

Cite as 2010 Ark. 207

**SUPREME COURT OF ARKANSAS**

No. CR-09-952

STATE OF ARKANSAS  
APPELLANT

V.

CLARENCE RICHARDSON  
APPELLEE

**Opinion Delivered:** May 6, 2010

APPEAL FROM THE PHILLIPS  
COUNTY CIRCUIT COURT  
[NO. CR-2006-37]

HON. L.T. SIMES II, JUDGE

APPEAL DISMISSED.

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**DONALD L. CORBIN, Associate Justice**

The State of Arkansas appeals an order of the Phillips County Circuit Court dismissing the State's case against Appellee Clarence Richardson on speedy-trial grounds. On appeal, the State argues that the circuit court erred in holding that it had lost jurisdiction to try or sentence Appellee under the speedy-trial rule. As this is a subsequent appeal, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(7) (2009). Because the circuit court's order granting the motion to dismiss was a nullity, we do not have an appealable order to review and must dismiss the State's appeal.

This is the third appeal of this matter, and because the facts have been previously set forth, a brief recitation of those facts will now suffice. Richardson was originally charged with two counts of theft of property in February 2006. The circuit court dismissed those charges based on an asserted defect in the arrest warrant. This court reversed the order of dismissal in *State v. Richardson*, 373 Ark. 1, 280 S.W.3d 20 (2008), and remanded the matter to the circuit court.

Thereafter, Richardson's trial was scheduled for May 21, 2008. On the morning of trial, Richardson attempted to waive his right to a jury trial. Despite the State's agreement, the circuit court refused the request and impaneled a jury. The case went forth and during deliberations, it was reported that a juror had been talking on a cell phone. The circuit court removed that juror, seated an alternate juror, and instructed the jurors to begin anew their deliberations. The jury subsequently returned a verdict, finding Richardson guilty on both charges. Before the jury began deliberating a sentence, Richardson orally moved for a new trial, arguing that the circuit court erred in refusing to allow him to waive his right to a jury trial and that the discharge of the juror warranted a new trial. The circuit court granted the motion for a new trial. The State appealed, but this court dismissed the appeal after determining that Richardson's oral motion was ineffective, rendering the circuit court's order a nullity. *State v. Richardson*, 2009 Ark. 206, 306 S.W.3d 11 (*Richardson II*).

Following the issuance of our mandate, the State filed a motion for sentencing. In response, Richardson filed an amended motion to dismiss pursuant to Ark. R. Crim. P. 28, asserting that his right to speedy trial had been violated. A hearing was held on June 9, 2009, wherein the State requested that the circuit court impanel a jury to consider evidence relating to sentencing. Richardson responded that before the court could consider the issue of sentencing, it was required to determine its jurisdiction, or lack thereof, based on his speedy-trial argument. Richardson asserted that under the court of appeals' recent decision in *Miller v. State*, 100 Ark. App. 391, 269 S.W.3d 400 (2007), the State failed to timely bring him to trial. Specifically, Richardson pointed to the holding in *Miller* that the filing of pretrial motions did not constitute excludable periods for purposes of speedy-trial calculations. The circuit

court granted the motion to dismiss after finding the reasoning of *Miller* to be persuasive.<sup>1</sup> This appeal followed.

On appeal, the State asserts that the circuit court erred in dismissing Richardson's case on the basis that it had lost jurisdiction to either try him in May 2008 or to sentence him in May 2009. Richardson has not filed a brief in the instant case.<sup>2</sup>

Before addressing the merits of the State's argument, we must first consider whether this appeal is properly before us. Although the State asserts that this court's jurisdiction is proper pursuant to Ark. R. App. P.–Crim. 3, we must first determine whether we are presented with an appealable order. This very issue was addressed in *Richardson II*. There, this court dismissed the State's appeal after determining that Richardson's oral motion for new trial made prior to entry of judgment was ineffective and the resulting court order granting the new trial was a nullity. We held as follows:

Given that Richardson's motion for new trial was ineffective, we conclude that the circuit court's order granting the untimely posttrial motion was a nullity. There appears to be no provision in our Rules of Criminal Procedure that permits a circuit court to grant a new trial *sua sponte*. The absence of a valid judgment and commitment order makes the motion for new trial ineffective, thus depriving the circuit court of any basis

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<sup>1</sup>The circuit court also adopted its order in *State v. Joshaway*, No. CR–2006–38 (Feb. 24, 2009), wherein the court ruled that Edward Joshaway, charged in connection with the same incident that resulted in the charges against Richardson, was denied his right to speedy trial and therefore dismissed the charges against him. Presumably, the court adopted this order because the findings made by the court, as to which periods were properly excluded for purposes of speedy trial, also applied to Richardson.

