



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,)
)
 Respondent,)
)
 v.) WD72165
)
 SYLVESTER R. SISCO, II,) Opinion filed: January 29, 2013
)
 Appellant.)

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Sandra Midkiff, Judge**

Before Division One: Thomas H. Newton, Presiding Judge,
Joseph M. Ellis, Judge and Gary D. Witt, Judge

Sylvester Sisco appeals from his convictions by jury of one count of murder in the first degree, § 565.020; one count of assault in the first degree, § 565.050; and two counts of armed criminal action, § 571.015. In his sole claim on appeal, Appellant contends that the trial court erred in finding that the State had not violated his right to speedy trial. For the following reasons the judgment is affirmed.

On October 19, 2006, a complaint and arrest warrant were issued against Appellant related to the October 16, 2006, shooting death of Jacob Higgs and the wounding of Reno Dillard at the Filling Station Bar in Kansas City, Missouri. Appellant was taken into custody the following day. On October 27, 2006, Appellant was charged

by indictment with one count of murder in the first degree, one count of assault in the first degree, and two counts of armed criminal action. The case was assigned to Division 10 of the Circuit Court of Jackson County. Defense counsel entered an appearance on behalf of Appellant on November 7, 2006, and filed a request for discovery at that time. Following a pre-trial hearing on January 18, 2007, based upon an agreement between the parties, trial was set for August 20, 2007. Appellant posted bond on January 23, 2007.

On August 14, 2007, the State requested and was granted a continuance until December 10, 2007, based upon health problems with the lead prosecutor. The case was subsequently continued by the court to March 24, 2008, due to docket constraints. After the judge on Division 10 was placed on special assignment to the family court, by agreement of the parties, the case was transferred to Division 18, wherein trial was reset for a special setting on June 30, 2008.

On the date of trial, June 30, 2008, the Appellant announced his readiness to proceed to trial and filed a motion requesting a speedy trial. The State requested and was granted, over Appellant's objection, a continuance after a witness indicated that she planned to invoke her Fifth Amendment right against self-incrimination and another witness could not be located.

Before the case could be reset, Division 18 was assigned to an exclusively domestic docket, and the case was transferred by agreement of the judges to Division 15. On September 18, 2008, the State filed a motion to compel Appellant to provide a Buccal swab for DNA comparison, indicating that it had decided to perform DNA tests

on samples recovered from the crime scene in 2006. A hearing on that motion was held on November 25, 2008. At that time, Appellant opposed the State's motion and asked that the matter be set for trial immediately. Over Appellant's objection, the court granted the State's motion to compel Appellant to produce a Buccal swab and set the case for April 27, 2009.

On April 22, 2009, the State informed Appellant that a new fingerprint expert recently had been asked to review the prints recovered from the crime scene and that expert, for the first time, identified a latent print as belonging to Appellant. The discovery previously provided to Appellant included a report from a different expert stating that none of the fingerprints found at the scene could be tied to Appellant. At that time, the State also informed Appellant that the original fingerprint expert had retired, was out of the state, and would be unavailable to testify at trial.

Appellant filed a motion *in limine* to exclude the new fingerprint evidence. Following a hearing on April 24, the trial court granted the motion *in limine* and denied the State's request for a continuance based upon that ruling.¹ On April 27, after Appellant announced that he was ready for trial and the trial court denied the State's request that it reconsider granting a continuance, the State dismissed the case *nolle prosqui*. The State then filed a new complaint against Appellant later that day, and

¹ Appellant attempts to rely on statements made by the trial court during the hearing on this motion, including a statement that the State's last minute disclosure of the fingerprints was extremely troubling and didn't "pass the smell test" and statements of concern over Appellant's right to speedy trial. But Appellant cites only to a partial transcript included in the appendix to his brief on appeal. The transcript of the hearing is not actually included in the record on appeal. "The mere inclusion of documents in an appendix to a brief does not make them part of the record on appeal," and "this Court will not consider documents and testimony outside the record on appeal." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 823 (Mo. banc 2011) (internal quotation omitted).

