

Supreme Court of Mississippi.

COPY

Doug Carroll,
v.

Appellant

State of Mississippi,

Appellee **FILED**

Sunday, August 5th. 2007.

NO. 2006 - CP - 01406.

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SUPREME COURT
COURT OF APPEALS

Brief for the Appellant.

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38738.

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Statement of the Case

The Appellant, Doug Carroll, appeals the imposition of his sentence and conviction; whereas this appeal arises from an illegal sentence imposed upon Carroll from the First Judicial District of Union County Circuit Court. Which after two (2) days of commencement of trial, Carroll in open court entered an open plea of Guilt to the charge of Robbery with a Deadly Weapon. (R. Vol 1/27-34).

On June 21st. 2006, with the Honorable Andrew Howarth, presiding of Union County's Circuit Court, convicted and sentenced Carroll to Forty-five (45) years, Ten (10) years suspended, Thirty-five (35) years to serve and five (5) years on Post-Release Supervision ran consecutively with an Tipton County Cause, Carroll's previous conviction. (R. Vol 1/27-35).

Course and Disposition of the Case in the Circuit Court

On June 7th. 2005, the Appellant was on Post-Release Supervision from an Tipton County conviction of Burglary of a Residential, a felony. At about 3 a.m. that morning, the Appellant was placed under arrest for an alleged crime of Robbery with a Deadly Weapon. He was then taken to the Union

County Detention Center, the following day June 8th. 2005, the Appellant was presented with an Arrest Warrant for the crime in questioning; along with an (\$50,000.00) Fifty Thousand Dollar Bond. However, there was an M.D.D.C. Hold lodged against Cantoll for possible Probation Violations, and an FBI. Hold for questioning concerning an gun "Pistol" alleged to have been used by the Appellant in Robbery. Thereupon, the Appellant entered a plea of NOT Guilty and refused to sign an assertion of his Right to a Speedy Trial, wanting to allow his attorney to advise him in that area. Thereafter, an FBI. Official Officer Orl. Hall, questioned the Appellant concerning the alleged Pistol; however no charges were filed.

The Appellant requested that an Revocation Hearing be conducted under cause NO. TH03-064, the Tipton County Post-Release Supervision, for an possible chance of making bond on the Robbery with a Deadly Weapon charge. However, on June 31st. 2005, an hearing was conducted whereas Cantoll's Post-Release Supervision was revoked by Honorable Henry Lackey, on account of the State's Assistant District Attorney, Kelly Luther's testimony and recommendation. Whereas, he recommended that the Appellant's Post-Release be revoked solely because of being arrested for an felony crime. Therefor, Judge Lackey took the recommendation of the State and revoked Cantoll's Post-Release.

However, on June 30th. 2005, the Appellant was taken to the State Penitentiary to complete imposed suspended sentence. Thereafter, on August 3rd. 2005, an Detainer was lodged against Cantoll holding the Appellant as an Case Custody offender solely of the fact of the City of New Albany Police Department's, detainer filed against him.

Thereafter, on October 13th. 2005, an indictment was returned by the Union County's Grand Jury, charging the Appellant with the alleged Robbery with a Deadly Weapon, under the Miss. Code Ann. § 97-3-79 (R. Vol 1/a6).

The Instantor Lapias had Carroll scheduled for arraignment on November 1st. 2005, however there was no arraignment held until March 15th. 2006. Whereas, through Court appointed Counsel, Thomas L. Levidiotis, Carroll entered an waiver of arraignment, an Not Guilty Plea and filed for discovery materials. However, on April 18th. 2006, acting as pro se the Appellant filed a Motion to Dismiss the Indictment and Pending Charge, for want of Prosecution and Violation of Right to a Speedy Trial, under the Sixth (6th) Amendment of the United States Constitution and the Mississippi Constitution of 1890. Inwhtch, an Evidentiary hearing was conducted on that motion on June 19th. 2006, which the Circuit Court Judge Andrew Howorth, presided entered an Order denying Appellant's motion. Therefore, Carroll testified on his own behalf concerning several conditions inwhtch he had suffered and claimed for that matter, that had his defense impaired. Therewith, asked for an Subpoena to be issued for his defense eye-witness, Melia Robinson, whom was missing at that time. Wherefore, the Honorable Andrew Howorth, denied stating that an subpoena would cause farther delay. Thereafter, the Appellant's trial was commenced for the alleged charge stated in the Indictment. However, during the course and/or proceedings, in open court the Appellant on June 20th. 2006, withdrew his plea of Not Guilty and entered, an plea of Guilt (R. Vol 100-31).

Whereas, the Union County Circuit Court accepted Appellant's plea therfor, sentencing was held on June 21st. 2006, inwhtch during that hearing the defence called on two witnesses, Lilady's Carroll, and Lynnie Gartner, for testimonies. Thereafter, the Honorable Howorth, sentenced in an order dated June 21st. 2006, the Appellant to Forty-five (45) years, Ten (10) years suspended, Thirty-five (35) years to serve and Five (5) years on Post-Release Supervision ran consecutively with the Tippah County Cause (R. Vol 138-35).

