IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROGER PATTERSON — APPELLANT

V. — NO. 2010-KA-1353-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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ROGER PATTERSON	**APPELLANT**
V.	**NO. 2010-KA-1353-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. Roger Patterson, Appellant
3. Honorable Ben Creekmore, District Attorney
4. Honorable Robert Elliott, Circuit Court Judge

This the 23rd day of November, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

W. DANIEL HINCHCLIFF
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STATEMENT OF THE ISSUE

ISSUE NO. 1 : WHETHER A THREE YEAR DELAY IN BRINGING A DEFENDANT TO TRIAL IS, PER SE, WHERE THERE IS NO RECORD SHOWING HOW SUCH A DELAY WAS REASONABLE, A VIOLATION OF THE CONSTITUTIONAL AND STATUTORY RIGHT TO A SPEEDY TRIAL.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Calhoun County, Mississippi, and a judgement of conviction against Roger Patterson for the crime of sale of a controlled substance, to wit: cocaine. Roger Patterson was sentenced to a term of twenty years, with eight years suspended after serving twelve, following a jury trial commenced on August 10, 2010, the Honorable Robert William Elliot, Circuit Judge, presiding. Roger Patterson is presently incarcerated in an institution under the supervision and control of the Mississippi Department of Corrections.

FACTS

Confidential informant Willie Moore was wired with video and audio by Philip Jackson, a Bruce police officer, given twenty dollars, and then sent to a neighborhood known as "The Quarters"

on August 25, 2007, to see if he could make drug buy. (T. 66-68) He encountered Eardie Duff, who, upon Willie's inquiry, informed him that "Bird" had some dope to sell. They went together to the residence of "Bird" or Roger Patterson. (T. 68-69) Willie Moore bought a "twenty" from Roger Patterson, the video showing the transaction, but not the faces. However, "Kitty" also known as Delois Jones was visible in the video, as was Eardie Duff. The audio did include the name "Roger" and "Thanks, Roger."

Willie Moore had either volunteered or been offered the opportunity to act as a confidential informant, after his third driving while intoxicated arrest. He, none-the-less had made several cases for officer Philip Jackson. In the present matter, he had made a purchase from Roger Patterson, as he testified , he asked Roger for crack. Then "I gave him the money, and he gave me the dope in my hand, and I left." (T.89)

Eardie Duff had lived on Riddle street, in that neighborhood for some time. She knew both Roger Patterson and Willie Moore. She agreed she had taken Willie to Roger's house to get some dope. (T. 92-95)

Delois "Kitty" Jones recalled being present, but not much else, as she was intoxicated at the time. She did recall that Roger Patterson came to see her the day before and asked he to say that it was Eardie that "passed the dope." (T. 97-99)

In his own defense, Roger Patterson claimed that the deal transpired next door with persons unknown. (T. 103) He had mentioned to Kitty that the hand visible in the video appeared to him to be the hand of a female. (T. 106)

The rebuttal testimony of Eardie Duff, Kitty and Philip Jackson reaffirmed the house in question as that of Patterson and his mother. (T. 108-112)

SUMMARY OF THE ARGUMENT

The duty of the State to bring a defendant to trial under the Constitution as well as pursuant to statute, while somewhat attenuated in recent years, is still fundamental and nearly inviolate. When a defendant is left hanging in the wind for three years and where the record stands as silent, obtuse, and vague as the Sphinx; then, it is strongly urged that any duty to assert such right is overridden by the prejudices of elapsed time and governmental neglect.

ARGUMENT

ISSUE NO. 1 : WHETHER A THREE YEAR DELAY IN BRINGING A DEFENDANT TO TRIAL IS, PER SE, WHERE THERE IS NO RECORD SHOWING HOW SUCH A DELAY WAS REASONABLE, A VIOLATION OF THE CONSTITUTIONAL AND STATUTORY RIGHT TO A SPEEDY TRIAL.

The State is imputed with the duty to bring a defendant to trial in a prompt and speedy fashion. *McGhee v. State*, 657 So. 2d 799, 804 (Miss. 1995) In this cause, it neglected and failed in that burden for a period of almost twenty-six months from the date of the arraignment and three years from the date of the alleged crime. No reason for the delay is contained in the record. When there has been a substantial delay in bringing an accused to trial, a balancing test to determine whether the fundamental right to a speedy trail has bee violated is necessitated. *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972) Certain factors must be considered: (1) the length of the delay, (2) the reasons for the delay, (3) whether or not the defendant has asserted his right to a speedy trial, and finally, (4) the harm or prejudice suffered. In the instant matter the defendant, as far as the record reveals, never demanded a speedy trial. Often times, that has acted as a virtual bar to the Court's examining further the violation of the constitutional and statutory right. *U. S. Const. Amend. VI* and *Miss. Const. Art. III, § 26*. But, the burden and the capacity to bring a matter to trial is sole the State's. As Judge Roberts observed in his very recent dissent:

