

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2019-KA-01044-SCT**

***KASEY BOOMER KELLY a/k/a KASEY KELLY  
a/k/a KASEY B. KELLY***

**v.**

***STATE OF MISSISSIPPI***

DATE OF JUDGMENT: 05/14/2019  
TRIAL JUDGE: HON. JON MARK WEATHERS  
TRIAL COURT ATTORNEYS: LINDSAY ELIZABETH SLAWSON  
ANDREW JAMES WILLIAMS  
MATTHEW DAVIS SHOEMAKER  
BRYAN P. BUCKLEY  
COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT  
ATTORNEYS FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER  
BY: ERIN E. BRIGGS  
GEORGE T. HOLMES  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: ASHLEY LAUREN SULSER  
DISTRICT ATTORNEY: PATRICIA A. THOMAS BURCHELL  
NATURE OF THE CASE: CRIMINAL - FELONY  
DISPOSITION: AFFIRMED - 11/19/2020  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE KITCHENS, P.J., MAXWELL AND CHAMBERLIN, JJ.**

**KITCHENS, PRESIDING JUSTICE, FOR THE COURT:**

¶1. Kasey Boomer Kelly was convicted of possession of a weapon by a convicted felon in the Circuit Court of Forrest County, Mississippi. Kelly appeals his conviction, claiming that his constitutional right to a speedy trial was violated and that the evidence was insufficient to support his conviction.

¶2. This Court finds that Kelly's constitutional right to a speedy trial was not violated

because he failed to assert that right and because he failed to demonstrate that he was prejudiced by the delay. We find also that the State presented sufficient evidence to show constructive possession of the weapon. Therefore, we affirm.

### **FACTS**

¶3. During the night of November 11, 2015, Officer Corey Henderson of the University of Southern Mississippi Police Department (USMPD) was on patrol, traveling northbound on Service Road. Upon approaching the intersection at Service Road and West 4th Street, Officer Henderson observed a vehicle he had dealt with on several prior occasions. The officer testified that, as he made a left turn onto West 4th Street, he could “smell the very strong odor of burnt marijuana in the area” when he was “approximately fifteen feet away from the vehicle.” He testified also that he remembered the windows of his patrol car were down but that he could not recall whether any of the windows of the other vehicle were down.

¶4. Officer Henderson initiated a traffic stop, and the vehicle pulled into the Hillcrest Dormitory parking lot. Four people were in the car: the driver and three passengers. Kelly was sitting in the back of the car behind the driver’s seat.

¶5. While Officer Henderson was talking to the driver of the vehicle, his partner, Officer Annie Bourgoyne, arrived on the scene. Officer Henderson asked Kelly to exit the vehicle to allow Henderson to search it. Kelly was instructed to walk toward Officer Henderson’s patrol car and to stay there. While Officer Henderson conducted a search of the vehicle, Officer Bourgoyne was talking with the other passengers. Officer Henderson testified that

he would occasionally stop his search to check on Kelly's whereabouts and to tell Kelly to put his hands back on the hood of the patrol car. While Officer Henderson continued searching the vehicle, Kelly fled the scene, running past the front of Hillcrest Dormitory "before turning to the right and beginning to run east across Highway 49." Officer Henderson pursued Kelly on foot and was about forty to fifty yards behind him. Throughout the foot pursuit, Officer Henderson yelled for Kelly to stop, but Kelly did not comply.

¶6. After Kelly had crossed the highway, he ran toward a commercial building. He ran alongside the building, then he turned a corner and headed down an alleyway on the back side of the building. Officer Henderson testified that the only time he lost sight of Kelly was when Kelly turned the corner to head down the alleyway. When Officer Henderson caught up to Kelly in the alleyway, Kelly was "on top of a fence"; he then dived into the wood line. Officer Henderson testified that he "was not about to jump the fence or go into the woods" to chase Kelly alone. Instead he went around toward 7th Street and regrouped with his supervisor in front of Jr. Food Mart. Officer Henderson noticed there were no fences behind the residences, which allowed him to enter the wooded area that Kelly had entered. He testified that he "went behind the house" and found Kelly "curled up next to the fence." Kelly was "no more than approximately ten to fifteen feet away" from Officer Henderson, who ordered Kelly to stand up and to come toward him. When Kelly complied, Officer Henderson observed a "piece of red material on the ground that resembled a wallet" and a black magazine for a handgun. He did not take these items into his possession at the time he observed them. Henderson arrested Kelly and walked him back to Jr. Food Mart; he then

placed Kelly in a patrol car. Once back at Jr. Food Mart, Officer Henderson told his supervisor that Kelly was “laying on something” and that he needed to go back and search the area “to make sure there wasn’t anything [Kelly had] tried to get rid of from his person at the time.” Officer Henderson went alone to the area behind the house where Kelly had been arrested and collected the items. Officer Henderson testified that the black magazine and wallet were found where Kelly’s right leg had been located.

