IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00236-COA

BOBBY L. TRAVIS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF BY THE APPELLANT

Oral Argument is Requested

OFFICE OF THE PUBLIC DEFENDER,
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STATEMENT REGARDING ORAL ARGUMENT

Bobby Travis, Appellant herein, respectfully requests oral argument in this cause to highlight the issues regarding the two errors he raises on appeal. The first involves appropriate evaluation and application of the rule requiring dismissal of the charges against him due to violation of his speedy trial rights, as guaranteed under both state and federal constitutions. The second regards proper application of the standard regarding a challenge to the weight of the evidence.

Given the gravity of the remedy for speedy trial violations, i.e., dismissal of all charges and discharge of the accused, reluctance to administer the proper remedy continues to present problems for state trial court judges.

Challenges to the weight of the evidence continue to be confused with challenges to the sufficiency of the evidence. As the standard for evaluation of new trial claim and the reviewing courts' role remain somewhat amorphous, Mr. Travis submits oral argument would assist the Court in providing additional benchmarks which would be useful to members of the bench and bar in future claims of error.

Respectfully submitted,

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Assistant Public Defender

Bobby L. Travis v. State of Mississippi

2007-KA-00236-COA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. The trial court erred in denial of the motion of Mr. Smith to dismiss for failure to grant a speedy trial, as two defense witnesses died between the time of the incident and the time of trial, depriving Mr. Travis of presenting a defense, all in violation of state and federal constitutional guarantees, and

II. The trial court erred in denial of the motion of Mr. Smith for a new trial, as the weight of the evidence was insufficient to sustain the verdict of the jury.

RESPONSE TO ARGUMENT OF THE STATE

I. The trial court erred in denial of the motion of Mr. Smith to dismiss for failure to grant a speedy trial, as two defense witnesses died between the time of the incident and the time of trial, depriving Mr. Travis of presenting a defense, all in violation of state and federal constitutional guarantees, and

With all due respect for learned counsel for the State, Mr. Travis would respectfully assert arguments and authority advanced in support of its position fail to rely on the facts adduced at trial and the verdict of the jury which found Mr. Travis "Not Guilty" of kidnapping.

First and foremost, the trial court most assuredly had the opportunity to address the speedy trial issue, as raised by the pro se *Motion to Dismiss* filed in January 2005. Counsel for Mr. Travis brought the issue before the judge the morning of trial. Counsel for the state noted as much in reproducing a portion of the proceedings at *Brief for the Appellee*, pgs. 14-15; T. 26-28. Moreover, the matter was preserved for appeal by inclusion in the *Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial*, giving the trial court a second bite at the apple. CP 65-66.

"A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v. Wingo*, 407 U.S. 514, 527 (1972). In *Barker*, the Supreme Court failed to find prejudice to a defendant after a five-year lapse in which numerous delays were attributable to the state, which tried a co-indictee six times before turning to the prosecution of Willie Barker.

Mr. Travis would submit that the facts of his situation are more like those of *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564 (1970), in which the nation's high court ordered reversal of the charges due to the prejudice accruing to Mr. Dickey with the death of two potential witnesses and *loss of police records*. Let us not forget that this record shows appalling lapses in evidence control by the Jackson Police Department, with copious references in testimony to evidence

allegedly recovered in a vehicle ostensibly under the control of Mr. Travis (but with no ownership from any record ever even offered into evidence). Late in the trial, *after* all the testimony of these items (an entire set of apartment keys, a face mask and crystal taken from the home of Hines) allegedly recovered from a car allegedly owned by Mr. Travis, the prosecution was forced to acknowledge all of it was simply gone from Jackson Police Department evidence lockers. T. 230; 232.

A recap of the chronology of events may be helpful to the Court:

August 13, 2003	Arrest of Mr. Travis;
March 2004	Indictment of Mr. Travis sought from the Hinds County Grand Jury;
June 8, 2004	Indictment finally filed [one year and nearly ten months after his arrest];
August 2, 2004	Arraignment of Mr. Travis [Mr. Travis represented by private counsel] and setting of November 16, 2004 as trial date;
August 16, 2004	Withdrawal of privately retained counsel CP 8; 9;
September 7, 2004	Appointment of Hinds County Public Defender's Office;
Nov. 16, 2004 – May 19, 2005	Continuance at request of defendant and,
August 9, 2006	Trial finally held.

Therefore, the calculation runs roughly:

August 13-2003 to June 8, 2004, date of filing of indictment – 300 days. This time is counted against the State under the authority of *Jenkins v. State,* 607 So.2d 1137, 1139 (Miss. 1992). CP4;

November 16, 2004 to May 19, 2005, - 186 days. This time is counted against Mr. Travis for seeking a continuance; (T. 23)

May 19, 2005 to Feb. 22, 2006 – 279 days. *Barker* and its progeny require that such unexplained delays be counted against the state, although the trial judge fails to consider this requirement at all. T. 26-28.

Feb. 22 to August 9, 2006 – 166 days. The trial judge cites a crowded docket and scheduling of one other trial.

Nevertheless, what the trial court failed to properly weight against the state account was the more than 300 days that elapsed between arrest and indictment and at least 279 days between May 19, 2005 (scheduled date after Mr. Travis sought the first continuance) and Feb. 22, 2006, a "presumptively prejudical" period under Mississippi law. Mr. Travis submits that under *Barker v. Wingo*, these factors were to be weighed against the state.

