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

DONALD KEITH BURTON, A/K/A
DONALD WAYNE BURTON **APPELLANT**

VS. **CASE NO. 2005-KA-01735-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record verifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Donald Keith Burton , a/k/a
   Donald Wayne Burton ----------Appellant

2. Honorable Tomie T. Green----------Circuit Court Judge, Seventh Judicial District

3. Dunn Lampton---------- United States Attorney

4. Linda Anderson ----------Assistant United States Attorney

5. Aafram Y. Sellers----------Attorney for Appellant, Donald Keith Burton, a/k/a Donald Wayne Burton

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STATEMENT OF THE CASE

On or about the 12 day of June, 2001, Appellant Donald Keith Burton, a/k/a Donald Wayne Burton, (hereafter referred to as Appellant), was indicted by the Hinds County Grand Jury. The indictment charged Appellant with kidnaping, armed robbery, rape and sexual battery. (R. 6-7). The case was tried on or about March 29, 2004, and the jury found Appellant guilty of kidnaping, armed robbery and rape. (Tr. 519). The lower court granted the Appellant's Motion for Directed Verdict on the charge of sexual battery. However, the court denied Appellant's Motion for Directed Verdict on the remaining charges. (R. 78, Tr. 420). On or about April 1, 2004, the lower court sentenced Appellant for the charge of kidnaping to twenty-five years, five years suspended, twenty years to serve and five years of supervised probation, pursuant to §97-3-53 of the Mississippi Code Annotated; for the charge of armed robbery to twenty-five years, five years suspended, twenty years to serve and five years of supervised probation, pursuant to §97-3-79 of the Mississippi Code Annotated; for the charge of rape to twenty-five years, five years suspended, twenty years to serve and five years of supervised probation, pursuant to §97-3-65 of the Mississippi Code Annotated. The Court further ordered that these sentences where to be served consecutively to one another. Additionally, the Appellant was convicted as a habitual offender pursuant to §99-19-83 of the Mississippi Code Annotated. (R. 72-74, Tr. 522).

On or about April 8, 2004, Appellant filed a Motion for a New Trial, or in the Alternative, Judgment Not Withstanding the Verdict. (R. 75). On or about July 25, 2005, the Court entered its order denying the Appellant's Motion for a New Trial, or in the Alternative, Judgment Not Withstanding the Verdict. (R. 91-92). Appellant filed his Notice of Appeal to the Mississippi Supreme Court on or about August 23, 2005. (R. 93-94).

STATEMENT OF FACTS

On or about June 12, 2001, Appellant was indicted by the Hinds County Grand Jury. The indictment charged Appellant with the kidnaping, armed robbery, rape and sexual battery of Chesley Childs which occurred on or about September 12, 2000. (R. 6-7). The relevant testimony shows that on the night of September 12, 2000, Chesley Childs, traveled to the Post Office at Lefluers Station in her 2000 Nissan Maxima. (Tr. 393-394). Once at the Post Office, Ms. Childs went in and checked her mail. As she exited the Post Office and walked to her car a man came up behind her and put a gun to her back and stated he need some money. (Tr. 395). Ms. Childs handed the man her wallet and he went through the wallet finding only a few dollars and her ATM card. (Tr. 395). The assailant made Ms. Childs get in the passenger seat of her car as he got in the driver's seat and drove to a nearby ATM. (Tr. 395-396). The assailant drove into the ATM backwards and made Ms. Childs get money out of her account. (Tr. 396, 398). The man had a towel over the top of his head covering his face. (Tr. 396).

After leaving the Bank, the assailant drove to a parking lot behind a bowling alley, pointed a gun at Ms. Childs, and told her to take her pants off. (Tr. 399). The assailant next made Ms. Childs get out of the car and took her to the back of the car, where he pulled her pants off completely. (Tr. 399). The assailant threw Ms. Childs face first on the trunk of the car and had sex with her. (Tr. 400).

Next, the assailant made Ms. Childs get dressed and drove her back to the post office parking lot. Once at the parking lot the assailant wiped down the steering wheel, got out of the car and got into another car which was parked on the street and drove off. (Tr. 401). Ms. Childs followed the assailant and got part of the tag number of the car he was driving and called 911.

(Tr. 402).

