

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2916

Larry David Davis

Plaintiff - Appellant

v.

Dexter Payne, Director

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cv-01441-JM)

JUDGMENT

Before LOKEN, BENTON, and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motions for leave to proceed in forma pauperis are denied as moot.

December 14, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A

**UNITED STATES COURT OF APPEALS
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Appeal from U.S. District Court for the Eastern District of Arkansas - Central
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ORDER

The petition for rehearing by the panel is denied.

January 21, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Al

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

LARRY DAVID DAVIS

PETITIONER

V. NO. 4:20-CV-01441-JM-ERE

**DEXTER PAYNE, Director
Arkansas Division of Correction**

RESPONDENT

JUDGMENT

Consistent with today's Order, it is CONSIDERED, ORDERED, and ADJUDGED that this habeas action is DISMISSED, with prejudice.

DATED this 27th day of July, 2021.


UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

**LARRY DAVID DAVIS,
ADC #123330**

PETITIONER

V.

CASE NO. 4:20-CV-1441-JM-BD

**DEXTER PAYNE, Director,
Arkansas Division of Correction**

RESPONDENT

ORDER

Petitioner Larry David Davis's motion to proceed *in forma pauperis* (Doc. No. 1) is GRANTED.

The Clerk is instructed to serve a copy of Mr. Davis's petition (Doc. No. 2) and a copy of this Order on Respondent Payne and the Arkansas Attorney General by regular mail. Director Payne must file an answer, motion, or other responsive pleading to the petition within twenty (20) days after service of this petition.

IT IS SO ORDERED, this 22nd day of December, 2020.


UNITED STATES MAGISTRATE JUDGE

B

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-19-484

LARRY DAVID DAVIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 19, 2020

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTH DIVISION
[NO. 60CR-18-2636]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED

N. MARK KLAPPENBACH, Judge

Larry David Davis appeals his convictions for commercial burglary and breaking or entering. For his sole point on appeal, Davis argues that the circuit court abused its discretion in denying his motion to dismiss on the basis of a speedy-trial violation. We affirm.

Warrants for Davis's arrest in this case were issued by the Jacksonville District Court on May 24, 2017, but he was not immediately arrested. As evidenced by a case note in the police file, Davis was in custody in Clark County awaiting trial on unrelated charges when the warrants were issued. The Jacksonville Police Department placed a "hold" on Davis so that the warrants would be served after Clark County released him. He was later sentenced to the Arkansas Department of Correction on the Clark County charges. The felony information charging Davis in the instant case in the Pulaski County Circuit Court was filed on July 20, 2018.

C

At the start of his jury trial in February 2019, Davis moved to dismiss the case. He argued that the delay of more than 400 days between the issuance of the warrants and the filing of the felony information—despite the State’s knowledge that he remained in continuous custody—violated his Sixth Amendment right to a speedy trial. The State argued that there was no requirement that the warrants be served within a certain amount of time and that the speedy-trial clock did not start until the felony information was filed.¹ The circuit court denied Davis’s motion.

The basic rule regarding speedy trial is that any defendant in circuit court who is not brought to trial within twelve months from the date of his or her arrest is entitled to have the charges dismissed with an absolute bar to prosecution. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002) (citing Ark. R. Crim. P. 28.1). When more than one year has passed from the date of arrest, the State bears the burden of showing that sufficient time may be excluded as “legally justified” such that the time that may be counted against speedy trial between arrest and trial does not exceed twelve months. *Id.* The right to a speedy trial is protected by both article 2, section 10 of the Arkansas Constitution and the Sixth Amendment to the United States Constitution. The minimum requirements of the federal constitution on this issue were set out in *Barker v. Wingo*, 407 U.S. 514 (1972). *Id.* Under *Barker* there are four factors to be considered in determining whether an individual received

¹The 2007 amendment to Arkansas Rule of Criminal Procedure 28.2, effective April 26, 2007, changed the speedy-trial start date to the date of arrest, whether the charge is filed before or after that date. *State v. Crawford*, 373 Ark. 95, 100 n.2, 281 S.W.3d 736, 740 n.2 (2008).

pre-indictment or pre-arrest delay, his argument fails. See *Moore, supra*. We affirm the circuit court's denial of his motion to dismiss.

Affirmed.

