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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001306-MR

MICHAEL JAMES MEZO — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 02-CR-00122

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Appellant Michael Mezo (Mezo) brings this appeal as a matter of right from a judgment on a conditional guilty plea[2] in the Union Circuit Court, entered on June 16, 2004, finding him guilty on four counts of third-degree burglary[3]

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] Kentucky Rules of Criminal Procedure 8.09.

[3] Kentucky Revised Statutes 511.040, a class D felony.

and one count of felony theft by unlawful taking[4] and sentencing him to five years imprisonment on each count, to run concurrently for a total of five years and to run consecutively with any previous sentence. Before us, Mezo argues violations of his rights to both a speedy trial and the Interstate Agreement on Detainers Act (IAD) (as preserved under the conditional plea), as well as a fatally flawed indictment.

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01. Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001); Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). The trial court's application of law is reviewed *de novo*. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). We conclude that the findings of the trial court are supported by substantial evidence and there was a correct application of law. Thus we affirm.

Because of the nature of Mezo's claims, we find it necessary to elaborate on the procedural history of his case. A series of burglaries and thefts from Union County businesses occurred in April and June of 2001. In September, 2001, Mezo was arrested in Evansville, Indiana, on Indiana state charges. Over a year later, in October, 2002, Mezo was first identified

[4] Kentucky Revised Statutes 514.030, a class D felony.

with the Union County offenses as a search of his residence yielded documents stolen during the Union County burglaries.

On November 5, 2002, a Union County Grand Jury returned an indictment against Mezo charging him with four counts of third-degree burglary; one count of trafficking in stolen identities;[5] one count of felony theft by unlawful taking; and as a persistent felony offender, first degree (PFO I).[6] The indictment alleged that from April 12 through 13, 2001, Mezo committed third-degree burglary by unlawfully entering the Kentucky Farm Bureau building, further committing theft by unlawful taking by taking cash and/or personal property of Kentucky Farm Bureau valued at $300 or more. It was further alleged that from June 2 through 3, 2001, Mezo committed third-degree burglary by unlawfully entering the buildings of Tri-County Tire, Thornsberry Insurance Agency, and Hendrickson Financial Services, and additionally on the same dates committed trafficking in stolen identities by possessing five or more separate identities for the purpose of trafficking. A criminal summons issued on the indictment which was returned for failure to locate, and on November 12, 2002, a bench warrant issued for his failure to appear for arraignment.

[5] Kentucky Revised Statutes 514.170, a class C felony.

[6] Kentucky Revised Statutes 532.080.

In March, 2003, Mezo began serving a federal prison sentence. According to Mezo, in May or June, 2003, the federal authorities checked outstanding state charges against Mezo and the Union County Indictment did not appear.

On July 18, 2003, the Union County Sheriff notified the Federal Correctional Institution (FCI) in Manchester, Kentucky, to place a detainer on Mezo pursuant to the Union County Indictment. Mezo claimed he first learned of the Union County Indictment in August, 2003, and around this time he contacted the Union County Commonwealth's Attorney directly, asking that the PFO charge be dismissed and all charges consolidated to a misdemeanor and that they be run concurrently with his federal sentence, in return for full cooperation.

On November 17, 2003, Mezo requested, pro se, from the Union County Circuit Clerk, copies of any court records on the above indictment, appointment of counsel, and leave to proceed as an indigent. In the motion he alleged a denial of his rights to a speedy trial and rights under the IAD. Pursuant to his request, the clerk sent him documents from his file.

On December 30, 2003, FCI notified the Union County Commonwealth's Attorney of Mezo's request for "disposition on the outstanding charges . . . filed against him as a detainer," under Article III of the IAD. On January 22, 2004, the Union County Commonwealth's Attorney notified FCI of acceptance of

temporary custody in connection with Mezo's request for disposition of the detainer. On February 4, 2004, Mezo was released from FCI, under the IAD, to the Union County Jail, where he was served with the Union County charges. He was appointed counsel and arraigned on February 9, 2004. On April 30, 2004, Mezo moved for dismissal of the indictment, alleging violations of state and federal speedy trial rights and prejudicial delay in the filing of the detainer; that same day a pretrial conference was set for May 10, 2004, at which time Mezo's motion to dismiss was heard and overruled by the court.

Another pretrial conference was held on May 19, 2004, when the Commonwealth gave notice, pursuant to Kentucky Rules of Evidence (KRE) 404, of intent to introduce evidence of other crimes, wrongs or acts. On that date, the Commonwealth offered, and Mezo agreed to, five years on each burglary and theft charge to run concurrently for a total of five years, and dismissal of the trafficking in stolen identities and PFO I charges, in exchange for a conditional guilty plea allowing Mezo to reserve for appeal the speedy trial issue. The Commonwealth opposed probation. Mezo waived counsel and signed a motion to enter a guilty plea. An order on a guilty plea reflecting these recommendations was entered that same day. On June 16, 2004, Mezo was sentenced pursuant to the plea.

