NUMBER 13-16-00513-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

KIMBERLY SEARS, **Appellee.**

On appeal from the County Court at Law No. 1 of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

The State appeals from an order granting Kimberly Sears' motion to dismiss for failure to provide a speedy trial. In one issue, the State complains that the trial court abused its discretion by granting dismissal on the ground that Sears "failed to show that her constitutional right to a speedy trial had been violated." We affirm.

I. BACKGROUND[1]

On November 26, 2011, Sears, according to an information, allegedly stole perfume, valued between fifty and five-hundred dollars, from an H.E.B. grocery store and resisted arrest. *See* TEX. PENAL CODE ANN. §§ 31.03 (theft), 38.03 (resisting arrest) (West, Westlaw through 2017 R.S.).

On December 30, 2011, the aforementioned information was filed. Thereafter, Sears retained counsel.

On January 12, 2012, Sears filed a waiver of arraignment that was signed by her and her retained counsel. According to Sears, her attorney "said he was going to take care of it [, the charges] . . . ." At the dismissal hearing, Sears was asked by the State, "So around spring of 2012, you thought this case was done?" She answered, "Yes."

On October 12, 2015, Sears[2] applied for a position in the jail division of the Nueces

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[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

[2] There is some confusion regarding Sears' name. At the dismissal hearing Sears testified:

SEARS' COUNSEL:	Ms. Luna, please state your full name for the record.
SEARS:	Kimberly Lopez Luna.
SEARS' COUNSEL:	And Ms. Luna, they have you down as Kimberly Sears. Why is that?
SEARS:	At the time of the arrest, I—I hadn't remarried, and my—I am not sure what happened, but I had—my name was already Luna. It wasn't Sears anymore. I don't know why they had booked me under Sears. I had told them, too, it was Luna.
SEARS' COUNSEL:	But Sears was your married name at the time of the arrest?
SEARS:	At the time—I got married in February of 2011, and I got arrested—I believe it was November 2011. So I was married already Luna before—before I got arrested.

County Sheriff's Office. As part of the application process, on February 11, 2016, the Nueces County Sheriff's Office received, according to Sears' counsel, a criminal history report from the Texas Department of Public Safety regarding Sears.[3] The report is dated February 11, 2016, and it includes the two charges at issue.

On April 12, 2016, Sears was arrested on the charges of theft and resisting arrest. The following day, the trial court found Sears indigent and appointed her counsel. Later that month, Sears propounded written discovery on the Nueces County Sheriff's Office, Sheriff Jim Kaelin, and the State.

On May 5, 2016, Sears moved to compel discovery responses from the Nueces County Sheriff's Office and Sheriff Kaelin.

On July 28, 2016, Sears filed her "Motion to Dismiss for Failure to Provide a Constitutional Speedy Trial." After an evidentiary hearing at which only Sears testified, the trial court granted Sears' motion to dismiss. This appeal followed.

II. DISCUSSION

In the State's sole issue, it challenges the trial court's granting of Sears' motion to dismiss for lack of a speedy trial by arguing that Sears failed to show that her constitutional right to a speedy trial had been violated.

A. Applicable Law

SEARS' COUNSEL: But the date of your arrest your—your married name was Sears?

SEARS: Yes.

From this testimony, it appears that at the time of her November 2011 arrest and the dismissal hearing, Sears' name was Kimberly Lopez Luna and her last name from a prior marriage was Sears. For simplicity's sake, we refer to appellant as Sears.

[3] The report identified Sears by both names, "Kimberly Lopez Luna" and "Kimberly Sears (AKA)."

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. U.S. CONST. amend. VI; *see also* TEX. CONST. art. I, § 10. The right to a speedy trial attaches once a person is arrested or charged. *See Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). In determining whether Sears' constitutional right to a speedy trial has been violated, we analyze her speedy trial claim "on an ad hoc basis" by weighing and then balancing the four factors expounded in *Barker v. Wingo*: (1) length of the delay, (2) the reason for the delay, (3) Sears' assertion of the right, and (4) the prejudice to Sears. *See Cantu*, 253 S.W.3d at 280 (citing *Barker v. Wingo*, 407 U.S. 514, 515 (1972)).

The conduct of both the State and Sears must be weighed in balancing the *Barker* factors, and no single factor is an essential or sufficient condition to the finding of a speedy trial violation. *See Barker*, 407 U.S. at 530. Rather, the *Barker* factors must be considered together, along with any additional and relevant circumstances. *See id*.

