

SUPREME COURT OF GEORGIA

Christian v. State, 281 Ga. 474

640 S.E.2d 21 (2007) · No. S06A1755 · Decided January 8, 2007

OPINION

CARLEY, J.

640 S.E.2d 21 (2007) CHRISTIAN v. The STATE. No. S06A1755. Supreme Court of Georgia. January 8, 2007. *23 Carl P. Greenberg, Atlanta, GA, for Appellant. Paul L. Howard, Jr., Dist. Atty., Peggy Ann Katz, Asst. Dist. Atty., Thurbert E. Baker, Atty. Gen., Laura D'Ann Dyes, Asst. Atty. Gen, Bettieanne C. Hart, Asst. Dist. Atty., for Appellee. CARLEY, Justice.

After a bench trial, Appellant Cheryl Christian was found guilty of felony murder of her three-year old daughter. She was also found guilty on separate counts of cruelty to children and aggravated assault on the young victim.

The predicate felony for the murder conviction was cruelty to children, which offense, as alleged in the indictment, consisted of Appellant's act of striking her daughter in the abdomen with an unknown object. After entering judgments of conviction on its findings of guilt, the trial court imposed a life sentence for murder, and concurrent 20-year sentences for the other two crimes.

Subsequently, the trial court denied Appellant's motion for new trial, and she appeals.[*] 1. At the time of her death, the child weighed only 27 pounds. The medical examiner testified that, in his opinion, she died within an hour or so after being hit in the abdomen, and that the fatal blow was not inflicted accidentally. During the relevant time period, Appellant was the only adult in the house with her son and daughter.

Her son testified that he overheard his mother threaten to whip his sister if she soiled her clothing again. Shortly thereafter, he heard his sister coughing and gagging. Appellant called 911, and the child was transported to the hospital where she was pronounced dead. Initially, Appellant admitted beating her daughter with a belt the preceding night, but she did not acknowledge any responsibility for the death.

After an autopsy showed that the victim had died from a blow to her abdomen, however, Appellant stated that she may have stepped on the child accidentally. When construed most strongly in support of the trial court's findings, the evidence is sufficient to authorize a rational trier of fact to find proof of Appellant's guilt of felony murder, cruelty to children and aggravated assault beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Because the separate cruelty to children and aggravated assault counts were based upon acts committed by Appellant on the day preceding the death of the victim, neither of those convictions merges into the felony murder count and, accordingly, separate sentences for those crimes were authorized.

2. Appellant filed a motion to dismiss, asserting a violation of her constitutional right to a speedy trial. The trial court denied the motion, and she enumerates that ruling as error. Appellant was arrested in May of 1998, shortly after the death of her daughter. She was not indicted until August of 2001, a delay of some 39 months.

The trial did not begin until June of 2003. Thus, 61 months elapsed between the arrest and trial. In examining an alleged denial of the constitutional right to a speedy trial, courts must engage in a balancing test with the following factors being considered: (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.

Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The existence of no one factor is either necessary or sufficient to sustain a speedy trial claim, and a trial court's findings of *24 fact and its weighing of disputed facts will be afforded deference on appeal. [Cits.] Williams v. State, 277 Ga. 598, 599(1), 592 S.E.2d 848 (2004). Length of the delay.

In calculating the length of the delay, the constitutional right to a speedy trial attaches on the date of arrest or when formal charges are initiated, whichever is earlier. Wimberly v. State, 279 Ga. 65, 608 S.E.2d 625 (2005).

Here, that would be May of 1998, when Appellant was arrested. The delay of over five years before she was brought to trial "is so extraordinarily long as to be considered presumptively prejudicial and to require the consideration of the remaining factors in the balancing test. [Cit.]" Williams v. State, supra at 599(1)(a), 592 S.E.2d 848. Reason for the delay.

The only reason the prosecution offered for the 39-month delay between Appellant's arrest and indictment was its inability to obtain the victim's medical records from the hospital. While the records may have been informative and helpful, the State did not show that, without them, obtaining an indictment was impossible or even difficult.

In fact, it appears that when the indictment eventually was returned against Appellant, the child's medical records still had not been turned over to the prosecution by the hospital. Moreover, the inaccessibility of the records did not account fully for the 39-month pre-indictment delay.

Thus, insofar as that portion of the 61-month period between Appellant's arrest and trial is concerned, "a review of the State's reasons for the delay reveals no valid explanation.... However, there is nothing evidencing `that most serious abuse'"A deliberate attempt to delay the trial in order

to hamper the defense...." [Cit.] [Cit.]" *Nelloms v. State*, 274 Ga. 179, 180, 549 S.E.2d 381 (2001). "[I]f the delay attributable to the [S]tate's preparation of its case is not deliberate but is negligent, it is weighted as a 'relatively benign' factor against the [S]tate.