<sup>2</sup>Counsel for Richardson, Jimmie Wilson, tendered a motion requesting an extension of time to file the brief on March 19, 2010, the day the brief was due to be filed with this court. At the time, Mr. Wilson had not paid his annual license fee. He then tendered the brief on March 22, 2010, at which time his license fee still remained outstanding. Then, on March 25, 2010, Mr. Wilson's license was suspended for failure to comply with CLE requirements. Thereafter, this court denied his motion for extension of time to file the brief. Because Mr. Wilson failed to file a brief on behalf of his client, a copy of this opinion will be forwarded to this court's Committee on Professional Conduct.

in the law for granting the motion. As a consequence, the circuit court's order granting a new trial is a nullity. Further, because there is no valid order from which the State could have taken an appeal, the State's appeal is dismissed.

*Id.* at 4–5, 306 S.W.3d at 13 (citations omitted).

Here, we are again presented with a situation where Richardson made an ineffective motion; specifically, a motion to dismiss for a speedy-trial violation based on pretrial delays made after he had already been tried. After the State moved to sentence him following our dismissal in *Richardson II*, Richardson filed an “Amended Motion to Dismiss Pursuant to A.R.C.P., Rule 28, Et Seq.”<sup>3</sup> In support of his motion, Richardson argued that the circuit court had previously dismissed the charges against Edward Joshaway and claimed that the identical periods of time applied to Richardson. Further, Richardson argued that under the court of appeals' decision in *Miller*, 100 Ark. App. 391, 269 S.W.3d 400, the act of filing pretrial motions did not itself toll the speedy-trial period, and because the State failed to show that its delay in trying him resulted from his conduct or was otherwise justified, the charges against him should be dismissed, despite the fact that he had already been tried.

The present case is analogous to the situation presented in *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007). There, the appellee was tried, convicted, and sentenced on a rape charge in 1982, but his judgment and commitment order was never forwarded to the Arkansas Department of Correction (ADC) until 1997. The appellee was then incarcerated as a result of subsequent convictions. He was paroled in 1995 but violated that parole in 1997, at which time his 1982 conviction and sentence was discovered and forwarded to the ADC.

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<sup>3</sup>At the hearing below, Richardson requested to orally amend his amended motion to reflect that he sought dismissal of his charges pursuant to Ark. R. Crim. P. 28.

He then served another seven years in the ADC. In 2006, the appellee moved to dismiss the charges that resulted in the 1982 conviction, as well as two subsequent charges filed against him in 1982, on the basis that his right to speedy trial had been violated by the State's failure to forward his 1982 judgment and commitment order to the ADC until 1997. The circuit court granted his motion, finding that the appellee had been prejudiced by the delay in the execution of his sentence because it affected his release from prison and his parole status. The State appealed, and this court reversed and dismissed the circuit court's order.<sup>4</sup> In so doing, this court agreed with the State's assertion that there was no basis on which the circuit court could have claimed to have authority to consider or grant the appellee's motion. Specifically, this court noted that the appellee's attempt to rely on Rules 28.1, 28.2, and 28.3 of the Arkansas Rules of Criminal Procedure was ineffective, stating that

they deal specifically with the time in which a defendant must be *brought to trial*, when that time commences, and what periods of time may be excluded. In this case, Wilmoth has already stood trial, and in fact, he has received a sentence for every conviction and guilty plea that he has accrued. Thus, the only authorities cited in Wilmoth's motion to dismiss do not indicate what jurisdiction the circuit court possessed to hear his motion.

*Id.* at 350, 255 S.W.3d at 422. This court concluded that there was no authority by which the circuit court could have considered the appellee's motion to dismiss and thus lacked jurisdiction to entertain the motion.

Likewise, the only authority cited by Richardson for his assertion that the circuit court was required to dismiss his charges because the State failed to timely try him was Rule 28, which

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<sup>4</sup>Because this court determined that the appeal arose from a collateral matter, it was civil in nature, and the State was not required to satisfy the requirements of Ark. R. App. P.–Crim. 3.

is clearly not controlling where his motion was made after he was tried and found guilty. Moreover, this is not a situation where Richardson alleges that he was not speedily sentenced, as was the situation in *Jolly v. State*, 358 Ark. 180, 189 S.W.3d 40 (2004), where this court held that a defendant's right to speedy trial encompassed a right to speedy sentencing. Thus, *Jolly* is inapplicable to the case at bar.

Because Richardson moved for a dismissal pursuant to Rule 28 and the State's failure to timely try him, *after* he had already been tried, his motion was ineffective. The circuit court had no basis in the law for granting the motion. Thus, the circuit court's order granting Richardson's motion to dismiss was a nullity, and his conviction on the two theft charges stands. This matter is now ripe for sentencing.

Appeal dismissed.

*Dustin McDaniel*, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellant.

No response.