While the State has the burden of justifying the length of delay and reason for delay, Sears has the burden of proving the assertion of the right and showing prejudice. *See Cantu*, 253 S.W.3d at 280 (citing *Barker*, 407, U.S. at 531; *Ex parte McKenzie*, 491 S.W.2d 122, 123 (Tex. Crim. App. 1973)). Additionally, Sears' burden of proof on the latter two factors varies inversely with the State's degree of culpability for the delay in prosecuting Sears. *Doggett v. United States*, 505 U.S. 647, 657 (1992). Thus, the greater the State's bad faith or official negligence and the longer its actions, or inactions, delay a trial, the less Sears must show actual prejudice or prove diligence in asserting her right to a speedy trial. *Cantu*, 253 S.W.3d at 280–281.

However, before engaging in an analysis of each *Barker* factor, the accused must show that the delay from the date of the accusation until trial is unreasonable enough to be "presumptively prejudicial." *See State v. Wei,* 447 S.W.3d 549, 556–57 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

B. Standard of Review

We apply a bifurcated standard of review to speedy trial cases. *See Cantu*, 253 S.W.3d at 281. We review factual components for an abuse of discretion while we review legal components de novo. *Id.* The balancing test as a whole is purely a legal question. *Id*. Under abuse-of-discretion review, we give deference to the trial judge's factual determinations and view all evidence from the record in the light most favorable to the trial court's ultimate ruling. *Id.*

C. Length of the Delay

The State concedes that the length of the delay suffices to trigger inquiry into the other *Barker* factors. The first *Barker* factor weighs against the State.

D. Reason for the Delay

The State asserts that the case against Sears "appeared to be on track for a trial in 2012, but then inexplicably disappeared for four years, reappearing on the docket for trial in 2016." It contends that the "delay appears to be the result of negligence on the part of both sides." The State characterizes its neglect as "unexplained," and it attributes Sears' neglect to "her attorney's mistaken belief that the case had been resolved."[4]

We reject the State's attempt to split the blame for this second *Barker* factor.

[4] We note that with regard to the third *Barker* factor—assertion of the right to a speedy trial—the State argues that Sears, rather than her counsel, "mistakenly believed" that the charges had been resolved.

True, Sears testified that her initial defense counsel told her that "he had taken care of it, and [Sears] had nothing to worry about any more." But, Sears' testimony does not support the State's contention that her counsel *mistakenly* believed the case had been resolved. The link between the two is, at best, speculative. One could equally speculate that Sears' counsel and the State had agreed to dismiss the charges, Sears' counsel vaguely relayed the effect of such an agreement to Sears in layman's terms of her having "nothing to worry about any more," and the dismissal papers were misplaced.

The State bore the burden of justifying the reason for delay, *see Cantu*, 253 S.W.3d at 280, and it presented no non-speculative evidence that Sears' counsel contributed to the delay. On this record, the second *Barker* factor weighs against the State.

E. Assertion of the Right

The State contends that the third *Barker* factor "weighs heavily" against Sears on the ground that "when in 2016 it became clear that" the charges were still pending Sears "delayed half a year in asking for a speedy trial, and then requested outright dismissal rather than trial."

The State's characterization of Sears' delay as "half a year" is not supported by the record. Sears was most recently arrested on April 12, 2016, and this is the only date in the record that could support the State's reference to "when . . . it became clear [to Sears] that" the charges were still pending. Sears moved for dismissal on July 28, 2016. Thus, Sears waited approximately three and a half months, not "half a year," between becoming aware of charges that she thought "had been taken care of," and which had laid dormant for over four years and three months, and moving for dismissal on speedy

trial grounds.

The State is correct in that Sears did not seek a speedy trial; and instead, she summarily moved for dismissal. In support of the State's contention that Sears failed to timely assert her right to a speedy trial, it references the following passage from *Cantu*,

> Filing for a dismissal instead of a speedy trial will generally weaken a speedy-trial claim because it shows a desire to have no trial instead of a speedy one. If a defendant fails to first seek a speedy trial before seeking dismissal of the charges, *he should provide cogent reasons for this failure*. Repeated requests for a speedy trial weigh heavily in favor of the defendant, while the failure to make such requests supports an inference that the defendant does not really want a trial, he wants only a dismissal.

253 S.W.3d at 283 (footnotes omitted) (emphasis added). Our analysis is also guided by a passage in *Barker* wherein the Supreme Court rejects the demand-waiver rule, writing:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, *a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client*, or from a situation in which no counsel is appointed.

407 U.S. at 528–29 (footnote omitted) (emphasis added). In *Barker*, the Court signaled that a knowing failure to object might be weighted more heavily against a defendant than an uninformed acquiescence. *Id*.

As we read the State's position, Sears is forestalled from prevailing on the third *Barker* factor unless she first requested a speedy trial after a case had laid dormant for four years and three months due solely to the State's dereliction. Had Sears moved for a speedy trial in February 2016, after her second arrest, the earliest that trial could have occurred would have been during a period that approaches the five-year period wherein the Fifth Circuit has concluded that a finding of presumed prejudice under the fourth *Barker* factor attaches. *See U.S. v. Cardona,* 302 F.3d 494, 498 (5th Cir. 2002) (holding that the excessive delay was due to the negligence of the State and reasoning that, because the prejudice caused by excessive delay compounds over time, a five-year delay was sufficient to absolve the defendant of his burden to prove prejudice). Given the State's dereliction and the state of the discovery, the likelihood of Sears receiving a trial during a period that was not presumptively prejudicial was low. *See id*. Therefore, we cannot fault Sears for not requesting what she likely would have never had—a speedy trial. *See Doggett*, 505 U.S. at 657 (providing that a defendant's burden of proof regarding the third and fourth *Barker* factors is inversely related to the State's degree of culpability for the delay).

The State's position is akin to the demand-waiver rule that the Supreme Court rejected in *Barker*. *Id*. "A defendant has no duty to bring [herself] to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Id*. at 527. When a defendant is confronted by charges that have been dormant for years and presumably "taken care of," a defendant should not be forced to sanitize the State's dereliction by first seeking to bring herself to trial.

Sears bore the burden of proving the assertion of the right to a speedy trial, *Cantu*, 253 S.W.3d at 280, and the procedural history of this case establishes that she met that burden. Sears' delay of three and a half months in seeking dismissal on speedy trial grounds is eclipsed by the four years and three months of delay attributable to the State. *See Barker*, 407 U.S. at 531 (noting that the third *Barker* factor "is closely related to the other factors"); *see also Doggett*, 505 U.S. at 657 (providing that a defendant's burden of proof regarding the third and fourth *Barker* factors is inversely related to the State's degree of culpability for the delay). The third *Barker* factor weighs in favor of Sears.

F. Prejudice

To analyze prejudice, the Supreme Court in *Barker* identified three interests the Speedy Trial Clause was designed to protect: (1) "to prevent oppressive pretrial incarceration," (2) "to minimize anxiety and concern of the accused," (3) and "to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532; *see Zamorano v. State*, 84 S.W.3d 643, 652 (Tex. Crim. App. 2002). The last interest is the most important because the fairness of the entire criminal-justice system is distorted when a defendant is unable to adequately prepare his defense. *Barker*, 407 U.S. at 532. The State advances three unavailing contentions regarding the fourth *Barker* factor.

First, the State contends that Sears "neither suffered prolonged pre-trial incarceration nor did she worry about a case that she assumed had been resolved." This contention is supported by the record, but it is not dispositive of the fourth *Barker* factor.

Second, the State contends that Sears "presented nothing to show that her ability to defend herself has been prejudiced by the present delay." But, the trial court was presented with differing accounts regarding the availability of witnesses. Sears' attorney represented to the trial court that, "basically this is something that occurred at an H.E.B. The two employees that worked for H.E.B. apparently don't work there anymore. I couldn't find them." On direct examination by her counsel, Sears testified:

> SEARS' COUNSEL: And—and I told you that I was going to hire some investigator—or an investigator, Santos Ronje, to go look for these witnesses to see if they were even around. Remember that?
>
> SEARS: Yes.
>
> SEARS' COUNSEL: And did I tell you that I could not find them?
>
> SEARS: Yes.

The State represented:

> I spoke to both of those employees on the phone today. I used the numbers that were on the subpoena that we originally provided. They both remember the incident, and they are willing to testify in the case. So I don't know how he wasn't able to locate them. I found them today by just calling them on the phone. They are willing to testify.

Assuming, without deciding, that attorneys for both the State and Sears were speaking from first-hand knowledge and that the trial court considered such statements, *see Gonzales v. State*, 435 S.W.3d 801, 811 (Tex. Crim. App. 2014) (providing that statements of an attorney on the record may be considered as evidence only if the attorney is speaking from first-hand knowledge) (quotation omitted), along with Sears' testimony, we must give deference to the trial court's factual determination in the light most favorable to its ultimate ruling. *See Cantu*, 253 S.W.3d at 281. Accordingly, the

trial court may have believed the assertions of Sears and her counsel, *see Gonzales*, 435 S.W.3d at 811, that store employees were unavailable to testify.

Third, the State contends that the record evidences "several months of discovery proceedings by the defense without any indication that it was prejudiced or would not be able to fairly defend against the charges at trial." Our own review of the clerk's record shows: [5]

- In April 2016, Sears (1) applied for a subpoena for business records from the Nueces County Sheriff's Office and Sheriff Kaelin; (2) filed a motion for notice of evidence under Texas Rule of Evidence 404(b); and (3) a motion for discovery seeking certain material from the State.

- In May 2016, Sears filed a motion to compel responses regarding the subpoenas served on the custodian of records for the Nueces County Sheriff's Office and Sheriff Kaelin.

The clerk's record provides no indication that the State responded to Sears' motion for discovery, which requested, among other things, a "list of the names and addresses of all witnesses the prosecution intends to call at trial." And, the State did not offer an exhibit of its discovery responses at the hearing, if they existed. Furthermore, Sears' motion to compel alleges that "Defendant's Counsel was notified by Jenny Cron, Assistant Nueces County Attorney, that they objected to said subpoena as lacking relevancy and essentially would not produce any documents."

The record before us shows that Sears' discovery requests were met by either silence or resistance. The delay in this case is four years and three months, which approaches the five-year mark wherein courts have concluded that a presumption of

[5] We note that the State fails to provide a record citation for its contention. *See* TEX. R. APP. P. 38.1(i) ("the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

prejudice attaches and the State must then rebut such a presumption. *Accord Cardona,* 302 F.3d at 498 (5th Cir. 2002) (holding that the excessive delay was due to the negligence of the State and reasoning that, because the prejudice caused by excessive delay compounds over time, a five-year delay was sufficient to absolve the defendant of his burden to prove prejudice), *Wei,* 447 S.W.3d at 556 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (surveying case law and recognizing that in no case surveyed was prejudice presumed because the length of the delay reached a "magic number"); *see also Gonzales,* 435 S.W.3d at 811 (Tex. Crim. App. 2014) (holding that where a presumption of prejudice is established the State must persuasively rebut the presumption). Given the length of the delay and that Sears' burden of proof is inversely related to the State's degree of culpability for the delay, *see Doggett*, 505 U.S. at 657, the resistance of the sheriff's office and the sheriff to Sears' discovery requests may be reasonably inferred as some evidence of prejudice.

We conclude that none of the State's contentions are availing. Furthermore, Sears provided some evidence that she was prejudiced as a result of the delay. The fourth *Barker* factor weighs in favor of Sears.

G. Balancing

All four of the *Barker* factors weigh in Sears' favor and against the State. The State concedes that the length of delay factor triggers a *Barker* analysis and that it weighs against the State. While the State suggests that the reason for the delay should be split between Sears and the State, we decline the State's suggestion. We conclude that the second *Barker* factor weighs against the State because it presented no evidence of why

it waited four years and three months to prosecute Sears. *See Doggett*, 505 U.S. at 657 (providing that the longer the delay due to official negligence, the less tolerable the delay becomes). The third *Barker* factor, assertion of the right to a speedy trial, weighs against the State. Giving the deference that we must to the trial court's factual determinations, *see Cantu*, 253 S.W.3d at 281, and the record that the State presents, *see* TEX. R. APP. P. 38.6(d), Sears timely asserted her right to a speedy trial, especially in light of the State's dereliction. Lastly, as to prejudice, we conclude that Sears presented some evidence that her defense counsel could not locate H.E.B. employees who would presumably have knowledge of the incident. We hold the trial court did not err in balancing the *Barker* factors and granting Sears' motion to dismiss for lack of a speedy trial.

We overrule the State's sole issue.

III. CONCLUSION

We affirm the trial court's order of dismissal.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
24th day of August, 2017.