Appellant was again arrested. An information was filed against Appellant on May 4, 2009, and following arraignment that same day, the case was assigned to Division 13 and set for trial on July 6, 2009. On May 6, 2009, Appellant filed a second written motion for speedy trial.

On June 29, 2009, Appellant filed a motion to dismiss the case with prejudice based upon a violation of his right to speedy trial. That motion was amended on July 1 to include a claim that the new information was invalid because Appellant had not waived his right to a preliminary hearing. Following a hearing, the trial court determined that Appellant had not waived his right to a preliminary hearing and that such a hearing should be conducted. After Appellant filed a petition for writ of prohibition asking this Court to direct the trial court not to allow the State to proceed under the defective information, on July 10, 2009, the State charged Appellant by indictment, thereby quashing the prior information, and the writ petition was denied.

Appellant filed a motion for change of judge, and the case was re-assigned to Division 12. On August 4, 2009, the court denied Appellant's motions to dismiss for violation of his right to speedy trial and his motion to have the State's prior *nolle prosequi* dismissal of the case declared to be with prejudice. On September 21, 2009, Division 12 set the matter for trial on October 5, 2009.

Appellant's trial began on October 5, 2009. During trial and in his motion for new trial, Appellant again raised his speedy trial claims. Following eleven days of trial, the jury eventually returned verdicts finding Appellant guilty as charged. The trial court subsequently sentenced appellant to a term of life imprisonment without the possibility

of parole on the murder count to be served concurrently with a term of thirty years on the associated armed criminal action count. The court sentenced Appellant to terms of thirty years on the remaining assault and armed criminal action charges to be served concurrently with each other and consecutively with the other sentences.

In his sole point on appeal, Appellant contends that the trial court erred in denying his motion to dismiss and finding that the government had not violated his right to speedy trial. He further contends that the trial court erred for the same reasons in refusing to convert the State's *nolle prosequi* dismissal into a dismissal with prejudice.

The latter argument is easily resolved. Under Missouri case law, "once a prosecutor dismisses a case without prejudice, a court 'has no authority to convert the dismissal to one with prejudice or to force the prosecutor to trial.'" ***State v. Clinch***, 335 S.W.3d 579, 583 (Mo. App. W.D. 2011) (quoting ***State v. Honeycutt***, 96 S.W.3d 85, 89 (Mo. banc 2003)). The trial court could not possibly have erred in failing to do what it had no authority to do.

The only issue remaining, then, is whether the trial court erred in denying Appellant's motion to dismiss based upon a violation of his constitutional right to speedy trial.² "Appellate courts review a trial court's ruling on a motion to dismiss for abuse of

² In addition to the alleged constitutional violations, Appellant contends that the motion to dismiss should have been granted as a result of a violation of § 545.780, which provides:

1. If defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter.
2. The provisions of this section shall be enforceable by mandamus. Neither the failure to comply with this section or the state's failure to prosecute shall be grounds for the dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial.

discretion." **State v. Ferdinand**, 371 S.W.3d 844, 850 (Mo. App. W.D. 2012) (internal quotation omitted). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." **Id.**

"The defendant's right to a speedy trial is founded upon the Sixth Amendment of the United States Constitution and Mo. Const. art. I, § 18(a)." **State v. Taylor**, 298 S.W.3d 482, 504 (Mo. banc 2009). "These constitutional provisions provide equivalent protection for a defendant's right to a speedy trial." **State ex rel. Garcia v. Goldman**, 316 S.W.3d 907, 911 (Mo. banc 2010) (internal quotation omitted). "The Sixth Amendment guarantees that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." **Doggett v. U.S.**, 505 U.S. 647, 650, 112 S.Ct. 2686, 2690, 120 L.Ed.2d 520 (1992). "The protections of the speedy trial provisions attach when there is a formal indictment or information or when actual restraints are imposed by arrest and holding to answer a criminal charge." **State ex rel. Garcia**, 316 S.W.3d at 911 (internal quotation omitted).