Mr. Travis reiterates that under *Jenkins*, the trial court erroneously concluded all delay would be counted against the accused had Mr. Travis brought the motion on for hearing, which of course, he did. T. 23.

Counsel for the state also seems to ignore *Brentgettcy v. State*, 794 So.2d 987, 994 (Miss. 2001) in which the Court specifically finds that "[w]hile failure or delay in raising a speedy trial claim may cost a defendant points in the *Barker* analysis, there is no procedural bar solely for failing to properly pursue the claim in open court." *Barker,* 531-532. The state Supreme Court's statement came in rejection of the state's argument that the accused had abandoned his motion, apparently similar to the argument the state advances in the case at bar.

The summary and conclusory finding of the trial court that no prejudice innured to Mr. Travis is at odds with the uncontroverted testimony that Mr. Travis could not pursue his occupation as a long-distance truck driver because he was unable to leave the state under his bond. In addition, Mr. Travis would also point out there was no testimony to contradict his testimony of the death of witnesses who could verify his presence elsewhere when the crime

occurred. The trial court didn't seem to care; it merely stated no witnesses would be allowed to testify due to violation of discovery rules, a conclusion seriously at odds with this Court's decision in *Hentz v. State*, 542 So.2d 914, 917 (Miss. 1989). T. 27.

Under the facts and authority in *Brief on the Merits by Appellant* and arguments as reproduced here, Mr. Travis would submit that the state is incorrect in its analysis applying a procedural bar and failed to address the facts as demonstrated by the record. Mr. Travis would respectfully request that the Court vacate his conviction and order his discharge due to the prejudice of death of two witnesses during the intervening time.

II. The trial court erred in denial of the motion of Mr. Smith for a new trial, as the weight of the evidence was insufficient to sustain the verdict of the jury.

Mr. Travis would argue that the state's response fails to take into account the facts, virtually none of which support the verdict for the basic reason that the two crimes were completely interconnected: Kidnapping and house burglary. The jury acquitted Mr. Travis of kidnapping, but if the testimony of the victim, Boris Hines, is to be believed, the perpetrators of the kidnapping also committed the house burglary. Hines testified as to one continuous incident. After he was bound, he listened to the ransacking of his apartment and distinguished three distinct male voices. T. 141; 161; 172. Hines also acknowledged he could not tell if one of the three voices belonged to Mr. Travis with whom he regularly conversed. T. 172-173. Moreover, there is the serious issue of a face mask, stolen crystal and a set of apartment keys that simply vanished from the Jackson Police Department evidence locker. T. 230-233. According to testimony of Det. Keith Denson, the items were found in a Ford Festiva that Hines said belonged to Mr. Travis. T. 149. Yet no evidence was ever introduced to show Mr. Travis owned or otherwise had control of a red Ford Festiva or any other vehicle.

A quick review of the testimony of Earltavious Jones, 17 in 2003 and cousin to Mr. Travis, also shows facts irreconcilable to the verdict of the jury.

While Mr. Travis acknowledges the rule that juries are entitled to believe any, all or part of any witness's testimony, he would also submit that the testimony is simply too contradictory to prove beyond a reasonable doubt that Mr. Travis was among those who robbed the home of Boris Hines in August 2003.

The standard of review of denial of a motion for a new trial is abuse of discretion. Under the criteria as established by *Dilworth v. State*, 909 So.2d 731, 737 (Miss. 2005), Mr. Travis would assert the trial court abused its discretion in failing to order a new trial.

Hines testified to seeing the mask of only one of his assailants – a blue one. Earltavious Jones had a blue mask in the pocket of his all black jumpsuit when arrested. T. 194. Hines saw one of his attackers brandish a chrome handgun, the same as Jones had with him. T. 161. 194; 258; 284; Exhibits 12; 15.

Hines testified he was dumped into a car trunk. T. 143. Jones testified Hines was put on the back-seat of a pick-up truck. T. 185. Jones testified he never knew the name of the mysterious "Dave," the third man, yet testimony shows he told Det. Dension the street where Dave lived and later, sent Dave's full name and residence address through his attorney to prosecutors. T. 267; 268. And while Jones testified he had no idea where Hines was taken, Det. Denson testified he went to Redwood Avenue to find the abandoned car because Jones told him Hines was taken there. T. 263.

Based on the authority already submitted in *Brief on the Merits by Appellant*, Mr. Travis would respectfully request that the Court vacate this conviction and order his discharge or, alternatively, at least reverse and remand this cause for a new trial on the charge of house burglary.

CONCLUSION

Under the authority of *Dickey v. Florida*, 398 U.S. 30 (1970), Mr. Travis respectfully submits the trial court erred in its refusal to find prejudice fatal to his constitutional right to a speedy trial due to the death of two witnesses who could attest to his presence in another state. In addition, Mr. Travis would ask the Court to consider the paucity of the evidence connecting him to the crime. The victim could not identify his voice, evidence purporting to link him to the crime vanished from police evidence lockers before trial and there was no evidence to link him to the vehicle in which the evidence was allegedly found. Finally, because Hines testified as to one continuous transaction, the home invasion, burglary and kidnapping, the fact that the jury acquitted Mr. Travis of the kidnapping charge is absolutely irreconcilable with the trial testimony. This demonstrates the lack of adequate evidentiary weight to sustain the verdict of the jury.

Therefore, Mr. Travis humbly seeks vacation of his sentence and discharge or, alternatively, he asks for reversal and remand for a new trial.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing *Reply Brief by Appellant*, to the following:

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So certified, this the 6th day of March, 2008.

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