¶7. While in pursuit, Officer Henderson had informed dispatch that he was pursuing a suspect on foot. The dispatcher notified Hattiesburg Police Department (HPD) that their assistance was needed. Hattiesburg Police Department Officers Eric Gannon and Jacob Byrd responded to the call to help Officer Henderson locate Kelly. Officer Byrd testified that, by the time he got to the area where Officer Henderson had located Kelly, Kelly already was in handcuffs. Officer Byrd said also that Officer Henderson had told him he had seen a magazine underneath Kelly. Officer Byrd did not see the magazine. After Officers Byrd and Gannon were made aware of the existence of the handgun magazine, they retraced Kelly’s steps, looking for items that Kelly could have disposed during the foot pursuit. Officer Byrd testified that they found a handgun near the corner of the building that Kelly had run behind. The gun was found “approximately fifty feet” from the location at which Kelly was arrested and was located over the fence and to the right of an oak tree in the yard behind 608 North 25th Avenue. Officer Gannon examined the handgun, which was a Ruger P89 nine millimeter, and removed the magazine. Officer Bourgoyne received the gun from the two HPD officers and turned it over to Officer Henderson for him to compare it to the handgun

magazine he had found under Kelly's leg. Officer Henderson testified that the handgun magazine found under Kelly's leg "did lock into place" and fit the Ruger pistol. No officer testified that he or she actually had seen Kelly with a firearm.

¶8. On July 12, 2016, a grand jury indicted Kelly for one count of possession of a weapon by a convicted felon. Kelly was arraigned on April 13, 2017, and his trial was set for September 14, 2017. On November 2, 2018, Kelly was assigned a new lawyer and was rearraigned, setting his trial for March 18, 2019. Kelly's new counsel filed several pretrial motions on March 5, 2019, including a motion to dismiss for violation of Kelly's Sixth Amendment right to a speedy trial. The trial judge denied Kelly's motion to dismiss, finding that

the State has shown good cause for the delay including the Defendant's absence from Forrest County after he absconded for over a year, changes in the staff of the public defender's office and the district attorney's office, reassignment of assistant public defenders and district attorneys to specific judges, and this Court's cancellation of its May, 2018, docket due to its court reporter tendering her resignation.

Kelly's trial commenced on April 8, 2019. The parties stipulated that Kelly was a convicted felon. On April 9, 2019, the jury found Kelly guilty of possession of a weapon by a convicted felon. He was sentenced to serve eight years in the custody of the Mississippi Department of Corrections, and the sentence was to run consecutive to any other sentence he already was serving. Kelly filed his notice of appeal on June 24, 2019.

### **STANDARD OF REVIEW**

¶9. "The standard of review of a speedy-trial claim encompasses a review of the facts and questions whether the trial delay arose from good cause." *Courtney v. State*, 275 So. 3d

1032, 1037 (Miss. 2019) (citing *DeLoach v. State*, 722 So. 2d 512, 516 (Miss. 1998)). “If substantial credible evidence supports a finding of good cause, this Court will not disturb that finding.” *Bateman v. State*, 125 So. 3d 616, 628 (Miss. 2013) (citing *Folk v. State*, 576 So. 2d 1243, 1247 (Miss. 1991)).

¶10. “When this Court reviews the sufficiency of evidence supporting a guilty verdict, we view the evidence in the light most favorable to the State and decide if rational jurors could have found the State proved each element of the crime.” *Lenoir v. State*, 222 So. 3d 273, 279 (Miss. 2017) (citing *Poole v. State*, 46 So. 3d 290, 293 (Miss. 2010)). This Court has said also that

if the facts and evidence considered in a challenge to the sufficiency of the evidence “point in favor of the defendant on *any* element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,” *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985), the appellate court should reverse and render the jury verdict.

*Kerns v. State*, 923 So. 2d 196, 199 (Miss. 2005).

## DISCUSSION

### I. Kelly’s constitutional right to a speedy trial was not violated.

¶11. Kelly asserts that the State violated his constitutional right to a speedy trial<sup>1</sup> because the delay was longer than eight months, the trial court erred by finding there was good cause for the delay, and the delay caused Kelly to suffer actual prejudice. The State contends that Kelly’s right to a speedy trial was not violated because Kelly failed to assert his right, and

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<sup>1</sup>Kelly challenges the trial court’s findings regarding his constitutional right to a speedy trial only. He does not challenge the trial court’s finding regarding his statutory right to a speedy trial, in which the trial court found that “Kelly ha[d] waived his statutory right to demand a speedy trial within 270 days of arraignment.”

he failed to show that he was prejudiced by the delay.

