

NO.
ROCKINGHAM
SUPERIOR COURT

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS
2009 FEB 23 A 11 30

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

08-S-579, 09-S-319

**DEFENDANT'S REPLY TO STATE'S OBJECTION TO
MOTION TO DISMISS FOR VIOLATION OF SPEEDY TRIAL RIGHTS**

Defendant Jesse Brooks, by and through counsel, submits this reply to address the State's Objection to Mr. Brooks' Motion to Dismiss for Violation of Speedy Trial Rights (Jan. 26, 2009) in this matter. The State's Objection errs in parsing the long history of this case and dissecting Mr. Brooks' speedy trial rights. The State argues incorrectly that because Mr. Brooks has not filed the pending Motion until now, he has suffered no speedy trial violation. The State also improperly discounts the effects of Mr. Brooks' continued pretrial detention in this matter and the prejudice that he suffers from the postponement of his trial. Hence, the State concludes erroneously that Mr. Brooks suffers no unlawful prejudice while still awaiting trial sixteen months after his initial indictment in this case, twelve months into his pretrial detention, and facing seven more months of incarceration prior to his currently scheduled trial date.

In further support of his Motion, Mr. Brooks states as follows:

1. The State's Objection belies a fundamentally erroneous and unworkable conception of speedy trial rights. According to the State, a defendant who "acquiesces" to a trial schedule that does not violate his speedy trial rights, even while asserting those rights both explicitly and implicitly, may not thereafter assert his rights when that schedule is amended such that it violates his rights. In the State's view, even if a defendant is constantly seeking "the

earliest trial date possible” and continually opposing postponements of his trial date, the “clock” on his speedy trial rights does not begin to run until those rights have already been violated.

2. Moreover, according to the State, if a defendant even “contemplates” that his trial date might be postponed but does not file a speedy trial motion until his scheduled trial date is actually moved, the defendant thereafter waives a speedy trial claim based on any of the time between the originally scheduled trial date and the postponed trial date, regardless of how long that time is.

3. Each of these propositions, however, is contrary to speedy trial requirements. Speedy trial analysis necessarily proceeds on a case-by-case basis. See Barker v. Wingo, 407 U.S. 514, 530 (1972) (“A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis.”) Hence, a single case can be very different for speedy trial purposes if one circumstance is changed significantly. A defendant who is free on bail awaiting a particular trial date may have no reasonable speedy trial complaint, whereas the same defendant may be subject to a speedy trial violation if his bail is revoked and his trial date postponed.

Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.

Id. at 531.

4. In this case, therefore, the State erroneously discounts the entire fourteen-month period between Mr. Brooks’ original indictment and Mr. Brooks’ original January 2009 trial date.¹ State’s Objection ¶ 20. According to the State, because Mr. Brooks did not file his

¹ The State errs in its reference to this timeframe. The State asserts that fourteen months elapsed “between the time of defendant’s indictment and the scheduling order that was issued in January

pending Motion when his trial was scheduled for January 2009, none of the time that precedes that date counts towards his assertion of speedy trial rights concerning a trial postponed for nine months thereafter, even though Mr. Brooks, prior to January 2009, continually asserted his speedy trial rights and sought “the earliest trial date possible.”²

5. Likewise, because Mr. Brooks “contemplated” that the State would move to postpone Mr. Brooks’ trial so that the State, for its own purposes, could try one of Mr. Brooks’ co-defendants first, the State asserts that Mr. Brooks cannot count the time attributed to the postponement. State’s Objection ¶ 21. Even though Mr. Brooks, with Robin Knight’s assent, explicitly opposed the reordering of his and Mr. Knight’s trials, the time that the State allocates for Mr. Knight’s trial is somehow uncountable for Mr. Brooks’ speedy trial analysis.³

6. The State also errs in suggesting that Mr. Brooks’ Motion would somehow be unnecessary if he had only “voiced his speedy trial concerns earlier.” State’s Objection at 1; *id.* ¶ 23. As noted in his Motion, contrary to the State’s belief, Mr. Brooks has asserted his speedy trial rights and sought the “earliest trial date possible” throughout the trial-schedule history of this case. Counsel for Mr. Brooks again asserted his speedy trial rights at the December scheduling conference in this matter. Moreover, as noted in Mr. Brooks’ January 8 scheduling

of 2008.” State’s Objection ¶ 20. As the State acknowledges elsewhere, however, Mr. Brooks was first indicted in November 2007. *Id.* ¶ 2. Hence, only two months elapsed between indictment and the scheduling order.

² The State contradicts itself regarding the relevance of the time period at issue. The State concedes that the length of time at issue here is sufficient to be presumptively prejudicial and trigger consideration of the other speedy trial factors. *See* State’s Objection ¶ 15; *see also id.* ¶ 13 (acknowledging that the “length of delay” is “merely the ‘triggering mechanism’” for speedy trial analysis). Yet the State is also at pains to note that in other cases “delays exceeding the delay at issue in this case do not entitle the defendant to a dismissal”. *Id.* ¶ 14.

