1983

# The State of Utah v. Robert Steven Smith : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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| THE STATE OF UTAH | : | |
| Plaintiff/Respondent | : | |
| -v- | : | |
| ROBERT STEVEN SMITH | : | Case No. 19053 |
| Defendant/Appellant | : | |

BRIEF OF APPELLANT

Appeal from a judgment and conviction of Attempted Robbery, a Third Degree Felony, and Attempted Burglary, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable David B. Dee presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, ROBERT STEVEN SMITH, appeals from a judgment and conviction of Attempted Robbery, a Third Degree Felony, and Attempted Burglary, a Third Degree Felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable David B. Dee presiding.

DISPOSITION IN THE LOWER COURT

Appellant was convicted by a jury of Attempted Robbery, a Third Degree Felony, and Attempted Burglary, a Third Degree Felony, in violation of §76-6-301, §76-6-202, and §76-4-101, Utah Code Ann. (1978).

## RELIEF SOUGHT ON APPEAL

Appellant seeks to have the conviction and judgment against him reversed and the charges dismissed.

## STATEMENT OF FACTS

On October 15, 1981, Robert Steven Smith was arrested by personnel in the South Salt Lake City Police Department (Trial transcript for 1/14/83 at 193, 1/18/83 at 26). On that date, statements were given to the South Salt Lake City Police by Brian Scott Moss and Gilbert Anthony Sisneros which implicated Appellant in an alleged burglary and robbery scheme in the household of Myra E. Kuhre. (Findings, Conclusions and Order on Motion to Dismiss on the Grounds of Pre-Accusation Delay, Dated January 11, 1983, at 2 (hereinafter cited as Findings)). Those allegations formed the basis for the charges contained in a four count Information that was filed against the appellant on September 7, 1982 (Findings at 5), which case was then tried below in the Third District Court, Salt Lake County, State of Utah, beginning January 13, 1983.

From October 15, 1981, to the present date, Appellant has been in the custody of the Utah State Prison (Findings at 4). On the above date, prior to his arrest, Appellant was a resident in a half-way house on a work release status. Id. Due to the arrest by the South Salt Lake City Police resulting from the accusations by the above-named witnesses, Appellant's

half-way house status was revoked and he was returned to the Utah State Prison (Findings at 4). He remained in prison pending the filing of the charges and the trial of this case. Id. A January 12, 1982, parole date that had been set for Appellant was rescinded by the Board of Pardons due to the suspected criminal activity that is the subject of this case (Findings at 4, 5).

Evidence of Appellant's involvement in the crimes charged in this case was first obtained by law enforcement authorities on October 15, 1983. (Findings at 2). That evidence consisted of post-Miranda statements given by Brian Scott Moss and Gilbert Anthony Sisneros. In brief summary, those statements indicated that Moss and Sisneros had been picked up by Appellant on October 15, 1981, that materials for a burglary were in the car, and that a plan was made to burglarize the home of Myre E. Kuhre.

At trial, the only evidence adduced that went to the guilt of Robert Steven Smith was the above testimony from Brian Scott Moss and Gilbert Anthony Sisneros (see transcript of trial in general).

## ARGUMENT

### POINT I

### UNNECESSARY DELAY BY THE STATE OF APPROXIMATELY ELEVEN MONTHS BETWEEN APPELLANT'S ARREST AND THE DATE FORMAL CHARGES WERE FILED AGAINST HIM VIOLATED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

#### A. THE RIGHT TO A SPEEDY TRIAL IS A FUNDAMENTAL GUARANTEE OF THE SIXTH AMENDMENT AND SERVES TO PROTECT ACCUSED PEOPLE FROM MISCARRIAGES OF JUSTICE.

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." The Magna Carta set forth the right in 1215, stating, "We will sell to no man, we will not deny or defer to any man either justice or right." Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) citing to Magna Carta, C 29 [c 40 of King John's Charter of 1215] (1225) in footnote 8. Sir Edward Coke noted delay of a trial would improperly deny justice and would be contrary to the law and custom of England. Klopfer at 224. The Supreme Court in Klopfer noted our founding fathers considered the right fundamental. Id. at 225.

