

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

STATE OF MISSOURI,

Respondent,

v.

MICHAEL L. PHILLIPS,

Appellant.

No. ED91985

**Appeal from the Circuit Court of the City of St. Louis
22nd Judicial Circuit
The Honorable Mark H. Neill, Judge**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Phillips' constitutional right to a speedy trial was violated.

A. The Standard of Review is *De Novo*

The State maintains that this Court should review Phillips' constitutional speedy-trial argument for clear error. (RB 11). The sole authority cited for this proposition is *State v. Lee*, 859 S.W.2d 768, 770 (Mo. Ct. App. 1993). But *Lee* did not review a claim of a constitutional right to a speedy trial, and, more significantly, stated that “the trial court’s determination of these *facts*” – namely, whether “(1) pre-indictment delay caused substantial prejudice to his right to a fair trial and (2) the delay was an intentional device to gain tactical advantage over the accused” – was reviewed for clear error. *Id.* at 769-70. Moreover, in the same paragraph citing *Lee*, the State declares, relying on *State v. Knox*, 697 S.W.2d 261, 263 (Mo. Ct. App. 1985), that Phillips' Sixth Amendment argument succeeds if in rejecting it the trial court either misapplied or misinterpreted the law, (*see* RB 11), an issue regarding which no deference is given the trial court. Notably, in its most recent speedy trial opinion, the Supreme Court never even hinted at deferring to the trial court’s resolution of the speedy trial claim. *See State ex rel. McKee v. Riley*, 240 S.W.3d 720, 726 (Mo. 2007).

B. The *Barker v. Wingo* Factors Establish a Speedy Trial Violation

The State concedes that Phillips has satisfied the first *Barker* factor – that the length of delay was presumptively prejudicial. (RB 12). Notably, the State says nothing about Phillips' observation that the case here was a simple one, minimizing the need for

delay. The State’s attempt to shorten the length of delay from around thirty-two to thirty months, by measuring the delay from the date of indictment, (RB 12), is improper. The constitutional right to a speedy trial attaches on the date of arrest. *Dillard v. State*, 931 S.W.2d 157 (Mo. Ct. App. 1996).

Regarding the second factor (reason for delay), the State does not deny that the *court* continued the case *seven* times, that not once did the prosecutor object to these continuances or seek to shorten them, and that congestion cannot excuse the delay. (*See* RB 12-14). Nor does the State deny that the vast majority of delay – sixteen of thirty months (RB 12-14), according to the State’s (incorrect) calculation – was unexcused.

Instead, the State tries to minimize the delay counted against it by contending, first of all, that not only the two defense-counsel continuances, but also the five-month continuance ordered on June 5, 2007, counts against Phillips. (RB 13-14). But neither Phillips nor defense counsel signed off on this continuance; the *court* requested and ordered this continuance. (LF 3, 25). The State next contends that Phillips does not “suggest any role played by the State in these continuances . . . Delays caused by the courts are weighted against the State, but only slightly. *State v. Newman*, 256 S.W.3d 210, 214-16 (Mo. Ct. App. W.D. 2008).” But *Newman*, which never uses the word “slightly” or a synonym thereof, holds that delays by the trial court are weighed *less heavily* than prosecutorial delays. It is fallacious to argue, as the State does, that because A weighs less than B, that B weighs very little. Furthermore, the State *did* play a role in these continuances: The trial court is an arm of the State, *see* Mo. Const. art. V, §1, and

the State (the prosecutor and the trial court), not Phillips, has the duty to ensure a prompt trial, *Barker*, 407 U.S. at 529, 532.

Against Phillips' argument that delay resulting from unprepared, unavailable, or ineffective counsel counts against the State, the State responds with *Vermont v. Brillon*, Case No. 08-88 (U.S. March 9, 2008). *Brillon* holds that delay caused by assigned defense counsel is attributed to the defense, except in cases of "systematic breakdown in the public defender system."¹ Hence, the State concludes, any continuances sought by defense counsel must count against Phillips. (RB 13-14). The State's reliance on *Brillon* is misplaced.

