RENDERED: October 22, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-001920-MR
AND
NO. 2003-CA-001281-MR

MAC MCINTOSH JR. — APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
INDICTMENT NO. 99-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

DYCHE, JUDGE: Mac McIntosh Jr. appeals an August 11, 1999, judgment of the Jackson Circuit Court from a jury verdict convicting him of two counts of burglary in the second degree and sentencing him to seven years' imprisonment. McIntosh also appeals from a May 8, 2003, order of the Jackson Circuit Court denying his motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to vacate or set aside the 1999 judgment as void or

satisfied. Having carefully reviewed the record, the applicable law and the arguments presented by the parties herein, we affirm in part, reverse in part, and remand.

On November 19, 1995, McIntosh, a seventeen year-old juvenile, and Gerald Anderson, an adult, had been cutting firewood and drinking beer together in Jackson County, Kentucky. Sometime during the day, McIntosh informed Anderson that he knew the location of a residence that they could enter and steal some items for resale. Anderson accepted McIntosh's suggestion and the pair proceeded to the residence of Fannie Ward. Upon arriving at the Ward residence, McIntosh kicked the door in, the pair entered and took a grandfather clock and a microwave oven from the house. After McIntosh and Anderson removed the clock and the microwave from the Ward residence, they set the house on fire. Thereafter, McIntosh and Anderson went to Johnny Durham's residence to drink more beer. Approximately one hour later, Anderson and McIntosh decided to unload the items taken from the Ward residence at Anderson's trailer.

After unloading the items taken from the Ward residence, Anderson and McIntosh proceeded to a residence occupied by Doug Allen. Upon arriving at the Allen residence and discovering that Allen was not home, McIntosh kicked the door open. McIntosh and Anderson then entered Allen's residence and removed two Nintendo entertainment systems, a radio, a

television set, and a bicycle. After taking these items and loading them in a pickup truck, they also set this house on fire. Anderson and McIntosh then returned to Anderson's trailer and unloaded the items stolen from Allen. Anderson's live-in girlfriend, Debbie Morris, informed the pair that she wanted nothing to do with the stolen merchandise. Later, Morris informed her mother that Anderson and McIntosh had stored stolen items in Anderson's trailer. Morris's mother immediately contacted law enforcement to recover the stolen items.

After the recovery and identification of the items in Anderson's possession, he was arrested and eventually entered a guilty plea to felony charges in connection with the events of November 19, 1995. Law enforcement also secured a juvenile petition against McIntosh, charging him with burglary in the second degree and arson in the second degree in connection with the events at the Allen and Ward residences. The Commonwealth moved to have McIntosh treated as a youthful offender and requested a transfer hearing.

The transfer hearing was held on April 8, 1996. During this hearing, the Jackson District Court found that the Commonwealth had proven that McIntosh was fourteen years of age at the time of the alleged commission of the offenses and that he was charged with Class B felonies, specifically two counts of second-degree arson. With regard to the burglary charges, the

district court found that McIntosh was over the age of sixteen at the time of the alleged commission of the offenses and was charged with two Class C felonies. However, the district court noted that McIntosh had never been previously adjudicated delinquent or as a public offender of a felony on two prior, separate occasions. Yet the district court erroneously listed on its transfer order that the Commonwealth had proven that McIntosh had been previously adjudicated delinquent or as a felony public offender on two prior, separate occasions. In any event, McIntosh was transferred to Jackson Circuit Court.

On January 13, 1999, approximately two years and eight months after being transferred to Jackson Circuit Court, the Jackson County Grand Jury returned an indictment against McIntosh charging him with two counts of arson and two counts of second-degree burglary. A jury trial commenced on June 23, 1999. At trial, two law enforcement officers testified that the fires at the Ward and Allen residences were suspicious because four distinct points of origin could be found and personal property had been taken from each residence. Gerald Anderson, despite admitting that he entered a guilty plea to arson charges in connection with these fires, testified that McIntosh actually set both residences on fire in an effort to hide fingerprints. Morris testified at trial that McIntosh admitted to her that he

kicked the doors in at the Ward and Allen residences, stole personal items from each house, and started the fires.

