IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEXTER LIPSEY **APPELLANT**
A/K/A DERRICK DEWAYNE LIPSEY

vs. **CAUSE No. 2008-KA-00607-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Hinds County, Mississippi, First Judicial District, in which the Appellant was convicted and sentenced for his felonies of **MURDER** (three counts) and **KIDNAPING**.

STATEMENT OF FACTS

Since the Appellant brings no challenge here as to the sufficiency or the weight of the evidence of his guilt for the murders of three people and the kidnaping of another, it will be unnecessary to set out in detail the evidence of his guilt for these felonies.

On 10 November 2005, Rebecca Virden was living in a residence located at 3520 Cromwell Street in Jackson, Mississippi. Also in the house at the time were J.W. Gilbert, Bruce Rankin and Louise Ray. Ray was said to have been Virden's girlfriend. On the night of that day

the Appellant came to the house. He was armed with a rifle. He ordered Virden, who was in a bedroom of the house, to come to the living room. The other three in the house were in the living room, sitting on a couch, Ray's hands raised.

Once in the living room, the Appellant demanded twenty-five dollars of Ray. Ray responded that she did not have that amount but would the next day. The Appellant told Ray that he could not wait until the next day and asked her again for that sum. When Ray again responded that she did not have that amount to give the Appellant, the Appellant shot her. Ray fell into the lap of Gilbert, who tried to hold Ray up. Virden went to her knees and tried to crawl toward Ray. The Appellant held his rifle on Virden and told her not to move. Virden then heard a second shot and then "blacked out."

When Virden came to, the Appellant was pulling her hair, telling her that she was going with him. The Appellant held his rifle on her and took her from the house. The Appellant's object was to have Virden help him access a bank account through an automated teller machine. In any event, they ended up beside a highway, Virden having told him that she had to answer a call of nature. The Appellant let her leave the car and went with her, rifle in hand, into a field for that purpose. While Virden was attending to this need, a police officer happened upon the scene. The Appellant put his rifle close to his side, in an attempt to hide it, and walked toward the car. As he got closer to the car, he dropped the rifle and ran off. (R. Vol. 3, pp. 293 - 300; Vol. 4, pp. 301 - 311).

Upon Virden's report that she had been kidnaped, officers were dispatched to 3520 Cromwell Street, where they found the victims. (R. Vol. 3, pp. 215 - 224).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT DEPRIVE THE APPELLANT THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE?

2. DID THE TRIAL COURT FAIL TO USE THE PROPER LEGAL STANDARD IN THE COURSE OF ADMITTING AUTOPSY PHOTOGRAPHS?

3. DID THE TRIAL COURT ERR IN REFUSING TO GRANT RELIEF ON THE APPELLANT'S MOTION TO DISMISS?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT DENY THE APPELLANT THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING AUTOPSY PHOTOGRAPHS OF THE VICTIMS

3. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO DISMISS

ARGUMENT

1. THAT THE TRIAL COURT DID NOT DENY THE APPELLANT THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE

In the Appellant's First Assignment of Error, it is said that the trial court denied him the right to present a complete defense. Four instances in which this supposedly occurred are alleged. There is no merit to the claim.

1. The alleged alibi witness.

On 4 September 2007, the State filed a "Motion to Suppress," in which it sought suppression of a proposed alibi witness. In that motion, the prosecutor alleged that he had previously, on 17 August 2007, in a motion for reciprocal discovery, requested written notice with respect to any alibi witnesses the defense might call, and that on 3 September 2007, Labor Day, the Appellant's counsel sent an e-mail to the prosecutor informing him of a possible alibi

witness. Trial was set to begin on 4 September 2007. The prosecutor sought suppression of the potential alibi witness's testimony on the ground that the defense attorney failed to comply with the requirement of URCCC 9.05. (R. Vol. 1, pp. 55 - 56).

Trial did indeed begin on 4 September 2007. (R. Vol. 2, pg. 1). Prior to *voir dire*, though, the trial court took up several motions, including the State's motion to suppress. In the course of the hearing on that motion, the prosecutor represented to the court that he had been at his office on 3 September 2007 and that he received a telephone call from the Appellant's attorney concerning the alibi witness and then, later, an e-mail from that attorney about the witness, all of this occurring at about 4.58 on the afternoon of 3 September 2007. The prosecutor, citing Rule 9.05, asked that the testimony of the witness be excluded because: (1) the "notice" given by the defense was not in proper form; (2) the "notice" was not timely; and (3) the information provided by the "notice" did not meet the requirements of the rule in that it was not sufficiently specific concerning the time and place about which the witness would testify. The prosecutor, noting that the defense attorney had been in the case for over a year, asserted that there was no excuse for the untimely notice given by the defense concerning the alibi witness, and sought her exclusion. (R. Vol. 2, pp. 24 - 30).