Before *Brillon* no Missouri opinion had held as *Brillon* did. Some intermediate appellate opinions attributed delays caused by "defense" requests to the defendant, without specifying whether the requestor was the defendant or counsel. Yet in none of these cases was the *Brillon* issue raised, so there are no holdings – or for that matter, even *dictum* – on the issue. See *Missouri State Highway Patrol v. Atwell*, 119 S.W.3d 188, 190 (Mo. Ct. App. 2003). "Judicial assumptions concerning, judicial allusions to, and

¹ The novelty of *Brillon*'s "systematic breakdown" theory, nowhere presaged by Missouri (or U.S. Supreme Court) case law, is yet another reason to require, at a minimum, a remand to give Phillips a chance to present evidence, if any, that the systematic underfunding and overworking of the Missouri Public Defender System contributed to the delay in bringing him to trial. Cf. *State v. Whitfield*, 107 S.W.3d 253, 272 n.19 (Mo. 2003).

judicial discussions of issues that are not contested are not holdings.” *U.S. v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990). More importantly, the Supreme Court has held (or at least strongly implied) in *McKee* that continuances procured by defense counsel “due to the press of other business or for other perfectly proper reasons unrelated to the defense of [the] defendant’s case” do not count against the defendant. 240 S.W.3d at 728. *Brillon* cannot supersede that interpretation of the state constitutional right to a speedy trial, Mo. Const. art. I, §18(a). *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

Regarding the third factor, the State concedes that Phillips asserted his right to a speedy trial, but argues that, as in *State v. Atchison*, 258 S.W.3d 914, 919 (Mo. Ct. App. 2008), the *timing* of Phillips’ request should be held against him. Though the Southern District stated in *Atchison* that *when* a defendant requests a speedy trial is important, *Barker* limits the third factor to “[w]hether and how” – not when – “a defendant asserts his right,” 407 U.S. at 531. Granted, a speedy-trial request must be made before the right would otherwise have been violated; the defendant cannot sleep on his rights. But Phillips’ request was made within a reasonable time, once it became apparent that the right was in jeopardy. Unlike the defendant in *Atchison*, who never requested a speedy trial, Phillips did so *seven* months before trial was held, and Phillips never changed judges four times or sought at least five continuances. *Id.* at 919. But even if nonlawyer Phillips could be faulted for not acting sooner, the Court should recognize that it is the “primary burden on the courts and the prosecutors to assure that cases are brought to trial”; the accused has “no duty to bring himself to trial.” *Barker*, 407 U.S. at 529, 532.

Regarding the last factor (prejudice), the State does not deny the potential harm to Phillips' defense from the delay, which is one interest safeguarded by the speedy-trial right. (AB 14). Nor does the State deny that the lengthy delay undermined two other speedy-trial interests – the prevention of “oppressive pretrial incarceration” and minimizing the “anxiety and concern of the accused,” *Barker*, 407 U.S. at 532 – as well as the societal interest in expeditious prosecutions. Rather, the State assumes that Phillips must prove *actual prejudice*. (RB 17). That is wrong, as the ample U.S. Supreme Court case law cited by Phillips (which the State fails to address) clearly establishes. *See, e.g., Moore v. Arizona*, 414 U.S. 25, 94 (1973) (“*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.”).

In any event, Phillips did prove actual prejudice. Because Phillips' grandfather, a second alibi witness, died during the delay, “the prejudice is obvious,” *Barker*, 407 U.S. at 532. The grandfather's testimony, corroborating a second witness's alibi testimony, would not have been cumulative. “Evidence is said to be cumulative when it relates to matters so fully and properly proved that by other testimony as to take it out of the area of serious dispute. . . . Evidence is not cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence.” *Black v. State*, 151 S.W.3d 49, 56 (Mo. 2004). That Phillips did not give notice of alibi until July 1, 2008 does not mean (*pace* the State) that if the trial had been scheduled earlier no timely notice would have been given. Additionally, the record reveals that the prosecutor faulted Phillips' mother for waiting “thirty-two months” to

come forward with an alibi with “a lot of detail,” (TR 354) – a criticism that a prompt trial would have mitigated.

