

Summary of SC93785, *State of Missouri v. Sylvester R. Sisco II*

Appeal from the Jackson County circuit court, Judge Sandra Midkiff
Argued and submitted October 2, 2014; opinion issued March 10, 2015

Attorneys: Sisco was represented by Clayton E. Gillette of Gillette Law Office LLC in Kansas City, (314) 330-4622, and Patrick W. Peters of Peters & Peters PC in Kansas City, (816) 474-3600. The state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals the trial court's judgment following his convictions in October 2009 for murder, assault and armed criminal action for his involvement in a bar shooting that occurred three years earlier. In a 6-1 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the judgment. The prosecutor had discretion to dismiss the charges against the man and then refile them, and the trial court had no authority to prevent the prosecutor from doing so. Further, analysis of the applicable factors shows the man's constitutional right to a speedy trial was not violated.

Judge Laura Denvir Stith dissents without opinion.

Facts: The state charged Sylvester Sisco II with first-degree murder, first-degree assault and armed criminal action in October 2006 for his involvement in a shooting earlier that month in a Kansas City bar that left one person dead and another seriously wounded. Sisco posted bond and was placed on house arrest in January 2007, and his trial was set for August 2007. Due to a prosecutor's health issues and the trial court's docket constraints, the trial was continued to March 2008. After the judge to whom the case had been assigned was placed on a different special assignment, the trial was reset for June 2008. When the day of trial arrived, Sisco announced he was ready for trial and, that day, had filed a motion for a speedy trial. The state, however, advised the court that one of its witnesses had indicated she would invoke her Fifth Amendment privilege against self-incrimination if called to testify. The witness was granted immunity and ordered to testify, but the court also granted the state a continuance – over Sisco's objection – to conduct DNA testing on a swab from a Bluetooth device recovered at the crime scene. Sisco objected, and after giving the parties an opportunity to file pleadings relating to the issue, held a hearing and, in December 2008, ordered Sisco to provide a swab for comparison and set the trial for April 2009. Five days before trial, the state provided Sisco with discovery reports, including a report from a new fingerprint expert who recently and for the first time had identified a latent print from the crime scene as belonging to Sisco. The state also provided Sisco with enhanced video surveillance footage. The trial court sustained Sisco's motion to exclude the fingerprint evidence but overruled his motion to exclude the surveillance footage. On the day of trial, Sisco announced he was ready to proceed, and the court overruled the state's motion for a continuance. The state then dismissed the charges *nolle prosequi* (a prosecutor's formal notice that the prosecutor no longer will prosecute a pending criminal charge) and filed a new complaint with the same charges against Sisco later in the day. The court set the case for trial in

July 2009, and Sisco filed a second motion for a speedy trial. Although potential jurors were ready for jury selection in July 2009, the court continued the case so the state could respond to various motions Sisco had filed that day, including a motion to dismiss. After overruling the motion to dismiss, the court set the case for trial in October 2009, and it began as scheduled. Sisco again raised – both during and after trial – his claim that his right to a speedy trial had been violated. The jury found Sisco guilty as charged, and the trial court sentenced him to life in prison without the possibility of parole for the murder charge to be served concurrently to consecutive 30-year prison terms for the remaining charges. Sisco appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not err in not converting the prosecutor’s notice of dismissal to a dismissal with prejudice (preventing the case from being refiled) because the court had no authority to do so. A prosecutor has broad discretion to determine whether to proceed with a prosecution, and section 56.087, RSMo, gives the prosecutor discretion to dismiss charges without a court’s consent. Under the statute, unless double jeopardy has attached, a dismissal by a prosecutor will be without prejudice, and the prosecutor has discretion to refile the case within the time permitted by the statute of limitations. As such, a prosecutor may dismiss charges following an unfavorable evidentiary ruling and then refile the charges. At the time the prosecutor dismissed the charges against Sisco, double jeopardy had not attached because the jury had not been empaneled and sworn. As such, the dismissal was without prejudice, and the prosecutor could refile the charges.

(2) The trial court did not err in determining that Sisco’s right to a speedy trial was not violated. While the trial court’s factual findings are subject to deference, this Court reviews de novo (reviewed anew, without deference to the trial court’s conclusions) whether a defendant’s constitutional right to a speedy trial was violated. Determining whether this right has been violated requires balancing four factors, none of which is determinative: the length of delay; the reason for the delay; the defendant’s assertion of this right; and the prejudice to the defendant resulting from the delay. The length of delay is measured from the time the defendant is arrested and charged to the time the trial begins. Missouri courts have found a delay of eight months to be presumptively prejudicial, triggering review of the remaining factors. For Sisco, this delay was nearly three years, which is presumptively prejudicial. Although the length of delay and the state’s use of prosecutorial discretion to dismiss and then refile charges to avoid an adverse ruling is concerning, the state only requested three continuances throughout the period. Most of the delay was due to neutral reasons; only the 70-day delay due to the dismissal and refiling weighs heavily against the state. Further, Sisco waited 20 months to assert his right to a speedy trial, and the actual prejudice he suffered by the delay was minimal. He was incarcerated for only three months following his arrest; thereafter, he was on house arrest and was able to work. Sisco does not identify any witnesses who became unavailable as a result of the delay, nor does he allege that any evidence was lost. The delay actually may have benefited him, as eyewitnesses who gave statements placing him at the crime scene became less cooperative as time passed. Balancing all the factors, the presumption of prejudice is outweighed.