Counsel for the Appellant asserted that he notified the prosecutor as soon as he learned of the witness, in supposed accordance with the rule. When questioned by the court as to whether he had spoken to the witness, he stated that he had not spoken to the witness and that in fact his investigator had not been able to locate her. The defense asked the court to allow the witness to make a proffer if the court decided to exclude her testimony from the trial. (R. Vol. 2, pp. 30 - 31).

The court did not rule on the State's motion at the conclusion of the argument, reserving

ruling. It did, however, instruct the attorneys not to mention the proposed and as then unlocated witness in the course of *voir dire*. (R. Vol. 2, pg. 31). At that point several other motions were disposed of, and *voir dire* begun.

After the jury had been selected, and at about five o'clock in the afternoon, just before the court was to recess for the day, the prosecutor told the trial court that he had been notified by the defense that the proposed alibi witness had been located and that the defense wished to make her available for an interview. The prosecutor renewed his motion to suppress or exclude the witness because there was no time to investigate whatever she proposed to testify about, the examination of witnesses to begin the next day. The defense attorney related to the court that he had been informed at about one o'clock that afternoon that the proposed witness had been found and that he had managed to speak with her. The court reserved ruling until the following morning. (R. Vol. 3, pp.172 - 173).

The following day, the court granted relief on the State's motion, finding that the defense failed to identify the witness in a timely fashion and failed to produce the proposed testimony of the witness and failed to produce any statement of the witness. (R. Vol. 3, pp. 174 - 175).

There was yet more about this proposed witness. The attorney for the defense represented to the trial court that, while he had spoken briefly with her the day before, and had been assured by her that she would come to his office on that day, she had not done so. Moreover, she did not respond to telephone calls made to her on that day by the attorney's investigator. Nonetheless, the attorney made what he referred to as a proffer of what she would testify, if permitted to testify. According to the attorney, she would have testified "that she was with [the Appellant] at some time she believed during the 10th". (R. Vol. 3, pg. 178).

The Appellant does not assert that the trial court erred in its ruling under Rule 9.05, and

he could not credibly do so. The prosecutor pointed out to the trial court, without objection from the defense attorney, that the defense attorney had had this case for over a year prior to trial. The e-mail sent by the defense attorney to the prosecutor on 3 September 2007 stated that the Appellant had only informed the defense attorney of the existence of the potential alibi witness on the same day the e-mail was sent. (R. Vol. 2, pg. 27). This statement by the prosecutor also went unrebutted by the defense attorney.

It ought to be quite clear that the Appellant waited until the last moment to inform his attorney about this proposed witness, even though the Appellant had over a year in which to relate this information to him. It is inconceivable, though, that the Appellant would have waited so long to inform his attorney of the existence of this said - to - be witness had there actually been an alibi witness. This was clearly an attempt to improperly gain a tactical advantage over the State. It was a cynical attempt to manipulate the rules of discovery. Exclusion of the witness under this circumstance was not improper. *Coleman v. State*, 749 So.2d 1003 (Miss. 1999).

The witness was also properly excluded because there was never a sufficient statement as to time and place, with respect to the alibi defense, that she would have testified to. The proffer made by the defense attorney was woefully inadequate for the purpose, and the e-mail sent to the prosecutor, literally on the eve of trial, was hardly better.

So seen, it is understandable why the Appellant does not here assert that the trial court committed error in its ruling under Rule 9.05. Rather, the claim made is that the trial court somehow violated the Appellant's constitutional right to present a "complete and meaningful defense," citing *Holmes v. South Carolina*, 547 U.S. 319 (2006), by engaging in what the Appellant characterizes as an arbitrary application of the sanction of exclusion. The Appellant, though, does not challenge the rule itself as being somehow arbitrary.