The assailant was dark complexioned black male, approximately 5'11 or 6' tall, with a skinny build. Ms. Childs never saw the assailant's face. (Tr. 409).

SUMMARY OF THE ARGUMENT

Appellant was denied his constitutional right to a speedy trial. Appellant submits that he was prejudiced by the denial of his right to a speedy trial. Further, Appellant was denied effective assistance of counsel. Additionally, based on the evidence presented at the trial, the trial judge should have granted the motion for a directed verdict and motion for judgment not withstanding the verdict. Furthermore, viewing the evidence in the light most favorable to the State, the trial judge should have granted Appellant's motion for new trial.

Appellant has been seriously prejudiced by the fact that he did not receive a speedy trial and by the ineffective assistance of counsel. Appellant submits that this Court should reverse the case for a new trial, or in the alternative, reverse and render the decision in favor of Appellant.

ARGUMENT OF ISSUES ON APPEAL BY APPELLANT

A. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR FAILURE TO PROVIDE HIM WITH A SPEEDY TRIAL.

1. CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

The constitutional right to a speedy trial attaches at the time of a formal indictment, information, or arrest. Lightsey v. State, 93 So.2d 375, 378 (Miss. 1996). In determining whether a constitutional right to a speedy trial has been denied the four-part balancing test set forth by the U.S. Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), must applied. Smith v. State, 550 So.2d 406, 408 (Miss. 1998). The four Barker factors to be considered are: (1) *length of delay*, (2) *the reason for the delay*, (3) *the defendant's assertion of his right to a speedy trial*, and (4) *prejudice to the defendant*. Barker, 407 U.S. 5114 at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 at 117 (1972). These factors must be considered in light of all the circumstances, and no one factor is dispositive. Jaco v. State, 574 So.2d 625, 630 (Miss. 1990).

In applying the Barker factors to the present case, we look first at the length of delay.

i. *Length of Delay*

Although there is no specific length of time to determine whether a right to a speedy trial has been denied, a presumption of prejudice arises when the delay between arrest and trial is more than eight months. Smith, 550 So.2d at 408. In the present case, Appellant was indicted on June 12, 2001 and arrested on July 28, 2003. (R. 1). The Appellant's trial began on March 29, 2004. (Tr. 7). Thus, approximately eight months passed from the time of Appellant's arrest to the time of trial, and a total of approximately two years and ten months passed between the indictment and time of trial. Accordingly, a presumption of prejudice exist, and the remaining

Barker factors must be analyzed.

ii. Reason for Delay

On this issue, the Mississippi Supreme Court as held, "in calculating the length of delay, the delays which are not attributable to the defendant will count against the State, unless the prosecution can show good cause." Vickery v. State, 535 So.2d 1371, 1377 (Miss. 1988). In analyzing the reason for delay, Baker states, "different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Anderson v. State, 2004WL422629 (Miss. App., March 9, 2004), (not released for publication), citing, Baker, 407 U.S.514 at 531.

In the present case the record reveals that Appellant's counsel moved for one continuance on October 2, 2003, which was the first trial setting of this matter. (Tr. 14-15, R. 67). However, Appellant was arrested for these charges on July 28, 2003 and arraigned on September 11, 2003. (R. 1) Appellant was appointed counsel on September 11, 2003. (R. 36). The reason the continuance was requested on behalf of the Appellant was to allow defense counsel additional time to investigate the case and obtain discovery. (Tr. 14-15, R. 67). Accordingly, the matter was reset for trial on December 8, 2003. (Tr. 14). Although attributable to Appellant, the only request for continuance by Appellant's counsel should not weigh heavily against Appellant due to the fact it was necessary to ensure that Appellant received a fair trial. However, any further delays in prosecuting this case, either due to a heavy court schedule or the unavailability of

State's witnesses, should be attributed to the State. Furthermore, not withstanding the one continuance requested by Appellant's counsel, the prosecution can show no good cause for the trial of this matter being delayed from the July 28, 2001 arrest of Appellant to the March 29, 2004 trial date.

iii. *Assertion of Right to Speedy Trial*

The Court must next analyze the Appellant's assertion of his right to a speedy trial. It is well settled under Mississippi law, that a "defendant is under no obligation to bring himself to trial; it is the State that bears the burden of doing so." Perry v. State, 419 So.2d 194, 199 (Miss. 1982). A Motion to Dismiss for Failure to Grant Defendant a Speedy Trial was filed on March 15, 2004. (R. 45-46). This motion was denied by the court on March 29, 2001. (Tr. 15).

The Appellant concedes that other than the Motion to Dismiss for Failure to Grant Defendant a Speedy Trial, no other formal demand for speedy trial was requested on behalf of the Appellant. However, the Appellant would reemphasize to the Court that in analyzing this issue, all of the Barker factors must be considered in light of all the circumstances, and no one factor is dispositive. Further, Appellant would argue that his counsel's failure to formally demand a speedy trial, though it weighs against him, it should not me determinative of whether he was denied his right to a speedy trial in light of all of the circumstances surrounding this issue.

iv. *Prejudice to Defendant*

The final factor to be examined is whether the Appellant was prejudiced by the delay. In the present case, the length of delay is presumptively prejudicial. Thus, "the burden of persuasion is on the state to show the delay did not prejudice defendant." State v. Ferguson, 576 So.2d 1252, 1254 (Miss. 1991). The Court in Atterberry v. State, 667 So.2d 622, 627

(Miss.1995), stated that, "There are three examples of prejudice which an accused may suffer because of the delay: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) impairment of the defenses." Atterberry v. State, 667 So.2d 622, 627 (Miss.1995). The Mississippi Supreme Court has held that, "The possibility of impairment of the defense is the most serious consideration in determining whether the defendant has suffered prejudices as a result of delay." Hughey v. State, 512 So.2d 4, 11 (Miss. 1987).

The Appellant's ability to defend himself was impaired greatly by the delay in this matter. First, due to the Appellant's confinement while awaiting trial he was unable to adequately assist his counsel in preparing for trial. Specifically, due to his prolonged confinement, the Appellant was unable to help his counsel locate witnesses to testify on his behalf at trial. (Tr. 424-426, 430-431, 452). Thus, Keisha Burton, was not available at trial to testify on the Appellant's behalf. (Tr. 452). Furthermore, because of the delay in this matter one of the Appellant's witnesses, Terry Rushing, was not able to recall the date in question or events surrounding this case, and was thus, unable to provide relevant or pertinent information regarding the Appellant's whereabouts on the date in question. (Tr. 455-456).

In conclusion, the record is clear that there was a lengthy delay in this matter which compels the application of the Barker balancing test. Although Appellant's counsel requested one continuance, this continuance was requested solely for the purpose of ensuring that the Appellant received a fair trial. This continuance was requested after counsel was appointed on September 11, 2003 to defend the Appellant in a trial that was set for October 2, 2003. This continuance should not be given much weight in this analysis since justice would require counsel to seek such a continuance under the circumstances. All other delays in this matter should be

counted against the State. Additionally, the Appellant should not be punished for his counsel's failure to assert a formal demand for a speedy trial. Finally, Appellant was prejudiced greatly by the delay in this matter.

In reviewing the totality of the circumstances, it is clear that Appellant's constitutional right to a speedy trail was denied. Accordingly, the ruling of the lower court should be reversed.

B. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS VOICE IDENTIFICATION OF THE VICTIM, THUS ADMITTING EVIDENCE OF A VOICE IDENTIFICATION MADE DURING A SUGGESTIVE CONFRONTATION.

The victim's pre-trial voice identification of the Appellant was the result of a tainted and impermissibly suggestive in-court confrontation orchestrated by the state.

The appropriate standard of review regarding the admissibility of evidence is abuse of discretion. Johnston v. State, 567 So.2d 237, 238 (Miss. 1990). The standard of review for trial court decisions regarding pretrial identification is "whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." Roche v. State, 913 So.2d 306, 310 (Miss. 2005). The ruling of the trial court will only be disturbed where there is an absence of substantial credible evidence supporting it. Id.

The Mississippi Supreme Court has held that, " suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." York v. State, 413 So.2d 1372, 1381(Miss. 1982). In deciding the admissibility of a suggestive eyewitness identification, the Mississippi Supreme Court applies the standard set forth in Neil v.

Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), which establishes that "evidence of a suggestive out-of-court identification will be admissible if, from the totality of the circumstances, the identification was reliable. Id.. The Court in Biggers, held the five "factors to be considered in evaluating the likelihood of misidentification include (1) opportunity of witness to view the criminal at time of crime; (2) witness's degree of attention, (3) accuracy of witness's prior description of the criminal, (4) level of certainty demonstrated by witness at the confrontation, and (5) length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. at 199. The purpose of rule set forth in Biggers is "to deter the police from using a less reliable procedure where a more reliable one may be available, would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process." Id. at 199.

In the present case, Ms. Childs testified that on May 2, 2001, she was present in court with a representative from the U.S. Attorney's office at the arraignment of Appellant, the person who had been charged with the crime committed against her. (Tr. 412, 414, 416-417). Ms. Childs also testified that she was present in court on another date in which she knew Appellant, the person charged with the crime against her, would be present. (Tr. 416). The U.S. Attorney's office contacted Ms. Childs and told her that the person charged with crime against her was going to be in Court. (Tr. 416). Ms. Child's testified that after hearing the Appellant plead not guilty and talk to the judge for approximately "a minute or two" at his arraignment, she was able to identify him as the person who committed the crimes against her. (Tr. 414-416). However, Ms. Childs testified that even before she recognized the voice, she knew that the man being charged with the crime against her was going to be in Court. (Tr. 417). Ms. Childs further

testified that prior to the Appellant entering the courtroom, she saw only one person go before the judge. (Tr. 413-414).

1. APPLICATION OF BIGGERS

The following is analysis of the application of the factors set forth in Biggers in the present case.

1. *Opportunity of the witness to view the accused at the time of the crime.*

In the present case, Ms. Childs testified that she was in the presence of her assailant for forty-five minutes to an hour. (Tr. 408). However, Ms. Childs never saw the face of her assailant. (Tr. 408-409, 417).

2. *Degree of attention.*

As previously stated, Ms. Childs testified that she never saw the face of her assailant because his face was covered with a towel. (Tr. 408, 417). Ms. Childs testified that her assailant was a black male with a dark complexion, approximately 5'10 to 6' tall, with a narrow build and was wearing red FUBU shirt with 05. (Tr. 409). Ms. Childs testified that she knew her assailant's voice and would know if she heard it. (Tr. 409).

3. *Accuracy of prior description.*

Although, Ms. Childs testified that she knew her assailant's voice she never gave a description of the assailant's voice. Furthermore, it does not appear from the record that a description of the assailant's voice was ever solicited from Ms. Childs. In no way did the description previously given by Ms. Childs, with regard to the physical description of her assailant, assist the authorities in apprehending a suspect.

4. *Witness's level of certainty at confrontation.*

Ms. Childs testified that when the Appellant walked in and started talking "she knew it was him." (Tr. 414-415). However, there was only one other criminal defendant who appeared in the court while Ms. Childs was present. (Tr. 413-414). Additionally, based on Ms. Childs own testimony, she knew before she ever heard his voice, that Appellant was the man accused of the crime against her and that he was going to be in Court on the dates she attended. (Tr. 417).

5. *Length of time between the crime and the confrontation*

As previously stated, the crime committed against Ms. Childs occurred on September 12, 2000. Ms. Childs' in-court identification occurred on May 2, 2001. Thus, almost eight months passed from the time of the crime to the time of Ms. Childs' identification of the Appellant.

In applying the Biggers factors to the present case, it is clear that there was a substantial likelihood of misidentification in allowing voice identification of Ms. Childs. The procedure used by the State to obtain an identification of Appellant, the alleged perpetrator of the crime against Ms. Childs, is the very type of tainted and unnecessarily suggestive procedure the Court in Biggers sought to deter. By Ms. Childs' own admission, she knew that Appellant, was the person charged with the crime against her and that he was going to be in court, even before she heard his voice. Ms. Childs was present in Court at the urging of the authorities. Furthermore, there was only one other person who appeared in Court before the Appellant. The confrontation orchestrated by the authorities heightened the likelihood that misidentification of the Appellant would occur. In fact the suggestive element in this identification procedure made it all but inevitable that Ms. Childs would identify the Appellant as the person who committed the crime against her.