Mezo first alleges a violation of his right to a speedy trial under Sections Two, Three, and Eleven of the Kentucky Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Analysis begins with the four-factor test in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, 117 (1972) which involves an examination of: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay. The factors are balanced and "[n]o single one of these factors is ultimately determinative by itself." Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000).

An analysis of the last three Barker factors begins by determining if the delay was presumptively prejudicial:

> [L]ength of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors . . .

Barker, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. Determining whether a delay was presumptively prejudicial requires examining two elements: the charges and the length of the delay. "The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Id. 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. In this case, Mezo was charged with multiple

counts of burglary; and single counts of theft, trafficking in stolen identities, and PFO I. We consider these charges to be moderately complex.

The second element, length of the delay, is the time between the earlier date of the arrest or the indictment and the time the trial begins. Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Mezo was indicted on November 5, 2002. He pleaded guilty on May 19, 2004, days before his trial date of May 24, 2004. The delay, therefore, between indictment and entry of the plea was approximately nineteen-months. While courts differ in the length of delay they require to find presumptive prejudice, in Bratcher v. Commonwealth, 151 S.W.3d 332, 344 (Ky. 2004), the Kentucky Supreme Court found an eighteen-month delay presumptively prejudicial in a murder case. We conclude that a nineteen-month delay given the nature and facts of this case is presumptively prejudicial.

Our conclusion that Mezo's nineteen-month delay was presumptively prejudicial leads to an examination of the remaining three Barker factors, beginning with the reason for delay. The Court enumerated three categories of reasons for delay: (1) a "deliberate attempt to delay the trial in order to hamper the defense"; (2) a "more neutral reason such as negligence or overcrowded courts"; and (3) "a valid reason, such

as a missing witness." Barker, 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. The Court explained that different reasons should be allocated different weights, even reasons within the same category. Id. For example, delay due to negligence, which is a neutral reason, would weigh more heavily in favor of a speedy trial violation than court overcrowding, which is also classified as a neutral reason. See Zurla v. State, 789 P.2d 588, 592 (N.M. 1990) ("bureaucratic indifference should weigh more heavily against the state than simple case overload"). Further, the Court was clear that even a neutral reason weighs against the state because "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." Barker, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 115.

Before the trial court, Mezo conceded that he had no argument with regard to the delay between the time of the alleged offenses in April and June, 2001, and the issuing of the indictment in November, 2002. We will therefore not address Mezo's attempt at arguing this theory again on appeal. Mezo's more specific argument before the trial court and in this appeal asserts a prejudicial delay due to the nine months between the indictment (November, 2002) and the placing of the detainer (July, 2003). It is important to note that for the first five months following the indictment, Mezo's location was unknown to

the Union County authorities due to his incarceration in Indiana on unrelated charges. In the fifth month, again unknown to the Union County authorities, Mezo was transferred to federal prison. The record is silent as to when the Union County authorities became aware of Mezo's federal incarceration, but we do know that four months after federal incarceration the Union County sheriff notified the federal authorities of the detainer. There is no evidence that either delay was intentional or avoidable, or due to a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 115.

The third Barker factor is the defendant's demand for a speedy trial. While the defendant has a right to a speedy trial regardless of whether he makes a demand, assertion of the right is a factor to consider. Id. 407 U.S at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. Such assertions are "entitled to strong evidentiary weight" in deciding whether the defendant's rights were violated. Id. This factor weighs in favor of the defendant. The record before us contains a letter from Mezo to the Union County Circuit Court Clerk, dated November 17, 2003, asking for "any and all Court records you may have for my person from March of 2001 to the present date." Attached to the letter were also motions for appointment of counsel and to proceed as an indigent, asserting Mezo's right to speedy trial. Another

letter to the clerk from Mezo, received December 5, 2003, makes reference to the clerk's forwarding of the indictment to Mezo. Within a month, the IAD forms are forwarded to Union County by the federal prison, pursuant to Mezo's request. It is important to note that Mezo made his IAD request within five weeks of his request to the clerk; within three weeks of the IAD request Union County acted on the IAD; within two weeks of that action Mezo was transported to Union County and arraigned; within two weeks a pretrial conference was held and discovery proceeded; within two months Mezo again asserted speedy trial rights; and within three weeks he pleaded guilty. The record is clear, therefore, that while Mezo did make the speedy trial assertion, his assertions were acted upon expeditiously.

