

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JERRY MCBRIDE**

**APPELLANT**

**VS.**

**NO. 2008-KA-1347-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction against Jerry McBride for the crime of sexual battery of his child under the age of 14. CP 23. After being convicted by a jury, the court sentenced McBride to twenty-five (25) years in the custody of the Mississippi Department of Corrections. Aggrieved, he appeals. CP 26.

**ISSUES**

- I. Whether McBride was denied his constitutional and statutory rights to a speedy trial?
- II. Whether the evidence was legally sufficient to sustain the verdict?

## STATEMENT OF THE FACTS

On May 30, 2006, a Coahoma County Grand Jury indicted McBride for the sexual battery of his daughter, a child under the age of fourteen, between January 1, 2002 and December 31, 2005. McBride was served with a capias and taken into custody on August 4, 2006 and arraigned on August 6, 2006. Several terms of court passed without McBride going to trial. Appearing on the criminal docket sheet provided by the Circuit Clerk is a notation that on September 5, 2006, the defendant filed a request for discovery and on October 17, 2006, the Supplemental State's Report of discovery disclosure was filed. On September 21, 2007 an order setting the trial docket was filed. (CP 1) On December 12, 2007, the trial court set the case for the February 2008 term of court. (CP Supp. Vol.) On December 26, 2007, McBride filed a *pro se* "Motion for Direct Verdict of Acquittal" complaining he had not been given a preliminary hearing; he had been incarcerated for sixteen months in "violation of [h]is constitutional rights;" he had never asked for a continuance; and that he had filed a complaint to the Coahoma County Sheriff's office. (CP 4-5). On December 31, 2007, McBride filed a second *pro se* "Motion for Direct Verdict of Acquittal" complaining he had not been given a preliminary hearing nor appeared before the grand jury; he had never filed for a continuance, signed anything or received indictment papers; had never been read his rights or questioned; and he had been incarcerated for sixteen months in "violation of [h]is constitutional rights." (CP 4-5; 6-7, CP 4-5, 6-7). On January 3, 2008, McBride filed a Motion to Withdraw Counsel. (CP 7-9). The trial court denied all three (3) motions in a pretrial hearing on February 14, 2008. (CP 14-22). McBride went to trial February 15, 2008.

At trial, the State produced three witnesses, the victim, her school counselor and a Department of Human Services (DHS) social worker. The victim, who was 18 at the time of trial, testified to the events surrounding the assault. (Tr 94-119). The school counselor testified that the victim approached

her and that based on what the victim told her she alerted DHS who sent a family protection specialist to the school to interview the victim. (Tr 124-27). The family protection specialist with DHS testified as to her interview with the victim, her family members and the investigation of abuse. (Tr 127-29).

The jury convicted McBride of sexual battery and the court sentenced him to 25 years in the Mississippi Department of Corrections. (CP 24-27). The court denied McBride's motion for a judgement notwithstanding the verdict or a new trial. (CP 32). McBride filed an out-of-time appeal raising a speedy trial issue and sufficiency of the evidence.

## **SUMMARY OF THE ARGUMENT**

McBride was not tried in violation of his constitutional and statutory rights to a speedy trial. While the length of delay triggered application of the *Barker* balancing test, the delay was not intentional or egregiously drawn out. Also, McBride made no demand for a speedy trial. The State submits the jury's verdict is amply supported by legally sufficient evidence and should be affirmed.

## ARGUMENT

### **PROPOSITION I: MCBRIDE WAS NOT DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL.**

In this initial allegation of error McBride claims he was denied his constitutional and statutory right to a speedy trial. According to McBride, the trial court erred in its analysis of whether McBride was denied a speedy trial.

Review of a speedy trial claim encompasses the fact question of whether the trial delay rose from good cause. The Supreme Court set forth the standard of review, this Court will uphold a decision based on substantial, credible evidence. If no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse. The state bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of non-persuasion. *Mims v. State*, 856 So.2d 518, 521 (Miss.App.,2003) quoting *DeLoach v. State*, 722 So.2d 512(¶12) (Miss.1998). “We will reverse only if the trial court's findings were clearly erroneous.” *State v. Woodall*, 801 So.2d 678, 681(¶ 8) (Miss.2001).

In assessing the merits of a speedy trial claim, an appellate court employs the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. *Id.* No one factor is dispositive, and the totality of the circumstances must be considered in determining whether the speedy trial right has been violated. *Jefferson v. State*, 818 So.2d 1099, 1106(¶ 11) (Miss.2002).

So, applying the four factors of *Barker v. Wingo*, 407 U.S. 514 (1972) to the facts of this case:

1) Length of Delay. The Mississippi Supreme Court has said that a delay of more than eight months is presumptively prejudicial. *DeLoach v. State*, 722 So.2d 512(¶ 16) (Miss.1998). The length



of delay in the case *sub judice* was well over eight months; therefore, we must look to the remaining three factors.

2) Reason for the Delay. "Once the delay is found to be presumptively prejudicial, the burden shifts to the State to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of the reasons." *Stark v. State*, 911 So.2d 447, 450 (Miss.2005); *Wiley v. State*, 582 So.2d 1008, 1012 (Miss.1991). The delay was not caused by the intentional delay of the prosecution and would ask this Court to find this factor to be, at most, slightly against the State.