¶12. This Court explained in *Bateman* that

Criminal defendants are guaranteed the right to a speedy trial by the United States and Mississippi Constitutions. U.S. Const. amend. VI; Miss. Const. art. 3, § 26 (1890). When considering an alleged violation of a defendant’s right to a speedy trial, this Court applies the four-part test developed by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). See *Adams v. State*, 583 So. 2d 165, 167 (Miss. 1991). The relevant factors to be considered are: (1) the length of delay; (2) the reason for delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. See *Barker*, 407 U.S. at 530-533, 92 S. Ct. 2182. None of these factors is a necessary or sufficient condition to the finding of a violation of the right to a speedy trial; they must be considered together with other relevant circumstances. *Id.* at 533, 92 S. Ct. 2182.

*Bateman*, 125 So. 3d at 628-29.

#### A. Length of Delay

¶13. “This Court has held that a delay of eight months or more is presumptively prejudicial and requires a balancing of the remaining *Barker* factors.” *Id.* at 629. When considering whether the constitutional right to a speedy trial has attached, we have held that it ““attaches “at the time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge.”” *Johnson v. State*, 235 So. 3d 1404, 1417 (Miss. 2017) (quoting *Rowsey v. State*, 188 So. 3d 486, 495 (Miss. 2015)). Kelly was arrested on November 11, 2015, indicted on July 12, 2016, and the *capias* was executed on April 13, 2017. Kelly’s trial began on April 8, 2019. The parties agree that the delay was more than eight months and that a full *Barker* analysis is required. This factor weighs in Kelly’s favor and against the State.

## B. Reason for Delay

¶14. “Once a presumption of prejudice is shown, ‘the burden of persuasion must shift to the State to show good reason for the delay.’” *Johnson*, 235 So. 3d at 1417 (quoting *Graham v. State*, 185 So. 3d 992, 1005 (Miss. 2016)). The State must show that “either the delay was caused by the defendant or that the delay was for a good cause.” *Hersick v. State*, 904 So. 2d 116, 121 (Miss. 2004). “Where the State is unable to do either, this factor must be weighed against the State.” *Id.* (citing *Smith v. State*, 550 So. 2d 406, 409 (Miss. 1989)).

¶15. In *Barker*, the United States Supreme Court determined that “different weights should be assigned to different reasons.” *Barker*, 407 U.S. at 531. The court defined those weights as

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

*Id.* (footnote omitted).

¶16. In the order denying Kelly’s motion to dismiss, the trial judge determined that the State has shown good cause for the delay including the Defendant’s absence from Forrest County after he absconded for over a year, changes in the staff of the public defender’s office and the district attorney’s office, reassignment of assistant public defenders and district attorneys to specific judges, and this Court’s cancellation of its May, 2018, docket due to its court reporter tendering her resignation.

¶17. Kelly asserts that the trial judge’s findings were neutral reasons that are to be weighed against the State, not Kelly. The State asserts that while the trial judge was correct in finding



there was good cause for the delay, these are neutral reasons for the delay that “should be weighed neutrally or, at the most, slightly against the State.”

¶18. Since the parties agree that these are neutral reasons, this Court finds that this factor weighs slightly against the State as stated in *Barker*. See *Barker*, 407 U.S. at 531 (“A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”); see also *Franklin v. State*, 136 So. 3d 1021, 1034 (Miss. 2014) (“Any delay caused by the succession of judges and the delay caused by an overcrowded docket should be weighed only slightly against the State.” (citing *Murray v. State*, 967 So. 2d 1222, 1230 (Miss. 2007))).

### C. Assertion of Right to a Speedy Trial

¶19. “The defendant’s assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Johnson*, 235 So. 3d at 1417 (internal quotation marks omitted) (quoting *Barker*, 407 U.S. at 531-32). A defendant’s failure to assert this right makes it “difficult for a defendant to prove that he was denied a speedy trial.” *Id.* at 1417-18 (internal quotation marks omitted) (quoting *Barker*, 407 U.S. at 532).

¶20. Here, the parties agree that Kelly did not assert his right to a speedy trial properly because Kelly filed only a motion to dismiss on the basis that his constitutional right to a speedy trial had been violated. “This Court has established that asserting the right to a speedy trial and filing for dismissal for violating that same right are not one and the same.”