The Sixth Amendment Right to Speedy Trial has multiple purposes. People v. Prosser, 309 N.Y. 353, 355, 130 N.E. 2d 891, 893 (1955), sets forth three purposes of the guarantee. First, it protects the accused against prolonged imprisonment. Second, it relieves the accused of anxiety and public suspicion

Third, it protects him from hazards of standing trial so far removed in time that means of proving his innocence are no longer available. The third enumerated reason is particularly important for the accused who is imprisoned because he is at lease able to assist in preparation of his defense. See United States v. Ewell, 383 U.S. 116 (1966). This Court noted the purpose of the Sixth Amendment to prevent undue and oppressive pretrial detention, minimize the anxiety and concern of unresolved accusations and prevent the miscarriage of justice caused by the impaired ability of the defendant to prepare a defense in State v. Lozano, 23 Utah 2d 312, 314, 426 P.2d 710 (1969).

In the leading case of Barker v. Wingo, 407 U.S. 514, 519-20 (1972), the Supreme Court established the societal interest in preservation of the right. The Court noted speedy trials would reduce the likelihood of crimes being committed by those free on pretrial release programs. The Court also noted accused people might be more inclined to manipulate pleas because of overcrowded court calendars, thereby weakening the criminal justice system. Also, delays in coming to trial decrease the chances of success in the rehabilitation process by extending the length of time before an accused can be

admitted into such a program. Finally, the Court noted the financial and administrative costs incurred by lengthy pretrial detention.

B. THE RIGHT TO SPEEDY TRIAL ATTACHED OCTOBER 15, 1981, WHEN APPELLANT WAS ARRESTED.

The Supreme Court, in Dillingham v. United States, 432 U.S. 64 (1975), addressed the question of when the right to a Speedy Trial attached. That decision held that a 22-month delay between the petitioner's arrest and indictment constituted unconstitutional deprivation of his Sixth Amendment speedy trial rights. In so holding, the Court further concluded that "it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." Id. at 65 (emphasis added). Quoting from United States v. Marion, 404 U.S. 307 (1971), the Court reasoned, "On its face, the protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." Id. at 64-65. The court continued: "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge." Applying Dillingham to the present case, Mr. Smith's Sixth Amendment right attached on the date of his arrest, not the date he was formally charged.

In United States v. Marion, 404 U.S. 307 (1971), the Court had earlier addressed the question of whether a three year delay in the pre-indictment period constituted either an unconstitutional denial of due process or an unconstitutional denial of the Sixth Amendment right to speedy trial. In holding the delay was not unconstitutional, the Court found the Sixth Amendment right did not attach until the indictment was handed down. Factually Marion differs from the case at bar because in Marion the arrests did not occur until after the indictment. In the present case, Mr. Smith was arrested October 15, 1981, and not charged until September 7, 1982. Therefore, he stood "accused" on October 15, 1981, and was protected by speedy trial provisions of the Sixth Amendment. Marion at 325. See also United States v. Lovasco, 431 U.S. 783 (1977), where the Court held no violation of speedy trial rights due to a pre-indictment delay of 18 months since the occurrance of the offense. Again, no arrest took place until after the indictment, distinguishing Lovasco from the case at bar.

State v. Almeida, 509 P.2d 549, 551 (Hawaii 1973), provides further support for the time of arrest as triggering the protections of the Sixth Amendment. In Almeida, the

court explained that either formal indictment or information or restraint of liberty imposed by arrest, whichever occurred first, would commence the protection of the Sixth Amendment.

C. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL IS NOT SUPPLANTED BY THE STATUTE OF LIMITATIONS.

Although both Dillingham and Marion make it clear that the speedy trial provisions of the Sixth Amendment attach upon the arrest of the accused, the argument might be made that a state's statute of limitations provisions are the exclusive remedy available to Appellant. It is admitted that the Information in the case at bar was filed within the applicable statute of limitations period. See §76-1-302, Utah Code Ann. (1978).

