IN THE SUPREME COURT
STATE OF GEORGIA

JAMIE RYAN WEIS	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S09A1951
	*	
STATE OF GEORGIA	*	
	*	
Appellee	*	

BRIEF OF APPELLEE

SCOTT L. BALLARD 035561
District Attorney

ROBERT WRIGHT SMITH, JR. 663218
Assistant District Attorney

Please serve:

Robert Wright Smith, JR.
Assistant District Attorney
Fayette County Justice Center
One Center Drive
Fayetteville, Georgia 30214
(770) 716-4250

IN THE SUPREME COURT
STATE OF GEORGIA

JAMIE RYAN WEIS	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S09A1951
	*	
STATE OF GEORGIA	*	
	*	
Appellee	*	

BRIEF OF APPELLEE

I. Procedural History

On February 2, 2006, Catherine King was found dead in her Pike County home. A few days later, Appellant was arrested and charged with various offenses related to the event. After the first indictment was dismissed because the names of the Grand Jurors did not appear thereon, Appellant was indicted on eight counts, including murder and felony murder on November 22, 2006. The first appearance hearing was held on January 11, 2007 and Appellant was arraigned on February 9, 2007.

Though Pike County, as a part of the Griffin Judicial Circuit, has a circuit-wide public defender with nine assistants and four investigators, the former director of the Georgia Public Defender Standards Council (hereinafter

'GPDSC') determined that the Georgia Capital Defenders had too many cases and entered into a verbal contract with current counsel, Mr. Citronberg and Mr. West, to represent Appellant. (Motion Hearing Transcript November 26, 2007 p. 8, 17, 20-22) At that time, Mr. West was involved in eight additional death penalty cases while still representing his private clients and Mr. Citronberg had three death penalty cases plus his private clients. (Motion Hearing Transcript February 9, 2007 p. 11, December 10, 2007 13) At the time, state guidelines only allowed an attorney to be involved in four death penalty cases. (Motion Hearing Transcript February 9, 2007 p. 36) This number was raised to eight during the pendency of this case. (Motion Hearing Transcript February 9, 2007 p. 36)

Without a written contract, counsel for Appellant began their representation of him on October 12, 2006 when they filed their entry of appearance. (R-31) Appellant also filed in excess of sixty motions. (R-33-66, 159-767) At the conclusion of the arraignment, the trial court attempted to set the motions hearing date for approximately one month later. However, counsel for Appellant had a conflict for some of the days. Additionally, counsel advised that five weeks from the date of arraignment to a

motions hearing date was "insufficient in a death case." (Motion Hearing Transcript Feb 9, 2007 p. 12)

At the motions hearing in March, only one of Appellant's counsel was present. (Motion Hearing Transcript March 15, 2007 p. 2-4) As the hearing began, he admitted that he did not anticipate the criminal case being resolved before September. (Motion Hearing Transcript March 15, 2007 p. 8) When Appellant finally began arguing his first motion in this case, it was a request that the case be continued due to "what's going on in the state legislature and with the Public Defender Standards Council." (Motion Hearing Transcript March 15, 2007 p. 12)

In making his request to examine the physical evidence, counsel for Appellant requested that the date be set "sometime mid April maybe." (Motion Hearing Transcript March 15, 2007 p. 21) The court, with the consent of counsel, set the date for March 28 and 29, 2007. (Motion Hearing Transcript March 15, 2007 p. 22) Both defense attorneys suffer from health issues and asked the court to "adjourn at a reasonable time" since they were not to work "marathons" or "crazy hours." (Motion Hearing Transcript March 15, 2007 p. 30, 32) At the conclusion of the hearing on the non-evidentiary motions, the trial court continued

the matter to May 14, 2007. (Motion Hearing Transcript March 15, 2007 p. 95)

