IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BOBBY L. TRAVIS — APPELLANT

VS. — NO. 2007-KA-0236

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS **NO. 2007-KA-0236-COA**

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STATEMENT OF THE CASE

Procedural History

Bobby L. Travis was tried in the Circuit of the First Judicial District of Hinds County on charges of burglary of a dwelling and kidnapping. (C.P.4) He was convicted of the former charge, acquitted of the latter, and sentenced to a term of 25 years in the custody of the Mississippi Department of Corrections with 15 years to serve, 10 years suspended and five years supervised probation. (C.P.58-59, 60) Aggrieved by the judgment rendered against him, Travis has perfected an appeal to this Court.

Substantive Facts

On May 16, 2003, Boris Hines was employed as the manager of Green Hill Apartments at 355 Green Street in Jackson. Mr. Hines lived in Apartment B10 with Quala Watson. Early in the morning of May 16, Mr. Hines "got a phone call from a female saying that someone was trying to break into Quala's truck," which was parked "on the blind side of the building." (T.134-36) When asked to recount what happened next, Mr. Hines testified as follows:

> Well, I was on a cordless phone, so I walked, and I said, "Quala, someone just called and said they tried to break in your truck." So then she jumped up off the sofa because she was in the living room, and she went to the door. And as I turned my back, I heard a scream, and I turned back around, and I saw her eing pushed back. She was at the door, but then she was being pushed back into the living room.
>
> (T.136)

Two men, "one tall and one small," forced their way into the apartment. They were wearing masks and wielding guns. Mr. Hines tried to run upstairs, but the intruders grabbed his leg, pulled him back down, took him to his bedroom, forced him to lie across the bed, put a plastic bag over his head, and tied his legs and arms. Having difficulty breathing, Mr. Hines "panicked," but "every time" he "said something" the men hit him with their fists and guns. "[T]hey kept saying" that Mr. Hines "owed the boss some money" and "kept asking where's the money." After Mr. Hines stated, "I don't owe anybody any money," he "just heard them kind of ramshacking [sic]" his house. (T.137-40)

During this ordeal, Mr. Hines heard Ms. Watson, who was "in the other room," say, "Quit, don't touch me." Each time Mr. Hines inquired whether "she was all right," he "got hit again." (T.142)

The intruders finally wrapped Mr. Hines in a sheet or a blanket, put a basket over his head, took him outside and put him in the trunk of a car. "[T]hey just drove, and then they stopped." The men then took Mr. Hines out of the car and said, "We're going to show you how we do it in new Orleans," and then "they shot." His head was still covered at this time. A few minutes later, they put him "in another vehicle, and Quala was in that vehicle." The assailants drove a short distance and stopped again, leaving left him in the car. Mr. Hines "managed to get out of the car, break loose ... " He "went to a house, ... banged on the door ... " and "the lady" let him in to phone the police. The responding officers took Mr. Hines back to his apartment, "and Quala was there." (T.142-46)

Mr. Hines went on to testify that on the date in question, Bobby Travis's red Ford Festiva was parked "along the curbside" of the apartment building. Travis resided in unit B12, which he had rented two to three months earlier. After paying the deposit, however, Travis had failed to pay the rent. Mr. Hines "started leaving notes" demanding the rent, but Travis "always ignored" these notices. Mr. Hines finally told Travis, "I'm going to have to do an eviction because I'm going to lose my job by helping you out." At that point, Travis's live-in girlfriend told Mr. Hines, "I'm going to get you" in the presence of several other tenants. About a week before the burglary, Mr. Hines gave Travis his final notice. (T.148-50)

The prosecutor then showed Mr. Hines several photographs, which depicted property that had been taken from his apartment and later retrieved from the police department. Furthermore, Mr. Hines identified photocopied images of his personal keys, "all of the apartment keys," and keys belonging to Ms. Watson. (T.154-58) Finally, Mr. Hines identified photographs depicting a blanket and a sheet in which he had been wrapped, and which had been recovered from the back seat of the car from which he had escaped. (T.168)

Referring to the car from which Mr. Hines had escaped, the assistant district attorney asked whether there was "anything unusual about it or its condition." Mr. Hines answered, "Yes," and testified that the window on the passenger's side was broken. (T.157-59)

Earltavious Jones, Travis's cousin and co-indictee, testified that on the night in question, he, Travis and "another dude named David" met at the residence of Travis's sister "on the other side of town" from Travis's apartment. The three of them traveled to the apartment complex in a red Nissan truck which had been borrowed from Jones's friend Angie Nixon. The plan was for the three men to spend the night at Travis's apartment, but when they arrived there, Travis observed that his electricity had been disconnected. Travis told Jones and "David" that "he was going to get some of the stuff to take back to his sister's house, but when he got out, he pulled a pistol from under the seat." According to Jones, "He went upstairs with it. He said he was going to his house to get his stuff out," but he in fact went "to another apartment," i.e. an apartment "beside his." He was accompanied by "David," and both of them were carrying guns. Jones saw