GRUBER, C.J., and VIRDEN, J., agree.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR 18-2636

LARRY DAVID DAVIS

DEFENDANT

NOTICE OF APPEAL

Comes now the Defendant, Larry David Davis, who was declared indigent by this Court, and prays an appeal to the Arkansas Court of Appeals from the conviction and sentence received in the above-styled matter at the conclusion of a jury trial held on February 13, 2019, from the sentencing order filed on March 11, 2019, and designates the entire record, including voir dire and opening and closing arguments, as well as transcripts of any audio and visual recordings, as his record of appeal in this case. Defendant Davis specifically requests that all audio tapes, CDs or audio recordings of any kind (including the audio portion of a videotape) that are played for the jury or the circuit court judge be transcribed as part of the record on appeal. It is the duty of the court reporter to make "a complete record of the proceeding." Ark. Code Ann. § 16-13-510 (a) (Repl. 2010). The trial record consists of "all proceeding . . . pertaining to any contested matter before the court or the jury." Ark. Sup. Ct. Admin. R. 4 (a). At the request of either party "said record shall be transcribed [and] certified by the reporter as true and correct." Ark. Code Ann. § 16-13-510 (a) (Repl. 2010). In addition to a transcript of the trial, also requested, but not limited to, are transcripts of the following hearings held in CR 18-2636: September 4, 2018; September 13, 2018; January 22, 2019; February 5, 2019; and February 13, 2019.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR 18-2636

LARRY DAVID DAVIS

DEFENDANT

NOTICE OF APPEAL

Comes now the Defendant, Larry David Davis, who was declared indigent by this Court, and prays an appeal to the Arkansas Court of Appeals from the conviction and sentence received in the above-styled matter at the conclusion of a jury trial held on February 13, 2019, from the sentencing order filed on March 11, 2019, and designates the entire record, including voir dire and opening and closing arguments, as well as transcripts of any audio and visual recordings, as his record of appeal in this case. Defendant Davis specifically requests that all audio tapes, CDs or audio recordings of any kind (including the audio portion of a videotape) that are played for the jury or the circuit court judge be transcribed as part of the record on appeal. It is the duty of the court reporter to make "a complete record of the proceeding." Ark. Code Ann. § 16-13-510 (a) (Repl. 2010). The trial record consists of "all proceeding . . . pertaining to any contested matter before the court or the jury." Ark. Sup. Ct. Admin. R. 4 (a). At the request of either party "said record shall be transcribed [and] certified by the reporter as true and correct." Ark. Code Ann. § 16-13-510 (a) (Repl. 2010). In addition to a transcript of the trial, also requested, but not limited to, are transcripts of the following hearings held in CR 18-2636: September 4, 2018; September 13, 2018; January 22, 2019; February 5, 2019; and February 13, 2019.

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL:

II. BASIS OF SUPREME COURT JURISDICTION (See Rule 1-2(a))

() Check here if no basis for Supreme Court jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court jurisdiction is asserted.

- (1) () Construction of Constitution of Arkansas
- (2) () Death penalty, life imprisonment
- (3) () Extraordinary writs
- (4) () Elections and election procedures
- (5) () Discipline of attorneys
- (6) () Discipline and disability of judges
- (7) () Previous appeal in Supreme Court
- (8) () Appeal to Supreme Court by law
- (9) (X) Appeal involves significant issue concerning the interpretation of the Sixth and Fourteenth Amendment right to a speedy trial
- (10) () Appeal involves the overruling of Arkansas Supreme Court precedent

III. NATURE OF APPEAL

- (1) () Administrative or regulatory action
- (2) () Rule 37
- (3) () Rule on Clerk
- (4) () Interlocutory appeal
- (5) () Usury
- (6) () Products liability
- (7) () Oil, gas, or mineral rights
- (8) () Torts
- (9) () Construction of deed or will
- (10) () Contract
- (11) (X) Criminal

ARGUMENT

I.

THE CIRCUIT COURT JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT DAVIS'S SIXTH AND FOURTEENTH AMENDMENT-BASED SPEEDY TRIAL MOTION TO DISMISS THE CRIMINAL CHARGES AT ISSUE GIVEN THAT HIS SIXTH AMENDMENT TO A SPEEDY TRIAL BEGAN TO RUN BY MAY 24, 2017, WHEN APPELLANT DAVIS WAS IN STATE CUSTODY, THE JACKSONVILLE POLICE KNEW WHERE HE WAS INCARCERATED AND ARREST WARRANTS HAD BEEN ISSUED FOR HIM FOR THE CRIMINAL CHARGES AT ISSUE.