Appellant filed a motion to continue the case after that hearing based on the inability of the Georgia Public Defender Standards Council to pay Appellant's attorneys pursuant to the oral agreement that they had made with the previous head of the agency. The July 19, 2007 hearing on the motion was held after July 1, 2007 at the request of Appellant's counsels. (Motion Hearing Transcript July 19, 2007 p. 6-7) The trial court attempted to ascertain a date that would not be in conflict with Appellant's attorneys hearing dates and trials. (Motion Hearing Transcript July 19, 2007 p. 9-15) During that discussion, defense counsel advised the trial court that "[i]t usually takes a month, four weeks, to select a jury" in a death penalty case. (Motion Hearing Transcript July 19, 2007 p. 16) The hearing ended with the case set for trial during February 2008 with the final evidentiary motions hearing on November 26, 2007. (Motion Hearing Transcript July 19, 2007 p. 17-18)

At the start of the November 26, 2007 hearing, the trial court noted that since the July 19, 2007 hearing Appellant had filed motions to continue the case as well as several conflict letters for the dates that the court had

determined no conflict existed for the trial of the case. (Motion Hearing Transcript November 26, 2007 p. 3-4) At the November 26, 2007 hearing, Robert M. "Mack" Crawford, the director of the GPDSC, testified concerning the contract status and reimbursement requests of Appellant's attorneys. During his testimony, Mr. Crawford explained to the court that the GPDSC had requested all the non-staff attorneys submit a budget for the expected costs of defending their clients and that the instant case was one of those matters. The budget had not been approved but the Council anticipated being able to provide funds by the first of June 2009 to assist in the defense of Appellant. (Motion Hearing Transcript November 26, 2007 p. 16)

Since the funds would not be approved until later, counsel asserted they were in a difficult position - either stop working or continue representing Appellant and face a potential ineffective assistance claim. (Motion Hearing Transcript November 26, 2007 p. 30-31) The State suggested a different way, pointing out that the Griffin Judicial Circuit's Public Defender's Office and staff could be used in the defense of Appellant as they were qualified and had sufficient funding. (Motion Hearing Transcript November 26, 2007 p 16-20, 39) Concerned that the case had languished for two years and could stay in that posture for

many more, the trial court removed the appointed attorneys and replaced them with the Griffin Judicial Circuit Public Defenders. (Motion Hearing Transcript November 26, 2007 p. 47-51)

In response to the trial court's order, Appellant refused to consult with his appointed attorneys and began filing pro se pleadings seeking to have the original attorneys re-instated. (Motion Hearing Transcript December 10, 2007 p. 3, 7, 9) While the Griffin Circuit Public Defender had a significant case load, they indicated that they could represent Appellant and the matter would be their first priority. (Motion Hearing Transcript December 10, 2007 p. 14) As of December 10, 2007, no pro bono attorneys had filed an entry in the case to assist Appellant and his original attorneys were not agreeing to continue the representation without pay. (Motion Hearing Transcript December 10, 2007 p. 14) The trial court recognized that reinstating prior counsel could result in no more action being taken in the case until June 2008 and denied the request. (Motion Hearing Transcript December 10, 2007 p. 24-27) The trial court did grant Appellant's motion for a continuance until January 2008 to obtain the file. (Motion Hearing Transcript December 10, 2007 p. 32-33) Appellant objected at this hearing to the change in

counsel. (Motion Hearing Transcript December 10, 2007 p. 35)

On December 20, 2007, pro se counsel entered on behalf of Appellant seeking a continuance as well as a certificate of immediate review of the trial court's actions on November 27, 2007. (R-935-940) During a hearing on July 8, 2009, Doctor Barry Scanlon testified that pro se counsel had paid his bills when reviewing Appellant's medical charts and medical history. (Motion Hearing Transcript July 8, 2009 p. 72)