The jury found McIntosh not guilty on the arson charges but did convict McIntosh of two counts of second-degree burglary. The jury recommended a sentence of seven years' imprisonment on each count, to be run concurrently for a total sentence of seven years' incarceration. However, the jury also wrote on the verdict form that it recommended McIntosh's sentence be probated. The circuit court ultimately sentenced McIntosh to a total of seven years' imprisonment. After the judgment was entered, the trial court overruled McIntosh's motions for shock probation and pre-release probation. McIntosh timely appealed his conviction.

After filing his appeal from the trial court's judgment of conviction and sentence, McIntosh filed his CR 60.02 motion to set aside the judgment of conviction as void or satisfied. In his CR 60.02 motion, McIntosh argued that the circuit court did not possess subject matter jurisdiction over him because the grand jury's failure to timely indict him caused the transfer order to expire by operation of law. Additionally, McIntosh argued that the circuit court should vacate his seven year prison sentence and sentence him as a juvenile in accordance with the provisions of Kentucky Revised Statutes (KRS) 635.060. On May 8, 2003, the circuit court rejected these

arguments and entered an order denying the CR 60.02 motion. McIntosh also appealed from this order. This Court ordered both appeals consolidated and heard together.

Before turning our attention to the arguments McIntosh presents in his direct appeal, we note that McIntosh has failed to properly preserve any of these alleged errors for appellate review. Nevertheless, we shall review these alleged errors under the palpable error rule, Kentucky Rules of Criminal Procedure (RCr) 10.26. Under RCr 10.26, if upon consideration of the whole case, there is not a substantial possibility that the result would be different absent the error, there is no manifest injustice to the defendant. Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003).

McIntosh first asserts that the Jackson Circuit Court did not have subject matter jurisdiction over him because, pursuant to RCr 5.22, the transfer order expired by operation of law when the Jackson County Grand Jury failed to timely issue an indictment. We find this assertion to be without merit.

Pursuant to RCr 5.22(2), final adjournment of a grand jury without having indicted a defendant shall effect the defendant's discharge and exonerate any bail posted by the defendant. The failure of a grand jury to return an indictment against a defendant does not prevent the charge from being submitted to another grand jury. RCr 5.22(3). Thus, the

purpose of RCr 5.22 is to limit the period of time a defendant may be held in custody without being indicted. Peercy v. Paxton, Ky., 637 S.W.2d 639 (1982).

However, KRS 635.020(3) limits the jurisdiction of the district court to act any further following its determination of probable cause. In Commonwealth v. Halsell, Ky., 934 S.W.2d 552 (1996), the Supreme Court found that, following a determination of reasonable cause to believe a child over age 14 has been charged with a felony wherein a firearm was used to commit the offense, KRS 635.020(4) operates to limit the jurisdiction of the district court to act any further. Further, Section 112(5) of the Kentucky Constitution vests the circuit court with jurisdiction as to that particular class of offenders. Nothing in KRS Chapter 635 or KRS Chapter 640 requires the Commonwealth to recertify its case against McIntosh in district court before presenting the case against McIntosh to another Grand Jury. Thus, contrary to McIntosh's assertions, we believe that Kentucky law does not permit a juvenile transfer order to expire by operation of law.

Next, McIntosh argues that the charges against him should have been dismissed with prejudice because his right to a speedy trial, as articulated in Section 11 of the Kentucky Constitution, and the Sixth Amendment to the United States Constitution, was violated. Particularly, McIntosh submits that