Following the Appellant's conviction and sentencing, he filed an timely Notice of Appeal, alleging that an illegal sentence, to the Mississippi Supreme Court (R. Vol 10).

Statement of the Facts

Whereas, similar to Trotter v. State, 554 So. 2d 313 (Miss. 1989) the Appellant appeals from an plea of Guilt, however he contends that an illegal sentence was imposed upon him, as found in Trotter. In which, that illegal sentence was imposed upon him by the Union County Circuit Court Judge, Andrew Howarth, on June 21st, 2006, in an Order of Incarceration with Test-Release Supervision. (R. Vol 1/32-34).

Therefore, in support the Appellant cites the findings found in Burns v. State, 344 So. 2d 1189 (Miss. 1977), where this Court implied that an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself. In Burns, an appeal from denial of a habeas corpus petition challenging the legality of a sentence imposed subsequent to a guilty plea was treated by this Court as a direct appeal. While the Court acknowledged the language of § 99-35-101, the Court stated: "We do not deem the present case as an appeal from a guilty plea." Burns, 344 So. 2d at 1190.

Therefore, the Appellant challenges the legality of his sentence whereas, the designation of the record on appeal is all-inclusive and specifically mentions a Motion to Dismiss the Indictment and Pleading Charge, for want of Prosecution and Violation of Right to a Speedy Trial. Therefore, the Appellant points this Court to the Record before it, which reflects progress in that direction for the transcript to be included. (R. Vol 1/a-9).

In this context, the Appellant cites Lambert v. State, 574 So. 2d 573 (Miss. 1990) where this Court noted that counsel for Lambert properly noticed his appeal and in connection therewith, designated for inclusion in the record "all in-chamber conferences." Holding that would certainly include a "bench conference." Therefore, the Appellant's transcript of that hearing held on the Motion to Dismiss the Indictment should certainly be included in the record, as designated for appeal. (R. Vol 1/a-9).

However, in this context, the United States Court of Appeals for the Fifth Circuit has explicitly held that "the imposition of sentence is part of the trial for the purpose of the Sixth (6TH.) Amendment speedy trial guarantee." Juarez - Casares v. United States, 496 F. 2d 190, 193 (5TH. Cir. 1974). Therefore, the Appellant states that there are Constitutional implications in this case that need to be addressed.

Summary of the Argument Proposition One.

Whether Carroll sentence is illegal because the Court Judge lacked authority to suspend imposition of his sentence in light of the fact that he had previously been convicted of a felony.

Whereas, "The law that states that there is a fundamental right to be free from an illegal sentence is interpreted to apply to sentences which cause the defendant to endure an undue burden rather than the luxury of a lesser sentence." McInerney v. State, 800 So. 2d 561, 466 (Miss. Ct. App. 2001). Therefore, the relevant portion of Carroll's sentencing order reads as follows:

It is, therefore, Ordered and Adjudged by the Court that the Defendant be and he is hereby sentenced to serve a term of forty-five (45) years in the custody of the Mississippi Department of Corrections as a facility to be designated by said department, that Ten (10) years of said sentence shall be and the same is hereby suspended and the defendant shall be and the same is hereby suspended and the defendant shall be placed under Post-release Supervision upon the release from the term of incarceration for a period of five (5) years pursuant to Mississippi Code Section 47-7-34, and the suspension of said sentence is based upon the following conditions:

And further that defendant LK-2005-130-A is to run consecutively with Tipton County Cause (R. Vol 1/33-34).

However, the imposition of that sentence is prejudice to the Appellant creating an undue burden as a result; therefore Carroll does not reap any benefits thereof. Whereas, the trial court erred in fashioning a sentence which could result in a fifty (50) year time span during which Carroll is under the direct supervision of the state. Therefore, in the Appellant's case the findings in Weaver v. State, 785 So. 2d 1065 (Miss. Ct. App. 2001) apply where that court held in conclusion "Weaver, guided by the knowledge that he is not eligible for a suspended sentence, may enter a new plea" and exercise his right of a new trial. Cooper v. State, 737 So. 2d 1042 (Miss. 1999).

Whereas, the Appellant's prior conviction of Burglary of a Residential, the Tippah County Cause in which is ran consecutively with this sentence imposed upon him on June 21st. 2006, by the Honorable Judge Andrew Honoth, of Union County's Circuit Court, constrains that Court the ability to place Carroll with an suspension (R. Vol 1/32-34).

It cannot be disputed that, at the time of sentencing, Carroll was not a prior convicted felon. Therefore, Carroll states that an illegal sentence was imposed upon him, by the Trial Court.

Summary of the Argument Proposition Two.

Whether or not, Carroll was denied his Constitutional Right to a Speedy Trial as guaranteed by the Sixth (6th) Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution of 1890.

First, the Appellant addresses an preliminary point. As cited in Lambert v. State, 574 So. 2d 573 (Miss. 1990), an appellant must present to this Court an record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved.

Whereas, Carroll properly presented his error that he asserted and timely preserved his right, during the Evidential Hearing conducted on his Motion to Dismiss the Indictment and Pending Charge, for want of Prosecution and Violation of the Right to a Speedy Trial, on June 19th. 2006, and designated for inclusive in the record for appeal. (R. Vol 1a-9).

Therefore, the Appellant argues vigorously that the Trial Judge erred in denying his motion to dismiss the indictment, by paying insufficient attention to the Analyzing test set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 31 L. Ed. 2d 101 (1972).

This Court has stated that, Speedy Trial claims necessarily entail question of fact regarding "Whether the trial delay rose from good cause." DeLoach v. State, 700 So. 2d 510, 516 (Miss. 1998). Therefore, this court stated it will uphold the trial court's findings on the issue of Speedy Trial where supported by "Substantial, Credible Evidence; but if no Probative Evidence supports the trial court's findings..., This Court will ordinarily reverse." Ross v. State, 605 So. 2d 17, 31 (Miss. 1993). However, in Flores v. State, 574 So. 2d 1314, 1318 (Miss. 1990). That Court held "that the state bears the burden of proving good cause for a Speedy Trial delay, and thus bears the risk of non-persuasion." Therefore, in Barker, 407 U.S. 2d at 101 The United States Supreme Court stated, "If the Court finds a Constitutional Speedy Trial violation, the sole remedy is to reverse the Trial Court's decision and dismiss the charges."

The Sixth (6th) Amendment of the United States Constitution guarantees the right to a speedy trial. U.S. Const. Amend. VI That right has been deemed a Fundamental right. Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). That Court further recognized the right acting through the due process clause of the Fourteenth (14th) Amendment, was binding on each of the states.

The first question is ascertainment of the Point in time when the speedy trial clock began to run against the Prosecution.

In Noe v. State, 616 So. 2d 898, 300 (Miss. 1993), this Court opined: The Constitutional right to a speedy trial, unlike the Mississippi Statutory right created by § 99-17-1 (Supp. 1998), attaches when a person has been effectively accused of a crime. Box v. State, 610 So. 2d 1148 (Miss. 1993); Beavers v. State, 498 So. 2d 788 (Miss. 1986).

Carroll's Constitutional Right to a Speedy Trial attached on June 7th, 2005, the date he was arrested. Jenkins v. State, 607 So. 2d 1137, 1138 (Miss. 1992); Handley v. State, 574 So. 2d 671, 674 (Miss. 1990). Whether Carroll's right to a Speedy Trial was respected must be determined by reference to that date. Lightsey v. State, 493 So. 2d 375, 378 (Miss. 1986). From Carroll's arrest date to his trial was 377 Days (R. Vol. 135).

In Smith v. Hooey, 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969), the Court held "that a state is under an affirmative obligation by virtue of the Sixth (6th.) Amendment as interpreted in Hopton, to make every good faith effort to bring the accused to trial, even from the jurisdiction of another state." However, "In setting these guidelines in Mississippi, this Court has held that a delay of eight (8) months or more would constitute a presumptively Prejudicial delay." Smith v. State, 550 So. 2d 406, 408 (Miss. 1989), and therefore "requires a close examination of the remaining factors." Handley v. State, 574 So. 2d 671, 676 (Miss. 1990).

When a defendant's Constitutional Right to a Speedy trial is at issue, the balancing test set out in Barker v. Wingo, is applicable. The factors to consider 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 was prejudiced by the delay.

407 U.S. 2d at 101.

This Court recognized in Beavers v. State:

No mathematical formula exists according to which the Barker,

weighting and balancing process must be performed. The weight to be given each factor necessarily turns on the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of non-persuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

498 So. 2d at 790.

Nor is the balancing process restricted to the Barker Factors to the exclusion of any other relevant circumstances. In Barker, 33 U. Ed. 2d at 118, the United States Supreme Court stated:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Argument Proposition One.

Whether Carroll sentence is illegal because the Court Judge lacked authority to suspend imposition of his sentence in light of the fact that he had previously been convicted of a felony.

Previously, the Appellant had been convicted in Tipton County, for Burglary of a Residential, a felony, which the trial court Judge ran consecutively with his conviction of Robbery with a Deadly Weapon (R. Vol 133-34).

Therefore, on June 21st, 2006, the Honorable Andrew Howarth, had no authority to give Carroll an suspended sentence under

Miss. Code Ann. § 47-7-33 (REV. 2004) which reads in pertinent part:

When it appears to the satisfaction of any circuit court or county court in the State of Mississippi, having original jurisdiction over criminal actions, or to the judge thereof, that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, such court, in termtime or in vacation, shall have the power, after conviction or a plea of guilty, except in a case where a death sentence or life imprisonment is the maximum penalty which may be imposed or where the defendant has been convicted of a felony on a previous occasion in any court or courts of the United States and of any state or territories thereof, to suspend the imposition or execution of sentence, and place the defendant on probation as herein provided....

Therefore, the trial court in Carroll's case, erred when it suspended a portion of his forty-five (45) year sentence (R. Vol 138-34).

Whereas, in Carroll's case, likewise to that found in Weaver v. State, 785 So. 2d 1055 (Miss. Ct. App. 2001), where Weaver pled guilty to Grand Larceny in 1986. Again, in 1989 he pled guilty to two separate charges of Burglary and Armed Robbery, charges. He got seven (7) years for the burglary conviction and twenty-five (25) years for the armed robbery charge. The twenty-five year sentence included suspended time and some probation time. In which, the judge suspended eighteen (18) years and imposed five (5) years of probation, to be served concurrently. However, Weaver argued that because he had a prior felony conviction, the judge had no authority to give him a suspended sentence under Miss. Code Ann. § 47-7-33 (REV. 2000).... In conclusion, this court held that because of the erroneous sentencing on the charge of armed robbery, we reverse and remand to the lower court, "so that Weaver, guided by the knowledge that he is not eligible for a suspended sentence, may enter a new plea" and exercise his right of a New Trial. His situation "as well as Carroll's" is akin to that also found in Cooper v. State, 737 So. 2d 1042

(MISS. 1999). SEE ALSO GROSS v. STATE, 781 SO. 2D 144 (MISS. 1998) (overruled on other grounds) (holding that defendant was not entitled to suspended sentence as a previously convicted felon).

Whereas, in Gross case similar to Carroll's, "He was sentenced to TEN (10) years in the Mississippi Department of Corrections, with SEVEN (7) years to serve and three (3) years suspended for a five (5) year period. Gross's sentence was to run consecutively with a sentence that he was then serving in Newton County. He appealed to this Court under MISS. CODE ANN. § 97-7-33 "If a defendant has a prior felony conviction, the Judge has no authority to give him a suspended sentence." Consequently, the judgement of the Trial Court was vacated and a new sentence was to be imposed in accordance with MISS. CODE ANN. § 97-17-37, with due consideration given to the portion of the sentence already served by Gross.

Therefore, Carroll points this Court to Weaver, in support of his contention that since he received an illegal sentence, he should be allowed to withdraw his guilty plea, and exercise his right of a New Trial.

Argument Proposition Two.

Whether or not, Carroll was denied his Constitutional Right to a ~~Speedy~~ Trial as guaranteed by the Sixth (6th.) Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution of 1890.

Before Analyzing the four Barker Factors individually, the Appellant set out the following chronology of events, pleadings, and proceedings which will be useful:

Chronology of Events

Arrest to Indictment

JUNE 7TH. 2005 to October 13TH. 2005 (4 months or 138 Days)

JUNE 7TH. 2005

Crime committed and arrest. Carroll arrested for the crime of Robbery with a Deadly Weapon, in Union County, while on probation in Tipton County, for previous conviction. (R. Vol 1/86).

JUNE 8TH. 2005

Arrest warrant. Carroll presented with the Arrest warrant and an \$50,000.00 bond, therewith entering an plea of not guilty, furthermore refused to sign an assertion of his right to a speedy trial relying on his attorney to advise him in that area, which an M.D.C. hold was lodged for possible probation violation and an FBI. hold for questioning; in which SA. Hall, an official officer questioned Carroll concerning a gun alleged to have been used by Carroll in store robbing, thereafter.

JUNE 21ST. 2005

Post-Release revoked. Carroll's probation revoked under cause NO. THDS-064, the Tipton County Cause, and the recommendation of the State concerning Carroll's revocation.

JUNE 30TH. 2005

Carroll transferred to Mississippi State Penitentiary to complete imposed suspended sentence.

AUGUST 3RD. 2005

An Detainer lodged against Carroll at State Penitentiary, for the crime of Armed Robbery, by the New Albany Police Department.

AUGUST 19TH. 2005

Carroll corresponded with WARDEN JAMES BREWER, at Mississippi State Penitentiary, concerning the City of New Albany Police Department's Detainer, as where Carroll was being held as an open close custody offender solely on account of the Detainer filed against him.

October 13th. 2005

Indictment Returned. Union County Grand Jury returned an indictment, against Carroll charged him with Miss. Code Ann. § 97-3-19 (1975) Robbery with a Deadly Weapon, under cause no. 41-0005-136-A (R. Vol 1/06).

Indictment to Arraignment

October 13th. 2005 to March 15th. 2006 (5 months) or 153 Days)

November 1st. 2005

Instantor Lapias. Carroll is scheduled for arraignment, however no arraignment had, due to inadvertence in the Courts Administrative office.

March 15th. 2006

Arraignment. Carroll presented with an copy of the Indictment and the Court appointed Counsel Thomas L. Levidiotis, to represent Carroll, thereafter acting through Counsel Levidiotis, Carroll entered an waiver of arraignment to plea not guilty and filed for Discovery.

Arraignment to Hearing on Motion to Dismiss the Indictment

March 15th. 2006 to June 19th. 2006 (3 months) or 96 Days)

April 13th. 2006

Motion Filed. Carroll filed pro se, Motion to Dismiss the Indictment and Pending Charge, for want of Prosecution and Violation of Speedy Trial.

June 19th. 2006

Evidential Hearing. Carroll's Motion to Dismiss the Indictment, Denied by Honorable Andrew Howarth.

Trial to Entrance of Guilty Plea and Sentencing.

June 19th. 2006 to June 21st. 2006 (3 Days)

June 19th. 2006

Trial. Carroll trial commenced.

JUNE 20TH. 2006

Entrance of Plea. In open Court Carroll withdrew his not guilty plea and entered an plea of guilty, in which the Trial Court accepted (R. Vol 101 - 31).

JUNE 21ST. 2006

SENTENCING. Carroll sentenced to a term of forty-five years (R. Vol 1/32-34).

Turning now to a Analysis of the Four Barker Factors.

(1) Length of the Delay: The delay between the Appellant's arrest on June 7th. 2005, and his trial on June 19th. 2006, was a delay of 377 Days (or approximately 12 1/2 months). Furthermore, the trial Judge found that when the Appellant's motion to dismiss the indictment was filed, a delay of approximately TEN (10) months and 4 days from the arrest warrant to be sufficient to require the review of the remaining Barker Factors (R. Vol 135).

However, in Smith v. State, 550 So. 2d 406, 408 (Miss. 1989), this Court held "that any delay of eight (8) months or longer is presumptively prejudicial." However, "this factor alone is insufficient for reversal, but requires a close examination of the remaining factors." Hendley v. State, 574 So. 2d 671, 676 (Miss. 1990).

While such Presumptive Prejudicial cannot alone carry a Sixth (6th) Amendment claim without regard to the other Barker criteria... it is part of the mix of relevant factors, and it's importance increases with length of the delay. Dogett v. United States, 505 U.S. 647, 112 S. Ct. 2686, 2693, 180 L. Ed. 2d 550, 531 (1993).

The length of the delay from Carroll's arrest to trial was 377 Days which, under the facts and circumstances in this case, is not an excessive or inordinate delay. However, in Smith v. State, 550 So. 2d 406 (Miss. 1989); Beavers v. State, 498 So. 2d 788 (Miss. 1986); Burgess v. State, 473 So. 2d 432 (Miss. 1985); Bailey v. State, 463 So. 2d 1059 (Miss. 1985); and Kerry v. State, 419 So. 2d 194 (Miss. 1982), "each defendant, in the wake of a Barker analysis, was discharged follow-

ing delays of 370, 403, 480, 548 and 560 Days, respectively." Therefore, Carroll should be given the benefit of any doubt. This factor favors the Appellant, necessitating scrutiny of the case as to the remaining Barker Factors.

(a) Reason for the Delay: In the Appellant's case, the reason for delay includes incarceration on another charge; an inadvertence in the Court's administrative office; delay in appointment of Counsel; delay in presenting Carroll with a copy of the Indictment; and the intentional delay in which to gain tactical advantage and/or to hamper the defense by prosecutor.

In the Barker case, 33 L. Ed. 2d at 117, the Supreme Court of the United States asserted:

Closely related to length of delay is the reason the Government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. Such as a deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence of over-crowded Courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason such as a missing witnesses, should serve to justify appropriate delay.

Once there is a finding that the delay is presumptively prejudicial, the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons. Wiley v. State, 580 So. 2d 1008, 1013 (Miss. 1991). In Carroll's case, the prosecution provided no excuse for the delay during the Evidential Hearing held on Appellant's Motion to Dismiss the indictment. Therefore, this Court held in Smith v. State, 550 So. 2d 406, 409 (Miss. 1989), "where the Defendant has not caused the delay and where the prosecution has declined to show good cause for the delay, we must weigh this factor against the prosecution. It is the burden of the state to see that a Defendant receives a Speedy Trial." (quoting Perry v. State, 419 So. 2d 194, 199 (Miss. 1983)).

However, in Rhymes v. State, 638 So. 2d 1270, 391 (Miss. 1994) This Court stated that, "there was no acquiescence in any continuances because the record shows no continuances to which Rhymes, had an opportunity to object." Therefore, Carroll states that there is nothing in the record which would suggest reason for delay in his case, that can be attributed to any party other than the state.

Arrest to Indictment

JUNE 7TH. 2005 to October 13TH. 2005 (4 months or 128 Days)

Following Appellant's arrest on June 7th. 2005, he was found to be on Probation for an prior conviction in Tiptah County (Mississippi), whereas an M.D.C. hold was lodged against him and an FBI. hold for questioning concerning the Pistol alleged to have been used by Appellant, in store robbing; therefore Carroll could not seek bond. However, Carroll requested an Revocation Hearing for an possible bond; whereas on June 21st. 2005, during that revocational hearing Carroll's Post-Release Supervision was revoked solely on account of the State's Prosecutor's recommendation of Carroll being arrested for a felony charge while on probation. Shortly after, on June 30th. 2005, Carroll was transferred to the State Penitentiary to complete imposed suspended sentence under Tiptah County Cause Number TH03-064. However, in Burgess v. State, 473 So. 2d at 433-34, this Court held that "incarceration via parole revocation is not a legitimate reason for the prosecution's failure to bring an accused to trial." Therefore, at the October 2005 term of Court when the indictment was returned against the Appellant, the state having known where Carroll, was should have presented him with an copy of its indictment; to which he was to face. Instead, the Appellant asserts that this was a form of an intentional delay to gain some sort of tactical advantage over him, thinking that it could hamper him as an Habitual offender. In accordance with those in-take notes, it somehow entered as evidence during trial, of SA. Hall's an FBI. official, concerning questioning of Carroll's involvement with Pistol used in robbery. Evidentially, the state thought Carroll would be indicted, whereas it would have had grounds to reinstate Carroll as an Habitual offender in its prosecution of him on Robbery with a Deadly Weapon.

In Doggett v. State, 505 U.S. 647, the United States Supreme Court stated that:

The Government concedes, that Doggett would prevail if he could show that the government had intentionally held back in its prosecution of him to gain some impermissible advantage at trial. Further, stating that Barker stressed that official bad faith in causing delay will be weighed heavily against the government, 407 U.S. at 531, and a bad-faith delay in the length of this negligent one would present an overwhelming case for dismissal.

Therefore, this Portion of the delay should have been weighed heavily against the State.

Indictment to Arraignment

October 13th. 2005 to March 15th. 2006 (5 months or 153 Days)

Attached to Carroll's indictment, was the Instantor Capias which scheduled him for an arraignment as early as November 1st. 2005, however, the Appellant states, due to some reason unknown to him as well as to the record, within the Courts Administration's Office inadvertence occurred, and arraignment was not until some (153 Days) after the returning of the indictment. "Obviously, if arraignment is delayed for a long period of time following arrest, or indictment, or charge, an accused right to a speedy trial could be denied even though there was strict compliance with the requirements of § 99-17-1." Perry v. State, 419 So. 2d at 198.

In this context, this Court stated in Rhymes v. State, 638 So. 2d 1070, 301 (Miss. 1994), that while it is true that the record suggests the inference that state contemplated a trial in November; there is no order establishing, or notice of, a trial date during that period. More importantly, there is nothing in the record which reflects that the defendant sought any delay at this time. Making plans for trial provides the State no excuse where there is nothing to show that the defendant took any action to frustrate those plans.

Therefore, the Appellant states that it should be considered unprofessional conduct for the prosecutor to recommend an indictment then intentionally delay in prosecution.

While Carroll's case is similar to that found in Bailey v. State, 463 So. 2d 1059, 1875 (Miss. 1985), where "the reason for delay was the State's failure to serve Bailey, with a copy of the warrant and indictment in September 1981, even though the case officer knew Bailey's parole had been revoked and he had been returned to prison." Whereas, in Carroll's case the prosecutor's testimony was sufficient to basic revocatory of His Test - Re - leased, and therefore the state knew that Carroll was detained at the State's Penitentiary; and yet still failed to serve him with the indictment in which he would have to face until some 153 days later. Therefore, this portion of the delay should have favored Carroll, as well.

Arraignment to Trial and Sentencing

March 15th. 2006 to June 21st. 2006 (3 months or 98 Days)

The Appellant states that in another form of an deliberate attempt to gain tactical advantage and/or to undermine and impair his defense, the Trial Court delay in its appointment of counsel, whereas it was a Prejudicial (281 Days) from Carroll's arrest until counsel was appointed; at his arraignment of March 15th. 2006. Whereas, this Court held in Tate v. State, 495 So. 2d 436, 2516 (Miss. 1986) "Once proceedings against a defendant reaching the accusatory stage, a right to counsel attaches," also stating that, we are very much aware of the fact that a number of recent federal cases have held that right to counsel secured by the Sixth (6th) Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceedings, i.e., Warrant, indictment and arraignment.

Therefore, this factor viewed in its three part totality, should have favor Carroll.

(3) Assertion of Right: The duty is on the State to insure that a defendant receives a speedy trial. However, a defendant has some responsibility to assert his right to a speedy trial. Flores, 574 So. 2d at 1393. In this context, the Appellant cites Wiley v. State, 582 So. 2d 1008 (Miss. 1991), whereas Wiley, did not assert his right to a speedy trial until the day before trial. However, this was understandable to some extent and is no fault of Wiley, due to the fact that Wiley

was practically without representation because of the changes in his attorney. Compare Barker, 407 U.S. at 531, 98 S. Ct. at 2192 ("The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay..."). This fact was not weighed against either Wiley or the State because of the circumstances.

Therefore, Carroll respectfully points this Court to June 8th, 2005, the day in which he was presented with the Arrest Warrant, thereafter he had refused to sign an assertion of his right; wanting to allow his attorney to advise him in this area, of protecting that right. However, the State put Carroll at an inability to raise this issue in a timely manner, due to its delay of (a prejudicial 881 Days) after arrest until Counsel was appointed to represent him, in the State's criminal proceedings against him.

Under Barker, a defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. The U.S. Supreme Court emphasized that failure to assert the right will make it difficult for a defendant to prove denial of a speedy trial. 407 U.S. at 531-32.

A late filing by the defendant asserting his right is not fatal to the defendant's claim to a Speedy Trial. Giles v. State, 650 So. 2d 846, 850-851 (Miss. 1995). Carroll asserted his right to a speedy trial on April 18th, 2006, after the founding of the Indictment. He asserted this right in an *pro se* filings, Motion to Dismiss the Indictment and Pending charge, for want of Prosecution and Violation of the right to a Speedy Trial.

Whereas, this Court held in Jenkins v. State, 607 So. 2d 1137, 1140 (Miss. 1992), Failure by the defendant to assert the right at all does not constitute a waiver of his right to a Speedy Trial. Moreover, in State v. Ferguson, 576 So. 2d 1252, 1254 (Miss. 1991), this Court held that, "an assertion of a speedy trial need not be made in writing." Whereas, it is the burden of the State to bring a defendant

to trial in a timely manner. See also Melhee v. State, 657 So. 2d 799, 804 (Miss. 1995), holding that, "It is not the duty of the accused to bring himself to trial." Kinzey v. State, 498 So. 2d 814, 823 (Miss. 1986). It is the state, of course, that bears the burden of bringing an accused to trial in a speedy trial manner. Magnusen, at 1383 (citing Vickery v. State, 535 So. 2d 1371, 1377 (Miss. 1988)).

(4) Prejudice to the Defendant: In Carroll's case, records reflect several prejudicial and improper reasons in the State delaying in its prosecution; that impaired Carroll's defenses severely. Moreover, the Appellant testified during an Hearing on an Motion to Dismiss the Indictment, on June 19th. 2006, concerning these impairments, in which he claimed, suggested and demonstrated several prejudicial conditions in the preparation of his defense.

However, this prong of the Barker analysis was discussed as follows:

A fourth factor is prejudice to the defendant. Prejudice of course, should be assessed in the light of the interests of defendants which the Speedy Trial right was designed to protect. This Court has identified three (3) such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defendant's defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case shews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker, 33 L. Ed. 2d at 118. (Emphasis supplied). The Prejudice prong of the Barker analysis encompasses interference with a defendant's liberty and actual prejudice in defending his case.

As for the first interest, Carroll was incarcerated from his arrest of June 7th. 2005, until his conviction and sentencing of June 21st.

2006, a period of 379 Days). However, in Ross v. State, 605 So. 2d 17, 23 (Miss. 1992), this Court opined that, "a defendant's assertion of prejudice attributable solely to incarceration, with no other harm; Typically is not sufficient to warrant reversal." Therefore, in the Appellate case, He claimed several types of oppressive pre-trial incarceration, in which He included in His Motion to Dismiss the Indictment. Whereas, He was in fact made ineligible for any type of early release, probation, parole, participating and/or negation in Rehabilitative, Educational programs such as any of the Vocational, trade classes, Job training, work programs, Mississippi Prison Industries Corp. (M.P.I.C.) offered by the M.D.C., religious programs or services, and therewith ineligible to be transferred to any less restrictive facility, during His current imposed suspended sentence, due to that fact of the City of New Albany's Police Department unresolved Detainer lodged against Carroll on August 3rd. 2005.

In Bailey v. State, 463 So. 2d 1059, 1060 (Miss. 1985), this Court found prejudice in the placement of a detainer against one incarcerated at the Mississippi State Penitentiary which resulted in loss of eligibility for parole, disqualification from participation in rehabilitation programs, and several other factors. Therefore, Carroll has shown that He has suffered oppressive pre-trial incarceration from a result of the State's unjustified delay in His prosecution and His unresolved Detainer filed against Him.

The Second Interest protected by the Constitutional right to a Speedy Trial is minimizing anxiety and concern. Whereas, Carroll asked this Court to assume the amount of anxiety and concern, that He has suffered, to be Extraordinary. Therefore, Carroll states that on August 19th. 2005, He filed and received an response from His Complaint to Warden James Brewer, at the Mississippi State Penitentiary, concerning the reason He was being held as an "Open Closed-Custody" offender. Whereas, Carroll was told that that reason was on account solely of the unresolved Detainer of Armed Robbery. Furthermore, at Carroll's Evidential Hearing on His Motion to Dismiss the Indictment, He claimed and produced proof of His assertion. Therefore, where this Court held that, "the defendant may be prejudiced by the fact that he has been detained before trial, that he has suffered anxiety as a result of the delay, or

that his defense has been impaired by the delay." Spencer v. State, 590 So. 2d 1380, 1387 (Miss. 1991). Therefore, Carrell implies that with that added stress of being housed in an lock-down unit, it added an incredible amount of anxiety and concern to him as he worried about his as well as his families future; whereas during the Evidential Hearing it was testified of his two (2) infant daughters). As to being an lock-down offender Carrell was restricted from several privileges in which would have allowed him to stay in contact with his family, such as visitation programs, Landline and Telephonic Services; which those privileges restricted, constrained his communications with family, solely because of the unresolved Detainer.

In State v. Magnusen, 646 So. 2d 1275, 1280 (Miss. 1994), this Court held that, "while Magnusen may have had a right to be anxious and concerned, not all of his woes and tribulations were a product of the changes proffered in the case." Furthermore, in Carson v. State, 655 So. 2d 37, 38 (Miss. 1995), this Court that "Anxiety is presumed from the mere fact of delay even where the defendant does not complain that he has suffered anxiety." However, at the Evidential Hearing Carrell's witnesses testified that prior to his arrest he was in fact working for (Shenoy's) Furniture Factory, in Ripley, Ms. Therefore, Carrell was suffering from an loss of income as a result thereof, which added additional anxiety and concern. See State v. Woodall, 801 So. 2d at P. 25, where this Court held there that, "there was simply no showing in the record that Woodall, lost any income, clients, caseload, or respect as a result of the delay."

The Third Interest, protected by the Constitutional Right to a Speedy Trial is that of minimizing the possibility that the defense of the accused will be impaired. Carrell, at his Evidentiary Hearing demonstrated that his defense was impaired and therewithal, requested that an subpoena be issued for an defense key-witness, Aletha Robinson. In which, the Honorable Andrew Howarth, denied stating that it would cause further delay in prosecution. However, Carrell provided the Trial Court with his witness name and the information to which she would and/or could have testified at, if an subpoena would have been issued. Whereas, in State v. Woodall, 801 So. 2d 678, 310 (Miss. 2001), this Court stated, "there that nothing in the record indicated any effort by the defendant or his

attorneys to record his alleged witnesses testimony and cited previous precedent holding that "the failure to attempt to secure a witness is fatal to the claim of actual prejudice." See also Rhymes v. State 638 So. 2d 1970, 1974 (Miss. 1994) (holding that "the fact that there was a total failure to attempt to secure a crucial defense witness appearance by sub-poeina is fatal to the claim of actual prejudice). However, Carroll states that without that testimony of his alibi witness and the explanation of why he was not the person who committed Robbery, he could not rebutt **not** demonstrate that he was not that person who actually committed the crime and therefore, was not guilty of the charge.

In United States v. Doe 149 F. 3d 945, 1998 U.S. App. Lexis 150 44, 98 6at, that court conclude that Appellant did not meet his "Heavy Burden" of est- abishing prejudice based on loss of testimony because he was able to rebut the stories of the knife on cross-examination. See United States v. Bracy 67 F. 3d 1401, 1407 (9th. Cir. 1995) (holding that claims of prejudice based on failed or post-event witness memories lack merit where a defendant can effectively cross-examine the witnesses about the events.) However, in Bailey v. State 463 So. 2d 1039, 1985 (Miss. 1985), this court held findings that "He was also unable to properly locate witnesses that would have substantiated his defense that someone stole his car and performed the burglary. See also Wall v. State 574 So. 2d 635, 639 (Miss. 1990), this court held that "Impairment of the defense may occur as a result of witnesses dying or disappearing or of loss of memory on the part of witnesses." Carroll furthermore argues loss of memory on the part of his witnesses, Gladys Carroll and (an courtreporter misspelling as to the witness name, courtreporter has a Lindsey Garner) Lynnsie Garner, during the sentencing hearing, they both during cross-examination suffered an loss of memory and became confused while on the witness stand. However, this court discussed prejudice in Wells v. State 288 So. 2d 860 (Miss. 1974) as follows, quoting from BARKER, supra.

There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Whereas, see BEAVERS v. State, 498 So. 2d 785, 3772 (Miss. 1986), where this Court held that "BEAVERS argued that the delay resulted in his witness, 'Charles Watts,' suffering a loss of memory and becoming confused while on the witness stand." Further stating, "that argument was inconclusive in that we have no way of knowing what Watts testimony might have been at an earlier trial (although it is within our actual and judicial knowledge that over time witnesses, being human, commonly suffer some memory loss, the fact and extent of which are usually difficult to prove). In any event, our review of Watts testimony reveals it no more confused than that of hundreds of other witnesses whose testimony we have read and studied over the years.

Under the Totality of the BARKER Factors, the balance should have been struck in favor of Carrolles. However, the Circuit Court Judge Andrew Howarth, of Union County (Mississippi) used an improper legal standard by not requiring that the State produce opposition of that the reason for delay was for "Good and Sufficient Cause," and that Carrolles defense was not impaired in support of his denial of Carrolles Motion to Dismiss the Indictment. Therefore, He placed too much weight of the Barker Factors without requiring that the burden be shifted to the Prosecution to produce evidence justifying its delay. Whereas, he paid insufficient attention to the various distinct periods of the delay in reaching his conclusion.

With all due respect, the Appellant states that on May 25th, 2007, under M.R.A.P. rule 31(c), He filed into this Honorable Court to have the Briefing Schedule suspended, to correct deficiency within the record, to add merit to his propositions. Therefore, Carrolles makes this statement in Hopes of Sanctions and proceedings to follow in this Courts directions.

Conclusion

The Appellant asks the Honorable Court to reverse the judgement of conviction of the Circuit Court of Union County.

Certificate of Service.

Certification, that the Appellant, being pro se, the undersigned, have cause this date as reflected below, to be mailed via U.S. Postal Service, postage pre-paid by placing the True and Correct copy of the foregoing and attached pleadings and/or instruments in the United States, addresses as follows:

Hon. Betty W. Septon
Post Office Box 249
Jackson, MS 39205-0249

Hon. Phyllis Stanford
Post Office Box 298
New Albany, MS 38653-0298

DONE, this 11th Day of August, 2007.

Sincerely,
Dyann H. H.
Appellant

Hon. Betty W. Septon
Supreme Court, Clerk
State of Mississippi
Post Office Box 249
Jackson, MS 39203-0249

Sunday, August 5th, 2007.

Re: Filing, Brief for the Appellant.
Doug Carroll v. State of Mississippi.
Cause No. 0006-L7-01406.

FILED

AUG 05 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Dear Clerk,

Enclosed for filing, Please find the above-referenced item.
Your time and assistance is most appreciated.

Sincerely,
Ray C. H.
Appellant