*Franklin*, 136 So. 3d at 1034 (citing *Bailey v. State*, 78 So. 3d 308, 323 (Miss. 2012)). This factor weighs in favor of the State and against Kelly.

#### D. Prejudice by Delay

¶21. In order for this Court to determine whether the delay prejudiced Kelly, we must consider three interests: “(1) prevent[ing] oppressive pretrial incarceration; (2) minimiz[ing] anxiety and concern of the accused; and (3) limit[ing] the possibility that the defense will be impaired.” *Johnson*, 235 So. 3d at 1418 (internal quotation mark omitted) (quoting *Johnson v. State*, 68 So. 3d 1239, 1244 (Miss. 2011)). Kelly’s argument concerns the third interest only. But the third interest is considered to be the most serious one. *Bateman*, 125 So. 3d at 632 (“The . . . most serious interest to be considered is whether the delay impaired the defense.”); *Barker*, 407 U.S. at 532 (“Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.”).

¶22. Kelly argues that he actually was prejudiced because the delay allowed for the destruction of the police body-camera footage, which “limited Kelly’s ability to adequately prepare his case.” Kelly asserts that, had he received a speedy trial, the State would have requested the footage and Kelly would have been afforded the opportunity to view the footage for *possible* exculpatory evidence. The State argues that Kelly was not actually prejudiced because the body-camera footage had no exculpatory value since Officer Henderson’s testimony included the same information that the footage would have provided.

¶23. We find Kelly’s argument is without merit. First, Kelly’s attorney had time to request

the body-camera footage before its destruction. At trial, Officer Henderson testified that, to his knowledge, the body-camera footage was stored electronically for two years. Kelly was arrested on November 11, 2015, meaning the footage would have been stored until November 11, 2017. When Kelly was arraigned on April 13, 2017, he had 214 days remaining to request the body-camera footage before it was destroyed. But Kelly’s defense attorney did not request the footage until November 7, 2018.

¶24. Second, Kelly’s argument is speculative because he fails to provide any proof that the footage actually contained exculpatory evidence. The State contends that the footage had no exculpatory value because “the footage would have merely confirmed Officer Henderson[’s] testimony.” We agree. Based on Officer Henderson’s testimony, the body-camera footage would not have recorded the moment when Kelly would have had the opportunity to throw the gun over the fence and into the yard because Officer Henderson had lost sight of Kelly at that time and because the body camera records only what the officer can see. Thus, we find that the body-camera footage lacked exculpatory value and that Kelly failed to provide sufficient evidence that the destruction of the body-camera footage prejudiced his ability to defend himself adequately in this case. This factor weighs against Kelly, not the State.

#### **E. Totality of the Circumstances**

¶25. “This Court looks at the totality of the circumstances, and no factor alone is dispositive.” *Thomas v. State*, 48 So. 3d 460, 477 (Miss. 2010) (citing *Price v. State*, 898 So. 2d 641, 648 (Miss. 2005); *see also Bateman*, 125 So. 3d at 633 (“After reviewing all of the factors relevant to the analysis of a speedy-trial claim, we must balance each factor along

with other relevant circumstances.” (citing *Barker*, 407 U.S. at 533)). As stated above, the first and second factors weigh in Kelly’s favor, and the third and fourth factors weigh heavily against Kelly. When considering the totality of the circumstances, it is clear that the delay was caused mostly by forces out of Kelly’s control. But Kelly did contribute to the delay of his trial by failing to assert his right to a speedy trial and by failing to request the body-camera footage before it was destroyed. Additionally, Kelly provides no evidence to support his claim that he actually was prejudiced by the delay. This Court finds that Kelly’s constitutional right to a speedy trial was not violated.

## **II. Sufficient evidence established that Kelly constructively possessed the gun.**

¶26. Kelly challenges the sufficiency of the evidence, arguing that it was error for the jury to convict him because there was a lack of evidence establishing that Kelly either was “in proximity to the gun” or “tying Kelly to the gun.” The State maintains that the evidence was sufficient to support the conviction because the firearm was found fifty feet from where Kelly had been arrested, Kelly was near that area moments before being arrested, Kelly was evading law enforcement officers, and an additional handgun magazine that fit the gun was found next to Kelly when he was arrested.

¶27. “The State must prove two elements beyond a reasonable doubt—(1) the defendant possessed a firearm, and (2) the defendant had previously been convicted of a felony crime.” *Williams v. State*, 285 So. 3d 156, 159 (Miss. 2019) (citing Miss. Code Ann. § 97-37-5 (Rev. 2014)). Here, the parties stipulated that Kelly had been convicted of a previous felony, satisfying the second element. Therefore, the State needed to prove only that Kelly possessed

a firearm in Forrest County, Mississippi, on the date in question.