McBride contends the length of delay was 541 days and blames the State for such delay. The State agrees the time from arrest to trial was 541 days but submits on January 7, 2008, (521 days after arrest) a joint motion to re-schedule the trial was filed. Also, during a hearing on February 14, 2008, McBride asked the trial court for another continuance of trial. Hence, the State should not be charged with the entire delay.

Not all reasons for a delay in bringing an accused to trial are cause for dismissal of the charge on speedy trial grounds. Rather, different weights are assigned to different reasons for a delay. *Birkley v. State*, 750 So.2d 1245, 1250(¶ 16) (Miss.1999) (citing *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). For example, a missing witness is a valid reason that will justify an appropriate delay, but negligence or docket congestion is weighed only slightly against the State. *Id.* However, a deliberate attempt to sabotage the defense by delaying the trial will be weighed very heavily against the State. *Id.* Conversely, a delay attributable to the defense is not counted against the State, such as a delay caused by the grant of the defendant's motion for a continuance. *Hersick v. State*, 904 So.2d 116, 121(¶ 8) (Miss.2004).

*Muise v. State*, 997 So.2d 248, 252 (Miss.App.,2008).

[A]ny delay unintentionally caused by the State will not be weighed as heavily against the [State] as where the delay was intended to hurt the defendant's case." This Court has stated that "[d]elays which are attributable to one party count against that party." *Brengett v. State*, 794 So.2d 987, 993 (Miss.2001). Therefore, delays "attributable to the defendant tol[l] the running of time." *Jenkins v. State*, 607 So.2d 1137, 1139 (Miss.1992).

McBride was served with a *capias* and arrested on August 4, 2006. He was arraigned and appointed an attorney on August 6, 2006. Also, the trial court was midway through its July term of court when McBride was taken into custody. This period of time should not be weighed against the State.

Discovery requests and responses were filed in September and October 2006. In November 2006, the court held a special “mini term” to address the cases scheduled for trial in the July 2006 term but not tried. McBride’s case was not on the July 2006 docket so it was not placed on the docket for the special term. This period of time should not be weighed against the State.

The trial court noted McBride’s case was not placed on the trial docket for the January 2007 and July 2007 terms of court. The prosecution stated that the senior circuit court staff initially sets the trial calendar and speculated that because McBride was not arraigned on the court’s usual arraignment day, the case was not placed on the trial docket. *Id.* There was no evidence suggesting that the delay was the result of deliberate efforts on the part of the State, therefore this delay should not be weighed heavily against the State. (Tr.22-24).

On September 21, 2007, the court set the trial docket for the November 2007 “mini term” but was it not tried at that time. Again there is no order of continuance in the record. However, the trial court opined the delay was due to a heavily congested docket and an unavailable witness. (Tr. 20-21). Under the holding in *Travis v. State*, So.2d , (Miss.App., 2008) this period of time should not be weighed heavily against the State.

On December 12, 2007, per order setting the January 2008 trial docket, the trial judge scheduled McBride’s case for January 22, 2008. (CP Supp. Vol) On January 7, 2008, **per joint motion of the defendant and State**, the court rescheduled the case until February 19, 2008, which was later in the same term.(CP Supp. Vol.). (Emphasis added by Appellee.) This time should not be

weighed against the State.

On February 14, 2008, during the pretrial hearing on McBride's *pro se* motion to withdraw counsel, **McBride asked the court to continue his case** so he could be appointed another attorney. (Tr 7). (Emphasis added by Appellee.)

The evidence of the reasons for the delay indicates that the State did nothing to purposely delay McBride's trial. Rather, the delay was caused by the failure to place the case on the trial docket, agreed continuances, and by docket congestion. Negligence causing delay weighs slightly against the State. *Perry v. State*, 637 So.2d 871, 875 (Miss.1994). And, delay due to docket congestion may be weighed against the State, but not heavily. *Adams v. State*, 583 So.2d 165, 169 (Miss.1991). Accordingly, the docket congestion and any negligence on the part of the State that contributed to the delay in bringing McBride to trial weighs slightly against the State.

3) Defendant's Assertion of His Right. The third factor concerns McBride's assertion of his right to a speedy trial. McBride filed a *pro se* Motion for Direct Verdict of Acquittal dated December 26, 2007, and another one on December 31, 2007; well after the majority of the delay had passed.(CP 4-7). McBride's motions asked for a directed verdict of acquittal on several basis, including, "That the defendant has been detained for sixteen months after arraignment, and no trial, which is a violation of his constitutional rights." The accused's assertion of or failure to assert the right to a speedy trial is one of the factors to be considered in an inquiry of whether the speedy trial right was denied. Although the defendant does not have an obligation to bring himself to trial, he will earn points on his side of the ledger when he has made a demand for a speedy trial. *Stevens v. State*, 808 So.2d 908, 917(¶ 22) (Miss.2000). However, "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532, 92 S.Ct. 2182. McBride did not request a speedy trial, but instead asked that the charges be dismissed against him.

In *Summers v. State*, 914 So.2d 245, 253(¶ 20) (Miss.Ct.App.2005), this Court held that a demand for dismissal for violation of the right to a speedy trial is not the same as a demand for a speedy trial. The Mississippi Supreme Court stated that a motion for dismissal based on violation of the right to a speedy trial and a demand for a speedy trial are not equivalent, with regard to the *Barker* analysis, as one seeks discharge and the other an immediate trial. *Perry v. State*, 637 So.2d 871, 875 (Miss.1994). See also *Adams v. State*, 583 So.2d 165, 169-70 (Miss.1991) (holding that demand for dismissal coupled with demand for instant trial is insufficient to weigh third Barker prong in defendant's favor where motion came after bulk of delay had elapsed). In *Travis v. State*, --- So.2d ----, 2008 WL 5220816, (Miss.App.2008), this Court did not count in the defendant's favor his pretrial motion seeking dismissal of the charges. McBride, like Travis, did not request a speedy trial, but instead asked that the charges be dismissed against him because of an alleged lack of speedy trial and did so after a majority of the time lapsed. Thus, this factor weighs in favor of the State and against McBride.

4) Prejudice to defendant. McBride claims that the delay automatically raised concerns about his pretrial incarceration.

In *Muise v. State* 997 So.2d 248, 254 (Miss.App.,2008), this Court refused to recognize a speedy trial violation where there was an unexplained delay of 496 days in bringing Muise to trial. Even though Muise was incarcerated the 496 days, this Court considered the totality of the circumstances and found there was no error so fundamental that it generated a miscarriage of justice.

The Court's final obligation under *Barker* is to weigh the factors. "The balancing test set forth in *Barker* must be applied on a case by case basis under the particular facts of the case under consideration." *Birkley v. State*, 750 So.2d 1245(¶ 30) (Miss.1999). While not considering lightly the fact that a delay did exist and McBride was incarcerated, there were no intentional efforts on behalf

of the State to delay the trial and McBride failed to ask for a speedy trial. "[W]hile the delay associated with this case is presumptively prejudicial, it is not such that violates the defendant's constitutionally guaranteed right to a speedy trial." (Order at CP 22).

McBride also contends that the trial court erred in not finding he was tried in violation of his statutory right to a speedy trial, as guaranteed under Miss. Code Ann. Section 99-17-1. In *Guice v. State*, 952 So.2d 129 (Miss., 2007) the Supreme Court held the defendant waived his statutory right to a speedy trial within 270 days of arraignment, when he did not complain, until 463 days after arraignment, about not being tried, and even on his trial date, which was 551 days after arraignment, defendant told trial judge that he was not asking for speedy trial but was asking for charges to be dismissed on grounds of violation of right to speedy trial.

McBride was arraigned on August 6, 2006. On December 12, 2007, the court set his case for trial for the January 2008 term of court. McBride did not file his first motion to dismiss until December 26, 2007, which was 137 days after the 270 deadline elapsed, and 507 days after his arraignment. McBride failed to raise the issue within 270 days of his arraignment and, therefore, acquiesced to the delay. *Mims v. State*, 856 So.2d 518 (Miss. App., 2003).

The State submits the trial courts' decision regarding denial of a speedy trial was based on substantial, credible evidence. McBride failed to prove the trial court's findings were clearly erroneous. This issue is without merit.

**PROPOSITION II: THE STATE PROVIDED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.**

In reviewing issues of legal sufficiency, the reviewing court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Bush v. State*, 895 So.2d 836, 843 (¶16) (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). Rather, the Court will view the evidence in the light most favorable to the State and determine whether any

rational juror could have found that the State proved each element of the crime charged beyond a reasonable doubt. Id.

McBride was indicted for the sexual battery of his daughter Jane Doe, a child under the age of fourteen (14). CP 2.<sup>1</sup> Jane Doe, who obviously was not very bright, having been held back in school for two (2) years, testified the crime occurred when she was 11 or 12 but she was not sure about the date.

#### DIRECT EXAMINATION

Q. Okay. Can you tell me about the first time that he did something to you?

A. Yes, sir.

Q. All right. About how old were you the first time?

A. Around 11.

T. 96

#### CROSS EXAMINATION

Q. And in that same interview with that lady in Oxford, you told her you were 13 or 14 at the time of the first incident, didn't you?

A. (No audible response.)

Q. Is that right?

A. Yes, sir.

Q. How old really were you?

A. Around 11.

Q. Why did you tell her wrong?

A. I wasn't sure then.

Q. Oh, I see. You got confused between 10 and 11 and 13 and 14; is that right?

A. No, I just never really think about it.

T. 105

#### REDIRECT EXAMINATION

Q. Have you at any point said that you were sure about these dates?

A. No, sir.

Q. You think you were around 11; is that right?

A. Yes, sir.

Q. You could have been 12?

A. Yes, sir.

T. 114

#### REDIRECT EXAMINATION

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<sup>1</sup>In order to protect the victim's identity she is referred to as "Jane Doe."

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal, the State would ask this reviewing court to affirm the jury's verdict and sentence of the trial court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

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This the 28th day of July, 2009.

  
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