Unfortunately for the Appellant, though, this claim was not raised in the trial court while the court was considering whether to exclude the witness, nor at any other time so far as we can see. This claim now raised by the Appellant is separate and distinct from the issue that was considered by the court; the failure to raise the claim there works a bar to its being presented here. *Kiker v. State*, 919 So.2d 190, 199 (Miss. Ct. App. 2005).

Assuming for argument that the point was preserved in the trial court, there is no merit in the position. It may be that the United States Supreme Court stated in *Holmes* that exclusionary rules of evidence that infringe upon a weighty interest of an accused *and* are arbitrary or disproportionate to the purposes they are designed to serve offend the accused's right to present a complete defense. *Holmes*, at 324 (Emphasis added). But that court has also held that rules substantively similar if not the same as Rule 9.05 do not, of themselves, adversely affect that right. *Williams v. Florida*, 399 U.S. 78 (1970). It has also found that the sanction of exclusion of testimony as a sanction for a violation of a notice - of - alibi rule is not *per se* a violation of the right to present a defense. *Taylor v. Illinois*, 484 U.S. 400 (1988).

In the case at bar, the facts concerning this issue were that the defense attorney had represented the Appellant for over a year prior to trial. Yet, according to the attorney, the Appellant did not mention this alleged alibi witness until literally the eve of trial, and on a holiday at that. The attorney had not interviewed the witness at the time he notified the prosecutor. Indeed, the defense attorney could not say what the alleged witness would testify about when the State's motion was heard. On the second day of trial, the defense attorney could not even get the proposed witness to come to his office or return telephone calls. The most the defense attorney could say about the alleged witness' testimony was some vague statement said to have been by her that she had been with the Appellant at some point. The State had previously

invoked Rule 9.05.

The facts of this case are similar to those in *Houston v. State*, 752 So.2d 1044 (Miss. 1999). There, on the morning of trial, moved the trial court to require the defense to reveal the nature of the testimony it wished to elicit from two witnesses who had not been previously listed in the discovery responses by the defense. The attorney could only say that his client had indicated that the witnesses had been present at some point during the night in question. The attorney had not interviewed the witnesses. This Court upheld the trial court's decision to exclude the witnesses, finding that the defense had committed a flagrant violation of the requirements of Rule 9.05. The Court should likewise find so here.

2. The rulings concerning the presence of cocaine in the bodies of the victims and the characterization of the house in which their bodies was found as a "crack house"

The three victims tested positive for the presence of cocaine. The State moved to exclude evidence of that fact, stating that it was irrelevant and might confuse or mislead the jury. In response, the defense alleged that there were indications that the residence at 3520 Cromwell Street was a place in which illegal drugs were used – a "crack house." According to the defense attorney, the fact that it was a "crack house" would be relevant to suggest that a person other than the Appellant might have committed the murders. The prosecutor responded that no drugs were found in the house and that there was nothing to show that the cocaine that the three had ingested had been ingested at that house. The court ruled that the fact that the victims had cocaine in their systems was not relevant, yet indicated that that ruling might change depending upon the facts brought out at trial. It also found that whether the house was a "crack house" was not relevant. (R. Vol. 2, pp. 31 - 35).

Here, the Appellant, citing only M.R.E. 401, asserts that this evidence was relevant. That

is so, speculates this Appellant, because "[w]here there are drugs, there is usually money and the case law of this state is replete with the tragedy that ensues from the confluence of drugs, money and greed, making it easier for jurors to believe that a third party committed the crime . . . ."

We note in passing that, while the case law of the State is said to be replete with instances of tragedy resulting from the confluence of drugs, money and greed, no case is cited to illustrate the attempted point. We further note that, in addition to the fact that no drugs were found in the house, no money was said to have been found in the house. Indeed, it was the lack of money that seems to have brought about the deaths of the three.

The facts of the case at bar do not show or suggest that the killings occurred in consequence of the proverbial "drug deal gone bad" scenario; nor do the facts indicate that the fact that the victims had cocaine in their systems was the reason or a part of the reason that they were killed. There was simply nothing to show that their drug usage or presence in a house said to have been a "crack house" were the operative reasons for their deaths. The defense was not self - defense. There was nothing to suggest that some other person might have killed the victims and kidnaped the eyewitness. In view of these considerations, the character of the victims was not relevant. *Pierre v. State*, 607 So.2d 43, 53 (Miss. 1992).