Appellant then filed a motion to recuse the trial judge as well as a mandamus action against him to reinstate the prior attorneys. (Jamie Ryan Weis v. Honorable Johnnie L. Caldwell, Jr. Pike County Superior Court Civil Action No. 2008-CV-070) This matter was originally assigned to a Senior Superior Court Judge but then sent to a sitting Superior Court Judge for hearing. The motion and petition were rendered moot when the trial court agreed to reinstate counsel. (Motion Hearing Transcript January 5, 2009 p. 3-5) Part of the reinstatement was an agreement that the trial court would not take any action in the case until after January 1, 2009. At that time, the court set the matter down for a status conference. However, even with the additional money, there was no signed contract for

representation for Appellant. (Motion Hearing Transcript January 5, 2009 p. 7-8, 15) The conference ended with the understanding that counsel for Appellant would file monthly status updates. (Motion Hearing Transcript January 5, 2009 p. 21)

Ultimately, evidentiary hearings were held on July 8, 2009. During the court hearing, Appellant first raised the issue of his Constitutional right to a speedy trial being violated. (Motion Hearing Transcript July 8, 2009 p. 128, 132) Appellant also sought to strike the trial date that had been set. (Motion Hearing Transcript July 8, 2009 p. 141-142). Those motions were denied and Appellant filed a notice of appeal. (R-1-2) This appeal follows.

II. Argument and Citation to Authority

A. APPELLANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS NOT BEEN VIOLATED.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. This right attaches at either the arrest of the accused or when the prosecutor brings formal charges, whichever is earlier. When reviewing claimed violations of this right, the United States Supreme Court has developed a four part balancing test. Barker v. Wingo, 407 U.S. 514 (1972). The Barker test balances (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant in determining whether a violation has occurred. "Standing alone, none of these factors are a necessary, or sufficient condition to a finding of deprivation of the right to a speedy trial, but rather should be considered as part of a balancing test." Bowling v. State, 285 Ga. 43 (2009), citing Washington v. State, 243 Ga. 329, 330 (1979).

i. THE LENGTH OF THE DELAY RAISES A PRESUMPTION OF PREJUDICE.

More than three years have elapsed from the arrest of Appellant to the filing of this appeal. Generally, any

delay of more than one year raises a presumption of prejudice. Disharoon v. State, 288 Ga. App. 1, 3 (1) (2007). The State concedes that the delay from Appellant's arrest in February 6, 2006 to this day is such that this Court will consider the presumption of prejudice raised. However, if the delay is attributable to the State's preparation of its case, courts have considered the delay a "relatively benign" factor when balanced against the State. Perry v. Mitchell, 253 Ga. 593. 594 (1984).

ii. THE DELAYS IN THIS CASE SHOULD BE WEIGHED AGAINST THE APPELLANT.

In the second part of the Barker analysis the court reviews the reasons for the delay attempting to determine which, if any of the parties, should be sanctioned for the delay of the proceedings. The consideration is whether through the delay, the State is making "[a] deliberate attempt to delay the trial in order to hamper the defense. . . ." Barker v. Wingo, 407 U.S. at 531.

This Court has noted that resolving numerous pretrial motions and the delay caused by such inquiries can be considered relatively benign. See Thomas v. State, 274 Ga. 492 (2001). In this case, Appellant filed in excess of

sixty motions which required multiple days of hearings to resolve.

Moreover, the largest portion of the delay in this case cannot be held against the State. Appellant attempts to merge the entity which is prosecuting him with the entity which provides funding for indigent representation. This syllogism fails.

Since 1985, a prosecutor has had no role in the funding of the defense, especially in a capital felony case. The United States Supreme Court's holding in Ake v. Oklahoma, 470 U.S. 68 (1985) does not allow the decision of funding to be part of the adversarial process. Most, if not all, conversations about such matters are held in ex parte conversations between the trial court and the defense counsel. In fact, O.C.G.A. § 17-12-3(c) specifically prohibits prosecutors or employees of the Prosecuting Attorney's Council from serving on the Georgia Public Defender Standards Council.