Based on the foregoing, the voice identification of Ms. Childs should not have been admitted into evidence. Accordingly, this case should be reversed and remanded back to the lower court for a new trial.

C. WHETHER APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

The standard for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Woodward v. State, 843 So.2d 1, 7 (Miss. 2003), citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Woodward, 843 So.2d at 7. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Woodward, 843 So.2d at 7, citing Stringer v. State, 454 So.2d 468, 477 (Miss. 1984), Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Woodward, 843 So.2d at 7, Stringer, 454 So.2d at 477.

To determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Woodward, 843 So.2d at 7, citing Mohr v. State, 584 So.2d 426, 430 (Miss. 1991). This means a probability sufficient to undermine the confidence in the outcome. Id. Additionally, a convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Woodward, 843 So.2d at 8.

First, Appellant's counsel failed to properly investigate his case. Specifically, counsel failed to contact all witnesses with information regarding his whereabouts on the night in question.

Second, Appellant's counsel failed to ensure attendance of witnesses at trial. Appellant asserts that counsel failed to exhaust all efforts to locate witnesses necessary to his defense and subpoena them to be present at trial (Tr. 432-436, 452).

Third, Appellant's counsel failed to call all of the witnesses Appellant believed to be relevant to his defense.

Fourth, Appellant's counsel should have filed a motion for continuance for lack of opportunity to prepare for trial. Martin v. State, 312 So.2d 5, (Miss. 1975), Lambert v. State, 654 So.2d 17 (Miss. 1995);(convictions of lustful touching of a child reversed; denial of continuance to retain new counsel a week before trial deprived him of a fair trial); Lester v. State, 692 So.2d 755 (Miss. 1997), (trial courts abused discretion in refusing continuance in order to adequately prepare a defense to surprise sexual abuse evidence). Appellant submits that because counsel had

not located all of the witnesses to testify on his behalf at the time of trial, this was grounds for a continuance. (Tr. 452).

Fifth, Appellant's counsel failed to formally assert the Appellant's Constitutional right to a speedy trial. Although, Appellant's counsel filed a Motion to Dismiss for Failure to Grant a Speedy Trial, a demand for dismissal for violation of the right to speedy trial is not the same as a demand for speedy trial. Adams v. State, 583 So.2d 165, 169-70 (Miss. 1994). Thus, Appellant has been prejudiced by counsel's failure to assert Appellant's right to a speedy trial.

Sixth, Appellant's counsel should have filed a motion to suppress the 911 tape which was introduced into evidence and played in court. (Tr. 150-153). The 911 tape was prejudicial and inflammatory evidence. The 911 transcript was introduced into evidence and provided the same information as the tape, without the prejudicial and inflammatory effect. (Tr. 150-151). Appellant's counsel did object to the tapes being introduced into evidence but was overruled by the Court. (Tr. 150-151).

Seventh, Appellant's counsel failed to require the trial court "to conduct an on the record hearing pursuant to the requirements enumerated in" Polk v. State, 612 So.2d 381 (Miss. 1992). In fact, counsel waived the Appellant's right to a Polk hearing. (Tr. 281). The Appellant submits that although counsel conferred with him regarding waiving the Polk hearing, counsel did not adequately explain to him the relevance and importance of such hearing during that conversation. (Tr. 282). Accordingly, Appellant asserts that he was denied his right to a Polk hearing.

Eighth, Appellant's counsel failed to call a DNA expert to rebut the State's DNA evidence. Although, counsel's Motion for An Independent DNA expert was granted by the court, counsel did not call this witness to testify at trial. (R. 44).

Ninth, Appellant's counsel assertion that he was an inadequate mouthpiece for the Appellant, was in and of itself an admission by counsel that he was not providing effective counsel for the Appellant. (Tr. 454). Appellant asserts that if counsel believed he was an "inadequate mouthpiece" for Appellant, he should have filed a motion to withdraw so that Appellant could obtain adequate counsel.

It is clear that Appellant has been prejudiced for failure to have been diligently represented by counsel. The conduct of Appellant's counsel could not fall within any wide range of reasonable professional assistance. Accordingly, Appellant submits that because of the ineffective assistance of counsel, the case should be reversed.

D. WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT.

The standard for reviewing the denial of a judgement notwithstanding the verdict is whether or not the evidence was sufficient to warrant such and whether fair-minded jurors could have arrived at the same verdict. White v. State, 761 So.2d 221, 224 (Miss. App. 2000). [Appellant courts] may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find that the accused was not guilty. Gleeton v. State, 716 So.2d 1083, 1087 (Miss. 1998).

Motions for directed verdict and motions for judgment notwithstanding the verdict are both for the purpose of challenging the legal sufficiency of the evidence. Noe v. State, 616 So.2d 298, 302 (Miss. 1993); McClain v. State, 625 So. 2d 774, 781 (Miss. 1993). See also Strong v. State, 600 So.2d 199, 201 (Miss. 1992).

> The sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent

> with [the Appellant's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence.

McClain, 625 So.2d at 778; Deloach v. State, 811 So.2d 454, 456 (Miss.App. 2001).

In viewing the evidence presented by the State in a light most favorable to the State, the State undoubtedly failed to establish a prima facie case for the crimes of rape, kidnaping, and armed robbery.

First, the State's fingerprint expert testified that out of 20 possible fingerprint matches that the FBI computer system pulled he only compared one possible print to the Appellant's fingerprints. (Tr. 377). He testified he did not compare matching points from the other 19 possible prints to the original finger print card. (Tr. 378-379). The State's fingerprint expert further testified that although the other 19 prints may have had similar characteristics he did not compare them to the original finger print card. (Tr. 381-382). Next, the State's DNA expert, Dr. Theisen, testified that the DNA analysis of one of the hair's found in Ms. Childs' clothing excluded Appellant as the source. (Tr. 298). Additionally, the State's DNA expert, Brendan Shae, testified that to a reasonable degree of scientific certainty Ms. Childs' boyfriend, Mr. Barham, was the source of DNA found on Ms.Childs' panties . (Tr. 314-315). However, none of the State's witnesses testified to a reasonable degree of scientific certainty that Appellant contributed to any of the DNA samples examined. Finally, the victims voice identification of Appellant was the result a suggestive confrontation, thus, her identification of Appellant unreliable and should not have been admitted into evidence.

Accepting the State's entire case-in-chief as true, there is no evidence to warrant a conviction of rape, armed robbery or kidnaping. Accordingly, the trial judge should have granted

Appellant's motion for directed verdict.

E. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

In criminal appeals, a presumption of correctness attaches to any ruling by the trial court. Carr v. State, 770 So.2d 1025, 1027 (Miss.App. 2000), citing Hansen v. State, 592 So.2d 114, 127 (Miss. 1991). A motion for a new trial focuses on the weight of the evidence presented at trial and a judgment notwithstanding the verdict concentrates on the legal sufficiency of the evidence. Bessent v. State, 808 So.2d 979, 986 (Miss. App. 2001). The standard for reviewing a denial of a new trial goes to the weight of the evidence. White v. State, 761 So.2d at 224. Appellant courts reverse only when there has been an abuse of discretion. McClain v. State, 625 So.2d 774, 781 (Miss. 1993).

In determining whether the verdict was against the overwhelming weight of the evidence,

> [This Court] must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice will this Court disturb it on appeal. As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper.

Dudley v. State, 719 So.2d 180, 182 (Miss. 1998), Todd v. State, 806 So.2d 1086, 1090 (Miss. 2001), Crawford v. State, 754 So.2d 1211, 1222 (Miss. 2000), Collier v. State, 711 So.2d 458, 461 (Miss. 1998).

The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. McClain v. State, 625 So.2d at 781. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an

unconscionable injustice. Bessent v. State, 808 So.2d at 986, 987, citing McClain v. State, 625 So.2d 774, 781 (Miss.1993). [Appellant courts] will reverse only for abuse of discretion, and on review accept as true all evidence favorable to the state. Id.

The State presented no evidence to support a finding of guilt beyond a reasonable doubt for the crimes of rape, kidnaping and armed robbery. As mentioned earlier in this brief, the State did not present evidence to make out a prima facie case for the charges of rape, kidnaping, and armed robbery. In balancing the weight of the evidence presented by the State and the defense, the trial judge should have granted a new trial.

Furthermore, in support of this argument, Appellant would direct the Court's attention to the argument and analysis presented in the previously discussed section of this brief..

In viewing the entire trial in a light most favorable to the State, there is insufficient evidence to warrant convictions for the charges of rape, kidnaping, and armed robbery. The overwhelming weight of the credible evidence favors Appellant. The trial judge should have granted Appellant's motion for a new trial. This case should be reversed and remanded back to circuit court for a new trial.

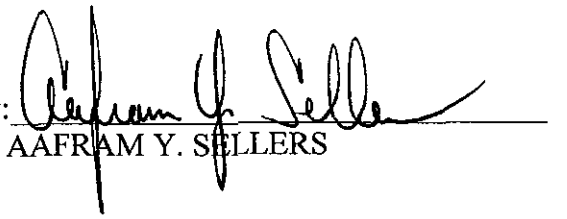
CONCLUSION

Appellant submits that the lower Court erred in denying his Motion to Dismiss for Failure to Provide Defendant with a speedy trial. Appellant was prejudiced by the delay in this matter being tried. Additionally, the trial court erred in admitting evidence of victim's voice identification of Appellant. This identification was the result of a unnecessarily suggestive procedure and thus, was unreliable and should not have been admitted into evidence. Further, Appellant submits that had his trial court counsel effectively assisted him in the trial, a jury could

have reached a different result. Finally, the circuit court's ruling on the Appellant's motion for directed verdict and motion for judgement notwithstanding the verdict not supported by substantial evidence. Based on the forgoing, Appellant urge this court to reverse the trial court's ruling and render a decision in favor of Appellant.

Respectfully submitted,

DONALD K. BURTON

By: 
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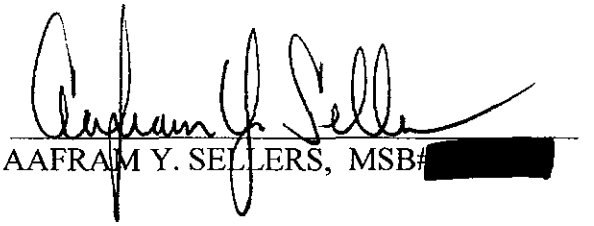
CERTIFICATE OF SERVICE

I, Aafram Y. Sellers, attorney for Appellant, **DONAL KEITH BURTON, A/K/A DONALD WAYNE BURTON**, do hereby certify that we have this day mailed a true and correct copy of the above and foregoing Brief For Appellant to Honorable Tomie T. Green, Circuit Court Judge, Seventh Judicial District, P.O. Box 327; Jackson, MS 39205; Honorable Dunn Lampton, U.S. Attorney and Honorable Linda Anderson, Assistant U.S. Attorney, Unites States Attorney's Office, 188 E. Capitol St., Suite 500, Jackson, MS 39201; and Donald Burton, Appellant, MDOC#29963, George-Greene County Regional Correctional Facility, 154 Industrial Park Rd., Lucedale, Mississippi 39452.

Dated this the 8th day of January, 2007.



AAFRAM Y. SELLERS, MSB#[redacted]

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

DONALD KEITH BURTON, A/K/A
DONALD WAYNE BURTON **APPELLANT**

VS. **CASE NO. 2005-KA-01735-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF MAILING

I, Aafram Y. Sellers, attorney for Appellant, **DONALD KEITH BURTON, A/K/A, DONALD WAYNE BURTON**, do hereby certify that I have this day mailed, by United States mail, proper postage prepaid, the following documents:

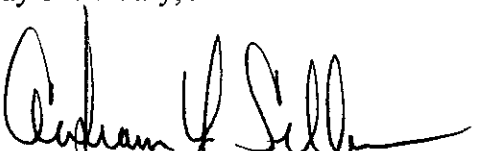
1. Original of the Brief of Appellant, Donald Keith Burton, a/k/a Donald Wayne Burton;

2. Three (3) copies of the Brief of Appellant, Donald Keith Burton, a/k/a Donald Wayne Burton;

3. Four (4) copies of the Record Excerpts for Appellee,Donald Keith Burton, a/k/a Donald Wayne Burton

to: Betty W. Sephton
Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205-0249

Respectfully submitted on this the 8th day of January, 2007.



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