³ The State overreaches in asserting that such time does not count against them as a matter of law. *See* State’s Objection ¶ 16 (citing *Barker*). The *Barker* Court, in dicta, merely speculated that under certain circumstances “[p]erhaps some delay” would have been permissible to allow for trial of the co-defendant in that case. 407 U.S. at 534.

motion, counsel for Mr. Brooks had discussed with the State prior to that date Mr. Brooks' contemplation of filing a speedy trial motion in the near future. See Defendant's Motion ¶ 3 (Jan. 8, 2009); see also State v. Locke, 149 N.H. 1, 9 (2002) (because "defendant raised concerns about his speedy trial right on several occasions this factor weighs in his favor").

7. The State improperly discounts Mr. Brooks' current pretrial incarceration, scheduled now to continue for seven more months, in assessing his speedy trial rights. See State's Objection ¶ 27. Mr. Brooks had been released on bail between the time of his arrest in this matter, through the time of his initial indictment in November 2007, until his bail revocation in February 2008. Since that revocation, however, Mr. Brooks has been incarcerated for one year already.

8. According to the State, Mr. Brooks errs in asserting that his current incarceration is due only to the "pending charge." Id. Yet the State incorrectly counts Mr. Brooks' bail revocation separately in this argument. Id. But for the "pending charge" in this case, there would have been no bail revocation in the first place. Mr. Brooks faces one count of conspiracy to commit murder in the State of New Hampshire, and that count is the only charge on which he is being detained. Cf. id. (citing State v. Lamarche, 157 N.H. 337 (2008) regarding mitigation of "defendant's anxiety at pretrial incarceration ... to extent it was due to *other charges*" (emphasis added)).

9. Mr. Brooks' continued incarceration weighs heavily in favor of his speedy trial rights. Courts assess speedy trial rights very differently depending on whether the defendant is incarcerated. See N.H. Superior Court Speedy Trial Policy; see also Barker, 407 U.S. at 532 (counting incarceration among types of prejudice in speedy trial analysis); State v. Colbath, 130 N.H. 316, 320 (1988) (record did not "disclose any significant prejudice to the defendant caused

by the twelve-month wait” where he was “free on bail”). As set forth fully in Mr. Brooks’ pending Motion for Release on Bail Pending Trial (Jan. 26, 2009), the rationale that the Court cited in support of his bail revocation twelve months ago does not support his continued detention. Hence there is no valid basis for his ongoing incarceration to counterbalance the prejudice of that incarceration. Every day that Mr. Brooks remains in custody supports his speedy trial claim. Cf. Lamarche, 157 N.H. at 344.

10. Finally, the State improperly discounts the prejudice that Mr. Brooks has faced, and continues to face, due to the postponement of his trial in this case. See State’s Objection ¶ 26. Perhaps most notably, it is difficult to see how the level of publicity to which Mr. Brooks has been and continues to be subject is “normal[.]” See id. (quoting Colbath, 130 N.H. at 319). Mr. Brooks has been subject to often daily news coverage of his and related cases since his arrest, most notably during the two-month trial, conviction, and sentencing of his father in the first death penalty case in the state in decades. The filing of Mr. Brooks’ pending Motion alone warranted full articles in local newspapers. See Trent Spiner, “Jesse Brooks seeks conspiracy charge dismissal,” Union Leader, Feb. 10, 2009; James A. Kimble, “Brooks wants court to drop murder case,” Eagle-Tribune, Feb. 9, 2009; James A. Kimble, “Prosecutors: Jesse Brooks belongs in jail,” Eagle-Tribune, Feb. 17, 2009. Such adverse news coverage has generated and continues to generate infamy for Mr. Brooks well beyond what might be considered “normal.”⁴

⁴ The news coverage of the pending Motion provides a sample of the unusual ignominy to which Mr. Brooks is subject in the press. The online version of the Union Leader article, like so many of such articles concerning this and related cases, included public commentary that assumes Mr. Brooks’ guilt. In this instance, the commentary purports to be from a member of the family of Jack Reid, Virginia Filippone. See Feb. 10 Union Leader, supra (“Cry me a river Jesse Shame on you and your family for what you have done to Jack and his children.”).

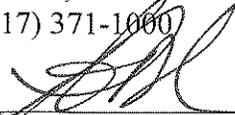
11. The State's Objection provides no compelling justification for further denial of Mr. Brooks' speedy trial rights. Therefore, Mr. Brooks again submits that the "only possible remedy" for that denial is dismissal of the case against him. See Barker, 407 U.S. at 522.

Respectfully submitted,

JESSE T. BROOKS,

By his attorneys,

William H. Kettlewell (*pro hac vice*)
Maria R. Durant (*pro hac vice*)
Dwyer & Collora, LLP
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 371-1000



Peter D. Anderson, NH Bar #7860
McLane, Graf, Raulerson & Middleton, PA
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
(603) 625-6464

Dated: February 23, 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, February 23, 2009, to counsel of record.