II. Phillips was prejudiced by improperly admitted hearsay.

The State gives two meritless reasons why it believes that Phillips failed to preserve any hearsay objections, limiting review to, at most, plain-error review. (RB 18-19). One, the State contends that Phillips’ motion *in limine*, which objected to anticipated testimony solely on hearsay grounds, did not cover testimony about Latoya Redd relaying Phillips’ name to Rucker and Marshall while they were discussing the crimes. But “a motion in limine, in and of itself, preserves nothing for appeal.” *State v. Gray*, 812 S.W.2d 935, 939 (Mo. Ct. App. 1991). The relevant question is whether Phillips raised a hearsay objection to the testimony in question. He did, either by expressly objecting “hearsay” or by advertent to his motion *in limine*, entitled “INADMISSIBLE HEARSAY STATEMENTS.” (LF 41-43; TR 268-69, 283-84, 289-90, 303). That the motion did not anticipate every way in which the prosecutor would seek to elicit hearsay is immaterial.

The State contends that cross-examination of Redd about what Phillips told her – in particular, his alleged confession and offer to sell the property he robbed from the victim – was permissible because (1) Mo. Rev. Stat. § 491.070 (2005) authorizes cross-examination about any matter that could have been inquired into on direct, and (2) admissions by a party opponent (Phillips) are not prohibited by the hearsay prohibition. (RB 20). The State misunderstands Phillips’ argument. He is *not* arguing that it was improper for the State to ask Redd whether Phillips had confessed and described the

crime. (That would obviously be proper.) Rather, Phillips is objecting to the statements from Redd to Marshall and Rucker and from Marshall to the victim – and no hearsay exception applies to these statements. (Nor does it matter whether the English (“wide-open”) or the American (“scope of direct”) rule applies. Phillips’ objection is not that the prosecutor went beyond the scope of direct (a meritless objection), but that the out-of-court statements from Rucker, Marshall, and the victim were inadmissible hearsay.) Is this a distinction without a difference? Not hardly. There is a vast difference between (a) having two witnesses, neither biased against the defendant, testify that the defendant’s own sister told them that he had confessed and offered to sell her the merchandise he had stolen and (b) solely asking the defendant’s sister whether she heard the defendant confess – and hearing her vehemently say no.

In essence, the State wants to be rewarded for its own wrongdoing. The sole reason Redd testified was to rebut the hearsay from Rucker, Marshall, and the victim. Had they never testified, at the prosecution’s urging, that Redd, Phillips’ own sister, had told them that Phillips had confessed to her, there would not have been a need, or any legitimate way to introduce, testimony by Redd that she had never inculcated her Brother to Marshall and Rucker. In short, the harm from the hearsay ramified to include the prosecutor’s detailed and damning examination of Redd. The Court should not allow the State to reap a windfall from its wrongdoing.

Phillips previously noted that the prosecutor in his opening statement and closing argument urged the jury to treat the out-of-court statements from Rucker, Marshall, and the victim as substantive evidence of guilt (i.e., hearsay). (AB 31). The State does not

disagree. Instead, it contends that because it was proper for the State to introduce Redd's prior inconsistent statements (elicited by the State in its rebuttal case) as substantive evidence of guilt, *see* MO. REV. STAT. § 491.074 (2005), not only could the jury treat (and the prosecutor to urge the jury to treat) the out-of-court statements *from Redd to Marshall and Rucker* as substantive evidence of guilt, it was also proper for the jury to treat (and the prosecutor to urge the jury to treat), the out-of-court statements *from Marshall and Rucker to the victim* as substantive evidence of guilt. (RB 21) ("Thus, by the time that closing argument arrived, there was no limitation on the use of testimony about Ms. Redd's statements by the State."). The State also notes that Phillips did not object to the prosecutor's closing argument. (RB 21).

