IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL LATAVIN SMITH — APPELLANT

VS.

NO. 2006-KA-1946-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. SMITH'S CONFESSIONS WERE PROPERLY ADMITTED.

II. SMITH WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

III. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN DENYING SMITH'S MOTION FOR A SEQUESTERED VOIR DIRE.

STATEMENT OF FACTS

On the morning of August 11, 2004, nineteen-year-old Joanna Eubanks told her mother that she was going to break up with her boyfriend, Michael Latvain Smith, that day. T. 367. Joanna also told her mother that she wanted to attend college the next semester if the family could afford it. T. 368. When Joanna left her mother's home at 1:00 that afternoon to go to Smith's home, it was the last time Ann Eubanks would see her daughter alive.

After going to Smith's trailer and discovering that he was not home, Joanna went to the home of Smith's grandmother who lived next door. T. 528. It was approximately 2:15 p.m. T. 528. After visiting with Smith's sister for a few minutes, Joanna left and went back to Smith's trailer. T. 528. At that point, Smith had arrived home. He would later give two versions of what transpired that afternoon. He would fist tell authorities that he was cleaning his gun when he shot her. T. 453; Exhibit 11. Smith indicated that Joanna was standing five to six feet away from him when he shot her. Exhibit10, p. 3. Five days after giving his first statement to authorities, Smith changed his story. Smith's second version of what happened after Joanna arrived at his trailer is as follows,

> I started playing with my gun and stuff. So I put the gun to my head and snapped the gun, snap, just like that. And, so, I said see, just like that, see. And by that time, I pointed it at her, and it shot. And it shocked me, so I dropped the gun. I did drop the gun. And then, I turned - she fell on her face and, then, I turned her over to see was she still breathing. She wasn't breathing.

Exhibit 9, pp. 4-5. Although Smith claimed to be shocked that the gun fired a bullet after he pulled the trigger, Smith admitted that he knew that four bullets were in the six chamber gun. Exhibit 9, pp. 9. Smith also stated that he was standing about three feet away from Joanna when he pointed the gun to her face. Exhibit 9, p. 13.

Dr. Steven Hayne, who performed the autopsy on Joanna's body, testified regarding the gunshot wound to Joanna's nose and the tattooing on Joanna's face. T. 425. Tattooing is the term

used when fragments of unburnt gunshot powder leave the muzzle of a weapon and become embedded underneath the skin's surface. T. 425. Dr. Hayne testified that the tattooing indicated that the gun was approximately three to six inches away from Joanna's face, but certainly no more than nine inches, when Smith fired it. T. 426.

After being instructed on murder, culpable negligence manslaughter, and accident, the George County Circuit Court jury found Smith guilty of murder.

SUMMARY OF THE ARGUMENT

Smith claims that his confessions should have been suppressed because they were involuntary. This assertion is simply contrary to the evidence. Smith was read his Miranda rights and signed a waiver. Smith never asserted his right to remain silent, nor his right to an attorney. He stated during the taped interviews that he understood his rights, and that no one had threatened him or promised him anything in exchange for his statements. Officer Keel, who conducted the interviews, also testified that Smith had not been threatened or made any promises. After considering the totality of the circumstances, the trial court correctly found that Smith's statements were voluntary and admissible.

Smith was not denied his statutory nor constitutional right to a speedy trial. The statutory speedy trial analysis allows any delays caused by the defendant to be subtracted from the number of days between arraignment and trial. Smith moved for and was granted seven continuances which account for 518 of the 604 days between arraignment and trial. Accordingly, for purposes of the analysis, Smith was tried well within the 270 time limit. Regarding his constitutional speedy trial claim, Smith fails to articulate any prejudice caused by the delay, rendering his claim wholly meritless.

Finally, the decision to allow sequestered voir dire is solely within the discretion of the trial court. Although the court denied Smith's motion for a sequestered voir dire, it allowed a reasonable alternative. Furthermore, Smith again failed to show actual harm or prejudice, which is required in order to disturb the trial court's decision to deny a sequestered voir dire.

ARGUMENT

I. SMITH'S CONFESSIONS WERE PROPERLY ADMITTED.

On appeal Smith claims that his confessions were involuntary, and therefore inadmissible,

because he did not understand his rights and because he was denied counsel.

A trial court's denial of a motion to suppress the defendant's confession will be disturbed only when the ruling is manifestly in error or against the overwhelming weight of the evidence. **McGowan v. State**, 706 So.2d 231, 235 (¶11) (Miss. 1997). A confession is admissible when knowingly, voluntarily, and intelligently given, and not the product of police threats or promises. **Wilson v. State**, 936 So.2d 357, 361 (¶8) (Miss. 2006). "A confession is voluntary when, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice." **Id.** at 361-362. The burden is on the State to prove the voluntariness of the confession. **Id.**

Deputy Keel testified that Smith was read his *Miranda* rights and signed a waiver of rights form before giving both his August 12 and August 17 statements. T. 115, T. 125. Deputy Keel also testified that Smith was not threatened, abused, or promised anything in exchange for his confessions. T. 116, 125. Although Smith did not testify at the hearing, he stated in his taped interview that he was read his rights, he understood his rights, he signed a waiver, and he was not threatened or made any promises in exchange for his statements. Exhibit 9, pp. 1-2; Exhibit 10, p. 6; Exhibit 11, pp. 1-2. After the State made out a prima facie case of voluntariness in showing that no threats or promises had been made, the defense produced no evidence to the contrary.

Smith does not argue on appeal that he was coerced into giving the statements to Keel. Rather, he claims that his statements should have been suppressed because he did not understand his rights due to some vague mental frailty. Smith's only witness at the hearing was his mother, who testified that Smith was hyper in school and "kind of slow," he was placed in alternative school after repeating a grade in elementary school, he had been on Ritalin, and he started a GED program but never completed it. T. 164-169.

Even in cases which involve mentally retarded defendants, our reviewing courts have held that the defendant's mental capacity is only one factor for the trial court to consider in its totality of the circumstances inquiry as to whether the statement was voluntarily given. **McGowan,** 706 So. 2d at 235 (¶12). In ruling that Smith's confession was admissible, the trial court made the following findings.

> The Court notes and finds that the defendant has pled guilty to other charges, which indicates that he understands the system, and in those colloquies and pleas, he would have sworn that he could, among other things, read and write.
>
> There is no evidence before the Court that anything occurred in conversations between the taping, of any kind of illegal nature or violations of the defendant's constitutional rights. There is no evidence before the Court that the defendant possesses low IQ or a learning disability, or anything of that nature, which woud cause him not to understand his rights and what he is engaged in. There is no evidence of coercion, intimidation or promises; no rebuttal whatsoever to Officer Keel's testimony; so the Court overrules the motion and finds that all statements are freely and voluntarily given after having been advised of his **Miranda** rights, and all statements were admissible.

T. 184. The trial court's decision must not be disturbed as it is not manifestly erroneous or against the weight of the evidence.

Regarding Smith's claim that he was denied counsel, he never invoked his right to counsel. "The right to have an attorney present must be 'specifically invoked.'" **Mooney v. State**, 951 So.2d 627, 629 (¶9)(Miss. Ct. App. 2007) (quoting **Holland v. State**, 587 So.2d 848, 856 (Miss. 1991)). Because Smith never invoked his right to counsel, his argument that his statements were involuntary because he did not waive his right to counsel must fail.

Smith's claim that the alleged delay in his initial appearance caused him to involuntarily confess is also meritless. Smith claims that he was held in police custody for six days before his August 18 initial appearance, in violation of URCCCP 6.03, which led to his giving involuntary statements. However, Smith was being held on August 12-18 on three outstanding bench warrants

for charges wholly unrelated to Joanna's murder. T. 161, C.P. 100-02. During that time, Smith gave voluntary statements to Keel during the course of his investigation. Officer Keel did not execute an affidavit for the murder charge until August 18. T. 161. In other words, Smith was not under arrest for Joanna's murder until August 18. Smith's initial appearance occurred on the same day. T. 159. Accordingly, his initial appearance was held well within the forty-eight hour time frame.

For the foregoing reasons, the trial court properly found that Smith's statements were voluntarily given and admissible.

II. SMITH WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

The following time-line is relevant to Smith's speedy trial claim:

11/1/04	Arraignment - Smith is represented by public defender for purposes of arraignment only. Smith indicates that his mother is hiring a private attorney for trial. Court orders defendant to report back on 12/1/05 to inform whether he has obtained private attorney. (T. 7-10; C.P. 7)
12/1/04	Smith tells court he needs more time to hire private attorney. Court gives him until 1/24/05 to obtain private attorney. (T. 11)
1/24/05	Smith indicates that he cannot afford representation. Court appoints Sidney Barnett and David Futch to represent Smith. (T. 13, C.P. 9)
1/24/05	Smith moves for first continuance due to recent appointment of attorneys. (C.P. 10,11)
1/31/05	Order granting continuance and setting trial for 4/18/05. (C.P. 12)
3/24/05	Futch moves to withdraw as counsel due to conflict. (T. 14)
3/29/05	Order allowing Futch to withdraw. (C.P. 18)
4/6/05	Order appointing Daphne Pattison as defense co-counsel. (C.P. 19)
4/15/05	Barnett moves for second continuance to give newly appt. co-counsel time to prepare for trial. (C.P. 20)
4/19/05	Order granting continuance and setting trial for 8/1/05. (T. 16, C.P. 21)

4/27/05	Smith demands speedy trial. (C.P. 24)
7/15/05 -	Smith moves for third continuance citing following reasons - waiting on Smith's school and mental records; tropical storm Cindy and Hurricane Dennis caused office closing resulting in preparation delays; defense counsel's involvement in another murder trial. (C.P. 55-58).
7/19/05	Order granting Smith's motion for continuance and setting trial for 10/24/05. (C.P. 31).
10/28/05	Order granting Smith's fourth motion for continuance due to Pattison's unavailability due to Hurricane Katrina. Trial set for 1/17/06. (C.P. 92)
12/6/05	Order granting Smith's fifth motion for continuance due to Pattison relocation to Houston after her office was destroyed by Hurricane Katrina. Chris Dobbins appointed as co-counsel. (C.P. 107, T.17)
1/17/06	Smith's sixth motion for continuance to allow Dobbins time to prepare. (T. 18)
1/17/06	Order granting Smith's motion for continuance and setting trial for 5/1/06. (C.P. 116)
2/2/2006	Order appointing Ross Simons to replace Barnett after Barnett's relocation due to Hurricane Katrina. (C.P. 129)
4/18/06	Smith's seventh motion for continuance to allow more preparation time for defense expert witness. (C.P. 178)
5/1/06	Order granting Smith's motion for continuance. Court also notes death in defense counsel's immediate family. Trial set for 6/26/06. (C.P. 180, T. 57)
6/26/06	Smith's trial commences.

The Statutory Right

Mississippi Code Annotated § 99-17-1 provides, "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." Miss.Code Ann. § 99-17-1. The statutory speedy trial right runs from the date of arraignment. **Manix v. State**, 895 So.2d 167, 174 (¶8) (Miss. 2005). "The first step to determine if there is compliance with the 270-day rule is to calculate the total number of days between arraignment and

the actual trial." **Id.** at (¶9). Smith was tried on June 26, 2006, which was 602 days after his November 1, 2004 arraignment. However, the inquiry does not end here.

> [T]he second step in calculating compliance with the 270-rule is to consider each delay separately, because only those delays attributable to the State count toward the 270 days. Any delay as a result of action by the State that is not supported by good cause will cause that time to be counted against the State. Yet a delay caused by the actions of the defendant, such as a continuance, will toll the running of the time period for that length of time, and correspondingly this time is subtracted from the total amount of the delay.

Id. Defense counsel moved for and was granted six continuances, pushing the original trial date from January 24, 2005 to April 18 to August 1 to October 24 to January 17, 2006 to May 1 to June 26. C.P. 10-12, 20-21, 31, 55-58, 92, 107, 116, 178-180; T. 7-13, 16-18, 57. The trial court found good cause for granting the defendant's motions for continuance, and the reasons for each order granting continuance is set out in the above time-line.

The defendant's seven consecutive continuances tolled the time from January 24, 2005 until June 26, 2006, or 518 of the 604 days between arraignment and trial. Accordingly, Smith's statutory right to a speedy trial was not violated.

The Constitutional Right

This honorable Court recently stated,

> A determination of whether an accused has been afforded a speedy trial within the parameters set forth in Mississippi Code Annotated section 99-17-1 requires a stricter analysis than what is constitutionally required. Thus, it follows that if the time period that an accused has had to wait before going to trial is not violative of the mandate of Mississippi Code Annotated section 99-17-1, then a state constitutional violation has not occurred either.

Shumaker v. State, 956 So.2d 1078, 1082 (Miss. Ct. App. 2007). As the State has shown that Smith's statutory right to a speedy trial was not violated, in accordance with **Shumaker**, neither was his constitutional right to a speedy trial violated. Nevertheless, out of an abundance of caution, the

State presents the following brief analysis regarding Smith's claim.

The constitutional right to a speedy trial attaches at arrest. cite. The following factors are employed to determine whether the right has been violated/complied with: the length of delay, the reasons for the delay, whether the defendant asserted his right to a speedy trial, and whether the defense suffered any prejudice from the delay. cite.

Length of delay

A delay of eight months or more is presumptively prejudicial. **Brunson v. State**, 944 So.2d 922, 926 (¶12) (Miss. Ct. App. 2006) (citing **Spencer v. State**, 592 So.2d 1382, 1387 (Miss. 1991)). Only when such a delay has occurred must the court consider the remaining factors. **Id.** Because Smith was arrested for Joanna's murder on August 18, 2004 and tried 678 days later, the remaining factor must be considered.

Reasons for delay

As stated above, all delay that occurred was strictly due to Smith's seven motions for continuance which were granted by the trial court. Accordingly, this factor necessarily weighs against the defendant.

Assertion of right

Smith made a demand for a speedy trial on April 27, 2005. C.P. 24.

Prejudice

Smith makes no serious allegation of prejudice caused by the delay. Rather, he simply references some "cumulative anxiety" caused by his confinement. Appellant's brief at 39. Our reviewing courts have found loss of evidence, death of a witness, and stale investigations to constitute prejudice for purposes of the speedy trial analysis. **Manix**, 895 So.2d at 177. Anxiety has simply not made the list. "In the absence of prejudice, we cannot find that [the Appellant's]

constitutional right to a speedy trial was violated." **Brunson**, 944 So.2d at 926 (¶17) (citing **State v. Magnusen**, 646 So.2d 1275, 1285 (Miss. 1994)).

For the foregoing reasons, Smith's constitutional speedy trial claim also fails.

III. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN DENYING SMITH'S MOTION FOR A SEQUESTERED VOIR DIRE.

The decision to grant or deny a motion for a sequestered voir dire is left to the sound discretion of the trial court. **Speagle v. State**, 956 So.2d 237, 242 (¶14) (Miss. Ct. App. 2006). An appellant must show actual harm or prejudice before a reviewing court will disturb the trial court's decision to deny a sequestered voir dire. **Id**.

Smith requested a sequestered voir dire so that he could individually question veniremen about their beliefs regarding race and interracial relationships, simply because Smith was a black male and the victim, his then girlfriend, was a white female. The following exchange occurred during the hearing on the motion.

> Defense: I think peoples attitudes towards race and towards dating between the races, are important, and I think that whether we want to or not, we harbor some kind of concerns within our heart that we maybe wouldn't want to talk about in front of 40 other fellow members in the community.
>
> The Court: What is the difference in that and the fact that we ask jurors some of the most intimate personal questions about their lives and the lives of their families? I mean, we've had people who have come up privately and talked about the rape of their children, et cetera, and they do that privately, and sometimes they don't, God bless them. Sometimes they do it in front of everybody, and hang their pain out for everybody to see. Why do you think that needs a private venue?
>
> Defense: It just seems to me to be a more sensitive issue, your Honor.
>
> The Court: Do you think that race is more sensitive than sex? Do you think that race is more sensitive than rape?
>
> Defense: Well, this case has both of those. It doesn't have rape.

The Court: It doesn't have rape.

Defense: No. First you said sex. It has both of those, and they're both sensitive issues.

The Court: What can you show me that says people will be more truthful privately than in a group?

Defense: I don't know that I can, your Honor. I'm not a sociologist, and I don't have studies like that with me, but it just seems to me that people are more willing to give their opinions in a more intimate forum than in front of a forum in front of 60 or 70 people.

The Court: Well, I have read the list of questions that you may ask. . . . But in the forum that I use, or that we use, I make it very clear that if the nature of these questions [is] so personal, that an individual can come forward and answer them. I have nothing before me that shows the system in which we are involved does not do what it is intended to do, and that is with the proper voir dire that brings it out, as best we can, the prejudice or lack thereof of people with respect to any of the issues that comes before us.; so I'm going to overrule the motion. We'll go forward with voir dire as we always have, with the understanding, and Mr. Lawrence has pointed this out, he's been before me before; if we've got issues that come up that are personal, somebody doesn't want to express them, then I'll certainly allow the individual to come forward and express them at the bench.

T. 91-93. As promised, the trial court informed the panel that during voir dire they were free to approach the bench and speak privately regarding any personal questions asked of them. T. 195. Before defense counsel began questioning the panel regarding race and interracial relationships, he too informed them that they could approach the bench and speak privately. T. 289, 290. Rather than approaching the bench, one juror raised his hand and stated that he did not approve of interracial relationships. T. 289.

The trial court did not abuse its discretion in allowing a reasonable alternative to a sequestered voir dire. Further, during questioning by the court, the judge repeatedly asked whether the potential jurors could be fair and impartial if they were chosen, to which he received all

affirmative responses. "This Court gives great deference to such statements of impartiality." **Id.** (citing **Morris v. State**, 843 So.2d 676, 678 (¶9) (Miss. 2003)). See also, **Le v. State**, 913 So.2d 913, 923 (¶13) (Miss. 2005). Finally, Smith has failed to show actual harm or prejudice which resulted from the denial of his motion for a sequestered voir dire. Rather, he simply offers bare speculation and conjecture regarding people's attitudes and beliefs about race and interracial relationships. Accordingly, his final issue must fail.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Smith's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 10th day of August, 2007.

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