Appellant asserts "[n]ot a moment of the delay is attributable to Mr. Weis." (Appellant's Brief at page 2) Yet the very first motion heard in this case was a motion for continuance until an unknown date in the future. Appellant through counsel formally requested a continuance in this case at least nine times. (R-165-185, 829, 847-

854, 856-860, 872-875, 881-884, 944-947, 954-957, 967-969) Most of those requests center on the dispute between counsel for Appellant and the GPDSC's inability and refusal to pay all of the invoices submitted to it from these attorneys. While Appellant laments the lack of guaranteed funds to ensure the continued participation of his current counsel, he places their refusal to work on the State.

Georgia law does not recognize the absolute right of an indigent criminal defendant to the attorney of his own choosing. Davis v. State, 261 Ga. 221, 222 (1991); Amadeo v. State, 259 Ga. 469 (1989). Rather, the trial court is invested with the discretion to appoint qualified and competent representation to an indigent defendant. In some instances, "when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight" these interests may converge. Davis, 261 Ga. at 222; Davenport v. State, 283 Ga. 29, 31 (2008).

In this case, Appellant was originally represented by the Griffin Judicial Circuit Public Defender. (R-18-19) For reasons never explained, the Georgia Capital Defender assigned Robert Citronberg and Thomas West to represent Appellant. They filed an entry of appearance on October

12, 2006 and have since represented Appellant. Shortly after an evidentiary hearing in March 2007, counsel advised the trial court that they would need a continuance because the GPDSC had exhausted its funds to pay non-staff members such as Mr. Citronberg and Mr. West. Counsel were not willing to work without assurances that they would get paid.

In both April 2007 and October 2007, counsel requested the trial court postpone the case until the GPDSC was willing to pay them. The trial court received evidence that the availability of money to pay non-staff members of the GPDSC was uncertain. In response, and based on the duty imposed on the State by Barker, the District Attorney sought to remove Mr. Citronberg and Mr. West. In conjunction with this request, the State asked the trial court to appoint two members of the Griffin Judicial Circuit's Public Defender Office who were qualified and had funding and had previously represented Appellant in this matter.

The trial court granted the motion and substituted counsel that were properly funded and trained. At no time was Appellant without representation. However, Appellant refused to cooperate and made plain his desire to not assist his appointed counsel in his defense. The Griffin

Circuit Public Defenders sought to withdraw from the case based on their uncertain ability to obtain additional funds for expenses that might be beyond their budget as well as the lack of cooperation from their client.

Since March 2007, Appellant has filed nine motions for continuances, seeking to delay the trial for an indeterminate period of time. He also has filed motions to recuse the trial judge and even sued him directly. All of these actions constituted the primary reasons for the more than three year delay between Appellant's arrest and the filing of this appeal. While the State has a responsibility and obligation to ensure the swift disposition of criminal matters, the delay in this case cannot be attributed primarily to the actions of the State.

Any negative weight from this factor towards the State must be slight at best. However, based on the actions of Appellant and his counsel in terms of refusing to assist his counsel, their inability to attend scheduled court hearings, and their demand for a continuance without an end date, this factor should be weighed against Appellant.

iii. APPELLANT'S DILATORY ASSERTION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL SHOULD BE BALANCED AGAINST HIM.

Appellant was arrested on February 2, 2006. The venue for this case is Pike County which has two terms of court each year, in April and October. See O.C.G.A. § 15-6-3. Since his arrest, seven terms of court have passed without any assertion of his right to a speedy trial pursuant to O.C.G.A. § 17-7-171. The instant request for dismissal of the murder charges against him, or the prohibition against the State from seeking the death penalty, was not filed until July 2, 2009 and only seeks to invoke the protections of the Federal and Georgia constitutions. Waiting three years and four months to raise this claim for the first time should be weighed against Appellant.