Evidence of a victim's character is irrelevant, subject to several narrowly defined exceptions. M.R.E. 404. In the case at bar, the Appellant completely failed to show any connection between the facts that the victims had used cocaine or had been in a place in which cocaine was used and his defense. Whether the house was or was not a "crack house" had nothing to do with whether the Appellant killed three people and kidnaped another. Clearly, the only purpose for which this evidence was wanted was to denigrate the victims.

3. Denial of re-cross-examination of Dr. Hayne

The Appellant then complains that he was not permitted to re-cross examine Dr. Hayne. He also claims that the trial court denied him the right to make a proffer of what his re-cross - examination would have produced in the way of evidence. The Appellant claims here that the trial court erred in refusing him the opportunity to conduct a re-cross examination on the subjects of (1) personal items found with the victims during autopsy and (2) the time of death of the victims. (Brief for the Appellant, at 15). We note that counsel for the defense did not say at trial that those were the issues he wished to explore. In any event, in considering this claim, we bear in mind that it is a matter left to the discretion of the trial court whether to allow re-cross examination. Error will be found only where it is shown that the trial court abused its discretion. *Moore v. State*, 1 So.3rd 871 (Miss. Ct. App. 2008).

As for the claim that the Appellant was denied the opportunity of a proffer, the record shows that the defense did request a proffer. It also shows, though, that the trial court made no ruling on that request and that the defense did not press for a ruling. (R. Vol. 4, pp. 403 - 404). Since the defense did not obtain a ruling by the trial court on its request, it may not complain about the matter here. *Jones v. State*, 993 So.2d 386 (Miss. Ct. App. 2008). There was no denial of a proffer since there was no ruling on the request.

While the Appellant cites *Cooper v. State*, 628 So.2d 1371 (Miss. 1993) for the proposition that it can be reversible error to cut short a proffer of evidence, there was a ruling in *Cooper*, none here. Beyond this, the facts in *Cooper* were quite close, in terms of that appellant's guilt, and the case turned upon the credibility of one witness. The trial court in *Cooper* refused to admit evidence of that one witness' character for truthfulness. This was held to be error, and not of the harmless kind, in view of the centrality of that witness' testimony in the State's case.

It is difficult to see the applicability of *Cooper* here. What personal effects were found on the bodies of the victims and the time of death can hardly be seen as central to the case. Dr. Hayne's testimony, while important, was not central to the State's case. On the other hand, the evidence was overwhelming as to the Appellant's guilt.

With respect to the scope of re-cross examination, it has been stated that "[i]t is proper to exclude questions [on re-cross examination] as to matters which were not opened up or brought out on redirect examination, or as to matters already fully covered or discussed at length on cross-examination, where there is not claim of oversight and no reason stated why the matter was not inquired into on the cross-examination proper." *Howell v. State*, 860 So.2d 704, 737 (Miss. 2003)(citing *Hubbard v. State*, 437 So.2d 430 (Miss. 1983).

As to the issue about the personal items found with the victims, counsel did attempt this enquiry on cross-examination. There was an objection, and after a bench conference, which was not recorded or transcribed, the defense went into a different line of questioning. (R. Vol. 4, pg. 394). Now, whether the objection was sustained or whether counsel chose to abandon questions about the personal items cannot be ascertained from the record. Yet, if it is supposed that the objection was sustained, there was no reason for counsel to attempt that line of questioning on a re- cross examination. If the defense attorney abandoned that line of questioning, but then thought better of it later, no questions could be asked about the personal items on re-direct since the prosecutor did not go into that area on re-direct examination.

As for the time of death of the victims, this area was not gone into on cross - examination or re-direct examination. In fact, time of death does not appear to have been gone into on direct examination. Counsel at trial gave no indication that there was an intention to enquire into the

times of death of the victims on re-cross examination, nor was there an explanation of why she did not do so on cross - examination. And, of course, that line of questioning was not opened up by re-direct.

The State was permitted to conduct a re-direct examination of Dr. Hayne. Re-direct was limited to questions concerning the position of the victims when they were shot, the trajectory of the bullets as they pierced the victims' bodies and the location of the firearm relative to the victims when they shots were fired. (R. Vol. 4, pp. 400 - 403). These questions were asked in light of the questions put by the defense on those points to Dr. Hayne on cross - examination. However, there were no questions to the witness about personal items or time of death.

