

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001440-MR

JAMES T. ASHBY

APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE DORTCH, JUDGE
ACTION NO. 99-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI and McANULTY, JUDGES.

EMBERTON, JUDGE: This is an appeal from a conditional plea of guilty to one count of possession of a firearm by a convicted felon for which appellant was sentenced to four years' imprisonment. Appellant's plea was conditioned upon the reservation of the right to appeal the denial of his motion for a speedy trial. We affirm.

Appellant was indicted on April 16, 1999, on six counts of possession of a firearm by a convicted felon and one count of being a persistent felony offender. He was subsequently arraigned and counsel was appointed to represent him. An initial trial date of August 19, 1999, was also set at that time. On

August 13, 1999, the circuit clerk filed an acknowledgment from the Roederer Correctional Complex noting that this indictment had been filed against appellant as a detainer.

Although, for reasons not apparent from the record, the August 19th trial on the instant charges did not take place as scheduled, it appears that appellant's counsel filed a motion to dismiss and a motion to preclude PFO enhancement to be heard on August 15th. These same motions were subsequently noticed for a hearing on August 26th. Furthermore, on August 19th, the Commonwealth filed a motion requesting the trial court to reset the case for jury trial at the "earliest convenience of the Court." By order of August 26th, trial was rescheduled for March 9, 2000.

On September 3, 1999, appellant file a pro se motion to be tried within 180 days as required by Kentucky Revised Statutes (KRS) 500.110. In response, the Commonwealth moved the court to change the trial date to January 14, 2000, in order to "accommodate the one hundred eighty day rule" invoked in appellant's motion. The trial court thereafter granted the Commonwealth's motion and rescheduled the trial for January 14, 2000. Appellant then filed a motion to dismiss the untried indictments against him for failure to comply with KRS 500.110 which was denied by order of December 22, 1999. Several subpoenas were issued for the January 14th trial date. However, the next item appearing of record is a March 2, 2000, order denying again appellant's pro se motion to dismiss upon the basis of the court's ruling that "he has already been tried once before

the sitting jury panel and that one case involving this matter had already been tried before said panel. . . ." Finally, on April 27, 2000, appellant entered a guilty plea to one count of possession of a firearm by a convicted felon, conditioned upon the retention of his right to appeal issues relating to his speedy trial claim, as well as an issue of double jeopardy and multiple enhancement. This appeal presses only the KRS 500.110 speedy trial issue.

Contrary to appellant's assertion, we are convinced that there existed in this case "good cause" to invoke the exception spelled out in KRS 500.110. The statute by its own terms provides that if good cause is demonstrated, "the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Here the trial court specified that the reason for the continuance was the fact that appellant had already been tried on a related charge before the panel which would have heard the instant charge. The separate indictment, which was tried on January 14th, charged appellant with burglary and theft of rifles and shotguns from a house in Ohio County. Appellant's conviction on these charges resulted in a sentence of fifteen years' imprisonment. Furthermore, it was the possession of these firearms which formed the basis for the possession charge at issue in this appeal. In our opinion, the trial court acted well within its discretion in continuing the appellant's trial on possession of firearms by a convicted felon in order to prevent him from facing the same jury panel twice on closely

related charges.¹ Similarly, we view the decision to delay appellant's firearm possession charge as falling squarely within the rationale set out in Gabow v. Commonwealth,² and Barker v. Wingo.³ In sum, there is absolutely no basis for disturbing the trial court's judgment in this case.

The judgment of the Ohio Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS BY SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: I respectfully dissent. I do not believe that the trial court should have presumed bias of the entire panel merely on the basis that some veniremen had served on the defendant's panel at an earlier trial. Failure to establish an insufficient number of jurors, in my opinion, militates against the trial court's finding of "good cause." KRS 500.110. I would remand this matter with instructions to dismiss the indictment with prejudice.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹ Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995).

² Ky., 34 S.W.3d 63 (2000).

³ 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 101 (1972).