his right to a speedy trial was violated because his June 23, 1999, trial commenced nearly four years after being first taken into custody pursuant to a juvenile complaint. McIntosh correctly asserts that the length of the delay for speedy trial purposes is measured from the earlier of the date of indictment or the date of arrest. Cain v. Smith, 686 F.2d. 374, 381 (6th Cir. 1982); Dunaway v. Commonwealth, Ky., 60 S.W.3d 563 (2001). However, while a juvenile may be taken into custody under the same circumstances applicable to the arrest of an adult, the detention of the juvenile is not deemed an arrest. KRS 610.190(1). A juvenile is not deemed to be arrested until the decision has been made to try the child in circuit or district court. Id. Here, while the Jackson District Court did find probable cause to transfer this matter to Jackson Circuit Court in order for McIntosh to be tried as a youthful offender, the decision to try McIntosh in circuit court was not completed until the Jackson County Grand Jury issued the indictment. Therefore, since the delay in this matter occurred prior to McIntosh's indictment or actual arrest as an adult, the speedy trial provisions of Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution are not implicated. Rather, the issue that permeates McIntosh's argument is whether the circuit court erred in failing to dismiss the charges against him due to a lengthy preindictment

delay because “unjustified and prejudicial preindictment delay may constitute a violation of due process and require dismissal. Prejudice alone will not suffice." Kirk v. Commonwealth, Ky., 6 S.W.3d 823, 826 (1999)(citation omitted).

The United States Supreme Court, in United States v. Lovasco, 431 U.S. 783 (1977), indicated that a due process inquiry must consider both the reasons for the delay and the prejudice to the accused. Id. at 790. Dismissal of the indictment is required only where the accused shows substantial prejudice to the ability to present a defense and where the prosecutorial delay was intentional in order to gain a tactical advantage. United States v. Marion, 404 U.S. 307, 324 (1971); Kirk, 6 S.W.3d at 826; Reed v. Commonwealth, Ky., 738 S.W.2d 818, 820 (1987).

McIntosh has not attempted to argue that there was an intentional effort on behalf of the Commonwealth to delay the procurement of an indictment for tactical reasons. To succeed on a claim that the delay caused substantial prejudice to him, he must satisfy both prongs. Even had we found that McIntosh had demonstrated actual prejudice, he has failed to present any argument related to intentional delay for tactical advantage. Consequently, as a matter of law, we reject any assertions of prejudicial preindictment delay.

Third, McIntosh contends that he was entitled to a directed verdict of acquittal. McIntosh asserts that the Commonwealth failed to introduce evidence that is both qualitatively and quantitatively sufficient to establish that he is guilty of second-degree burglary beyond a reasonable doubt. We disagree.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but must reserve for the jury questions as to the credibility and weight to be given to such testimony. Id. On appellate review, the test of a directed verdict is that if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Id.

Using the Benham standard, we believe that it was not clearly unreasonable for the jury to find McIntosh guilty based upon the evidence as a whole. McIntosh's co-defendant, Gerald Anderson, testified that McIntosh developed the idea to break

into the Ward and Allen residences and take personal property for resale. Anderson testified that McIntosh kicked the door down on both residences and assisted in taking numerous items of personal property. Further, Morris testified that McIntosh readily admitted to burglarizing the Ward and Allen residences. With all of the facts taken together in the light most favorable to the Commonwealth, it was not unreasonable for a jury to believe that McIntosh had committed two counts of second-degree burglary. As such, the circuit court correctly denied the motion for directed verdict.

Finally, we address McIntosh's argument, raised in both his direct appeal and in the appeal from the denial of his CR 60.02 motion, that the Jackson Circuit Court was without authority to sentence him pursuant to KRS 640.030 and that the circuit court erred by refusing to vacate the seven year prison sentence. McIntosh argues that KRS 640.040(4) limits the circuit court to the more lenient dispositions provided by KRS 635.060. KRS 640.040(4) provides as follows:

> Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from KRS 635.020(2), (3), (4), (5), (6), (7), or (8) shall be disposed of by the Circuit Court in accordance with the provisions of KRS 635.060.

Our review of this argument reveals that McIntosh is correct.

