IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY MCBRIDE — APPELLANT

V. — NO. 2008-KA-1347-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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JERRY MCBRIDE **APPELLANT**

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

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Jerry McBride, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Charles E. Webster, Circuit Court Judge

This the 5th day of January, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHERE THE TRIAL COURT FOUND THE DELAYS PRESUMPTIVELY PREJUDICIAL BUT DID NOT REQUIRE THE STATE TO OVERCOME THE PRESUMPTION; FAILED TO ADEQUATELY WEIGH PREJUDICE AND WHERE THE PRIMARY REASON FOR DELAY IS NEGLECT IN PLACING THE CASE ON THE TRIAL DOCKET.

ISSUE NO. 2: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT WHERE IT WAS NOT POSSIBLE TO PROVE THE ELEMENTS OF THE CRIME AS SUBMITTED TO THE JURY IN THE JURY INSTRUCTIONS, WITHIN THE TIME FRAME SUBMITTED TO THE JURY AS PRESCRIBED IN SAID JURY INSTRUCTIONS.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgement of conviction for the crime of sexual battery against Jerry McBride following a jury trial commenced on February 19, 2008, Honorable Charles E. Webster, Circuit Judge, presiding. Upon

a verdict of guilty, Appellant Jerry McBride was sentenced to a term of twenty-five (25) years and is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Jerry McBride ["McBride"] was accused of the crime of sexual battery, sexual penetration of a child under the age of fourteen, purportedly occurring at a non-specified point in time sometime during a four year span between January, 2002 and December, 2005. The indictment was dated May 30, 2006 and McBride was arraigned on August 10, 2006.

Before the matter was set for trial McBride filed two pro se "Motion[s] for Direct Verdict of Acquittal" complaining that he had been incarcerated for sixteen months in "violation of [his] constitutional rights." (C.P. 4-5, 6-7, R.E. 4-5,6-7) He stated that he had not been served a copy of the indictment and that he had not requested any continuances. McBride also filed a motion to have his court appointed attorney removed. (C.P. 8-10) At a pretrial hearing the trial court heard McBride's motions and entered an order denying each motion. (C.P. 15-22, R.E. 11-18) While denying his motion, the trial court did find that the "most significant complaint" made by McBride concerned the significant delay in bringing him to trial, recognizing that a delay of merely eight months is presumed to be prejudicial. However, upon conducting the balancing test advocated in *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184 (1972), the trial judge weighed the factors and decided against McBride.

The state produced three witnesses at trial, the victim [hereinafter referred to as Jane Doe], a middle school counselor and a DHS worker. The counselor and the DHS worker provided no direct evidence of any crime; both, in essence, testifying that they had talked with Jane Doe and referred her on. The counselor referred Jane Doe to DHS and DHS sent her for a forensic interview. (T. 124-

129) No evidence of the forensic interview was adduced at trial.

Jane Doe testified that she was now eighteen (18) years of age[1], but that when she was eleven (11) her father took her and her brother for a drive. (T. 94-96) She claimed that they went to a house and while at the house, McBride penetrated her. (T. 96-97) She was also allowed to testify to a separate event, occurring at some time in 2005, where she claimed McBride touched her "[o]n top" of her clothes. (T. 99-100) On cross examination she affirmed that she was ten (10) or eleven (11) when the claimed contact occurred. (T. 106) However, on redirect, in response to a leading question, she agreed she could have been twelve (12). (T. 113) None-the less, it was still her testimony that she thought she was eleven (11) and that the first event occurred while she was in the third grade, fourth at the latest.

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

A. Yes, sir. (T. 113)

The above two incidents were the only such incidents according to Jane Doe's testimony. (T. 103)

The state rested upon these proofs and the defendant exercised his right to not testify. The defense moved for a directed verdict and tendered a peremptory instruction which were denied.

SUMMARY OF THE ARGUMENT

McBride was denied his constitutionally and statutorily guaranteed right to a speedy trial, when he was incarcerated for sixteen to seventeen months prior to trial due to the State's neglect in getting his case placed on the docket. The facts adduced at a trial were not sufficient to support the verdict.

ARGUMENT

ISSUE NO. 1: WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY

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[1]Jane Doe later testified that her date of birth was November 11, 1989.

RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHERE THE TRIAL COURT FOUND THE DELAYS PRESUMPTIVELY PREJUDICIAL BUT DID NOT REQUIRE THE STATE TO OVERCOME THE PRESUMPTION; FAILED TO ADEQUATELY WEIGH PREJUDICE AND WHERE THE PRIMARY REASON FOR DELAY IS NEGLECT IN PLACING THE CASE ON THE TRIAL DOCKET.

McBride sat in jail for a period of some seventeen months (517 days) before being brought to trial. He was indicted on May 30, 2006, and arraigned on August 10, 2008; but not brought to trial until February 19, 2008. McBride brought a pro se motion[2] to have the charges against him dismissed premised in part upon the violation of his right to a speedy trial. The trial court heard his motion on February 15, 2008 and entered an order that day denying McBrides motion.

The trial court perfunctorily denied the statutory violation stating that "But as we know, the 270 day rule is not necessarily an absolute bar for the prosecution. There are matters that can cause the delay." (T. 15-16) The court's written order made no further finding concerning McBride's statutory right to a speedy trial. This ruling would seem contrary to the clear language of the statute:

> **Unless good cause be shown, and a continuance duly granted by the court,** all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned. (Emphasis added.)
> Miss. Code Ann. § 99-17-1

The plain language of the statute requires that continuances have been granted upon a showing of good cause. "We have held that § 99-17-1 is plain and unambiguous and requires trial of a defendant no later than 270 days after his arraignment unless good cause is shown for trial after 270 days." *Ford v. State*, 589 So.2d 1261, 1262 (Miss.1991) "It is well settled that when a court considers a statute passed by the Legislature, the first question before the Court is whether the statute is ambiguous. If the statute is not ambiguous, the court should interpret and apply the statute according

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[2]McBride filed two motions styled "Motion For Direct Verdict Of Acquittal" within days of one another. Both motions were considered together by the trial court.

to its plain meaning without the aid of principles of statutory construction." *Harrison County Sch. Dist. v. Long Beach Sch. Dist.*, 700 So.2d 286, 288-89 (Miss.1997)

In the case at bar, there were no continuances granted. The delay in bringing McBride to trial was admittedly neglect by the State in getting McBride's case placed on the docket. This neglect should not be equated with the establishing "good cause" for the delay. The burden is on the State to show "good cause" for delay[3], but in this case, the State could only show neglect.

The trial court in it's order took judicial notice of crowded dockets.(C.P. 21) Crowded dockets, standing alone, will not provide a sufficient excuse for violation of a defendant's right to be tried within 270 days. *Walton v. State*, 678 So. 2d 645 (Miss. 1996), rehearing denied, 691 So.2d 1025 (Miss. 1996). More importantly, no order of continuance concerning crowded docket is found in the record. The plain language of the statute requires an order be granted and the facts and record herein equally plainly show no such order was entered.

McBride had no duty to bring himself to trial. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), rehearing denied 693 So. 2d 384 (Miss. 1997), disagreed with on other grounds. It was the State's burden to get McBride's case on the docket and get it tried within 270 days. When it failed to do so and showed neglect, not good cause, the trial court erred in failing to dismiss this cause. *Turner v. State,* 383 So. 2d 489 (Miss. 1980)

McBride further urges that the trial court erred in its analysis under *Barker v. Wingo*, *Id.* The trial judge appropriately found that the delay of 541 days was presumptively prejudicial, but then left the burden with the defendant to show prejudice, rather than requiring the state to demonstrate the lack of prejudice. Further, the court found there was no significant prejudice where McBride had offered that the facts would have been a lot "fresher" on his mind. Never mind that McBride was

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[3] *Polk v. State*, 612 So. 2d 381, 387 (Miss. 1992)

already disadvantages by the passage of time where he was indicted in May of 2006 for a crime that allegedly occurred between January 2002 and December 2005. The trial court failed to consider entirely the other two prongs of the test for prejudice, the time of incarceration.

> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker v. Wingo, Id., at U.S 532, S.Ct 2182. In *Barker* the Court went on to explain that the deprivation of liberty was a "serious" consideration in weighing prejudice to the defendant. McBride was incarcerated for more than seventeen months or for 541 days[4]. For an extended period of time McBride was deprived of his liberty spending "idle time" under a "cloud of anxiety" while having no opportunity to "gather evidence" on his own behalf. All "serious" concerns required to be considered under the *Barker v. Wingo*, balancing test. McBride clearly suffered "oppressive pretrial incarceration" as condemned in *Barker*, which was not considered.

The trial court, it is further urged, also erred in its finding that the reason for the delay did not weigh heavily against the State. True intentional delay is not ascertainable from the record, but the primary, if not the sole, reason for the delay was neglect. As the State has a duty to bring a defendant to trial in a speedy manner, and the burden lies with the State to prove actual "good cause" for the delay (*Summers v. State,* 914 So. 2d 245, 248 (Miss. App. 2005)), to trivialize neglect where a citizen suffers a denial of their liberty should not be acceptable. The trial court chose to weigh the cause of the delay not heavily against the State. Negligent delay should still be weighed "heavily", since the burden to bring the defendant to trial rests with the State, just "less heavily"

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[4]The trial court found that 17 days of delay were excusable due to agreement and an unavailable witness.(C.P. 21)

according to *Barker.*

> negligence or overcrowded courts should be weighted **less heavily** but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.(emphasis added)

Barker v. Wingo, Id. At U.S. 531, S.Ct. 2182.

Accordingly, McBride has been denied his constitutionally and statutorily guaranteed rights to a speedy trial.

ISSUE NO. 2: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT WHERE IT WAS NOT POSSIBLE TO PROVE THE ELEMENTS OF THE CRIME AS SUBMITTED TO THE JURY IN THE JURY INSTRUCTIONS, WITHIN THE TIME FRAME SUBMITTED TO THE JURY AS PRESCRIBED IN SAID JURY INSTRUCTIONS.

The only proofs adduced at trial, other than the State's sole witness agreeing with the prosecutor asking a leading question on re-direct examination, placed the occurrence of the alleged event happening when Jane Doe was eleven years old and was in the third or fourth grade. As Jane Doe was born on November 11, 1989, the event could not have occurred on a date occurring after January, 2002 as set forth in the elements instruction to the jury. No reasonable juror could have found, on the evidence placed in within their consideration, that the events claimed could have mathematically occurred within the time frame they were instructed to consider.

The standard used in the determining whether evidence adduced at trial was sufficient to sustain the verdict is that the reviewing court may only reverse a verdict where:

> the State's proof as to one or more of the elements of the offense charged is so deficient that a reasonable and fair-minded juror could only find the accused not guilty.

Mauldin v. State, 750 So.2d 564, 565 (Miss. App. 1999) In the facts of this matter, McBride urges that no reasonable juror could have found under the facts of this case, that any crime occurred within the time frame set forth in the elements instruction, and for this reason, this cause should be reversed

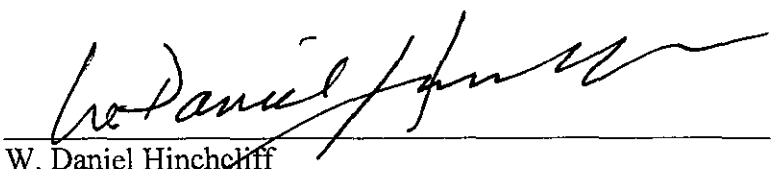
and rendered.

CONCLUSION

Upon the argument and authority cited here, Appellant McBride respectfully requests that this Honorable Court reverse this cause and either render or remand this cause for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Jerry McBride, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 5th day of January, 2009.

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