A. Summary of argument.

The circuit court judge abused his discretion in denying Appellant Davis's Sixth and Fourteenth Amendment-based speedy trial motion to dismiss the criminal charges at issue. By May 24, 2017, the Jacksonville Police Department knew Appellant Davis was in custody in Arkansas as a result of criminal convictions unrelated to the criminal charges at issue in the instant case. On May 24, 2017, the Jacksonville District Court issued arrest warrants for Appellant Davis in connection with the criminal offenses at issue. Despite knowing that Appellant

Davis was in custody in Arkansas, the Jacksonville Police Department intentionally delayed service of the arrest warrants until Appellant Davis was released from incarceration. It was not until July 20, 2018, that the State filed an information against Appellant Davis. He stood trial on February 13, 2019. The period of time from May 24, 2017, until February 13, 2019, is 630 days. Given that by May 24, 2017, the Jacksonville Police Department knew Appellant Davis was in custody, the police knew where he was and arrest warrants had been issued for him, the speedy trial time governed by the Sixth Amendment began to run. *Gravitt v. U.S.*, 523 F.2d 1211, 1215 (5th Cir. 1975). Because more than one year elapsed between the start of Appellant Davis's Sixth Amendment speedy trial period and the start of his trial, the Appellant Davis was presumptively prejudicial. *Doggett v. U.S.*, 505 U.S. 647, 652 n.1 (1992). Given the 630 day delay in the start of Appellant Davis's trial and given that, at his trial, the State failed to establish any valid reason for the delay, Appellant Davis's trial was held in violation of his Sixth Amendment right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

When reviewing a circuit court judge's denial of a speedy trial-based motion to dismiss, this Court will affirm absent an abuse of discretion. *State v. Lewis*, 268 Ark. 359, 361, 596 S.W.2d 697, 698 (1980). A circuit court judge abuses his discretion when he erroneously interprets the law. *Reeves v. State*, 374 Ark. 415,

417, 288 S.W.3d 577, 579 (2008).

B. Procedural history and pertinent facts of the case.

In Pulaski County Circuit Court Case No. CR 18-2636, Appellant Davis stood trial on February 13, 2019. A jury sat as the trier-of-fact. The jury found that Appellant Davis had committed one count of the Class C felony of commercial burglary and one count of the Class D felony of breaking or entering. (Ab. 47-48; R. 349-50) The jury also found that Appellant Davis had committed theft of property, but that finding of guilt was dismissed by the circuit court judge. (Ab. 49; R. 355) Pursuant to the jury's penalty phase verdicts, the circuit court judge sentenced Appellant Davis to an aggregate sentence of forty-five years's imprisonment. (Ab. 50; R. 369-70; Add. 13; R. 129)

On appeal, Appellant Davis asserts that the circuit court judge abused his discretion in denying defense counsel's in limine motion to dismiss the criminal charges at issue based on the State's violation of Appellant Davis's Sixth and Fourteenth Amendment right to a speedy trial. Defense counsel's speedy trial motion to dismiss, the State's response and the circuit court judge's ruling were as follows:

DEFENSE COUNSEL: We do have some preliminary motions.

THE COURT: Okay.

DEFENSE COUNSEL: Our first motion is to dismiss this case for lack of speedy trial. Warrants were issued, submitted and signed, by Judge Rita Bailey in -- on May 22 of 2017. There is a case file note from the detective that states that (as read), "I notified the warrants division that Mr. Davis was in custody in Clark County and a hold was placed on him. The warrants will be served after Clark County releases him and the case will be inactive pending open warrant. The case will be inactive open pending the warrants being served." During that time the defendant was sentenced to 30 years in the Arkansas Department of Corrections on November 29, 2017. (R. 177)

In April 2018, Jacksonville sent it back to the prosecutor's office about the whereabouts of the defendant, citing that he was in ADC and that these outstanding [warrants] had not been filed. The case was then filed July 20 of 2018. And the defendant was seen in Seventh Division on September 13, 2018.

If I may, I have three Defense Exhibits and then I'll have a little bit more argument. Exhibit 1 is the officer's case note. Defense Exhibit 2 is a copy of the warrants. And Exhibit 3 is the fax to the prosecutor's office from Jacksonville Police Department.

THE COURT: Are those marked?

DEFENSE COUNSEL: They are.

THE COURT: Have you seen them?

DEPUTY PROSECUTING ATTORNEY: Yes.

THE COURT: Let me have them.

(THEREUPON, Defendant's Exhibit Number 1, 2 and 3, having been marked previously for identification, was received into evidence.)

THE COURT: Let me just see what the State says. (R. 178)

DEPUTY PROSECUTING ATTORNEY: I thought she had more argument.

THE COURT: She does, but I'm wondering what are you going to say.

DEPUTY PROSECUTING ATTORNEY: The warrant was issued in May of 2017. There's no requirement that that be served within a certain amount of time. We were informed in April of '18 that the whereabouts of the defendant, he was in ADC, and we

commenced our file decision process shortly after that. And the State's position is that speedy trial starts on the day that the felony information was filed, which is July 19, 2018, and we're within that year.

THE COURT: Argue.

DEFENSE COUNSEL: It is our position that the lack of filing or lack of serving the arrest warrant violates the defendant's federal and state Sixth Amendment right to a speedy trial. The arrest warrant specifically states (as read), "You are therefore commanded to arrest and bring the above-named person before Rita Bailey, Judge of the District Court of Jacksonville, Arkansas, to be dealt with according to the law." At that moment, Jacksonville Police Department knew exactly where the defendant was. So much that they even state in their own notes they placed a hold on him. (R. 179)

There were 423 days between the date of the issuance of the warrant and the filing of the felony information. The defendant was in continuous custody and the State was aware of it.

It wasn't until April of 2018, 11 months after the arrest warrants were issued, that Jacksonville even told the prosecutor's office, "Hey, this guy's in ADC and we haven't filed these warrants."

THE COURT: Okay.

DEFENSE COUNSEL: So for that reason we ask that it be dismissed based on speedy trial.

THE COURT: That's denied. (R. 180)

(Ab. 1-4; R. 176-180) The three defense exhibits appear in the Addendum at Add. 15-34; R. 412-431.

Twice during Appellant Davis's trial, defense counsel renewed the Sixth Amendment-based speedy trial motion to dismiss the criminal charges at issue. (Ab. 35, 36; R. 312, 315-16) The circuit court judge denied these renewed motions. (Ab. 35, 36; R. 312, 315-16)

TABLE OF AUTHORITIES

CASES

X <u>Barker v. Wingo</u> , 407 U.S. 514, 530 (1972)	2, 6, 9, 10
<u>Barker v. Wingo</u> , 407 U.S. at 519-21	7
<u>Barker v. Wingo</u> , 407 U.S. at 530	10
<u>Barker v. Wingo</u> , 407 U.S. at 530-32	7, 8, 9
<u>Barker v. Wingo</u> , 407 U.S. at 532-33	6, 7
need → <u>Doggett v. U.S.</u> , 505 U.S. 647, 652 n.1 (1992)	2, 9
<u>Gravitt v. U.S.</u> , 523 F.2d 1211, 1215 (5th Cir. 1975)	2, 11
<u>Klopper v. N. Carolina</u> , 386 U.S. 213, 221-22 (1967)	6
<u>Klopper v. N. Carolina</u> , 386 U.S. at 223	6
<u>Reeves v. State</u> , 374 Ark. 415, 417, 288 S.W.3d 577, 579 (2008)	2, 3
<u>Robinson v. State</u> , 2013 Ark. 60 at 4-6	10
<u>Smith v. State</u> , 2013 Ark. 364 at 2-4	10
<u>State v. Lewis</u> , 268 Ark. 359, 361, 596 S.W.2d 697, 698 (1980)	2
<u>State v. Washington</u> , 273 Ark. 82, 88, 617 S.W.2d 3, 6 (1981)	6
<u>U.S. v. Louzon</u> , 392 F. Supp. 1220, 1226-27 (E.D. Mich. 1975)	10
<u>Weaver v. State</u> , 313 Ark. 55, 58-59, 852 S.W.2d 130, 132 (1993)	7

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPEARANCE OF COUNSEL

NO. 21-2916

LARRY DAVID DAVIS

PETITIONER

VS.

**DEXTER PAYNE, Director
Arkansas Division of Correction**

RESPONDENT

The Clerk will enter my appearance as Counsel for the following party(s):

Dexter Payne

Attorney Name: Rachel Kemp /s/: Rachel Kemp

Firm Name: Arkansas Attorney General

Business Address: 323 Center Street, Suite 200

City/State/Zip: Little Rock, AR 72201

Telephone Number: (501) 682-5587

Email Address: rachel.kemp@arkansasag.gov

CERTIFICATE OF SERVICE

☒ I hereby certify that on August 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

☒ I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Mr. Larry David Davis
ADC #123330
Delta Regional Unit
880 East Gaines
Dermott, AR 71638-9505