"In analyzing whether a defendant's rights to a speedy trial have been violated, courts consider and balance all of the circumstances, and weigh four factors as set forth by the United States Supreme Court in *Barker v. Wingo*: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to

Under the unambiguous language of the statute, dismissal is not allowable unless it is established that the defendant's constitutional rights were violated. Accordingly, the analysis of Appellant's arguments is one and the same. We gratuitously note that § 545.780 would have allowed Appellant to attempt to enforce its provisions and force a speedy trial through a writ of mandamus. Appellant did not pursue such a remedy in this action.

the defendant." **State v. Greenlee**, 327 S.W.3d 602, 611 (Mo. App. E.D. 2010). None of these four factors is "either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." **Barker v. Wingo**, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972). "The [*Barker*] test is obviously not designed to supply simple, automatic answers to complex questions, but rather, it serves as a framework for a difficult and sensitive balancing process." **Ferdinand**, 371 S.W.3d at 851 (internal quotation omitted). "Thus, the right necessarily depends upon the facts and circumstances of each case." *Id.*; see also **Vermont v. Brillon**, 556 U.S. 81, 129 S.Ct. 1283, 1291, 1292, 173 L.Ed.2d 231 (2009) ("*Barker's* formulation necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. . . . The factors identified in *Barker* have no talismanic qualities; courts must engage in a difficult and sensitive balancing process.") (internal quotations omitted).³

Barker analysis actually involves a two-stage inquiry. **Doggett**, 505 U.S. at 650, 112 S.Ct. at 2690. "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial'⁴ delay since, by definition, he cannot complain

³ As noted in **Barker v. Wingo**, 407 U.S. 514, 522, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972):

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

⁴ "[A]s the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a

that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness." *Id.*, 505 U.S. at 652, 112 S.Ct. at 2690-91 (internal citation omitted). "If the accused makes this showing, the court must consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Id.*, 505 U.S. at 652, 112 S.Ct. at 2691.

"Missouri courts have found that a delay of greater than eight months is presumptively prejudicial." *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 911 (Mo. banc 2010) (internal quotation omitted). From the date of Appellant's arrest, just short of three years passed prior to Appellant being brought to trial.⁵ Thus, the delay was presumptively prejudicial, and stretched on for almost 28 months beyond the presumptively prejudicial point. We must therefore consider this delay along with the other three *Barker* factors and determine whether the trial court abused its discretion in determining Appellant's right to speedy trial was not violated under the totality of the circumstances presented.

The second *Barker* factor is the reason for the delay in bringing Appellant to trial. As to this factor, "[w]e are to determine whether the trial court could have reasonably decided the delay was or was not justified." *Ferdinand*, 371 S.W.3d at 853 (internal quotation omitted).

statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. U.S.*, 505 U.S. 647, 652 n.1, 112 S.Ct. 2686, 2691 n.1, 120 L.Ed.2d 520 (1992).

⁵ Approximately 30 months passed between Appellant's arrest and the State's dismissal *nolle prosequi* and immediate re-filing of the case against Appellant.

"The burden is upon the State to accord an accused a speedy trial, and if there is delay it becomes incumbent upon the State to show the reasons which justify that delay." **Greenlee**, 327 S.W.3d at 611-12(internal quotation omitted). "Different weights are assigned to different reasons for a delay." **State ex rel. Garcia**, 316 S.W.3d at 911. "A deliberate attempt by the state to delay the trial is weighed heavily against the government, while a more neutral reason such as negligence should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." **Id.** (internal quotation omitted). As recognized by the United States Supreme Court:

Although negligence is obviously to be weighed more lightly than deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Doggett, 505 U.S. at 657, 112 S.Ct. at 2693-94 (internal quotations and citations omitted). On the other hand, valid reasons for delay, like a missing witness, are not held against the State. **Ferdinand**, 371 S.W.3d at 853. Similarly, delays attributable to the defendant's continuances, motions, or other actions are not held against the State

and must be subtracted from the total delay. **State v. Newman**, 256 S.W.3d 210, 214 (Mo. App. W.D. 2008).

For speedy trial purposes, the clock began running on Appellant's right to speedy trial when he was arrested on October 20, 2006. Following a pre-trial hearing on January 18, 2007, trial was set for August 20, 2007.

On August 14, 2007, the State requested and was granted a continuance until December 10, 2007, based upon health problems with the lead prosecutor. The case was subsequently continued by the court to March 24, 2008, due to docket constraints. After the judge on Division 10 was placed on special assignment to the family court, by agreement of the parties, the case was transferred to Division 18, wherein trial was reset for a special setting on June 30, 2008. These are neutral reasons for the State delaying Appellant's trial and, as such, are weighed slightly against the State. **State ex rel. Garcia**, 316 S.W.3d at 911.

On the date of trial, June 30, 2008, the Appellant announced his readiness to proceed to trial and filed a motion requesting a speedy trial. The State requested and was granted, over Appellant's objection, a continuance after a witness indicated that she planned to invoke her Fifth Amendment right against self-incrimination and another witness could not be located. The trial court could properly consider these to be justifiable reasons for delay on the part of the State and not counted a reasonable period of time thereafter against the State. **Ferdinand**, 371 S.W.3d at 853.

At a hearing on November 25, 2008, Appellant asked that the matter be set for trial immediately, and the court set the case for April 27, 2009. Following a hearing on

April 24, the trial court granted a motion *in limine* requested by Appellant and denied the State's subsequent request for a continuance based upon that ruling. On April 27, after Appellant announced that he was ready for trial and the trial court denied the State's request that it reconsider granting a continuance, the State dismissed the case *nolle prosqui*. The State then filed a new complaint against Appellant later that day, and Appellant was again arrested. As the State's action in dismissing and refiling the case was intentional and solely designed to delay trial and circumvent adverse rulings by the trial court, the resulting delay must be weighed heavily against the State.⁶

On May 4, 2009, the case was assigned to Division 13 and set for trial on July 6, 2009. On May 6, 2009, Appellant filed a second written motion for speedy trial. On June 29, 2009, Appellant filed a motion to dismiss the case with prejudice based upon a violation of his right to speedy trial.

On July 1, 2009, Appellant claimed for the first time that the new information was invalid because he had not waived his right to a preliminary hearing. Following a hearing, the trial court determined that Appellant had not waived his right to a preliminary hearing and that such a hearing should be conducted. After Appellant filed a petition for writ of prohibition asking this Court to direct the trial court not to allow the State to proceed under the defective information, on July 10, 2009, the State charged Appellant by indictment, thereby quashing the prior information, and the writ petition

⁶ Indeed, had Appellant been able to prove both that the delay was an intentional device to gain tactical advantage over Appellant and that it caused substantial prejudice to his right to a fair trial, the trial court would have been required to dismiss the charges against him. *State v. Morris*, 285 S.W.3d 407, 413 (Mo. App. E.D. 2009). Appellant failed, however, to prove that his right to fair trial was substantially prejudiced.

was denied. The ten days of delay resulting from Appellant's procedural challenge is not counted against the State.

Appellant then filed a motion for change of judge, and the case was re-assigned to Division 12. The delays resulting from this maneuver are attributable to Appellant and do not weigh against the State. Division 12 set the matter for trial on October 5, 2009, and that is when he was tried.

The third *Barker* factor that must be considered is "whether, in due course, the defendant asserted his right to a speedy trial." *Doggett*, 505 U.S. at 650, 112 S.Ct. at 2690. This factor is viewed under the totality of the circumstances, considering the timeliness of the assertion of the right and the frequency and force of the defendant's objections. *Barker*, 407 U.S. at 522-31, 92 S.Ct. at 2188-92.

In its brief, citing *State v. Bohannon*, 793 S.W.2d 497, 504 (Mo. App. S.D. 1990), the State argues that any delay of five months or more in asserting speedy trial rights should be deemed sufficient to attenuate any delay attributable to the State in bringing a defendant to trial, before or after the demand is made. It claims that any time a defendant does not assert his right to speedy trial within such a bright line period, this factor should be weighed against the defendant or, at least, not weighed against the State. The State's position in this regard is untenable.

"There is no fixed requirement for when the right must be asserted; rather, the circumstances surrounding the assertion or failure thereof comprise the factor to be weighed." *Newman*, 256 S.W.3d at 216 (internal quotation omitted). In *Barker*, the Supreme Court stated that "there is no fixed point in the criminal process when the

State can put the defendant to the choice of either exercising or waiving the right to a speedy trial." *Barker*, 407 U.S. at 521, 92 S.Ct. at 2187. Furthermore, the Court rejected demand-waiver rules, that had been adopted in a large number of jurisdictions, which provided that the defendant was deemed to have waived consideration of his right to speedy trial for any period prior to making a formal demand for a speedy trial.

Id., 407 U.S. at 525, 92 S.Ct. at 2189. In so doing, the Court noted:

[A] rigid view of the demand-waiver rule places defense counsel in an awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client's right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time.

Id., 407 U.S. at 527, 92 S.Ct. at 2191-92. It bears noting that, even under the various demand-waiver rules prior to *Barker*, delays attributable to the State after the right to speedy trial was asserted were not deemed to have been waived.

Barker requires any court assessing whether the defendant's right to speedy trial to weigh the defendant's assertion of his rights under the totality of the circumstances in the context of that specific case. *Id.*, 407 U.S. at 521, 92 S.Ct. at 2187. "Whether and how a defendant asserts his right is closely related to the other factors. . . . The strength of his efforts will be affected by the length of the delay, to some extent by the reasons for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." *Id.*, 407 U.S. at 531, 92 S.Ct. at 2192. Indeed, in *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 911 (Mo. banc 2010), the Missouri Supreme Court noted that, under the circumstances of that case, asserting the

right to a speedy trial within ten months of indictment and arrest was properly viewed by the trial court as a reasonable time in which to have raised the speedy trial claim. Thus, the State's assertion that any delay in asserting the right over five months after arrest should render this factor favorable to the State is contrary to Missouri case law.

Moreover, the timing of the defendant's assertion of his right to speedy trial shades differently delays attributable to the State prior to the assertion of that right than it does delays attributable to the State occurring after the right has been expressly asserted. It is far more reasonable for the State to allow delays where it may reasonably believe that the defendant is acquiescing in such delays and preparing his or her defense. Once the right has been affirmatively asserted, however, even if raised long after the charges are brought, the State is unquestionably placed on notice from that point onward that the defendant desires an expeditious resolution of the charges against him, and delays occurring after that point must be weighed more heavily against the State than those occurring before the right is asserted and the weight increases proportionally as time drags on.

In the case at bar, Appellant first asserted his right to speedy trial on June 30, 2008, announcing that he was ready for trial and requesting a speedy trial. From his actions up to that point, having failed to file a motion for speedy trial early in the case and failing to voice any speedy trial related concerns about how the case was proceeding up until that point, the trial court could more than reasonably have inferred that Appellant was satisfied with the speed at which the case against him had been brought and that Appellant had utilized that time to prepare his own defense.

Accordingly, the trial court could properly have assigned little to no weight to the delays occurring before June 30, 2008.