During the December 10, 2007 hearing, the trial court expressed his displeasure in continuing the trial date another six months because "[w]e could be here this time in '08 with still the exact same situation we've got now with nothing have moved...I can assure you, I then am going to get a motion from this defendant that says his rights have been violated because he is entitled to a speedy representation and trial of his case." (Motion Hearing Transcript December 10, 2007 p. 25-26) In response to the

trial court's commentary, counsel for Appellant replied "It would probably be a motion that would need to be filed." (Motion Hearing Transcript December 10, 2007 p. 26) For nearly a year and a half, Appellant had notice that the trial court was concerned about a Constitutional speedy trial challenge and failed to raise the issue.

This delay balances strongly against Appellant's interests.

iv. APPELLANT HAS NOT SUFFERED PREJUDICE FROM THE DELAY REQUIRING DISMISSAL OF THE MURDER CHARGE AGAINST HIM.

The Barker court discussed additional factors to assist appellate courts in measuring the prejudice to an accused's interest: (1) whether there has been oppressive pre-trial incarceration; (2) the anxiety and concern of the accused; and (3) the possibility of harm to the accused's defense. Bowling v. State, 285 Ga. 43 (2009).

Appellant attempts to lump these factors together in the discussion about his struggle with "major mental illnesses." (Appellant's Brief at 14). While relevant to a discussion as to his "anxiety and concern," Appellant has neither filed a notice to introduce mental illness as a

defense nor sought a mental health evaluation.[1] Moreover, as this Court has noted before, "these anxieties are always present to some extent and thus absent some unusual showing not likely to be determinative in defendant's favor." Bowling, 285 Ga. at 46, quoting Boseman v. State, 263 Ga. 703, 733 (1994).

Appellant has not been denied any medical coverage or medications as authorized by the treating physicians. As evidenced in the record, Appellant has been treated multiple times for a variety of conditions. The record is absent any showing that the care Appellant has received has been lacking. In response to an attempted suicide attempt after Dr. Ahmed switched medications, the Court ordered Appellant be examined again by Central State to determine if his medications needed to be continued, discontinued, or changed. (Hearing Transcript July 8, 2009 p. 84)

Traditionally, an accused complains that during the delay from his arrest to actual trial that evidence is missing, witnesses are no longer available or similar issues. However, Appellant only claims that his GPDSC paid counsels' refusal to represent him has prejudiced his case.

---

[1] If such request has been made through ex parte communications, the State is not aware of such arrangements and has not been provided the findings of any medical professional as to this issue.

Since this prejudice is actually caused by the actions of Appellant and his defense team, this factor balances against Appellant.

Other than the length of the delay, the Barker factors balance against Appellant. His right to a speedy trial under the Sixth Amendment to the United States Constitution has not been violated. The trial court was correct to deny Appellant's motion and should be affirmed.

B. THIS COURT SHOULD USE THIS OPPORTUNITY TO RECONSIDER ITS DECISION IN HUBBARD V. STATE, 254 Ga. 694 (1985).

Upon the denial of a Motion for Speedy Trial, whether based on O.C.G.A. § 17-7-170 or the Sixth Amendment to the United States Constitution, a Georgia criminal defendant may seek immediate review of the issue with an appellate court. Hubbard v. State, 254 Ga. 694 (1985); Callaway v. State, 275 Ga. 332 (2002). In Hubbard, this Court analogized that, since a motion for discharge based on prior jeopardy was directly appealable pursuant to Abney v. United States, 431 U. S. 651 (1977), a motion to dismiss based on a failure to afford a defendant a speedy trial pursuant to O.C.G.A. § 17-7-170 would receive similar treatment. This Court found that both the Georgia statutory right to a speedy trial and the federal

prohibition on subjecting a person to trial twice for the same charges involve claimants "concerned with 'embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.'" Hubbard, 254 Ga. at 695, quoting Green v. United States, 355 U. S. 184, 187 (1957).

In response to petitions for certiorari in three cases, this Court held that there was not "any persuasive rationale for departing from settled precedent as to the applicable methods of pre-trial appeal and creating a distinction between constitutional and statutory speedy trial rulings." Callaway v. State, 275 Ga. 332 (2002).