"somebody coming to the door," and afterward he observed Travis and "David" running into the apartment. Ten to 15 minutes later, they brought out a man and a woman who had "something tied across their eyes and had their hands tied up." (T.177-83)

According to Jones, Travis "was fixing to put them in another car, but I heard him tell David that when he was fixing to pull off and the gas light popped on, he didn't have no gas in it." Travis and "David" then brought the man and woman to the truck. In Jones's word, "They put the dude on the back seat, and he was trying to put the female in the back of the Nissan truck where I was, so I got out. ... So they had her laying [sic] across that." Jones got out of the truck and stood "on the side of the building" as the truck "pulled off." Approximately an hour later, Travis "David" and the woman returned. Travis "told the female that if she cooperated, she wasn't going to be hurt. All she had to do was call the male's dad and tell him that he owed Bobby some money." Travis, "David" and the woman, whose eyes were still covered, went back to Mr. Hines's apartment. About ten minutes later, Travis and "David" returned with "like some laundry bags full of stuff in it." The woman was not with them. Travis and "David" put the bags "on the back of the truck." (T.184-88)[1]

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[1]Jones testified further that the "stuff" had come from Travis's apartment. When the prosecutor asked, "This is Bobby's stuff we're talking about now?" Jones answered, "That's what he told me." (T.188-89)

Travis asked "David" to return the truck to Angie Nixon, but he declined to assume responsibility for the vehicle. Travis then decided that he and "David" should drive to his sister's house in a maroon Corsica and that Jones should follow them in the truck. Travis and "David" left the scene but Jones stayed behind to smoke a cigarette.[2] By the time he had started the truck and driven it "about five feet," he was apprehended by a police officer. (T.188-91)[3]

Officer Letisha Gibbs of the Jackson Police Department was dispatched to the scene that morning. When she arrived, she "noticed there was a red truck, and then ... the lights went out, and it was a black guy inside the vehicle, and he slumped down in the vehicle." Officer Gibbs exited her car and "advised the driver of the truck to stick his hands out the window" for her safety. Upon observing "a weapon in the vehicle," Officer Gibbs ordered the driver, who had identified himself as Earltavious Jones, out of the truck. (T.207-10)

After Jones had been detained, officers recovered property from the truck which was photographed and identified later by Mr. Hines. (T.213-15)

Keith Denson, who was at the time a detective with the robbery/homicide

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[2]Ms. Nixon apparently did not allow smoking in her vehicle.

[3]Pursuant to a plea bargain, Jones later pleaded guilty to burglary. He agreed to testify truthfully, and the state agreed that the kidnapping charge would be dropped. No one had promised him a sentence of less than 25 years. (T.199, 204-05)

division of the Jackson Police Department, testified that Mr. Hines's apartment had been "ransacked." During his initial investigation, he interviewed Ms. Watson, who stated that she was "a roommate of the person" who rented the apartment. (T.222-24) After talking with Jones, Detective Denson "had two possible suspects," i.e., Bobby Travis and one "David." When Detective Denson looked inside the Ford Festiva belonging to Travis, he saw in plain view a black ski mask. Thereafter, he secured a warrant to search the car, from which he recovered "several keys, a ski mask and some crystal."[4] (T.227-31)

During this initial investigator, Mr. Hines eventually appeared at his apartment and told Detective Denson what had happened. Information provided by Mr. Denson led officers to 335 Redwood Avenue, where they found a vehicle at an abandoned house. (T.233) An "electrical cord tied in a knot" was taken from this car. (T.257)

SUMMARY OF THE ARGUMENT

The defendant was not tried in violation of his constitutional right to speedy trial. While the length of delay triggered application of the *Barker* balancing test, the delay was not intentional or egregiously protracted. Further, the defendant made no demand for speedy trial, and no prejudice has been shown. Finally, he

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[4]Photocopied images of these keys were identified later by Hines.

may not be heard for the first time on appeal to allege a violation of his statutory right to speedy trial.

