

Rel: January 11, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0934

Kelly Hopkins Armstrong

v.

State of Alabama

Appeal from Blount Circuit Court
(CC-15-176)

KELLUM, Judge.

Kelly Hopkins Armstrong pleaded guilty to one count of unlawful manufacturing of a controlled substance, a violation of § 13A-12-218, Ala. Code 1975; one count of unlawful possession of a controlled substance, a violation of § 13A-12-

CR-17-0934

212, Ala. Code 1975; and one count of unlawful possession of drug paraphernalia, a violation of § 13A-12-260(c), Ala. Code 1975. For the manufacturing conviction and the possession-of-a-controlled-substance conviction, she was sentenced to 10 years' imprisonment; the sentences were split and she was ordered to serve 9 months in confinement followed by 5 years on probation. For the possession-of-drug-paraphernalia conviction, she was sentenced to 180 days' imprisonment. The sentences were to run concurrently. Armstrong expressly reserved the right to appeal the issue whether she had been denied her right to a speedy trial, and she argues on appeal that the trial court erred in denying her motion to dismiss the indictment on that ground.

Although somewhat sparse, the record reflects the following. Armstrong was arrested on the three charges listed above on June 28, 2013. On July 22, 2013, Armstrong waived a preliminary hearing, and the charges were bound over to the grand jury. On March 5, 2014, Armstrong filed in the district court a motion to dismiss the charges against her with prejudice, or in the alternative, a motion for a speedy trial. She argued, among other things, that she had been unable to

make bond¹ and had been incarcerated since her arrest and that the State had yet to seek an indictment against her despite the fact that 3 grand juries had been empaneled and had returned 445 indictments since her incarceration. After a hearing, the district court granted Armstrong's motion to dismiss the charges with prejudice on March 25, 2014, and Armstrong was released from jail.

On July 28, 2015, the grand jury returned an indictment against Armstrong for the same charges and she was arrested on August 13, 2015. That same day, Armstrong filed a motion to dismiss the indictment on the ground that she had been denied her right to a speedy trial. She argued that it had been over 25 months since her initial arrest, that the charges against her had been dismissed with prejudice 16 months before the indictment was returned, that she would be unable to post bond and would suffer additional pretrial incarceration and anxiety, and that her defense would likely be impaired because of the excessive delay. Without conducting a hearing, the trial court denied the motion on October 23, 2015, with the

¹Armstrong had previously filed multiple motions to reduce her bond; all but one of those motions had been denied.

CR-17-0934

following notation on the case-action-summary sheet: "Motion to dismiss indictment is denied." (C. 2.)

On September 24, 2015, Armstrong pleaded not guilty to the charges. A pretrial hearing was conducted on November 10, 2015, and a notation on the case-action-summary sheet on that date indicates that the case was "to be set for trial by order." (C. 6.) However, the record reflects no order setting a trial date until October 4, 2016, 11 months later, at which point, the trial court scheduled the trial for April 6, 2017. A notation on the case-action-summary sheet dated April 14, 2017, states that the case was "not reached" and that the trial would be "re-set by order." (C. 7.) A subsequent notation on the case-action-summary sheet dated December 7, 2017, indicates that an order was electronically filed, but the record does not contain a copy of that order. The record reflects that Armstrong pleaded guilty to the charges on February 12, 2018.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The Alabama Constitution, Art. I, § 6, Ala. Const. 1901,

guarantees the same right. In Barker v. Wingo, 407 U.S. 514 (1972), the United States Supreme Court held that, when determining whether an accused has been denied his or her right to a speedy trial, a court must look at: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right; and (4) the prejudice to the defendant's case. See also Ex parte Walker, 928 So. 2d 259 (Ala. 2005) (in which the Alabama Supreme Court thoroughly examined and explained the proper application and weighing of each of the Barker factors when conducting a speedy-trial analysis). The first factor -- the length of the delay -- serves both as a triggering mechanism for a speedy-trial analysis and as a factor to consider when conducting that analysis. See Ex parte Walker, 928 So. 2d at 263-69. Only if the length of delay is "presumptively prejudicial" is it necessary for a court to conduct a speedy-trial analysis and consider the remaining Barker factors. 928 So. 2d at 263 (citations and internal quotation marks omitted).