The Appellant appears to suggest that the right of confrontation was unduly limited by the trial court in its refusal to permit a re-cross examination, citing *Young v. State*, 731 So.2d 1145 (Miss. 1999), *Valentine v. State*, 396 So.2d 15 (Miss. 1981), and *White v. State*, 785 So.2d 1059 (Miss. 2001). In each of the cases cited by the Appellant, there was an improper restriction placed by the trial court on the right to impeach a State's witness. Here, the trial court did not restrict the defense on cross - examination. It may or may not have sustained an objection as to the personal items line of questioning, but if the Appellant meant to complain of that he should have argued that here, rather than allege that there was error in not allowing a re-cross examination.

The trial court did not permit the defense re-cross examination, and this ruling, as we have demonstrated above, was well within its discretion. The Appellant wholly fails to show how questions about personal items or time of death would have somehow adversely affected Dr. Hayne's credibility.

Finally, the Appellant asks this Court to take note of the fact that Dr. Hayne no longer

performs autopsies for the State and that there are "serious questions" as to Hayne's handling of autopsies. We submit that the Court may not judicially notice these alleged facts under M.R.E. 201. There is no need or reason to consider what the Appellant mysteriously refers to as "serious questions" about Dr. Hayne. *Duplantis v. State*, 708 So.2d 1327, 1329 (Miss. 1998). In any event, none of this matters in view of the fact that the Appellant should have attempted to get into these areas of enquiry during cross - examination. The Appellant, for whatever reasons, did not do so. His failure to do so does not mean that the trial court was obliged to permit re-cross examination on those points, especially where those points were not broached on re-direct. While the Appellant would have this Court view the case as a denial of the right of confrontation, it is not. It is simply a question of whether the trial court abused its discretion in refusing re-cross examination, a power the trial court clearly had. There was no abuse of discretion here, for the reasons set out above.

The First Assignment of Error should be denied.

2. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING AUTOPSY PHOTOGRAPHS OF THE VICTIMS

In the Second Assignment of Error, the Appellant complains of the admission of autopsy photographs of the victims. It is to be born in mind that there were three murders in the case at bar. Consequently, there were as a matter of course more photographs than one would ordinarily find in a case involving one homicide.

Prior to trial, the defense moved for the exclusion "gruesome autopsy photographs." The State responded that it did not intend to introduce photographs it considered gruesome. Nonetheless, it believed that some photographs would be useful in the course of the pathologist's testimony. Photographs of the bodies at the scene of the murders would be useful in assisting the

jurors in visualizing the crime scene. The court reserved ruling on the defense motion until the defense and it had the opportunity to review them, stating that the pictures were not to be used during *voir dire* and opening statement. (R. Vol. 2, pp. 44 - 46).

After the jury had been selected, argument on the issue resumed. The State indicated that it would use the least gruesome photographs possible and that it wished to use photographs to show the jury the crime scene and to assist the pathologist in his testimony. The defense thought the State should be required to use black and white photographs and renewed its argument that the photographs would inflame the jury. As for the suggestion that the State use black and white photographs, the State responded that the photographs were made in color. (R. Vol. 3, pp. 167 - 171). The trial court reviewed the photographs the State indicated that it would not put into evidence and those that it did intend to offer into evidence and ruled that the State would be permitted to offer for evidence those it had chosen to use. (R. Vol. 3, pg. 174).

The admission of photographs is a matter left to the discretion of the trial court. Its discretion in this regard is virtually unlimited, regardless of the gruesomeness, repetitiveness and the extenuation of probative value. So long as the photographs have probative value and its introduction serves a meaningful evidentiary purpose, it is admissible despite being gruesome, grisly, unpleasant or even inflammatory. Photographs that show the location of the body or supplement or clarify witness testimony have evidentiary value. *Williams v. State*, 3 So.3rd 105, 110 (Miss. 2009).

The photographs in the case at bar were clearly admissible. They either showed the crime scene and the location of the bodies of the victims, or they were used by the pathologist to supplement or clarify his testimony. The State clearly had no intention to unduly prejudice the Appellant. It selected the least gruesome pictures available for these purposes. The trial court

did not abuse its discretion in admitting the photographs.

The Appellant here makes much over the fact that the trial court prohibited the use of the pictures during *voir dire*. But this is hardly surprising. The court had not ruled on the Appellant's motion, and it was not sure at what point it would rule. Consequently, it simply intended that the photographs not be used until such time as it ruled that they could be put into evidence.

