

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00849 COA

HERB RUMMEL A/K/A HERBERT THOMAS RUMMEL

APPELLANT

v.

CITY OF BRANDON

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LOUIS GOZA JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHRIS N.K. GANNER

ATTORNEY FOR APPELLEE:

MARK C. BAKER

NATURE OF THE CASE: CRIMINAL: SPEEDING, DRIVING UNDER THE INFLUENCE OF
INTOXICATING LIQUOR

TRIAL COURT DISPOSITION: FOUND GUILTY OF SPEEDING AND DUI, FINED AND
ORDERED TO PAY COURT COSTS

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Herb Rummel a/k/a Herbert Thomas Rummel (Rummel) was convicted of speeding and driving under the influence of intoxicating liquor in the Brandon Municipal Court. He appealed to the county court where a de novo trial was held, and he was found guilty of the same. Rummel was fined \$33.50 for the speeding violation, \$400.00 for the DUI conviction, ordered to pay court costs, successfully complete the MASEP program, attend one session of the Victim's Impact Seminar Program, and serve twenty-four (24) hours in the Rankin County jail. From this judgment, Rummel perfected his appeal to the circuit court, and finally to this Court. On appeal, Rummel asserts the following issues: (1) that the lower court erred in failing to dismiss his case for failure to afford him a speedy trial and (2) the lower court erred by admitting hearsay evidence into testimony, thus, depriving him of his constitutional right to confrontation. Finding no reversible error, we affirm the judgment.

FACTS

On December 7, 1991, Rummel was arrested and charged with speeding and driving under the influence of intoxicating liquor. Rummel was convicted of both charges in municipal court on January 14, 1992. The following is a chronological list of the events that followed:

1.) January 17, 1992- Rummel appealed to the county court. Trial was set for July 16, 1992.

2.) June 29, 1992- Rummel was granted a continuance and trial was reset for September 3, 1992.

3.) August 17, 1992- Rummel sought another continuance which was granted. Trial date was set again for October 13, 1992.

4.) October 13, 1992- Both sides appeared for trial, but the case was continued because of an overcrowded docket. Trial was set for June 4, 1993.

5.) State requested a continuance because of a conflict. Trial was reset for October 14, 1993.

Rummel filed a demand for speedy trial on June 10, 1993. The motion was heard on October 14, 1993, and denied. The trial proceeded on its merits. During trial, the State introduced calibration certificates under seal pertaining to the breathalyzer machine used on Rummel. The jury returned a guilty verdict on both charges.

DISCUSSION

I. CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

Rummel was arrested on December 7, 1991. His trial was originally set for July 16, 1992. However, due to a series of continuances, he was not tried until October 14, 1993. Rummel claims that his constitutional right to a speedy trial was violated by a delay in excess of twenty-two (22) months.

When a defendant asserts a constitutional speedy trial violation, we must balance four factors in determining whether the claim is justified. *Johnson v. State*, 666 So. 2d 784, 792 (Miss. 1995). The factors are: (1) length of delay, (2) reason for the delay, (3) whether the defendant has timely asserted the right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Johnson*, 666 So. 2d at 792 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). No single factor is dispositive, but this Court must consider the totality of the circumstances, plus any additional relevant circumstances beyond the four factors, when making the determination. *Id.*

a) Length of Delay

Our state supreme court has held that a delay of eight or more months between arrest and trial is presumptively prejudicial. *Id.* (citations omitted). This factor alone, however, will not require reversal in and of itself but will require that we examine the remaining factors closely. *Id.* (citations omitted). The total period of delay between Rummel's arrest and his trial was approximately twenty-two months. Such a delay is presumptively prejudicial and triggers an examination of the remaining factors.

b) Reason for Delay

Rummel's county court trial was originally set for July 16, 1992, one hundred and eighty-three days after the municipal court found him guilty of the charges and two hundred and seven days, (just over seven months) from the date he was arrested. Since this was less than an eight month period, it is not presumptively prejudicial. The trial date was subsequently reset twice because Rummel's attorney requested two continuances. This set the trial date back to October 13, 1992. The October 13, 1992 trial date was continued until June 4, 1993 due to an overcrowded docket. The June 4th trial date was again continued per request of the State. The case finally went to trial on October 14, 1993. Continuances due to docket congestion do not weigh as heavily against the State as would periods where no cause for the delay was seen. *Jasso v. State*, 655 So. 2d 30, 33 (Miss. 1995). *But see, e.g., Hurns v. State*, 616 So. 2d 313, 318 (Miss. 1993) (overcrowded court dockets and trial schedules are neutral reasons in *Barker* analysis); *McGee v. State*, 608 So. 2d 1129, 1133 (Miss. 1992) (docket congestion can furnish good cause for delay). With this in mind, the trial was delayed about one hundred and thirty days (130) due to the State's request for a continuance. Given that the remainder of the delays were due to continuances per request of the defense, and as a result of overcrowded dockets, this factor should not be weighed against the State.