The State is doubly mistaken. One, Phillips need not have objected to the State's closing argument in order to cite the closing argument as a evidence that the jury treated the out-of-court statements as substantive evidence of guilt (i.e., as hearsay). Phillips is not arguing that the closing argument created reversible error. Two, one item of hearsay (e.g., from Marshall to the victim) cannot be retroactively justified because inquiry about statements *from a different witness* (e.g., from Redd to Marshall and Rucker) is permitted. Such a strange rule would give the State license to introduce mountains of hearsay so long as one piece of that hearsay was permitted. The law is otherwise: Each item of hearsay testimony must have its own separate legal justification – and here there is no justification for the hearsay testimony from Marshall, Rucker, and the victim.

Moreover, the State is hoisted by its own petard. Inadvertently, the State is conceding that the testimony by Marshall, Rucker, and the victim about Redd's

statements was, in fact, introduced as substantive evidence. Concession accepted! Moreover, the State has provided, albeit unintentionally, further evidence that the out-of-court statements about Phillips elicited from Marshall and Rucker were treated by the jury as substantive evidence of guilt (i.e., hearsay): That the jury could treat Redd's testimony, during the prosecutor's rebuttal case, about statements allegedly made by Phillips to her as substantive evidence probably led the jury to retroactively treat Rucker and Marshall's testimony about Redd's statements as substantive evidence (i.e., hearsay). Phillips thanks the State for pointing this out.

Phillips argued in his opening brief that the nonexistence of a limiting instruction regarding the out-of-court statements in question increased the probability that the jury treated the statements as substantive evidence of guilt. The State transforms this argument into a claim of trial-court error in not giving the instruction. (RB 22). Phillips makes no such claim. He is just asking the Court to look at the totality of circumstances, as the Court must, in deciding whether Phillips was prejudiced by the hearsay. The lack of a limiting instruction is one relevant factor, as *Shigemura* and various other federal and state cases hold.

In an attempt to jump the gun, the State questions whether the hearsay testimony here was unnecessarily detailed. (RB 22). Before that issue can be addressed, this Court must first ascertain whether it was proper to introduce *any* statements to explain subsequent conduct. See *U.S. v. Davis*, 154 F.3d 772, 779 (8th Cir. 1998); *State v. Lockett*, 165 S.W.3d 199, 205 (Mo. Ct. App. 2005) (noting that subsequent-conduct testimony must also be relevant to be admissible). The answer is no. Never did Phillips

question, nor was there any need to explain to the jury, why he was targeted and ultimately arrested and charged. The State's case was easy to understand: The victim, who had observed the culprit for about twenty minutes, told the police that his name was "Michael Phillips" and where she had seen him, and then, after he was arrested, picked him out of a lineup of similarly-looking persons. Objectively speaking, the only reason to digress into an inquiry about what the defendant's sister and the victim's boyfriend told others was to introduce damning evidence that the defendant's own sister had said he had confessed.

In any event, the hearsay testimony was unnecessarily detailed. The testimony went beyond merely saying that the victim and her boyfriend went searching for, and eventually saw, Phillips because of "information received" from others, which would have sufficed to explain their conduct, to the extent explanation was needed. *See State v. Garrett*, 139 S.W.3d 577, 579-80 (Mo. Ct. App. 2003). (No explanation was need. The victim of a crime and the victim's boyfriend have an obvious incentive to be on the look-out and to try to find the victimizer.) The hearsay testimony also directly implicated Phillips. The victim testified that while she was at the hospital (soon after being victimized) "[her boyfriend] told her who it was" – that is, who had robbed and kidnapped her. The State contends (with nary a record citation) (RB 22) that the victim then retracted that inculpatory statement by saying that her boyfriend had "only" given her a name. No such limitation appears in the transcript. (*See* TR 210). Moreover, the premise of the State's argument, that testimony describing the name given Marshall, Rucker, and the victim is not unnecessarily detailed, is incorrect. The context

surrounding these statements – discussions of the crime by the victim, her boyfriend, and Phillips’ sister – reveals that when they testified about a “name” they received, they meant, and a reasonable jury would inescapably take them as meaning, “the name of the person who committed the crimes.” Even if this “name” testimony might not have been as egregious as the hearsay testimony in the cases cited by the State (RB 21-23), it was still improper.

State v. Lockett does not help the State. There, the out-of-court statements (that a pawn shop contained guitars stolen in a burglary) did not inculcate *the defendant*, let alone directly tie him to the crime; they concerned a *co-defendant*. 165 S.W.3d at 205. Moreover, in *Lockett*, the out-of-court statements, to the extent they concerned the defendant, were not prejudicial, this Court held, because the defendant “testified that he had sold the stolen guitars to the pawn shop.” *Id.*

The State insists that because Redd testified, giving the jury the opportunity to gauge her credibility and “thereby eliminating the underlying reason for the hearsay rule,” (RB 24), Phillips suffered no prejudice. In support of this position, the State lifts the following statement from a decision of the Southern District: “Prejudice will not be found from the admission of hearsay testimony where the [hearsay] declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination.” *State v. McClanahan*, 202 S.W.3d 64, 68-69 (Mo. Ct. App. 2006).

This argument is flawed, for two reasons. One, the assumption that the sole reason hearsay is prohibited is because of the jury’s inability to observe the hearsay declarant and gauge her credibility is false. There are *four* reasons why hearsay is

prohibited – namely, the traditional hearsay dangers that the witness (1) misheard the hearsay declarant (inaccurate perception); (2) misremembered what the declarant said (false memory); (3) lacks sincerity because of, for instance, a motive or desire to slant the facts (insincerity); and (4) failed to spot an ambiguity in the hearsay statement, which the declarant could clarify (ambiguity). E. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 177-78 (1948). Having the hearsay declarant (Redd) testify at trial in no way obviates the dangers of inaccurate perception, false memory, or insincerity on the part of the witnesses relaying the hearsay from the declarant. The State is confusing one purpose of the *Confrontation Clause* – to require the presentation of “live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant,” *U.S. v. Inadi*, 475 U.S. 387, 394 (1986) – with the multiple purposes of the hearsay prohibition.

(2) The State’s reliance on *McClanahan*, a Southern District decision, is misplaced. The *McClanahan* quotation comes from *State v. Hamilton*, 892 S.W.2d 371, 378 (Mo. Ct. App. 1995), which in turn cited *State v. Robinson*, 484 S.W.2d 186, 189 (Mo. 1972). *Robinson*, however, did not adopt the *per se* rule ascribed to it by *Hamilton*. Rather, *Robinson* held that hearsay testimony by a police officer – which did not inculcate the defendant – was not prejudicial because the hearsay declarants (the victims) had testified consistent with the police officer’s testimony and were thoroughly cross-examined. 485 S.W.2d at 189. It is fallacious to apply such a holding to cases where, as here, the hearsay testimony *contradicted* the testimony of the hearsay declarant.

Extending the *Robinson* holding and the hyper-literal meaning of the quoted passage to the latter type of cases would, as a matter of policy, be mistaken. A simple hypothetical shows why. Suppose the Pope, former president Bill Clinton, Osama Bin Laden, and Richard Posner testified that the victim's sister had told them that Phillips had confessed; but the sister testified that he had said no such thing. According to the State, it would be *impossible* for Phillips to have been harmed by the testimony of these personages. It would be as-if nobody had testified about these confessions. Nonsense. A hyper-literal, acontextual reading of the quoted passage would be absurd.

Thankfully, even if this Court were to read the quoted passage literally, the result sought by the State (a finding of no prejudice) would not follow. The passage's requirement that the hearsay witness and hearsay declarant have "testified on [in?] the same manner" can be read as requiring, as in *Robinson*, that the testimony be duplicative, not contradictory. Moreover, a later appellate court can impute qualifications or carve back overly broad language from a prior judicial opinion: "[J]udicial opinions should not be confused with statutes. Qualifications often are implied [in judicial opinions] or developed as the judges grapple with additional circumstances." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1221 (7th Cir. 1993).

CONCLUSION

For the reasons set forth in this brief and Phillips' opening brief, the State violated Phillips' constitutional right to a speedy trial and adduced inadmissible and prejudicial hearsay testimony. The Court should reverse the judgment outright or, at a minimum, remand the case to allow creation of an adequate record for this Court to review point one.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. The attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,790 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and
2. The floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were both e-mailed (to terrence.messonier@ago.mo.gov) and mailed on April 21, 2009 to:

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