

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002467-MR

PATRICK HOWARD

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR. JUDGE  
ACTION NO. 97-CR-00172

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, KNOPF AND MCANULTY, JUDGES.

BUCKINGHAM, JUDGE: Patrick Howard appeals his fourth-degree assault conviction in the Bell Circuit Court based upon the allegation that the court violated his right to a speedy trial. Having reviewed the record and applicable law, we affirm.

Howard was indicted in December 1997 for first-degree assault and for being a second-degree persistent felony offender (PFO II). On February 6, 1998, Howard was arraigned and an attorney was appointed to provide legal representation. The matter was set for further hearing on April 15, 1998, but the hearing was ultimately continued due to appointed counsel being out-of-town at that time.

During his next court appearance, on July 1, 1998, Howard requested that he be allowed to proceed pro se in that he believed appointed counsel was ineffective. He further claimed that he had previously filed a motion for a speedy trial; however, the record was devoid of any such motion and Howard had no proof that same had ever been sent to or received by the court. Noting that this was the first notice of a request for a speedy trial, the Commonwealth nonetheless announced that it was ready to proceed at that time. In response, the court ordered that Howard be appointed conflict counsel, set a trial date of March 17, 1999, and informed Howard that after conferring with new counsel it was determined that his defense could be prepared sooner, then the court would schedule an earlier trial date.

On August 21, 1998, Howard, pro se, filed a letter with the court entitled "Motion to Dismiss For Failure to Prosecute," wherein he claimed that 180 days had passed since he had filed his motion for a speedy trial and accordingly the case should be dismissed. As previously noted, the record reflects that no request for a speedy trial had been received. The court denied that motion on October 27, 1998.

On February 9, 1999, conflict counsel filed a motion for a written bill of particulars and a motion for production. The Commonwealth responded to said requests on March 10, 1999. Thereafter, on March 29, 1999, conflict counsel requested a copy of the preliminary hearing tape from district court which request was granted. During the March 29 hearing, the trial court told Howard that the trial would be rescheduled for April 15, 1999, in

accordance with Howard's request for a speedy trial. Howard responded, "Okay, good enough, Judge."

The case was not tried on April 15, 1999, and on January 27, 2000, the court assigned a pre-trial conference for February 22, 2000. The record does not indicate why the trial date was cancelled or why there was further delay. Due to a scheduling problem with conflict counsel, the matter was reassigned for conference on April 10, 2000, at which time a trial date of September 14, 2000, was set. Howard was convicted by a jury of fourth-degree assault and the PFO II charge was dismissed. The recommended sentence of twelve months' imprisonment and a \$500 fine was imposed by the court. This appeal followed.

Before this court, Howard contends that his right to a speedy trial was denied in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution. We disagree.

There are four factors to be considered in determining whether the right to a speedy trial has been violated: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000). The first inquiry is only triggered by a presumptively prejudicial delay. Id. Cases have held that delays ranging from three to five years are presumptively prejudicial. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); McDonald v. Commonwealth, Ky., 569 S.W.2d

134 (1978); Preston v. Commonwealth, Ky. App., 898 S.W.2d 504 (1995). Here, we will conclude that a thirty-three month delay between indictment and trial was presumptively prejudicial, thus requiring further inquiry into the remaining factors.

The second prong of the test (the reason for the delay) is the most difficult inquiry to resolve in this matter. The record reveals that none of the delays were prompted by the Commonwealth. Conversely, the Commonwealth provided its discovery to the defense at Howard's arraignment. It appears that some delays were generated by the defense attorney going on vacation, Howard's own motion to have counsel withdrawn, and the subsequent appointment of conflict counsel. Thereafter, the record is silent as to the reason for further continuances. It is reasonable to perceive that the defense's February 17, 1999, request for discovery prompted the court to assign a trial date for April 15, 1999, a date to which Howard acquiesced. However, at this point, aside from the orders providing for the continuances, the record is mute as to the reasons therefore. There exists no further pleadings, correspondence, or other communication with the court either requesting or objecting to the unexplained delays. Accordingly, we believe that Howard's silence operated as acceptance to the delay. Thus, if the defendant acquiesced in the continuance, he cannot be heard to complain about the delay. Gabow, 34 S.W.3d at 70.

The third factor in determining whether the right to a speedy trial has been violated concerns the defendant's assertion of the right. As we have discussed, Howard's request for a

speedy trial was first heard by the court and the Commonwealth on July 1, 1998, when Howard claimed he had filed a motion for same, although no such document was contained in the record nor did Howard have proof that it was sent to or received by the court. Thereafter, the only writing making mention of a speedy trial was Howard's pro se motion to dismiss for lack of prosecution.<sup>1</sup> However, our Supreme Court has held that a motion to dismiss for failure to provide a speedy trial is not a formal demand for same. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 22 (1998).

The fourth and final inquiry concerns what prejudice, if any, Howard suffered as the result of the delay. The possibility of prejudice is insufficient to support the contention that constitutional rights have been violated. Rather, the onus is on the appellant to demonstrate actual prejudice. Preston, 898 S.W.2d at 507. Here, Howard argues that, if convicted, he would have been able to serve his twelve-month sentence for a prior traffic conviction concurrently with the sentence assessed for the assault conviction. Howard apparently began serving the prior twelve-month sentence on January 26, 1998. He was arraigned for the offenses in this case on February 6, 1998. Although the record does not indicate when Howard was released from custody on the prior sentence, the trial judge informed Howard on July 1, 1998, that he would be released in two or three months. Considering these circumstances and the fact that Howard was clearly not denied his right to a speedy

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<sup>1</sup>Howard erroneously believed that he was entitled to avail himself of KRS 500.110.

trial during the first year after his indictment, we conclude that he suffered no prejudice in this regard.

Lastly, Howard alleges that a potentially favorable witness who had moved away in the intervening years could not be located at the time of trial. Although Howard contends that this witness "may" have been advantageous, he cannot demonstrate with any certainty as to what testimony may have been proffered. Moreover, it appears from the record just as likely that the witness may have been hostile to the defense. As such, Howard has failed to show actual prejudice, and his claim on this point must also fail.

Accordingly, the delay in bringing Howard's case to trial was sufficient to trigger the Barker inquiry, but it appears that much of the delay was attributable to the defense and none to the Commonwealth. Further, Howard ineffectively attempted to trigger a proper request to a speedy trial although the court still strived to accommodate same. Lastly, Howard has failed to show any actual prejudice from the delay. Admittedly, at first blush a delay of thirty-three months in bringing an assault case to trial seems extreme; however, in this case no speedy trial violation occurred.

In accordance with the foregoing discussion, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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