c. Assertion of Right by Defendant

Although Rummel was not required to demand a speedy trial, his assertion of such right will weigh more heavily in his favor under this analysis. *Johnson*, 666 So. 2d at 793. However, Rummel did not file this motion until June 10, 1993, after he had requested two continuances. "Although this late filing is not fatal to his claim, it weighs less heavily than would an earlier assertion of his right." *Id.*

d. Prejudice

There are three elements of prejudice to be considered in this situation: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *Spencer v. State*, 592 So. 2d 1382, 1388 (Miss. 1991) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

Obviously, the first element is not applicable because Rummel was not incarcerated. However, Rummel asserts that he was prejudiced because the delay caused him to suffer anxiety over the case. He testified he has been unable to consider job opportunities in other states because of the delay in this matter. He also makes a conclusory assertion that the time lapse from the municipal court trial to the county court trial caused his memory to fade about the details of the incident, thus impairing his defense. After reviewing the reasons Rummel has cited, we are not persuaded that he has been actually prejudiced due to the delay.

e. Totality of the Circumstances

Considering the totality of the circumstances, Rummel has not been denied his constitutional right to a speedy trial. We find that the length of delay was presumptively prejudicial, and weighs in Rummel's favor. However, when considering the remaining factors, we find that the reasons for the delay cannot be weighed against the State. Furthermore, although Rummel's late assertion of his right to a speedy trial is not fatal to his claim, he can claim very little benefit from this factor. Additionally, other than planning for the future and other conclusory assertions, Rummel has made no showing of actual prejudice.

II. HEARSAY EVIDENCE

At trial, the State introduced into evidence two certificates of calibration with respect to the breathalyzer used to measure Rummel's blood-alcohol content. Rummel objected contending that it was hearsay evidence and now asserts that his right to confrontation was violated as a result. Section 63-11-19 of the Mississippi Code requires that certification of the breathalyzer machines take place at least quarterly. Miss. Code Ann. § 63-11-19 (Rev. 1989). In *Johnston v. State*, the defendant challenged the admissibility of a breathalyzer result by arguing that the proper predicate to authenticate accuracy had not been laid to accept the test into evidence. *Johnston v. State*, 567 So. 2d 237, 239 (Miss. 1990). In that case, an officer testified that the breathalyzer was calibrated every month. The trial court overruled the defendant's objection that the testimony was not the best evidence and also overruled the defense's request for the certificates of calibrations. *Johnston*, 567 So. 2d at 239. The trial court accepted the officer's testimony without requiring the State to produce a certificate. The defendant then produced a certificate showing that the machine was calibrated one hundred and thirty days (130) after his test. *Id.* This was beyond the statutory period allowed for

certifying the machine. *Id.* The supreme court reversed the verdict because the breathalyzer had no certificate of calibration to meet the requirements of the statute. *Id.* Although the *Johnston* case does not directly address the issue we are faced with today, we can infer from the holding that evidence as to the calibration of the breathalyzer is admissible.

As far as authenticating the certificates, we think that the certificates of calibration fall within the purview of Rule 902(4) of the Mississippi Rules of Evidence since the certificates are filed at the police department, and signed under seal by an agent of the Mississippi State Crime Laboratory pursuant to section 63-11-19 of the Mississippi Code. Miss. Code Ann. § 63-11-19 (Rev. 1989). Rule 902(4) states in relevant part:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office . . . certified as correct by the custodian or other person authorized to make this certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

M.R.E. 902(4). Accordingly, the officer who issued the certificate of calibration need not testify as to the authenticity of the certificate, and therefore, Rummel was not denied his constitutional right of confrontation.

THE JUDGMENT AND CONVICTION OF THE RANKIN COUNTY CIRCUIT COURT OF SPEEDING AND TO PAY A FINE OF \$33.50, DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR AND TO PAY A FINE OF \$400.00, AND OTHER CONDITIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., AND THOMAS, P.J., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

BRIDGES, P.J., NOT PARTICIPATING.