Reliance upon the §76-1-302 Utah Code Ann., however, would be misplaced in this case. The Marion Court asserts that although the speedy trial right attaches upon the arrest of the defendant, it does not apply to the period of time between the crime and the arrest or charge. Id. at 322. The applicable statute of limitations protests us all during that period. Upon arrest or charge, however, the additional speedy trial protection attaches so as to "present undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusations and to limit the possibilities

that long delay will impair the ability of the accused to defend himself." United States v. Ewell, 383 U.S. 116 (1966). Although the statute of limitations serves the same purpose its protections as an exclusive remedy apply only to the pre-arrest time period.[1] It, therefore, is not the exclusive remedy available to the Appellant in the case at bar.

D. THIS COURT SHOULD ANALYZE APPELLANT'S CASE IN THE LIGHT OF BARKER V. WINGO.

In Barker v. Wingo, 407 U.S. 514, 519-20, 530-33 (1972), the Supreme Court set forth a comprehensive four factor balancing test in assessing claims of denial of speedy trial later adopted by this Court in State v. Hafen, 593 P.2d 538 (Utah 1979). In Barker, the Court held continuances over a five and one-half year period were not a denial of the defendant's right to speedy trial. Although none of the factors is to be determinative, each is to be balanced against the others in deciding whether the delay becomes unconstitutional. The four factors enumerated are: (1) the length of the delay; (2) the reasons for the delay, including good faith prosecutorial efforts; (3) whether and when the defendant asserted the right;

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1. Of course, if actual prejudice is asserted, the Due Process right would be an additional remedy available to the defendant.

and (4) whether the defendant suffered any prejudice. United States v. Lovasco stated the test must embrace the notions of "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions, . . . and which define 'the community's sense of fair play and decency.'" 431 U.S. at 790.

In applying the four Barker factors to the case at bar, Petitioner contends the scales tip in his favor. First, the delay was almost eleven months; from October 15, 1981, the date he was arrested to September 7, 1982, the date he was formally charged. The State's only valid articulated reason for a delay was because of an "ongoing investigation" until March or April 1982. However, no new evidence was discovered during the five or six month "investigation." In Ross v. United States, 349 F.2d 210, 211 (D.C. Cir. 1965), the court held due process under the Fifth Amendment had been denied when formal charges were delayed for an "unreasonable oppressive and unjustifiable time after the offense. . . " The case involved a narcotics transaction in which the government wished to continue using the agent in ongoing investigation in other drug sales before disclosing his identity. Specifically the court noted no new evidence

was discovered during the delay and the agent had, in fact duplicated some of his earlier discoveries. Id. at 212. The court frowned on the fact that the delay so hindered the memory of the narcotics agent, he was only able to testify from a recollection refreshed just before trial by referring to entries in a notebook.

In the present case, the State's chief witness, Mr. Moss, was unable to consistently remember his version of the events during the four times he testified. He testified about the events on October 15, 1981, January 11, 1982, during a preliminary hearing and again at trial. Some of his inconsistencies as well as those of the other State witness, Mr. Sisneros, are set forth below:

"Question. And as a matter of fact, calling your attention to the sworn deposition of January 11th, 1982, isn't it a fact that in that statement you had previously stated that when Mr. Smith drove by to pick you up at 21st South and 3rd East that Mr. Pearson was with him at that time, right?

"Answer. Yes.

"Question. And today you stated that, no, Mr. Pearson was not with him but Mr. Smith was alone; is that correct?

"Answer. Yes.

"Question. Okay. Also, in the same deposition here (indicating) of January 11th, you stated that there was no conversation between the time of being picked up at 21st South and 3rd East and the time that you drove to 21st South and 5th East regarding any plans; is that correct?

"Answer. Yes.

"Question. So there were no conversations. But today you come in and you now say that there was extensive conversations about the illegality -- about the plan and what was to be done, et cetera; right?

"Answer. Yeah.

"Question. All right. Do you have -- what else did you have on you when you left from school -- when you left to go to school that morning? What else did you have with you?

"Answer. Just the hat and the stocking and my gloves."