¶28. Since there were no witnesses who could testify that Kelly had physical possession of the weapon, the State relied on the theory of constructive possession. “An item is within one’s constructive possession when it is subject to his dominion or control. Constructive possession may be established by direct evidence or circumstantial evidence.” *Keys v. State*, 478 So. 2d 266, 268 (Miss. 1985). This Court has stated also that “[p]roximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.” *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971).

¶29. Kelly argues that he did not have exclusive dominion or control of the premises and that there was no evidence presented that connected him to the gun. He claims that there is trial testimony that shows this area was a common walkway to Jr. Food Mart and that the premises where the gun was found belonged to another person, giving rise to the rebuttable presumption that the gun belonged to the owner of the property, not Kelly.

¶30. This Court has explained that

one who is the owner in possession of the premises, or the vehicle in which contraband is kept or transported, is presumed to be in constructive possession of the articles found in or on the property possessed. The presumption of a constructive possession, however, is a rebuttable presumption and must give way to the facts proven. Moreover, the rebuttable presumption of constructive possession does not relieve the State of the burden to establish defendant’s guilt as required by law and the defendant is presumed to be innocent until this is done.

*Dixon v. State*, 953 So. 2d 1108, 1113 (Miss. 2007) (quoting *Hamburg v. State*, 248 So. 2d 430, 432 (Miss. 1971)). Additionally, “[w]hen contraband is found on premises which are *not* owned by a defendant, mere physical proximity to the contraband does not, in itself, show

constructive possession.” *Kerns*, 923 So. 2d at 200 (internal quotation marks omitted) (quoting *Cunningham v. State*, 583 So. 2d 960, 962 (Miss. 1991)). Therefore, “when contraband is found on premises, there must be evidence, in addition to physical proximity, showing the defendant consciously exercised control over the contraband, and, absent this evidence, a finding of constructive possession cannot be sustained.” *Id.* (internal quotation marks omitted) (quoting *Cunningham*, 583 So. 2d at 962).

¶31. This Court finds that the State did not rely on Kelly’s physical proximity alone and that the State presented adequate evidence to rebut the presumption and to establish constructive possession. First, the State provided testimony from the residents of the premises in question, and all denied ownership of the recovered weapon. “[T]he jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony.” *Gathright v. State*, 380 So. 2d 1276, 1278 (Miss. 1980). Considered “in the light most favorable to the State[,]” it is possible that a reasonable juror could find the residents’ denials alone to be enough to rebut the presumption that the owner of the property possesses the contraband. *Lenoir*, 222 So. 3d at 279; *see also Dixon*, 953 So. 2d at 1113 (“[O]ne who is the owner in possession of the premises, or the vehicle in which contraband is kept or transported, is presumed to be in constructive possession of the articles found in or on the property possessed.” (quoting *Hamburg*, 248 So. 2d at 432)).

¶32. Second, the State provided evidence that established that Kelly had the opportunity and motive to dispose of the weapon. Officer Henderson’s testimony shows that Kelly was near the area and had the opportunity to throw the gun over the fence and into the yard. The

State also presented evidence that Kelly had a motive for tossing the weapon over the fence because he was fleeing from police officers.

¶33. Third, the State presented to the jury the fact that an additional handgun magazine was found next to Kelly at the time of his arrest and that the additional handgun magazine fit the recovered pistol. Kelly asserts that “[a]lthough he was found with a gun magazine under his leg that was compatible with the gun that was later recovered, it is important to note that the gun the officers found already had a magazine attached to it.” But “matters regarding the weight and credibility given the evidence are the province of the jury.” *Cowart v. State*, 178 So. 3d 651, 666 (Miss. 2015) (citing *Ginn v. State*, 860 So. 2d 675, 685 (Miss. 2003)). Considering the existence of the additional gun magazine “in the light most favorable to the State[,]” a rational juror could have found that the magazine helped to establish Kelly’s possession of the pistol with which it was compatible. *Lenoir*, 222 So. 3d at 279. Thus, this Court finds that there was sufficient evidence to support a finding of Kelly’s constructive possession of the firearm.

### **CONCLUSION**

¶34. Kelly’s constitutional right to a speedy trial was not violated, and sufficient evidence supported his conviction. We affirm Kelly’s conviction for possession of a firearm by a convicted felon.

¶35. **AFFIRMED.**

**RANDOLPH, C.J., KING, P.J., COLEMAN, MAXWELL, BEAM,  
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**