The state submits the verdict is amply supported by the evidence. Travis is not entitled to new trial.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN DENYING TRAVIS'S MOTION TO DISMISS

On January 13, 2005, Travis acting *pro se* filed a MOTION FOR DISMISSAL asserting, *inter alia*, that he had been denied his constitutional right to speedy trial. (C.P.20) That motion was heard on August 9, 2006. immediately prior to trial. (T.2) At the beginning of that hearing, the defense called Travis, who testified that he was arrested on these charges on August 13, 2003; that he was indicted in June, 2004, and arraigned the following August; and that he was released from jail on January 26, 2005. He went on to testify that although he had been at liberty on bond, the pendency of the charges had prohibited him from leaving the state and thus had thwarted his ability to earn a living as a truck driver. Furthermore, he testified that his alibi witnesses, Odell Harris and a "Mr. Booker" had died "around February or March" of 2006 and in January 2006, respectively. (T.3-5)

On cross-examination, Travis acknowledged that he had had a trial setting for November 17, 2005, but stated that he "didn't know" whether the alleged alibi witnesses had been subpoenaed for that setting. (T.8-9) He also allowed that the

case had been reset for February 22, 2006, but again was unable to testified that these witnesses had been subpoenaed. Moreover, he conceded that he had been out of custody, on bond, for 18 months. (T.11-13)

Under questioning by the court, Travis stated that he learned about Mr. Harris's death "a good two to three weeks ago." As to Mr. Booker's death, he stated, "I learned that about a month ago." (T.14)

In response to the defendant's argument that the case should be dismissed for the violation of the right to speedy trial (T.15-17), the assistant district attorney asserted that the state had filed its jury instructions and had been ready to proceed to trial in February 2006. However, the case had been "bumped ... because of the other cases running over." (T.17-18) The prosecutor went on to argue as follows:

> At no time during the entire history of this case, I will tell Your Honor as an officer of the court, were we provided any discovery listing these witnesses that counsel has described, and counsel has not argued that he gave us any discovery, and he was the attorney at this last setting of this case.
>
> Those witnesses for the purposes of this motion, we submit to the Court respectfully, don't exist because they were never discovered to us in any manner whatsoever.
>
> The only continuance in the file was granted at the request of the defendant, and while the State didn't object, nevertheless, it was granted at the request of the defendant, not the State. So that time certainly can't be weighed against us.
>
> At all times we have been ready to try this case. We would ask Your Honor to take judicial notice not only of the court file but of your docket.
>
> And I don't refer to it as a backlog. There's just

so much crime there are just a lot of cases. But the fact is because there are so many cases, they each have to wait their turn, and there are cases older than this one that have been tried ahead of it, and at every opportunity we get ready on as many cases as we can for trial, and such was the case for this one the last time it was set.

But the defendant by his testimony through Your Honor's questioning, which we think is extremely pertinent here, didn't even know until a couple of weeks ago that these witnesses had died.

Why weren't they even subpoenaed for this trial date up to that point or discovered to us if they existed, and the answer is that they have not been.

The rule requires that they be promptly discovered to us. That's not been done. So they just can't exist for purposes of this motion.

Somewhere, Your Honor, counsel argued, or he really just alluded to it, that the filing of the motion itself was a demand for speedy trial. The Supreme Court has said otherwise. ...

But what the Supreme Court said was that a motion to dismiss is not a demand for a speedy trial. ...

So when you take the Barker factors, certainly, the length of the delay, the first one, does create the presumption or the prejudicial presumption.

The reasons for the delay are none other than, number one, the defendant's motion for a continuance, which was granted by the Court and resulted in about a six month continuance, and the fact that the case just couldn't get to the courtroom because there were other cases ahead of it.

The assertion of the right, there has been none whatsoever taking the Supreme Court at its word that the filing of that motion is not an assertion of the right but merely a motion relative to the dismissal of it.

> And, further, the prejudice, we submit, Your Honor, respectfully that testimony of the witness does not establish any prejudice, and, in fact, he's been out on bond for a year and a half, and the Court has even said the incarceration wouldn't be enough on its own to justify dismissal for lack of a speedy trial.
>
> So we ask the Court to consider all those factors. ...
>
> (T.17-21)

Ruling from the bench, the court initially noted that after arraignment, the case was set, without objection, for trial on November 16, 2004. Accordingly, the time from August 2, 2004, to November 16, 2004, would not count against the state. (T.22-23) The court went on to find that on September 9, 2004, the defendant, now represented by the Public Defender's Office, filed a motion for discovery. At the request of the defense, the case was rescheduled for May 19, 2005. Again, the block of time from September 9, 2004, to May 19, 2005, would not count against the state. While the defendant filed a *pro se* motion to dismiss on January 11, 2005, this was not to be treated as a demand for trial. Moreover, it had never been brought on for a hearing. (T.22-24) The court found further that the defendant was released from custody the day after this motion was filed. (T.22-25)

Regarding the asserted prejudice of the absence of the alleged alibi witnesses, the court noted that "there were no subpoenas ever issued for these witnesses" and that their names had not been provided to the state in discovery. The court went on to make this finding: "So the Court can only assume that this was done to gain a tactical advantage. In that event, even if the witnesses were

here to testify today, they would not be allowed to testify under the rules of reciprocal discovery." (T.25-26)