Do you recall his testimony that he had a black pair of leather gloves at the time?

"Question. Okay, now talking about these orange gloves here, Exhibit No. 6, when did you say you first saw those gloves?

"Answer. When Mr. Pearson got them out of his car.

"Question. Allright. And how many pairs did he bring back?

"Answer. When I talked--he had two. There was those ones. And like I was talking to Mr. Housley, he had a brown pair of leather ones."

This is after he had told Mr. Housley that he only brought one pair of gloves, the orange pair of gloves.

Now, on cross-examination in an attempt to ferret out the truth now we have two sets of gloves. And you recall Detective Judd's testimony regarding the search on Moss at the time, at the South Salt Lake Police Station. "How many gloves, if any, did you find on the people?" Mr. Judd said he found no gloves. He didn't find a brown leather pair or black leather pair.

(T. 47-48, January 19, 1983, Closing Argument).

The varied testimony of both Mr. Moss and Mr. Sisneros shows that their memory was hindered by the delay. Unlike the narcotics agent in Ross, they were unable to refresh their recollection from notebooks. Such faulty memory is another reason to disallow unwarranted delays in charging Appellant. Justice cannot be met when time-warped testimony reflects such inaccuracies.

The delay in the present case, just as the court found the delay in Ross, was not necessary for effective law enforcement. Here, the State did not assert there were undercover agents whose identity could not be revealed at the time, no other defendants were added after the investigation in the case,

nor was any new evidence or witness discovered during the delay. The only evidence the State ever procured against Appellant was obtained at the time of his arrest. Thus, the State has not adequately justified the delay from October, 1981, to March, 1982.

Finally, while the prosecutor's August, 1982, vacation may, arguendo, explain the one month delay from August, 1982, to September, 1982, it does not account for the delay from April, 1982, to August, 1982. The bare assertion by the State that the delay in filing the information was due to an ongoing investigation must be viewed as no justification at all for a delay which amounted to eleven months.

The third factor listed in Barker has been called the Demand Doctrine. At one time, defendants were held to have waived their right to speedy trial by failure to demand it. Appellant, however, asserted his right in a timely fashion by filing a 120 day request for disposition of detainers in the latter part of October, 1981, and again in September, 1982. (Finding at 5). The Demand Doctrine, however, has been rejected by the Supreme Court in Barker, which simply considers a demand as one of many factors to be considered in determining whether defendant's speedy trial right is violated. In United States v. Chase, 135 F. Supp. 230, 233 (N.D. Ill. 1955), the court stated, "The stakes are too high to imply a waiver on his part. . . to require a man to beg for trial on such a charge, with its enormous penalty, requires too much of human nature." In

Taylor v. United States, 238 F. 2d 259 (D.C. Cir. 1956), the court rejected the doctrine because there was no showing the defendant, who was incarcerated in New York, knew of the indictment against him. That case carries particular significance here where the Appellant could not know of any indictment or charge against him because there was none until September, 1982. In People v. Prosser, 130 N.E. 2d 891, 895 (N.Y. 1955), Judge Fuld noted it is the state which initiates the action and the state that has the duty to see that the defendant is brought to trial. In the Supreme Court case of Dillingham v. United States, 423 U.S. 64 (1975), where the post-arrest, pre-indictment delay was held to deny petitioner his right to speedy trial, the petitioner's motions were made post-arraignment and post-trial. 423 U.S. at 64. Since there is no Utah case law directly on point, Appellant urges this Court to reject the Demand Doctrine, consider it simply to be one factor to weigh, and find that the filing of the 120 dispositions was a good-faith effort by Appellant to demand a trial in this case.

The fourth factor of Barker's balancing test require an assessment of the prejudice to the defendant caused by the delay. The Barker Court identifies three interests of the accused protected by the speedy trial right which, if compromised, would result in prejudice to the accused. They are: (1) the prevention of oppressive pre-trial incarceration; (2) the minimization of anxiety and concern of

the accused; and (3) the limitation of the possibility that the defense will be impaired. Barker at 532. See also Klopfer v. North Carolina, 386 U.S. 213, 218, 222 (1967).