After June 30, 2008, Appellant reasserted his right to speedy trial on several occasions both verbally and in writing. He eventually pursued dismissal of the charges based upon a violation of his right to speedy trial on May 6, 2009. Thus, Appellant sought to have his case brought to trial for almost a year prior to moving for dismissal of the case, thereby differentiating this case from those where the defendant fails to request a speedy trial and brings the issue to light for the first time in a motion to dismiss. The delays attributable to the State from the time Appellant first asserted his right to speedy trial on June 30, 2008, until he was eventually tried on October 5, 2009, must be weighed more heavily against the State, though not as heavily as if Appellant had pursued a speedy trial from the outset of the case.

While Appellant claims that the trial court should have deemed all of the delays caused by the State, including the continuance due to the prosecutor's illness, to have been intentional rather than negligent because of the alleged weakness of the State's evidence at the relevant times, Appellant has failed to identify any additional evidence presented by the State at trial that was not available to the State at the time of the delays, and he has not challenged the sufficiency of the evidence to support his conviction on appeal. The trial court was certainly not required to reach the inference drawn by Appellant on appeal.

The final *Barker* factor that must be considered is the prejudice to the defendant. "There are three considerations in determining whether a delay has prejudiced the

defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired." **State ex rel. Garcia**, 316 S.W.3d at 912. "Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." **Doggett**, 505 U.S. at 652, 112 S.Ct. at 2691; see also **State ex rel. Garcia**, 316 S.W.3d at 912.

"Generally, prejudice must be actual prejudice apparent on the record or by reasonable inference – not speculative or possible prejudice." **State ex rel. Garcia**, 316 S.W.3d at 912 (internal quotation omitted). "More recently, however, the United States Supreme Court allowed a speedy trial claim to stand absent particularized prejudice." **Id.** (citing **Doggett**, 505 U.S. 647, 112 S.Ct. 2686). "Negligence, the Supreme Court said, is not 'automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.'" **Id.** (quoting **Doggett**, 505 U.S. at 657, 112 S.Ct. at 2693). Accordingly, "'affirmative proof of particularized prejudice is not essential to every speedy trial claim,' as 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.'" **Id.** at 913 (quoting **Doggett**, 505 U.S. at 655, 112 S.Ct. at 2692-93). "While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay."⁷ **Doggett**, 505 U.S. at 655-56, 112 S.Ct. at 2693 (internal citation omitted). "Between diligent prosecution and bad-faith delay, official negligence in

⁷ Such presumptive prejudice is rebuttable by the State. **State ex rel. Garcia**, 316 S.W.3d at 913.

bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.*, 505 U.S. at 656-57, 112 S.Ct. at 2693.

Appellant was incarcerated for three months prior to being released on bond. While on bond, he was electronically monitored and was under house arrest when he was not working. While the State argues that Appellant cannot be deemed to have sustained any prejudice as a result of pre-trial incarceration because he was ultimately sentenced to a term of life imprisonment without the possibility of parole, he was certainly subject to some degree of pre-trial incarceration, albeit not particularly oppressive incarceration. The restrictions on his freedom during the almost three years it took to bring him to trial certainly gave rise to some degree of prejudice.

Appellant did not present any concrete evidence that he suffered from any anxiety or concern during the pendency of this action aside from generally raising speedy trial claims. It was for the trial court to determine whether anxiety and concern should weigh into the equation and to what degree.

Appellant also fails to establish that his defense was impaired by the delays in this case. He does not identify any evidence that any aspect of his defense was eroded by time, nor does he identify any aspect of the State's case that improved over time.⁸ With regard to this aspect of prejudice, Appellant is left to rely upon the presumptive prejudice recognized in *Doggett*. "While such presumptive prejudice cannot alone carry

⁸ The fingerprint evidence was ultimately excluded at trial.

a Sixth Amendment claim without regard to the other . . . criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." **Newman**, 256 S.W.3d at 217 (quoting **Doggett**, 505 U.S. at 655, 112 S.Ct. at ____). However, "[t]o be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." **Doggett**, 505 U.S. at 657, 112 S.Ct. at 2694.