[Cits.]" *Jackson v. State*, 272 Ga. 782, 784, 534 S.E.2d 796 (2000). On the other hand, the 22-month delay between indictment and trial was attributable, at least in part, to Appellant, who sought a continuance on one or more occasions. These actions by the defense clearly contributed to the [6]1 month delay in bringing [her] to trial. "Thus, to the extent the reason for delay is attributable to the [S]tate, it is a relatively benign but definitely negative factor."

[Cit.] *Nelloms v. State*, supra. Assertion of the Right to Speedy Trial. "[D]elay often... work[s] to a defendant's advantage. [Cit.]" *Perry v. Mitchell*, 253 Ga. 593, 595, 322 S.E.2d 273 (1984). This consideration plays into the third factor, i.e., the assertion of the right to a speedy trial. This factor "is entitled to strong evidentiary weight' against the defendant, (cit.)" [cit.], where, as here, [Appellant] filed no statutory demand for speedy trial pursuant to OCGA § 17-7-171 and did not raise [her] constitutional right to a speedy trial for the [6]1 months between [her] arrest and the filing of [her] motion to dismiss, in which [she] finally asserted the right.

This delay in asserting [her] right to a speedy trial must be weighted against [Appellant]. [Cit.] *Nelloms v. State*, supra at 181, 549 S.E.2d 381. Prejudice: *Barker v. Wingo*, supra, identifies three interests that the speedy trial right is designed to protect, "the last being the most important: (a) to prevent oppressive pretrial incarceration; (b) to minimize anxiety and concern of the accused; and (c) to limit the possibility that the defense will be impaired.'

[Cit.]" *Williams v. State*, 279 Ga. 106, 109(1)(d), 610 S.E.2d 32 (2005). Appellant was free on bond for all but three months of the 61-month period, and she did not show that she was subjected to oppressive pre-trial incarceration. See *Smith v. State*, 275 Ga. 261, 263, 564 S.E.2d 441 (2002); *Jackson v. State*, supra at 785, 534 S.E.2d 796. "As for the second prejudice factor, anxiety and concern of the accused, 'it is always present to some extent, and thus absent some unusual showing is not likely to be determinative in defendant's favor.'

[Cits.]" *Boseman v. State*, 263 Ga. 730, 733(1)(d), 438 S.E.2d 626 (1994). Appellant did not make "any showing in the record that the delay caused [her] significant anxiety and concern beyond that generally experienced *25 by defendants in [her] situation. [Cits.]" *Salahuddin v. State*, 277 Ga. 561, 563(2), 592 S.E.2d 410 (2004). With regard to impairment of her defense, Appellant claims that, because of the delay, the tape of her 911 call, her daughter's medical records and two witnesses were unavailable.

However, she did not show how the tape or the records were material to her defense of the murder and related charges. Applying the necessity exception to the hearsay rule, the trial court admitted into evidence the statement of one of the missing witnesses. See *Brannen v. State*, 274 Ga. 454,

458, 553 S.E.2d 813 (2001) (prejudice resulting from missing defense witness "alleviated" by stipulation to admissibility of his statement).

Moreover, his statement was of minimal importance, since he neither directly exculpated Appellant nor directly inculpated anyone else for the acts which resulted in the child's injuries and death. Compare *Hardeman v. State*, 280 Ga.App. 168, 171(4), 633 S.E.2d 595 (2006) (testimony of deceased witness "material" and "went to the heart of the defense").

The other missing witness was Appellant's uncle, who had supervised her two children during the day on which the death occurred. However, she did not show that he was a material witness whose testimony was relevant to her defense and might have supported a different result in her bench trial. Balancing these factors, we conclude that although the State was negligent in failing to bring [A]ppellant to trial in a timely fashion, that consideration is outweighed by the facts that [A]ppellant suffered little actual prejudice to [her] defense, suffered no unduly oppressive pretrial incarceration and waited a significant amount of time before asserting [her] right to a speedy trial.

Hence, the trial court properly ruled that [she] was not unconstitutionally denied [her] speedy trial rights. *Salahuddin v. State*, supra at 563(2), 592 S.E.2d 410. Judgments affirmed. All the Justices concur. NOTES [*] The homicide occurred on May 16, 1998, and the other crimes were committed on the preceding day.

The grand jury indicted Appellant in August of 2001, and reindicted her on April 22, 2003. On July 14, 2003, the trial court entered the judgments of conviction and sentences on its findings of her guilt. Appellant filed a timely motion for new trial, which the trial court denied on November 10, 2005. Appellant filed a notice of appeal on November 21, 2005, and the case was docketed in this Court on June 22, 2006.

The appeal was submitted for decision on the briefs.