The Appellant thinks it is significant that family members of the victims were allowed to excuse themselves when photographs of their family member were shown. This was merely an act of kindness by the trial court. It did not order the surviving members out of the courtroom. It merely gave them the opportunity to leave if they wished.

The Appellant, naturally, trots out *McNeal v. State*, 551 So.2d 151 (Miss. 1989), that singular example in the State's criminal law in which a case was reversed on account of a picture said to be gruesome and of no evidentiary value. That *McNeal* remains the only decision to our knowledge in this State in which error was found in the admission of a photograph of a victim says all that need be said about that very odd decision. Notwithstanding what may have been said or suggested in *McNeal* concerning the admissibility of photographs of victims of homicide, subsequent decisions on the point have made it quite clear that photographs are admissible if they serve a legitimate evidentiary purpose, regardless of how gruesome they may be.[1] It may be the

---

[1] The undersigned briefed and argued the State's case in *McNeal*. During the argument, the Court's questions focused primarily upon the admissibility of "snitch" testimony. There was practically no discussion at all about the photographs, and so it came as a surprise indeed to find the case reversed on the issue about the photograph. Given what was apparently of great interest to the Court at argument and the fact that *McNeal* remains the sole example of a reversal on account of the admission of a grisly or gruesome photograph, one must wonder whether it really was the photograph that caused reversal. To our knowledge no case had been reversed prior to *McNeal* on account of a gruesome photograph. None since. This is all neither here nor there in

Supreme Court chided the State about the photographs it used in *Welch v. State*, 566 So.2d 680 (Miss. 1990), but the Court did not reverse the case on the point.

The Appellant then points to *Palmer v. Volkswagen of America, Inc.*, 905 So.2d 564 (Miss. 2005), a case in which the exclusion of photographs was upheld. There is nothing of benefit to the Appellant in this decision. The Court simply held that the trial court did not abuse its discretion in excluding photographs of the child, given the extensive reports and diagrams detailing the injuries suffered by the child. By way of contrast, though, the Court in *Palmer* suggested that the trial court would not have abused its discretion had it admitted the autopsy photographs by noting that a trial court's discretion in this regard is virtually unlimited.

There were three homicide victims in the case at bar, and photographs of each one. They were used to show the location of the bodies when found and used by the pathologist in the course of his testimony. These were legitimate evidentiary purposes. The trial court thus did not abuse its very broad discretion in admitting them to evidence.

The Second Assignment of Error should is without merit.

3. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO DISMISS

The Appellant was said to have been arrested for the felonies at bar on 19 November 2005. (R. Vol. 2, pg. 5). He was indicted on 11 April 2006. (R. Vol. 1, pp. 5 -6). He was arraigned on 28 June 2006. (R. Vol. 1, pp. 8 - 11). Trial commenced on 4 September 2007. (R. Vol. 2, pg. 1). By the Appellant's calculations, the period between arrest and trial was one of 654 days; the period between arraignment and trial, a period of 428 days.

---

the case at bar, of course, yet the decision in *McNeal* was and remains a curiosity in the State's jurisprudence.

There was no demand for a speedy trial filed until 24 August 2007, eleven days prior to trial. (R. Vol. 1, pg. 33). A motion to dismiss on the claims of a denial of the statutory and constitutional rights to speedy trial was filed that same day. (R. Vol. 1, pp. 39 - 42). The Appellant *pro se* filed a motion on 28 August 2007 alleging a violation of the right to a speedy trial and seeking dismissal of the indictment. (R. Vol. 1, pp. 43 - 44).

The Appellant brought his motion to dismiss on for a hearing just prior to *voir dire*. He pointed out the events and time frames set out above. He claimed that he had requested no continuances of trial and alleged that he had made demand for a speedy trial. There was also a claim that there were demands for trial during various docket calls.

As for prejudice, it was alleged that the Appellant had been unable to locate a witness. However, interestingly enough, the Appellant's attorney told the court that he had never spoken to the witness. When asked by the court why he had not attempted to locate the witness in the year and a half that he had had to prepare the case, the attorney mentioned something about someone else having been able to remember a first and last name of the potential witness. Beyond this claim, there was the usual boilerplate about pre-trial anxiety and the common complaint about the Appellant having been in jail since the time of arrest. (R. Vol. 2, pp. 5 - 11).

The State responded that the Appellant was being less than forthright with the court in that the instant cause had not appeared on a docket until the last docket call prior to trial. The Appellant apparently announced ready for trial at that docket call, and the State made the case the first one up. As for reasons for the delay, the State pointed out that it had been working on those cases older than the Appellant's, that the instant cause was never on the docket until the last docket call prior to trial and that the State made the Appellant's trial a priority as soon as the

Appellant's case appeared on the docket.

The State further pointed out that tool mark tests were not completed until 29 August 2007. Another test was had not been completed until 25 May 2007.

The State then went on to point out how late the Appellant's demand for trial was. It further pointed out that, as to the claim of a missing witness, the defense never mentioned such a witness in its discovery responses. The State pointed out the length of time the defense had in which to locate witnesses and prepare for trial, and noted the absurdity of the attempt to claim prejudice in a situation in no proposed testimony could be produced by the Appellant. As to the fact that the Appellant had been in jail since his arrest, the State pointed out that this was hardly unusual in a case in which a person had been charged with three murders and a kidnaping. (R. Vol. 2, pp. 11 - 17).

The defense responded to this, asserting that it had no duty to have tests performed. As to the missing witness, there was more talk of faded memories. The only thing clear from the defense was that whoever that alleged witness might have been, it was not Vanessa Sims. The person with the faded memory was the Appellant. (R. Vol. 2, pp. 17 - 22).

The trial court found that the reason for delay was on account of the fact that the court was working through cases older than the Appellant's. Once the Appellant's case was placed on the docket, and the Appellant announced ready for trial, the case was set for trial. This docket call occurred on 14 August 2007.

The court did not consider the Appellant's announcement at docket call a demand for trial, and noted that there was no demand for trial until 24 August 2007.

As for prejudice, the court found none. As for the alleged missing witness, the court was not convinced that the witness had ever been available. If the witness had been available at an

earlier time, any prejudice was caused by the Appellant by his having failed to mention the witness or having had the witness interviewed. Relief on the Appellant's motion was denied. (R. Vol. 2, pp. 22 - 24).

Here, the Appellant's argument is entirely based upon the *Barker*[2] factors. No attempt is made to assert a violation of Miss. Code Ann. Section 99-17-1 (Rev. 2007). Any complaint about such an alleged violation was waived, however, in view of the fact that the Appellant did not file his demand for trial until after the expiration of the period of time set out in the statute. *Guice v. State*, 952 So.2d 129, 140 (Miss. 2007). The Appellant acquiesced in the delay. *Roach v. State*, 938 So.2d 863, 867 (Miss. Ct. App. 2007).

The trial court did not commit error in denying relief on the Appellant's motion to dismiss.

Length of delay

As we have pointed out above, the period of delay between the time of arrest and the time of trial was 654 days. This period of delay was sufficient to require the trial court to consider the other *Barker* factors. *Smith v. State*, 550 So.2d 406, 408 (Miss. 1989). We will point out that much longer periods of delay have occurred without resulting in a finding that the right to a speedy trial had been violated. *E.g. Gray v. State*, 926 So.2d 961 (Miss. Ct. App. 2006) (Unexplained delay of four years).

Reasons for delay

The reasons were docket congestion – the court had been working through older cases -- and the need to complete testing on some items of evidence.

---

[2] *Barker v. Wingo*, 407 U. S. 514 (1972).

Docket congestion, if weighed against the State, weighs only slightly against the State. *Muise v. State*, 887 So.2d 248 (Miss. Ct. App. 2008). On the other hand, it has also been held, where the reasons for delay are docket congestion and the need to complete testing of evidence, that this factor weighs in favor of the State. *Felder v. State*, 831 So.2d 562 (Miss. Ct. App. 2002).

The Appellant claims that he never sought a continuance and that he continually announced ready for trial. (Brief for the Appellant, at 22). It is difficult to see how the Appellant could have continually announced ready for trial in view of the fact that the Appellant's case was not on the docket until August, 2007. The prosecutor rebutted this claim by the Appellant. (R. Vol. 2, pg. 11). There is also a claim by the Appellant that it is an "unrebutted fact . . . that the docket of cases set for trial is determined by a "priority list" of cases from the Office of the District Attorney and [that] the district attorney's office never put [the Appellant's] case on "priority status" until August of 2007. The Appellant cites page 23 of the transcript in support of this factual allegation. Pages 22 and 23 of the transcript show that the Appellant's case was first set for docket call in August, 2007, and that the Appellant was subsequently placed on the trial docket. But there is no record support as to the "unrebutted fact" the docket is determined by a priority list kept by the district attorney's office.

The point made by the Appellant, though, is of no moment. The trial court clearly stated that it had been working through older cases. The Appellant's case was placed on docket call, apparently, as soon as the court could reach it. There is nothing to show that the Appellant's case could have tried earlier, and certainly nothing to show that the State deliberately delayed trial of the Appellant's case in order to occasion some prejudice to his defense.

Another reason for delay was the need to complete testing of evidence. Delay occasioned

by the time needed to complete such tests does not count heavily against the State. *Jenkins v. State*, 947 So.2d 270 (Miss. 2006). The Appellant does not dispute that that is a good cause reason. Instead, the Appellant makes allegations against the Hinds County prosecutor who tried this case as to something he is said to have done in another, unrelated case. We find it unnecessary to respond at any length to the allegation that that prosecutor misrepresented facts to the trial court in *Flora v. State*, 925 So.2d 797 (Miss. 2006) in view of the fact that there is no claim here that misrepresentations were made concerning scientific testing of evidence. There was no allegation by the defense in the case at bar that the State misstated facts in its argument in the trial court.

The claim of what the trial record in *Flora* supposedly "clearly shows" is utterly irrelevant here. The innuendo that what the prosecutor in *Flora* supposedly did there is evidence that the prosecutor's statement that delay in the case at bar on account of the need to complete the tests was untrue is nothing more than innuendo, and should be disregarded for that reason. It is proof of nothing in the case at bar. There is nothing in the record of the case at bar to show or even suggest that the delay in trial was caused by a deliberate act, done for the purpose of prejudicing the defense, by the district attorney's office.

Demand for trial

The Appellant made no demand for trial until a few days prior to trial. Because the assertion of the right was so belated, this factor ought to weigh in favor of the State. *Black v. State*, 823 So.2d 543 (Miss. Ct. App. 2002). If not entirely in favor of the State, then the factor should benefit neither party, in view of when the Appellant's first demand for a speedy trial was filed. *Hersick v. State*, 904 So.2d 116 (Miss. 2004)

Prejudice

The Appellant says that he was prejudiced because he could not recall the names of supposed witnesses. However, counsel for the Appellant had been representing the Appellant for well over a year prior to trial. No explanation is given as to why the Appellant did not give his attorney the names or locations of these supposed witnesses quite early on. No explanation is given as to why counsel for the Appellant did not attempt to locate and interview these alleged witnesses early on, rather than waiting until the eve of trial.

Beyond this, the Appellant failed to clearly indicate what these witnesses would have testified to. There was only a vague statement to the effect that these witnesses might have established alibi. It simply will not do to allege that names have been forgotten or that witnesses gone missing. To permit vague claims such as these to establish prejudice under *Barker* is to invite abuse and less than candid representations in the trial courts.

It appears that the Appellant was in jail from the time of his arrest until trial, but this is hardly surprising since he was facing three murder charges and charge of kidnaping. In any event, incarceration alone is insufficient to establish the prejudice factor of the *Barker* factors. *Hersick, supra*, at 124.

This factor does not weigh in favor of the Appellant.

The entire length of delay was not nearly as long as that in a number of cases in this State, and probably not very long by Hinds County standards. The delay was caused by docket congestion and the need to complete testing. The demand for trial was filed only days before trial occurred; at no time prior to that filing date did the Appellant demand a speedy trial. As for prejudice, none was shown.

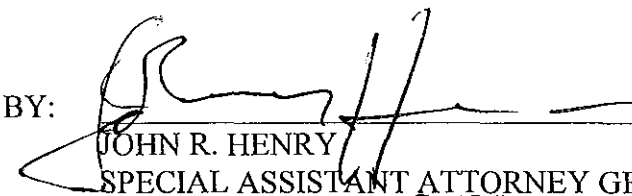
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, John R. Henry, 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:

Honorable Winston L. Kidd
Circuit Court Judge
P. O. Box 22747
Jackson, MS 39225

Honorable Robert Shuler Smith
District Attorney
P. O. Box 22747
Jackson, MS 39225-2747

Virginia L. Watkins, Esquire
Attorney At Law & Hinds County
Assistant Public Defender
Post Office Box 23029
Jackson, Mississippi 39225

This the 7th day of August, 2009.

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680