"The length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant -- whichever is earlier -- to the date of the trial." Roberson

CR-17-0934

v. State, 864 So. 2d 379, 394 (Ala. Crim. App. 2002). In this case, 56 months elapsed from Armstrong's arrest in June 2013 to her guilty pleas in February 2018. This Court has found that delays of less than half that time are presumptively prejudicial. See Ingram v. State, 629 So. 2d 800, 802 (Ala. Crim. App. 1993) (19-month delay), and Beaver v. State, 455 So. 2d 253, 254 (Ala. Crim. App. 1984) (16-month delay). Therefore, the 56-month delay in this case was presumptively prejudicial and an inquiry into the remaining Barker factors is necessary.

However, the record before this Court is not sufficient for us to conduct a speedy-trial analysis under Barker, supra, and Ex parte Walker, supra, and to adequately review the propriety of the trial court's denial of Armstrong's motion to dismiss. Although the length of delay is clear and the record reflects that Armstrong promptly asserted her right twice, the record does not reflect the reasons for the delay in this case. The Alabama Supreme Court recognized in Ex parte Walker that "[t]he State has the burden of justifying the delay" and that "[c]ourts assign different weight to different reasons for the delay." 928 So. 2d at 265. Deliberate delay by the

State is weighed heavily against the State, negligent delay is weighed less heavily against the State, and justified delay is not weighed against the State. Id. The record contains no motions for a continuance by Armstrong; thus, it appears that the entire delay may have been attributable to the State, but because the State did not respond to, and no hearing was conducted on, Armstrong's motion to dismiss the indictment, we are unable to determine the reasons for the delay. In addition, we are unable to determine whether Armstrong was prejudiced. Armstrong asserted in her motion to dismiss the indictment that she had been after her initial arrest, and would continue to be after indictment, prejudiced by oppressive pretrial incarceration and by anxiety and concern, and that her defense would be hampered by witnesses becoming unavailable, especially in light of the fact that the charges against her had previously been dismissed, which led her to believe that the case would not be pursued. However, because no hearing was conducted on Armstrong's motion and because the record does not reflect the reasons for the delay, we are unable to properly evaluate those assertions of prejudice. See Ex parte Walker, 928 So. 2d at 267 (noting that there are

"three types of harm that may result from depriving a defendant of the right to a speedy trial: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence," and that both the length of delay and the reasons for delay impact the analysis of the fourth Barker factor) (citations and internal quotation marks omitted).

Moreover, the record does not indicate that the trial court properly considered and weighed each of the four Barker factors when denying Armstrong's motion to dismiss. As noted above, the trial court simply denied the motion without comment and without conducting a hearing. Because the record is not sufficient for this Court to conduct a speedy-trial analysis and because the record does not affirmatively reflect that the trial court properly considered the Barker factors when denying Armstrong's motion to dismiss the indictment, we must remand this cause for further proceedings. See, e.g., Batts v. State, 186 So. 3d 981 (Ala. Crim. App. 2014); State v. Tolliver, 171 So. 3d 94 (Ala. Crim. App. 2014); State v. Robinson, 79 So. 3d 686 (Ala. Crim. App. 2011); State v. Mack,

CR-17-0934

56 So. 3d 704 (Ala. Crim. App. 2009); State v. Stovall, 947 So. 2d 1149 (Ala. Crim. App. 2006); Coventry v. State, 903 So. 2d 169 (Ala. Crim. App. 2004); Parris v. State, 885 So. 2d 813 (Ala. Crim. App. 2001); and Bishop v. State, 656 So. 2d 394 (Ala. Crim. App. 1994).

Accordingly, we remand this cause for the trial court to conduct a hearing on Armstrong's motion to dismiss the indictment and to issue specific written findings of fact regarding each of the four Barker factors in accordance with the principles set forth by the Alabama Supreme Court in Ex parte Walker, supra. Due return shall be filed withing 63 days of the date of this opinion and shall include the trial court's written findings of fact, a transcript of the hearing, and any and all evidence received and/or relied on by the trial court in making its findings.

REMANDED WITH DIRECTIONS.

Windom, P.J., and Welch, Joiner, and McCool, JJ., concur.