Appellee submits that this Court's consolidation of both the statutory right to a speedy trial and the constitutional right to speedy trial did not take into consideration all of the applicable federal case law on the subject matter. U.S. v. MacDonald, 435 U.S. 850 (1978) and its progeny hold that there is no right to an immediate review in federal court for a speedy trial violation when asserted under the Sixth Amendment to the United States Constitution. "A speedy trial claim is best reviewed after trial when the district court's dismissal is more conclusive and allegations of prejudice are less speculative." Carden v. Montana, 626 F.2d 82, 84 (9th Cir.

1980). In denying relief to Moore, a pre-trial detainee in New Jersey, the Third Circuit noted that "[a] double jeopardy claimant has once endured the rigors of a criminal trial. Moore, by contrast, has not yet stood trial on any of the indictments arising out of the alleged criminal assault. Thus, the constitutional and policy considerations, which may entitle a defendant claiming double jeopardy to have that claim considered in a pre-trial federal habeas petition before state court exhaustion of that issue on the merits do not apply with equal force to Moore's "speedy trial" contention. Accordingly, any reliance by Moore on double jeopardy cases IS MISPLACED." Moore v. De Young, 515 F.2d 437, 446 (3rd Cir. 1975) (citations omitted, emphasis in original).

The goal of a speedy trial claim is to ensure swift disposition of a criminal matter. However, when a criminal defendant is allowed to bring a halt to the trial level proceedings and submit a matter for appellate review, the very right which the accused asserts has been violated is trampled. Consider the recently concluded matter of State v. Hassel, 284 Ga. 861 (2009). The accused in that matter claimed a violation of his right to a speedy trial based on a thirteen month delay. His motion was denied in July 2008, the appeal was docketed in this Court on September

16, 2008 and this Court's opinion was issued, affirming the trial court, on January 26, 2009. A six month delay, nearly one-half the complained of delay between arrest and trial, was introduced into the matter because the accused was able to directly appeal the trial court's denial.

Without requiring an accused to use the discretionary review process or reserving the matter until after trial, an accused can effectively create multiple speedy trial demands by seeking appellate review of the trial court's decisions over and over again. There are few, if any, safeguards to prevent a criminal defendant dissatisfied that his motion for continuance has been denied by the trial judge from filing a constitutional speedy trial demand and upon its denial using the appellate process to obtain the previously sought delay.

This Court looked to the federal courts for guidance in how to resolve an issue and created a process that can become rife with abuse and frustrate the very right that is sought to be defended. Using the case at bar, this Court should adopt the federal courts' stance and review Constitutional or non-statutory speedy trial complaints post-conviction.

III. CONCLUSION

Appellant's right to a speedy trial has only been frustrated by his own actions. The trial court's decision should be affirmed. Additionally, this Court should adopt the appropriate standard and deny any further direct appeals involving Constitutional speedy trial challenges unless the case has been decided on its merits.

Respectfully submitted,

SCOTT L. BALLARD 035561
District Attorney

ROBERT WRIGHT SMITH, JR. 663218
Assistant District Attorney

Fayette County Justice Center
One Center Drive
Fayetteville, Georgia 30214
(770) 716-4250

IN THE SUPREME COURT
STATE OF GEORGIA

BENJAMIN MARTIN ELLIS	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. S09A0767
	*	
STATE OF GEORGIA	*	
	*	
Appellee	*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Response by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

Robert H. Citronberg
303 Peachtree Street
Suite 4100
Atlanta, Georgia 30303

Thomas M. West
400 Colony Square
Suite 200
Atlanta, Georgia 30361

Stephen B. Bright
83 Poplar Street, NW
Atlanta, Georgia 30303

This 22nd day of September, 2009.

ROBERT WRIGHT SMITH, JR.
Assistant District Attorney