Regarding the first of the above interests, Barker expresses concern that the obvious societal disadvantages of long pre-trial incarceration are even more serious for the accused who cannot obtain his release. Barker v. Wingo at 532. The detrimental impact of such incarceration is felt by the individual through the resulting loss of employment, disruption of family life, the enforcement of idleness, and the curtailment of rehabilitation. Id. The anxiety and concern of the accused caused by the delay between accusation and trial has long been recognized as central to the reason for the existance of the speedy trial right, United States v. Ewell, 383 U.S. 116 (1966), and virtually mandates the conclusion that a defendant is always prejudiced by such delay. Finally Barker asserts that "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Barker v. Wingo at 533 (emphasis added).

In the present case, all of these above interests have compromised. The Appellant was in a half-way house prior to his October 15, 1981, arrest. In a half-way house, rehabilitation proceeds apace, employment is available, and as a result idleness is avoided. As a result of his arrest, Appellant was returned to the Utah State Prison and thus was compelled to take a giant step backward from the above goals.

The anxiety, concern and frustration which would necessarily result from eleven months of wondering what the status the charges was needs no further description than simply this statement. Finally, the impairment of Appellant's defense is equally clear on its face. Detailed investigation of who the Appellant's accusers were, what their involvement was in the matter, as well as investigation of other witnesses is critical to a case which is based, at least as it related to Appellant, solely on the confession testimony of two witnesses regarding conversations which occurred on only one or two specific occasions. Prevention of defendant's involvement in such investigation due to his incarceration, exacerbated by the passage of time, diluted the ability of the defense to reconstruct what actually transpired during the alleged conversations.

Guidance in balancing the above factors is provided by the Barker Court's own balancing efforts in that case. After concluding that the length of time was too long and unjustifiable, the Court further found that that factor was outweighed by the prejudice being minimal and the fact that the defendant did not want a speedy trial.

In the present case, the fact that the delay was considerably shorter than that in Barker, is counterbalanced

by the factors that the Appellant demonstrated a desire to have the case resolved by filing a 120 day disposition, that he was incarcerated the entire time and thereby prejudiced and that the prosecutor's offered justification is not supported by anything tangible and is therefore inadequate. Where an accused is incarcerated, the standard for proceeding quickly with the prosecution, unless the defendant himself is the architect of the delay, should be strict. The consequences of pre-trial, and in this case, pre-information incarceration, are too onerous to permit deviation from the expeditious disposition of the case for any but very substantial reasons. The reason articulated by the state of a continuing investigation does not outweigh the right of an accused who is incarcerated to have his day in court much sooner than eleven months. If the accused is not incarcerated, then such a reason may be adequate. With the accused in prison, however, then more a compelling reason for delay should be required -- such as the safety of an undercover investigator. No such compelling reason is offered in the present case. On balance, society's interest in the enforcement of the law is severely tested when the exchange is the continued incarceration of an innocent-until-proven-guilty accused. The orderly and fair administration of justice, as mandated by the Sixth Amendment speedy trial right, requires that a

stronger justification than simply the continuing of an investigation exist before any delay is permitted in the prosecution of one who is incarcerated.

POINT II

DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL REQUIRES DISMISSAL OF THE CHARGES AGAINST HIM.

If the Court finds that the Appellant has been denied his speedy trial right, then, although severe, the only remedy available is the dismissal of the charges. Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972).

CONCLUSION

The Sixth Amendment protects Appellant from the hazards caused by delay of prosecution and trial. Because the Appellant was arrested on October 15, 1981, his speedy trial right attached as of that date. The anxiety and uncertainty caused by the State's unwarranted delay caused Appellant to suffer prejudice, and, because the delay between arrest and the filing of an Information, amounted to eleven months, Appellant's speedy trial right has been violated. Therefore, Appellant prays that this Court find

that said right has been violated and that this Court reverses the conviction of the lower court and orders that the charges be dismissed.

DATED this 7 day of June, 1984.

Respectfully submitted,

THOMAS J. McCORMICK
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah this 8 day of June, 1984.