Furthermore, the court took judicial notice of its own docket and found as follows, in pertinent part:

> [O]n February 22nd of this year not only the Court but Mr. LaBarre, this defendant's attorney, was in this courtroom trying the case of State versus Vidal Sullivan, which was one of the many so-called gang-related cases that the Court had specially set because it was so difficult in coordinating schedules with all attorneys involving all of the defendants in that case.
>
> That was a multi defendant case, Mr. Sullivan just being only one of those defendants. So that was the reason that the case did not proceed to trial on February 22nd, 2006.
>
> Now, while it is true that a defendant does not have the responsibility or obligation to bring himself to trial, the appellate courts have consistently ruled that the lack of a request or a demand or assertion of the right to a speedy trial is a factor to be weighed against the defendant or at least it mitigates against the other delay that might otherwise be charged to the State.
>
> And as to prejudice, the only two things that the Court has been presented have been the testimony of the defendant's inability to drive a truck out of the state, and as the Court has noted the Court is more persuaded by the written conditions of the bond rather than the defendant's testimony that he was not allowed to leave the state. Whatever might have been the reason for the defendant believing that, it is clearly not imposed by the Court.
>
> As to the alibi witnesses, as the Court has previously indicated for the reasons already stated, if they were here, they wouldn't be allowed to testify.
>
> So considering all of the factors that the Court is considering, number one, the motion has been

> abandoned under Rule 2.04 ... The reason for delay is involvement in the other trials that I mentioned. There has been no assertion of the right or demand for a speedy trial, and there has been no showing of any prejudice.
>
> For all of those reasons, together and independently, the motion will be overruled.
>
> (T.26-28)

The state submits no error has been shown in the court's factual findings, which are supported by the record, and its application of the four factors enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972).[5] While the court properly noted that the length of the delay triggered application of the remaining factors, it also found correctly that a substantial part of the delay chargeable to the defense. The remainder was attributable to crowded dockets, a neutral reason which is not weight heavily against the state. *Horton v. State*, 726 So.2d 238, 246 (Miss.App.1998).

Furthermore, the court appropriately noted that a motion to dismiss is not tantamount to a demand speedy trial, and that the defendant accordingly had not asserted the right. The court properly weighed this factor against the defendant. *Stark v. State*, 911 So.2d 447, 452 (Miss.2005). Accord, *Burton v. State*, 970

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[5]The only issue before the court was the alleged violation of the constitutional right to speedy trial. Travis "is procedurally barred from arguing that his statutory right to a speedy trial was violated because he did not raise this issue at the trial level." *Smiley v. State*, 798 So.2d 586, 587 (Miss.2001)

So.2d 229, 233 (Miss.App.2007). Finally, the court's finding of the absence of prejudice within the meaning of *Barker* is amply supported by the record. The court's disposition of this issue was proper.

The state respectfully submits the defendant was not tried in violation of his constitutional right to speedy trial. His first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ERR IN DENYING TRAVIS'S MOTION FOR NEW TRIAL

Travis finally contends the trial court erred in denying his motion for new trial. To prevail, he must meet the stringent standard of review summarized as follows:

> "[T]his 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." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "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 an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss.App.1999).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Court of Appeals recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Here, "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify." *White v. State*, 722 So.2d 1242, 1247 (Miss.1998).

Incorporating by reference the facts set out under the Statement of Substantive Facts, the state submits the trial court did not abuse its discretion in

overruling the motion for new trial. The evidence is not such that reasonable jurors could have returned no verdict other than not guilty, or such that to allow it to stand would be to sanction an unconscionable injustice. The testimony of Mr. Hines, Jones and the police officers, as well as the physical evidence and the reasonable inferences flowing therefrom, provide a rational basis for a finding that Travis committed burglary of a dwelling.[6]

The state respectfully submits Travis is not entitled to a new trial. His final proposition should be denied.

CONCLUSION

The state respectfully submits the arguments presented by Travis are without merit. Accordingly, the judgment entered against him should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

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[6]Moreover, even if the verdicts– guilty of burglary but not guilty ofkidnapping--could not be reconciled rationally, Travis would have no basis for complaint on appeal. "[A]n inconsistent verdict, in and of itself, is insufficient to reverse a criminal conviction." *Hubbard v. State*, 938 So.2d 287, 291 (Miss.App.2006). Accord, *Holloman v. State*, 656 So.2d 1134, 1141-42 (Miss.1995), citing *United States v. Powell,* 469 U.S. 57, 65, 69 (1984).

CERTIFICATE OF SERVICE

I, Deirdre McCrory, 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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