the Court of Appeals on remand in One 1970 Mercury Cougar, the government clearly does not. Rather, the government argued that it "was judicially estopped from pursing the forfeiture matter based on the Circuit Court's Order staying discovery until the conclusion of Hampton's pending federal criminal and civil actions." The government then contradicted its judicial estoppel argument by conceding that the "federal civil case was not dismissed until August 24, 2009;" however, the stay of the forfeiture was lifted on an ex parte motion made by the government in December 2004, over four and one half years earlier. Govt. Br. at 9.

Because the government conceded that the federal civil case was not a proper basis for the stay by its motion to lift the stay, made and granted before the conclusion of the federal civil case, all that remained to have warranted a stay was the federal criminal case which, according to

the government, had concluded in July 2001 when Mr. Hampton was sentenced. See Govt. Br. at 4. The government, however, did not schedule a hearing on any petition for forfeiture until February 2005, over three and one half years after the federal criminal case concluded and, importantly, over three years after Mr. Hampton demanded a speedy trial in the forfeiture case in December 2001. See Supp. App. at 7. Mr. Hampton accepts the government's concession that it has no evidence to present on its Barker factor since it offered no evidence or argument on that over three year delay. See Govt. Br. at 9 ("Tunica County augmented the record regarding their reasons for reasonable delay").

The government's statement that "Tunica County should not be forced to continue this litigation because Mr. Hampton did not adequately present his case..." clearly reflects the basis of the government's opposition; it is not one based on law, but one that, importantly, in effect conceded the existence of evidence relevant to the Barker factors that Mr. Hampton could not introduce because he was not present and because the lower court erroneously concluded that the remand hearing was not an evidentiary hearing. See Govt. Br. at 9; see also (R. Tr. 20). This Court should reverse and vacate the post-remand order and again remand this case for a proper, evidentiary hearing on the Barker factors.

CONCLUSION

This matter should be remanded to the Circuit Court of Tunica County for a proper evidentiary hearing, at which Tunica County will be required to prove, by appropriate evidence, if any, the second Barker factor, the reason for the delay. Mr. Hampton should be allowed, by this Court, at that hearing, to present evidence regarding the second, third, and fourth Barker factors, i.e., the reason for the delay, his assertion of his rights, and the prejudice he suffered as a consequence thereof, and any other factors pertinent to a determination pursuant to Barker.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, John M. Colette, attorney for Defendant/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF FOR THE APPELLANT to the following:

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