The Barker Court identified three interests bearing on the final factor, prejudice to the defendant caused by the delay: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed.2d at 118. Of these three, the last is the most serious. Id. Mezo claims that all three prejudicial interests exist in his case, specifically arguing without any supporting authority that "he could have received a sentence concurrent to the one he was currently serving [in Indiana] had the state of Kentucky

proceeded promptly; that he “did not qualify for placement in a half-way house and was subject to more stringent restrictions;” and that he was unable, given his incarceration, to prepare his defense. While delay can cause anxiety and incarceration can prejudice the defense, in Barker the court found only minimal prejudice due to a ten-month pretrial incarceration and nearly four years of anxiety producing, post-indictment proceedings. Barker, 407 U.S. at 534, 92 S.Ct. at 2194, 33 L.Ed.2d at 119. And as LaFave points out, "absent some unusual showing [anxiety and concern] is not likely to be determinative in defendant's favor." LaFave et al., Criminal Procedure, § 18.2(e) at 684. Mezo has made no showing of unusual anxiety in his case. As for the last and most important factor of impairment to his defense, despite repeated questioning by the trial court as to specific instances of prejudice in the preparation of his defense, Mezo has again made only a conclusory allegation. As indicated above, following Mezo’s letter to the clerk in November, 2003, all participants in the system responded appropriately and in a timely fashion.

We conclude, therefore, after balancing the Barker factors, that Mezo’s constitutional right to a speedy trial was not violated. Though Mezo asserted his right and the length of delay was presumptively prejudicial, the reasons for the delay

were acceptable and the prejudice caused the appellant was minimal.

Mezo next argues that he was not tried within the required time limit set by Article III, Sections One and Four, of the IAD, codified in Kentucky Revised Statutes (KRS) 440.450 et. seq. Section Four has no application herein, as it requires the dismissal of an indictment with prejudice if a trial is not had on the indictment prior to the return of the prisoner to the original place of imprisonment, and those facts are not present in the case sub judice. Section One provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

The notice by the federal prison authorities to the Union County sheriff was mailed December 30, 2003. The record is silent as to when the Union County Commonwealth's Attorney actually received the federal notice, but the record does contain a document dated January 20, 2004, indicating the Commonwealth's acceptance of temporary custody of Mezo. Insofar as the record before us, the one-hundred eighty-day time limit, therefore, commenced sometime between December 30, 2003, and January 20, 2004, as the time limit does not commence until the detainee's request for final disposition of charges against him has actually been delivered to the court and to the prosecuting officer of the jurisdiction that lodged detainer against him. Fex v. Michigan, 507 U.S. 43, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993); Wright v. Commonwealth, 953 S.W.2d 611 (Ky.App. 1997). The plea on May 19, 2004, therefore, was well within the one-hundred eighty-day time limit.

Mezo's argument that his November 17, 2004, pro se letter to the Union County Circuit Court Clerk, containing a motion for appointment of counsel in order to preserve speedy trial rights, triggered the running of the one-hundred eighty-day time limit also fails because that motion, unlike the December 30, 2003, notice, was insufficient as it was not accompanied by a certificate from the appropriate official having custody of the prisoner detailing specific information

about the prison term in the sending jurisdiction. Ellis v. Commonwealth, 828 S.W.2d 360 (Ky. 1992). Mezo's trial was originally set for May 24, 2004, and he entered his plea on May 19, 2004. Either was well within the one-hundred eighty-day time limit. We conclude, therefore, that there was compliance with the time limits of the IAD.

Mezo last asserts that the third-degree burglary charges were fatally defective pursuant to Kentucky Rules of Criminal Procedure (RCr) 6.10(2) for lack of specificity in failing to state that he entered the businesses "with the intent to commit a crime." While acknowledging that this issue is not preserved for review on appeal, Mezo requests review under CR 61.02 or RCr 10.26 as a palpable error.

For an alleged defect in an indictment to be considered on appeal, it must be preserved for review. A defect will be deemed waived unless raised by a timely objection. Stark v. Commonwealth, 828 S.W.2d 603 (Ky. 1991), *overruled on other grounds*, Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996); *see also* Johnson v. Commonwealth, 709 S.W.2d 838 (Ky.App. 1986), *cert. denied*, 479 U.S. 865, 107 S.Ct. 222, 93 L.Ed.2d 150 (1986). Mezo's failure to object renders his challenges to the indictment unpreserved and reviewable only for palpable error pursuant to RCr 10.26.

A finding of palpable error is inappropriate absent manifest injustice. As required by Thomas, 931 S.W.2d at 449, and Salinas v. Commonwealth, 84 S.W.3d 913, 916 (Ky. 2002), the indictment informed Mezo of the charges against him. It also cited the relevant statutory provision, which set forth all of the elements of the offense. Additionally, Mezo makes no claim that he would have prepared differently for trial had the indictment included all elements of the charged offenses. In any event, to further dilute Mezo's argument, it is not necessary for a burglary indictment to contain the phrase "with intent to commit a crime." Abney v. Commonwealth, 588 S.W.2d 714 (Ky.App. 1979); Godsey v. Commonwealth, 661 S.W.2d 2 (Ky.App. 1983).

For the foregoing reasons, the judgment of the Union Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Kentucky Attorney General

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky