IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL LATAVIN SMITH — APPELLANT

VERSUS

NO. 2006-KA-01946-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF FOR APPELLANT

APPEAL FROM THE CIRCUIT COURT OF GEORGE COUNTY

HONORABLE ROBERT P. KREBS, CIRCUIT JUDGE

APPELLANT DOES NOT REQUEST ORAL ARGUMENT

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ARGUMENT

Issue I **Whether the admissions or confession of Smith were properly admitted despite failure to timely provide an initial appearance, failure to provide counsel, and inability of Smith to understand his rights and understand and agree to waivers.**

For the reasons argued in the Brief for Appellant, all of which are reiterated here by reference, the trial court committed reversible error in denying Smith's motion to suppress his confession.

Issue II **Whether Smith was denied his guaranteed rights to a speedy trial where continuances were granted without good cause and appointed attorneys forfeited his right without his knowledge or agreement.**

The State argues that Smith's statutory speedy trial rights were not violated because fewer than 270 unexcused days – that is, days chargeable against the State – had passed between arraignment on 1 November 2004 and trial on 26 June 2006. It reaches this count of days by arguing that all of the continuances sought by Smith (they were actually sought by Smith's attorneys and not by Smith himself) were granted for "good cause shown."

Smith has argued in his Brief for Appellant that various continuances following defense counsels' motions were not granted for good cause shown because good cause was not shown.

Smith was in no way responsible for the misfortune and consequent rotation of his various counsel which led them to seek and the court to grant delays. Smith had nothing to do with the selection of his counsel from 31 January 2005 onward. He had nothing to do with their desires to withdraw or with the trial court's permitting withdrawal. He never asked for a change of counsel or complained of his counsel. A close reading of the record does not reveal that he ever saw his counsel or even knew who they were between 24 January 2005 and 18 April 2006

when he was first made aware of what was going on. These numerous delays should not be counted against him. They should be counted into the 270-plus days chargeable against the State that he was held without trial. *Hersick v. State*, 904 So.2d 116 at ¶13 (Miss.2004).

The State has cited no authority to refute this assertion.

An additional overlapping but different argument has been made by Smith in his Brief for Appellant: that his constitutional rights to a speedy trial cannot be waived by counsel without a knowing and voluntary waiver of that right by himself, the accused.

That Smith was capable of a knowing waiver of his rights even if – *arguendo* – he had been made aware of what his appointed counsel were doing – is highly questionable (see Brief for Appellant, pp. 14-16, wherein the intellectual capacity of Smith is examined).

Not being aware, or not understanding, he did nothing between 24 January 2005 and 18 April 2006.

Defense counsel may and should protect the constitutional rights of the accused; they may not and should not forfeit them on their own motion or for their own convenience.

The orders granting continuances sought without Smith's knowledge or acquiescence each contained the boilerplate waiver-of-speedy-trial-rights sentence. Regarding this we quote at length from Mr. Justice Diaz dissenting in *Guice v. State*, 952 So.2d 129 at 150 (Miss.2007):

> ¶72. We began to allow the idea that a defendant might waive the right to a speedy trial through inaction in *State v. Davis*, 382 So.2d at 1098, which was quoted with approval in *Walton v. State*, 678 So.2d 645, 649 (Miss.1996), the case upon which the Court of Appeals relies. However, *Barker* made it completely clear that a defendant cannot waive her right to a speedy trial under the Sixth Amendment of the U.S. Constitution: "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." 407 U.S. at 528, 92 S.Ct. 2182. The Court clarified that "[t]his does not mean, however, that the defendant has no responsibility to assert his right, but that the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of

> the factors to be considered in an inquiry into the deprivation of the right." *Id.* at 528-29, 92 S.Ct. 2182.

One of Smith's counsel filed a motion demanding a speedy trial on 25 April 2005.

> ¶73. The reasoning in *Davis* and *Walton* was based upon an ALR article from 1958–14 years before *Barker* forbade waiver. It is unclear whether these cases were referring to the state or federal right, but that is unimportant: while states may craft laws and constitutions granting more freedom than is afforded under the U.S. Constitution, they cannot do less. The U.S. Supreme Court has determined that a constitutional right to a speedy trial may not be waived through inaction, and to the extent *Davis* and *Walton* contradict binding U.S. Supreme Court authority regarding the Sixth Amendment right, they must be overruled. This approach does not eliminate the possibility that a defendant may waive his or her right to a speedy trial through affirmative action, but simply that such a crucial right may not be waived by inaction.

Guice, *supra*, at 150.

This argument, like the prior one that good cause for continuances was not shown, was simply not refuted by the State. It was ignored and like the prior argument is unchallenged by any authority or precedent cited by the State.

Smith has argued that both his state constitutional and U.S. constitutional rights to a speedy trial were violated. He re-adopts those arguments here. Regarding these constitutional rights the Appellee's brief finds all the support the State claims to need in *Shumaker v. State*, No. 2006-KP-00039-COA (decided May 15, 2007)) but then "out of an abundance of caution" goes on to analyze, however cursorily, the four factors first identified as such in *Barker* (*Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)) and subsequently adopted by our Court as germane to the determination of speedy trial rights. *Barker* is not cited. Nor is any Mississippi case specifically adopting the *Barker* criteria cited. Nor is it clear from the State's brief whether the U.S., the Mississippi, or both constitutional rights are being discussed. Neither constitution is mentioned specifically.

The State seems to find in *Shumaker* (before proceeding in its abundance of caution) that since, from its position, the 270-day statute has not been violated then no constitutional rights have been violated – state or U.S. If this is the State's argument (we cannot be sure), then the State is ignoring the U.S. Constitution entirely. Only Mississippi cases are cited.

Shumaker itself restricted its equating of § 99-17-1 (the 270-day rule) satisfaction with constitutional satisfaction to the state constitution (¶4). It then proceeded to examine the delay to see if there has been U.S. Constitution adherence under the *Barker* formula. The necessity that our Court employ two separate analyses is recognized (¶3) and followed (¶5 *et seq.*).

In *Shumaker* the speedy trial analysis appropriately is cut short for, under the *Barker* formula, the entire length of delay is not long enough to be considered presumptively prejudicial.

In the case now before the Court Smith's delay was clearly presumptively prejudicial. Hence he is entitled to a full *Barker* analysis of all the factors with reference to his speedy trial right under the U.S. Constitution.

This Court's finding on the speedy trial issue in *Shumaker* is correct. It is correct because Shumaker was tried only 161 days after the time of his waiver of extradition (he waived his arraignment at an even later date). Thus the 270-day rule (§ 99-17-1) could not have been violated. *Shumaker* is also correct in ruling that his right to a speedy trial under the U.S. Constitution was not violated because the threshold consideration is length of delay. If length of delay is not presumptively prejudicial (8 months from arrest in Mississippi) there is no need to look at the other factors. *Barker v. Wingo*, 407 U.S. at 530.

With all respect to this Court, however, we urge that the Court's statement in *Shumaker* is improvidently made:

> 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, *supra*, at ¶4 (emphasis added).

This ruling should be corrected as soon as possible.

If such a pronouncement correctly states the law, then this Court has given prosecutors and law enforcement officers the license to delay arrest, to unreasonably delay indictment while the accused is incarcerated, and to delay arraignment after that because the protection afforded the accused under 99-17-1 – limiting the State's time in which to act – concerns only the period after arraignment and not the time that passes before arraignment.

The State has based its entire "first argument" (Brief for the Appellee, p. 9) on the above-quoted paragraph. It consists in its entirety of the following: "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." As stated earlier, the argument does not identify which constitution's right to a speedy trial is involved here and seems to imply that both are involved. The argument is incorrect in either event.

The State's entire "second argument" on this question – done out of an abundance of caution – is page 10 of its Brief for the Appellee, a cursory look at the *Barker* factors.

Smith sees no need to repeat his examination of the facts and argument of the law on those factors (Brief for Appellant, pp. 26-39).

Smith has argued the law as it was when his Brief was written. *Shumaker* makes no change at least as far as the 270-day statute and the U.S. Constitution are concerned. Smith reasserts those arguments and urges that they are not refuted by the Brief for the Appellee.

In addition Smith here refers to the dissenting opinion in *Guice*, *supra* (part of which is quoted with approval in *Shumaker*, ¶3).

The dissent in *Guice* urges that the distinction be maintained between the analysis of 99-17-1 and the analysis of the U.S. Constitution right to a speedy trial be. This was done in *Shumaker*. However, *Guice* goes further and argues *inter alia* for a complete separation of the content of these two analyses. That is, *Guice* urges that there be a complete pruning from the statutory analysis of all those factors grafted on it by our Court since 1996 from the *Barker* decision – and a consequent return to the direct and simple language of the statute itself. Counsel urges that this reading of the law is correct and should be accepted by the majority.

However, under the present majority view of speedy trial rights, Smith, nonetheless, should prevail. His arguments are sufficient in themselves and are not refuted by the State's brief.

Issue III **Whether the court committed an abuse of discretion when it denied Smith's motion for a sequestered voir dire on the limited issues of race and intimate interracial relationships.**

Smith has shown in his argument of Issue III, regarding a sequestered voir dire on the question of intimate interracial relations, that the atmosphere at his trial was heavily burdened by a concern for the fact that the accused and the victim in this case were of different races and until the morning she was killed had been lovers. She was white and blonde, as the prosecutor told the jury in the initial moment of his opening statement. He was black or African American.

This special concern for the interracial situation and especially for the interracial-sexual connections was shown in numerous ways throughout the trial: in the comments of several members of the venire while sequestered for voir dire on the question of publicity – they saw racial identity and mention of a "relationship" in the newspapers where no such information was given and one volunteered that she strongly disagreed with interracial dating (Brief for Appellant, p. 44); in the private report of one panel member that he had heard two others agree that "she probably got what she deserved" when they saw a white female sitting with a group of black females (Brief for Appellant, p. 44); in the barely disguised comments of the court regarding the "nature of the case involving two young people" (The court was correct in not identifying why the emotions were so high, lest someone on the panel was somehow oblivious to it, yet Smith's efforts to get a fair jury despite the emotions were frustrated by that judge's ruling.); and finally in the comment in open court of the one panel member who was willing to run the risk of making his position clear – for personal reasons, he did not approve of interracial dating.

With all respect to the trial court we believe that its position that people are as likely to speak the truth (on this particular issue) when in a group as when speaking privately (T. 92; RE. 11; Brief for Appellant, p. 42) was an avoidance of reality. In this case that reality surrounded the court, but was ignored. The trial court abused its discretion.

The propriety of leaving to the sound discretion of the trial court the question of whether to allow individual sequestered voir dire (on any issue) is not challenged. It is the exercise of that discretion in the instant case that Smith urges must be found wanting.

URCCCP 3.05 states that "individual jurors may be examined . . . for other good cause allowed by the court." Our court has often recognized that these individuals may be sequestered

in this examination. See *Stevens v. State*, 806 So.2d 1031, 1054 (Miss. 2001) and the extensive list of cases cited therein to this effect, particularly at page 1055, ¶109.

The Brief for the Appellee cites a most recent case of this Court of Appeals to the same effect, *Speagle v. State*, 956 So.2d 237, 242 (¶14) (Miss.Ct.App. 2006)). That Brief then claims *Speagle* as authority that "[a]n appellant must show actual harm or prejudice before a reviewing court will disturb the trial court's decision to deny a sequestered voir dire" (Brief for Appellee, p. 11).

Speagle itself says: "[T]his Court requires a showing of actual harm or prejudice. . . ." Its authority is *Le v. State*, 913 So.2d 913, at 923 (¶14) (Miss.2005), which cites as its sole authority *Morris v. State*, 843 So.2d 676, 678 (¶3) (Miss.2003).

Morris ("An appellant must show actual harm or prejudice . . .") cites as its sole authority on the prejudice question *Stevens*, *supra*, at 1054.

Stevens, again, is the case citing the extensive list of other cases which recognize that sequestered voir dire may be granted, but generally holding that the usual method is sufficient – that is, the method allowing a sequestered examination only to those who first request it following a threshold question in open court.

What *Stevens* itself does state is:

> We find that the decision of whether to allow individual sequestered jury voir dire should be left to the discretion of the trial court. The trial court in the case sub judice allowed juror questionnaires, open voir dire option of small group voir dire, as well as, allowed many jurors to approach the bench to answer the questions posed during voir dire. We determined that Stevens presents no harm or prejudice as a result of the way voir dire was conducted. This issue is wholly without merit.

Stevens, *supra*, at ¶112, (emphasis added.)

This is no more than a statement that under the facts of that case, the trial court was not unreasonable, did not abuse discretion, in refusing to allow the individual sequestered voir dire. It is certainly not a ruling that prejudice or harm must be found before the denial of a defendant's motion will be reversed. Abuse of discretion must be found. The circumstances of the case should be examined. Here they point, unwaveringly, at abuse of discretion.

We have examined all the cases cited in *Stevens* and are unable to find in any of them a statement that a showing of prejudice must be made. We do find several times the statement that the rule (now URCCCP 3.05) does not require more than by its terms it requires. It would seem that this should of itself preclude the necessity to show prejudice.

The idea that prejudice must be shown has a decidedly spurious lineage. It should not be applied automatically.

CONCLUSION

For the reasons stated in Issue I this Court should reverse and remand.

For the reasons stated in Issue II if this Court finds that Smith's constitutional rights to a speedy trial were violated, it should reverse and render.

If this Court finds that only the statutory speedy trial rights were violated, it should reverse and remand without prejudice to re-indict (the trial court having found that Smith suffered no prejudice from the delay).

For the reasons stated in Issue III this Court should reverse and remand.

Respectfully submitted,

Michael Latavin Smith, Appellant

By: 

Bernard Gautier
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CERTIFICATE OF SERVICE

I hereby certify that I have this date sent by United States mail, first-class postage prepaid, to Honorable Betty W. Sephton, Clerk, Supreme Court of the State of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, 1 floppy disk plus the original and 3 copies of the foregoing REPLY BRIEF FOR APPELLANT in Cause No. 2006-KA-01946-COA, Michael Latavin Smith versus State of Mississippi, and a true and correct copy of said Reply Brief to the following persons:

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WITNESS my signature, this the 25th day of SEPTEMBER, 2007.

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