Canter v. Commonwealth, Ky., 843 S.W.2d 330 (1992), is factually similar to the matter currently before us. In Canter, the juvenile defendant was charged with murder, a capital offense, but ultimately convicted of a Class C felony, first-degree criminal abuse. The trial court sentenced the juvenile defendant in Canter pursuant to KRS 640.030 as follows:

> [E]ight (8) years in the Cabinet of [sic] Human Resources at a facility so designated by the Cabinet for Human Resources until the defendant reaches the age of eighteen (18) or is paroled or probated, whichever first occurs[;] and if parole or probation has not been granted, after the defendant reaches the age of eighteen (18) she shall be returned to this Court, at which time the Court will determine whether or not the defendant will be placed on probation or conditional discharge or returned to the Cabinet for Human Resources to complete a treatment program, or be incarcerated in an institution operated by the Corrections Department [sic].

Canter, 843 S.W.2d at 331.

On appeal, Canter argued that the trial court erred in sentencing her pursuant to KRS 640.030 because KRS 640.040(4) dictates that the final disposition of a youthful offender is dependent upon the ultimate conviction, not the original charge. The Kentucky Supreme Court agreed:

> [W]e need examine only the relationship of this statute to subsection (2) of KRS 635.020 the threshold for possible youthful offender status for a child "charged with a capital offense, Class A felony or Class B felony." A Class C felony, of which Canter

> was ultimately convicted, certainly would not fall within the purview of KRS 635.020(2); had she originally been charged with only a Class C felony, she clearly would have been exempt from youthful offender status, and disposition would have been pursuant to KRS 635.060.

Id. at 332.

Accordingly, Canter stands for the principle that the final disposition of a youthful offender is dependent upon the ultimate conviction, not the original charge. Thus, a juvenile under the age of fourteen who is charged with a capital offense, Class A felony or Class B felony, but is convicted only of a Class C or Class D felony is to be sentenced under the provisions of KRS 635.060.

In the matter currently before this Court, McIntosh was convicted only of two counts of burglary in the second degree. Both of these convictions constitute Class C felonies. Had McIntosh been charged with only these offenses, the Commonwealth would have had to prove that McIntosh had "on two prior separate occasions been adjudicated a public offender for a felony offense." KRS 635.020(3). While the district court's order indicates that the Commonwealth met that burden, it is clear from the audiotape of the transfer hearing that this portion of the transfer order is clearly erroneous. In making its findings on the record at the conclusion of the April 8, 1996, transfer hearing, the district court noted:

> The court has considered all the testimony involved today, it is going to sustain the motion . . . to transfer Mr. McIntosh [as a] youthful offender and the court will state several things on the record. It is admirable that Mr. McIntosh has not had any trouble with the law and the court certainly appreciates that, and that is a very important thing that needs to be addressed and commented on. The fact that you [McIntosh] don't have any prior record in here is a good thing, and I personally appreciate that. However, arson and burglary, although it is not a crime against the person, . . . it's an extremely serious crime and basically takes away a person's home and their security and all the things they have worked for.

For its part, the Commonwealth presented no evidence at the transfer hearing, or at any other point during the pendency of its prosecution of McIntosh, that McIntosh possessed a prior criminal record.

CR 60.02 is available in both civil and criminal proceedings. Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968). The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court. Young v. Edward Technology Group, Inc., Ky. App., 918 S.W.2d 229, 231 (1995) (citing Davis v. Home Indem. Co., Ky., 659 S.W.2d 185 (1983). We believe that McIntosh properly and timely brought this issue

to the attention of the Jackson Circuit Court in his CR 60.02 motion and that his motion is well taken. Accordingly, the circuit court erred by refusing to properly consider McIntosh's CR 60.02 motion and order McIntosh to be sentenced in accordance with the provisions of KRS 635.060.

The August 11, 1999, judgment convicting McIntosh of two counts of burglary in the second degree is affirmed. However, the sentencing provisions of the August 11, 1999, judgment and the Jackson Circuit Court's May 8, 2003, order denying McIntosh CR 60.02 relief are reversed, and this matter is remanded to Jackson Circuit Court for disposition in accordance with the provisions of KRS 635.060.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy G. Arnold
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky