

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01223 COA**

DAVID JENKINS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	11/06/95
TRIAL JUDGE:	HON. ANDREW C. BAKER
COURT FROM WHICH APPEALED:	YALOBUSHA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT COOPER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES MARIS
DISTRICT ATTORNEY:	ROBERT WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION W/ INTENT; 18 YEARS, 9 TO SERVE
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	3/5/98
CERTIORARI FILED:	4/29/1998
MANDATE ISSUED:	

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

David Jenkins appeals his conviction of possession of marijuana with intent to sell and possession of cocaine with intent to sell raising the following issues as error:

I. THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, AND THE DEFENDANT'S STATUTORY RIGHT TO BE TRIED WITHIN 270 DAYS OF ARRAIGNMENT.

II. THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN ILLEGAL SEARCH AND

SEIZURE, WITHOUT A WARRANT.

III. THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF POSSESSION WITH INTENT TO SALE, BARTER, OR DISTRIBUTE A CONTROLLED SUBSTANCES.

Finding no error, we affirm.

FACTS

The Yalobusha County Sheriff's Department received information that David Jenkins was entering Coffeerville, Mississippi on Fridays and Saturdays to sell drugs. On August 5, 1994, Deputy Milton Hervey saw Jenkins driving in town. Hervey contacted Deputy Homer Melton and told him that Jenkins was driving around the west side of Coffeerville. Melton drove around and saw Jenkins stopped at a stop sign. Melton pulled beside Jenkins. As Melton stepped outside his vehicle to talk to Jenkins, he noticed that Jenkins had a beer can between his legs. The deputy informed Jenkins that it was illegal to have beer in Yalobusha County and asked Jenkins for his driver's license. As Jenkins bent over to retrieve his license, Melton reached in the automobile and put the vehicle in park. Melton then asked Jenkins to exit his vehicle, and as Jenkins was exiting he tried to flee. As Jenkins tried to flee, Melton saw that he was trying to reach in his pocket. Melton was able to apprehend Jenkins, and soon thereafter Deputy Hervey arrived on the scene. As the deputies were handcuffing Jenkins, he threw a brown bag out of his pocket. After they handcuffed Jenkins, Melton retrieved the brown bag, looked inside, and discovered that the bag contained what appeared to be marijuana and crack cocaine.

After they handcuffed and placed Jenkins under arrest, the deputies transported him to the Yalobusha County Jail in Water Valley, Mississippi. Officer Randy Corbin, with the Mississippi Bureau of Narcotics, was called to assist on the arrest of Jenkins. Corbin testified that he helped photograph the evidence and thereafter took custody of all the alleged drugs. Corbin transported seven separate "dime" bags of marijuana and several small plastic containers that contained approximately thirty-eight rocks of crack cocaine to the Mississippi Crime Laboratory in Batesville. Carol Karr, with the Mississippi Crime Laboratory, testified that she tested the contents and found that the exhibits contained marijuana and cocaine.

Jenkins testified that he and his brother had been driving around Coffeerville that day. He stated that his brother was drinking beer, but he had not. Jenkins testified that when he dropped his brother off, his brother left his beer in the tray on the floorboard. Jenkins stopped at a stop sign and was about to turn when he saw Deputy Melton driving. Since Melton did not have his turn signal on, Jenkins waited for Melton to drive by. However, Melton turned and signaled Jenkins to stay. After the deputy stopped his vehicle, Jenkins testified that Melton got out of the sheriff's vehicle and walked up to his automobile. When Melton got to his automobile, Jenkins stated that the deputy asked for his driver's license. As Jenkins was reaching for his license Jenkins testified that Melton asked him to step out of the vehicle. Before Jenkins made it all the way out of the automobile, Melton grabbed him and Deputy Hervey arrived on the scene. Jenkins testified that he did not reach in his pocket at any time because Melton had his arms. As Jenkins was sitting in the back of the deputy's vehicle, he saw Melton searching his vehicle. Jenkins testified that he never had a brown bag in his pockets or in his vehicle.

Following deliberation, the jury returned a verdict of guilty of intent to sell less than one ounce of marijuana and intent to sell cocaine.

ANALYSIS

I.

THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, AND THE DEFENDANT'S STATUTORY RIGHT TO BE TRIED WITHIN 270 DAYS OF ARRAIGNMENT.

The Sixth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution of 1890 guarantees that "[i]n all criminal prosecutions the accused shall have a right to . . . a speedy and public trial." Jenkins's constitutional guarantee to a speedy trial attached at the time he was arrested. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989); *Bailey v. State*, 463 So. 2d 1059, 1062 (Miss. 1985); *Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982). This right exists separately from the statutory right to a speedy trial. *Bailey*, 463 So. 2d at 1062; *Perry*, 419 So. 2d at 198. Once this right has attached this Court will follow the test laid out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 515 (1972) for the determination of a violation of the right to a speedy trial.

In *Barker* the Court promulgated a balancing test delineating four factors that we must weigh when a defendant asserts a constitutional speedy trial violation. Each factor is to be considered on an individual basis. The Court stated:

We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

***Barker*, 407 U.S. at 533.**

The factors set out by the United States Supreme Court are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. *Id.* at 533. No one factor is, in itself, dispositive. *Bailey*, 463 So. 2d at 1062. Rather, the factors must be considered and assessed, objectively and dispassionately, then weighed and balanced together. *Flores v. State*, 574 So. 2d 1314, 1322 (Miss. 1990); *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989); *Kinzey v. State*, 498 So. 2d 814, 816 (Miss. 1986).

Our speedy trial statute, Mississippi Code Annotated § 99-17-1 (Rev. 1994), states "[u]nless good cause is shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused

has been arraigned." Continuances for "good cause" toll the running of the 270-day period. **Vickery v. State, 535 So. 2d 1371, 1375 (Miss. 1988)**. Here Jenkins had two trial settings in the same week of May 1995. Jenkins was tried on another charge, and the trial lasted approximately two to three days. At the motion to dismiss, the trial judge stated that he was denying the motion because it was his custom not to make a criminal defendant stand trial before the same jury panel, because of the resulting prejudice that might befall the defendant, and he noted that Jenkins's trial was set for the first term of court since Jenkins's last trial.

The total elapsed time between the presentment of indictment on October 24, 1994 and the October 18, 1995 trial was 359 days. Deducted from this total should be 119 days from June 21, 1995 to October 18, 1995 for the continuance granted with good cause. This amounts to 240 days, well within the 270-day statutory rule. We hold that there was no violation of Miss. Code Ann. § 99-17-1 (Rev. 1994).

CONSTITUTIONAL SPEEDY TRIAL VIOLATION

1. Length of the delay

This first factor under *Barker* operates as a "triggering mechanism." **Smith v. State, 550 So. 2d 406, 408 (Miss. 1989)**. For purposes of Jenkins's constitutional speedy-trial claim, the delay is calculated from the date of arrest. **Flores v. State, 574 So. 2d 1314, 1322 (Miss. 1990)**. For Jenkins the time between arrest and trial was four hundred thirty-six days. In **Smith v. State, 550 So. 2d 406, 408 (Miss. 1989)**, the Mississippi Supreme Court held "that any delay of eight (8) months or longer is presumptively prejudicial." This factor standing alone is insufficient for reversal, but requires a close examination of the remaining factors. **Handley v. State, 574 So. 2d 671, 676 (Miss. 1990)**.

2. Reason for the delay

"The [S]tate bears the risk of non-persuasion regarding the reasons for delay and must show whether that the defendant caused the delay or that good cause existed for the delay." **Fleming v. State, 604 So. 2d 280, 299 (Miss. 1992)** (citing *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991)). As stated above, the bulk of delay in bringing Jenkins to trial dealt with the fact that he had two trial settings in the same week of May 1995. At the motion to dismiss, the trial judge stated that he was denying the motion because it was his custom not to make a criminal defendant stand trial before the same jury panel. Thus, the bulk of the delay was caused by the trial court's desire to protect Jenkins from any resulting prejudice. The reason for the delay does not weigh against the State.

3. Whether the defendant asserted his right to a speedy trial

Jenkins filed a motion to dismiss on October 10, 1995, eight days before his trial. It is not fatal to Jenkins's speedy trial claim where he was late in asserting his right to a speedy trial. "The duty of a defendant to request a trial is less than the duty on the state to bring the trial forward." **Flores, 574 So. 2d at 1323**. Jenkins's delayed assertion of his right to a speedy trial is likewise not fatal to his claim here, but since Jenkins did not file his motion to dismiss until well over a year, this factor favors the State, although lightly because the ultimate burden falls on the State's shoulders.

4. Whether the defendant has been prejudiced by the delay

The United States Supreme Court has stated that prejudice to the defendant should be assessed in light of the three distinct interests which the speedy trial right was designed to protect: (1) the prevention of oppressive pretrial incarceration, (2) the minimization of anxiety and concern of the accused, and (3) the limitation of the possibility that the defense will be impaired. ***Barker*, 407 U.S. at 532.**

In recent years, the Mississippi Supreme Court has treated the prejudice prong of the *Barker* test in various ways. Although *Trotter v. State*, **554 So. 2d 313, 318 (Miss. 1989)**, held that no affirmative showing of prejudice is required in order to prove a defendant's constitutional right to a speedy trial has been denied, the court in *Polk v. State*, **612 So. 2d 381, 387 (Miss. 1992)**, said that without a showing of prejudice, this element cannot be weighed in favor of the defendant. Recently, the Mississippi Supreme Court has appeared to require criminal defendants to demonstrate an actual impairment of their defense if their claims of denial of a speedy trial are to succeed. *Herring v. State*, **691 So. 2d 948, 956 (Miss. 1997)**; *Skaggs v. State*, **676 So. 2d 897, 901-902 (Miss. 1996)**; *McGhee v. State*, **657 So. 2d 799, 804 (Miss. 1995)**. Although the court contends that no one factor is dispositive in balancing the elements, the court continues to rely on whether or not the defendant can prove he suffered actual prejudice to his defense as a result of the delay. *McGhee*, **657 So. 2d at 806** (Sullivan, J., dissenting).

Jenkins cannot show prejudice by the delay. Jenkins was out on bond the majority of the time, and he does not even attempt to show prejudice and none is self-evident from the record. Also, Jenkins does not allege oppressive conduct by the State. *Kolberg v. State*, **No. 93-DP-00825-SCT, 1997 WL 751945, at *12 (Miss. Dec. 8, 1997)**. Thus, this factor weighs against Jenkins and in favor of the State.

The first of the four *Barker* factors, length of delay, is presumptively prejudicial to Jenkins because it exceeds the eight-month period of delay which the Mississippi Supreme Court has declared to be presumptively prejudicial. The second factor, the reason for delay, weighs in favor of the State. The third factor, Jenkins's assertion of his right to a speedy trial, cannot be weighed against the State. Regarding the fourth and final factor, we hold that Jenkins was not prejudiced by the delay.

Because the majority of the factors weigh for the State, we reject Jenkins's argument that the State denied him his right to a speedy trial. Accordingly, we affirm the court's denial of Jenkins's motion to dismiss.

II.

THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN ILLEGAL SEARCH AND SEIZURE, WITHOUT A WARRANT.

Jenkins argues that the marijuana and cocaine seized were based on an illegal, warrantless search of him and his vehicle. He opines that the lower court should have excluded the evidence because the deputies had no probable cause, and no evidence was presented at the trial to establish probable cause, for the search of him or his vehicle. The State argues that the deputies' initial encounter with Jenkins was either a voluntary conversation or an investigative stop in which no probable cause was needed. We agree.

Police activity in preventing crime, detecting violations, making identifications, and in apprehending criminals may be divided into three types of action: (1) Voluntary conversation: An officer may approach a person for the purpose of engaging in a voluntary conversation no matter what facts are known to the officer since it involves no force and no detention of the person interviewed; (2) Investigative stop and temporary detention: To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest; (3) Arrest: An arrest may be made only when the officer has probable cause.

***Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975).**

The situation in the case *sub judice* falls either under the first or second type of action. Here, the Yalobusha County Sheriff's Department received information, several calls from reliable sources, that Jenkins was coming into Coffeeville on Fridays and Saturdays and selling drugs. The sources told them that Jenkins would be driving a brown 1983 Buick Regal with a front license plate bearing the name "David." On Friday August 5, 1994, Deputy Milton Hervey spotted Jenkins in Coffeeville driving the described vehicle and relayed that information to Deputy Homer Melton. Melton proceeded to the area and saw the vehicle, with Jenkins driving, stopped at a stop sign on a side road. Melton turned into that road and stopped his automobile along side Jenkins' vehicle. Melton testified that Jenkins spoke to him, because they knew each other and the deputy stopped. When Melton stepped from his vehicle, he observed a beer can between Jenkins' legs. Knowing that possession of beer in Yalobusha County is illegal, Melton asked Jenkins to step from the vehicle. When Jenkins was exiting the vehicle, he broke and ran, but was caught by Melton. Hervey arrived on the scene and assisted Melton in securing Jenkins and as they did so, Jenkins threw a brown bag from his pocket. The bag contained several small baggies of what appeared to be marijuana, and several containers which held approximately thirty-eight rocks of what appeared to be crack cocaine. Melton then placed Jenkins under arrest.

Police officers have the authority to detain a person without actually arresting him for investigatory purposes. ***Haddox v. State*, 636 So. 2d 1229, 1234 (Miss. 1994).** "[G]iven reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest." ***Estes v. State*, 533 So. 2d 437, 441 (Miss. 1988)** (quoting *Griffin v. State*, 339 So. 2d 550, 553 (Miss. 1976)).

We hold that the seizure of the cocaine and marijuana was the result of a valid investigative stop only requiring reasonable suspicion that criminal activity was afoot or about to take place, ***Neely v. State ex rel. Tate County*, 628 So. 2d 1376, 1379 (Miss. 1993); *Floyd v. State*, 500 So. 2d 989, 992 (Miss. 1986)**, or the result of a voluntary conversation, since both Jenkins and Melton testified that they knew each other prior to this incident. The seized cocaine and marijuana was not the fruit of an illegal arrest. What emerged was a temporary, investigatory stop, or a voluntary conversation, that was reasonable under the circumstances. Therefore, we hold that the trial court did not err in admitting into evidence the crack cocaine and marijuana.

III.

THE LOWER COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A

**DIRECTED VERDICT ON THE ISSUE OF POSSESSION WITH INTENT TO SALE,
BARTER, OR DISTRIBUTE A CONTROLLED SUBSTANCES.**

Jenkins argues that the only testimony concerning an intent to sell marijuana and cocaine came from Agent Corbin. Corbin testified that based on the packaging of the marijuana and cocaine seized, the marijuana being packaged in "dime bags," meaning \$10 bags, and the cocaine being seized in \$20 rocks of crack cocaine and "dime" rocks of crack cocaine, would be consistent with someone selling drugs. Jenkins states that this testimony is insufficient to support a conviction of possession of marijuana and cocaine with the intent to sale, barter, or distribute.

"Intent to distribute or dispense controlled substances may be established by circumstantial evidence." *Jackson v. State*, 689 So. 2d 760, 767 (Miss. 1997) (quoting *Hicks v. State*, 580 So. 2d 1302, 1305 (Miss. 1991)). "[A] jury may reasonably conclude that a defendant intended to unlawfully distribute a controlled substance if the quantity or nature of the seized substance evidences an intent to distribute—as opposed to an intent to merely possess for personal use." *Jackson*, 689 So. 2d at 767 (quoting *Hicks*, 580 So. 2d 1305). "The evidence sufficient to infer intent to [deliver] must be evaluated in each case." *Jackson*, 689 So. 2d at 767 (quoting *Jackson v. State*, 580 So. 2d 1217, 1220 (Miss. 1991)). "[W]here the contraband is in an amount which a person could reasonably hold for personal use, other evidence of intent is necessary." *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992). *See also Jowers v. State*, 593 So. 2d 46, 47 (Miss. 1992); *Ivy v. State*, 589 So. 2d 1263, 1266 (Miss. 1991); *Breckenridge v. State*, 472 So. 2d 373, 378 (Miss. 1985).

Examining the facts of this case in the light most favorable to the State, the evidence was sufficient to establish beyond a reasonable doubt that Jenkins intended to distribute the cocaine and marijuana. The prosecution offered the following circumstantial evidence in support of the charge of possession with intent to distribute cocaine and marijuana: 1) the quantity was beyond the amount which an average user could consume, according to the expert testimony of Agent Corbin; 2) the packaging of the crack cocaine and marijuana was consistent with a person who would distribute crack cocaine and marijuana, specifically, Jenkins was in possession of seven separate "dime" bags of marijuana, and approximately thirty-eight rocks of crack cocaine, packaged in several separate containers; 3) several reliable sources informed the Yalobusha County Sheriff's Department that Jenkins was coming into Coffeerville and selling drugs; and 4) Jenkins was found driving in an area known for drug trafficking.

No reasonable jury could have determined that Jenkins lacked the intent to distribute. Because the State sufficiently met its burden of proof, this assignment of error is without merit.

THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I OF POSSESSION OF COCAINE WITH INTENT TO SELL, BARTER, TRANSFER, DISTRIBUTE, OR DISPENSE AND SENTENCE OF THREE (3) YEARS WITH TWO YEARS SUSPENDED, SENTENCE TO BE SERVED CONSECUTIVE TO COUNT II, AND FINE OF \$1,000; COUNT II OF POSSESSION OF MARIJUANA WITH INTENT TO SELL, BARTER, TRANSFER, DISTRIBUTE, OR DISPENSE AND SENTENCE OF FIFTEEN (15) YEARS, WITH THE LAST SEVEN (7) SUSPENDED, AND FINE OF \$1,000, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**