Viewing all of the *Barker* factors and the totality of the circumstances, while the record could likewise have supported a contrary decision by the trial court, the trial court cannot be deemed to have abused its discretion in determining that Appellant's right to speedy trial was not, in fact, violated in this case. The State's actions resulted in a delays totaling over four times longer than the presumptively-prejudicial eight-month delay deemed sufficient to trigger speedy trial judicial review. For the first twenty months of that time, however, Appellant did not assert his right to a speedy trial and did not voice any objection to the continuances requested by the State. The trial court could reasonably have determined that Appellant acquiesced in this initial delay. As to the remaining delay, a large portion of it must be weighed against the State, especially the delay caused by the State's dismissal and re-filing of the case, unabashedly seeking to avoid a negative *in limine* ruling and the denial of a further continuance by the trial court. Finally, Appellant failed to provide concrete evidence of prejudice that his defense was compromised by these delays, and while some degree of prejudice to Appellant can be presumed, the weight given any prejudice in this case was for the trial court to assess, as the amount of time passing after the assertion of the right to speedy

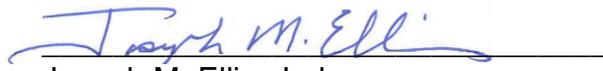
trial was not so egregious as to conclusively establish sufficient prejudice to warrant dismissal.⁹ Thus, the ultimate decision in this case rested squarely within the discretion of the trial court. Under our standard of review, the trial court cannot be deemed to have erred in denying Appellant's motion for dismissal, and the judgment must be affirmed.

While our standard of review dictates that the Appellant's conviction and sentences be affirmed, the State was walking exceedingly close to the precipice in more than one regard in this case. The record herein could easily have supported a finding by the trial court that the Appellant's right to a speedy trial had been violated, and under our standard of review, this Court would have similarly been obliged to affirm that finding by the trial court. The State's repeated delays in producing additional discovery until the eve of the various trial dates and use of a *nolle prosequi* on the day of trial solely to avoid an *in limine* order and the denial of a motion for continuance, at a minimum, create an appearance of unfairness to a defendant who has requested a speedy trial. Regrettably, this Court has seen similar suspect discovery practices before, albeit in circumstances other than speedy trial analysis. See ***State ex rel. Jackson Cnty. Prosecuting Attorney v. Prokes***, 363 S.W.3d 71, 85 (Mo. App. W.D. 2011).

⁹ See ***Doggett***, 505 U.S. at 657, 112 S.Ct. at 2694 ("When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief.") (internal citations omitted).

The recurrence of such behavior by the same office is certainly a factor to be weighed in the context of the totality of the circumstances in the speedy trial analysis for "the role of a prosecutor is to see that justice is done." *Id.* (quoting **Connick v. Thompson**, ___ U.S. ___, 131 S.Ct. 1350, 1365, 179 L.Ed.2d 417 (2011)). We would encourage a careful review of the trial practices of the prosecutors within that office with a goal of avoiding in the future even the appearance of any impropriety for "[i]t is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* (quoting **Connick**, ___ U.S. at ___, 131 S.Ct. at 1365). "Moreover, a prosecuting attorney in a criminal case acts as a quasi-judicial officer representing the people of the State; his [or her] duty is not to convict at any cost but to see that justice is done **and** that the accused receives a fair and impartial trial." *Id.* (emphasis in original). "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when an accused is treated unfairly." *Id.* Furthermore, "[a] speedy trial is not only for the benefit of the defendant, it is also for the benefit of society." **State ex rel. McKee v. Riley**, 240 S.W.3d 720, 731 (Mo. banc 2007) (internal quotation omitted).

The judgment of the trial court is affirmed.


Joseph M. Ellis, Judge

All concur.