> As for the "assertion-of-the-right" prong of the Barker analysis, I do not disagree with the majority's conclusion that McBride did not assert his rights to a speedy trial in his pro se motions. To clarify, however, that does not mean that this factor weighs against McBride. "[A] defendant has no duty to bring himself to trial." *Nations v. State*, 481 So.2d 760, 761 (Miss.1985) (quoting *Barker*, 407 U.S. at 527, 92 S.Ct. 2182; *Turner v. State*, 383 So.2d 489, 491 (Miss.1980)). "It is the State that bears the burden of bringing the accused to trial in a speedy fashion." *Atterberry v. State,* 667 So.2d 622, 627 (Miss.1995) (citations omitted). While a defendant may have some responsibility to assert his speedy-trial claim, the primary burden is on the court and prosecutor to assure that they bring the case to trial. *Simmons v. State*, 678 So.2d 683, 687 (Miss.1996). By failing to assert his speedy-trial rights, McBride merely lost his opportunity to acquire "points" under this factor. Id.

*McBride v. State,*____So. 3d ____, 2010 WL 1757933, 11 (Miss.App.) (Miss.App.,2010) Cert. Granted November 18, 2010.

An accused is not required to put forth proofs of actual prejudice, and a delay of eight months affords an accused an automatic presumption of prejudice. When such a delay has occurred, it is required that a close examination be had of the reasons for the delay with a weighing of the factors. "[W]e determined that while there are some exceptions to the rule, it may generally be said that any delay of more than eight months is presumptively prejudicial. Id. However, the delay factor alone is not sufficient for reversal, but it requires a close examination of the remaining Barker factors." *Young v. State* 891 So.2d 813, 817 (Miss. 2005) No close examination was done herein. In any event, delay in a trial is recognized as causing anxiety in an accused, and that is a prejudice suffered by the defendant. *Hersick v. State*, 904 So. 2d 116 (Miss. 2004); *Ginn v. State*, 860 So. 2d 675 (Miss. 2003)

The statutory right to a speedy trial requires a defendant be brought to trial within 270 days unless the trial court finds good cause and enters a continuance.

§ 99-17-1. Trial within 270 days of arraignment

> 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.

Miss. Code Ann. § 99-17-1 Thus, the trial court would seem obligated to, *sua sponte*, make such a record and to have entered an order of continuance. When the State fails in this burden, an accused is entitled to a dismissal. *Dies v. State*, 926 So. 2d 270 (Miss. 2006)

The failure to bring this matter to trial was never, placed before the trial court. Again, such a failure has operated as a bar to appellate review. But, Appellant respectfully asserts that such a critical and basic right as the right to a speedy trial should not be summarily dismissed where more than two years have elapsed. A window of two years is more than an adequate amount of time to bring a defendant to trial, and the failure to do so abridges a fundamental right. But as the right is fundamental, the trial court should, *sua sponte*, make inquiry into the reasons for delay and make a finding of the *Barker* factors. Accordingly, Appellant asserts this failure should be examined under the plain error doctrine. "When a defendant fails to file such a motion, and thereby obtain specific findings of fact going to an alleged deprivation of the right to a speedy trial, the issue is barred from appellate review unless an appellate court finds plain error." *Johnson v. State*, 9 So.3d 413, 416 (Miss. App. 2008)

The burden of a speedy trial is upon the State. Similarly, it should also be the duty of the State and the trial court to assure that, where there has been a significant delay, that the defendant's rights are protected and that the record makes clear that that burden upon the State has been met. Accordingly, Appellant respectfully asserts that the trial court's failure to make a determination of the reasons for the delay, failure to properly enter an order continuing this matter and of the State to bring this cause to trial, entitles Roger Patterson to a dismissal of this case.

CONCLUSION

Appellant was not brought to trial for a period of three years from the date of the alleged crime and over two from the date of the indictment. Such a delay, without any record to show the cause thereof, should not be endorsed by this Honorable Court, and accordingly, this defendant should be discharged and the judgement of the lower court reversed and rendered.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
STAFF ATTORNEY

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Roger Patterson, 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:

Honorable Robert Elliott
Circuit Court Judge
388 CR 490
Ripley, MS 38663

Honorable Ben Creekmore
District Attorney, District 3
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Oxford, MS 38655

Honorable Jim Hood
Attorney General
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This the 23rd day of November, 2010.

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