

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001005-MR

JEFFERY L. CARPENTER

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Jeffery L. Carpenter has appealed from the final judgment entered by the Butler Circuit Court on April 17, 2003, following a jury verdict of guilty on one count of sexual abuse in the first degree,¹ and guilty of persistent felony offender in the first degree (PFO I).² Carpenter was sentenced to 15 years' imprisonment pursuant to the jury's recommendation.

¹ Kentucky Revised Statutes (KRS) 510.110.

² KRS 532.080(3).

Having concluded that (1) Carpenter's motion for disposition of pending charges was not filed in accordance with KRS 500.110 and that he waived his speedy trial motion, and (2) the trial court did not abuse its discretion in refusing to strike Juror No. 35 for cause, we affirm.

On August 10, 2000, Carpenter was indicted on 31 counts of sexual abuse in the first degree against a female under 12 years of age. An arrest warrant was served on Carpenter on August 14, 2000. Carpenter was scheduled to be arraigned on September 5, 2000, but the arraignment was continued until October 10, 2000. At the arraignment, a pretrial conference was scheduled for May 8, 2001, and a jury trial was set for June 4, 2001.³

On February 19, 2002, Carpenter filed a pro se motion for disposition of pending charges, i.e., a motion for speedy trial, as well as various other discovery motions. In a motion filed on February 26, 2002, the Commonwealth moved the trial court to set a trial date in Carpenter's case. During a hearing held on March 12, 2002, the trial court noted that Carpenter was scheduled for trial on April 29, 2002,⁴ for charges stemming from

³ On May 8, 2001, Carpenter failed to appear for a pretrial conference. The Commonwealth noted that Carpenter was a fugitive and a bench warrant was issued for his arrest in this case. Thus, the trial set for June 4, 2001, was not held.

⁴ The trial scheduled for April 29, 2002, was continued until July 22, 2002, after defense counsel realized during the pretrial conference, held on April 9, 2002, that he represented both co-defendants scheduled to be tried.

an earlier indictment. The trial court then set the instant case for trial on November 22, 2002.⁵

On July 9, 2002, Carpenter was arraigned on a PFO I indictment stemming from Carpenter's previous felony convictions which were discovered during his trial on other charges held on July 22, 2002.⁶ Following a motion by the Commonwealth, the trial court consolidated the indictment for sexual abuse in the first degree and the indictment for PFO I. Both were set to be tried by a jury on December 11, 2002.

On August 27, 2002, Carpenter filed a pro se motion to dismiss this case due to the Commonwealth's failure to try him in a timely manner. A hearing on this issue was held on September 3, 2002, wherein the trial court stated that in Butler County jury panels were seated for four-month terms, running from January through April, May through August, and September through December. The trial court reasoned that since Carpenter had been tried in July on a separate indictment, he could not be tried twice by the same jury panel. Therefore, the trial court denied Carpenter's motion.

Carpenter's trial set for December 11, 2002, was continued until January 24, 2003, because the trial judge was scheduled to undergo several medical tests. A pretrial

⁵ However, defense counsel stated that he would need more time to prepare this case, therefore, the trial was set for December 11, 2002.

⁶ This trial resulted in a hung jury.

conference was held on January 14, 2003, wherein the trial judge explained that he would be having surgery and would be unavailable for trial on January 24, 2003. Therefore, the trial court set Carpenter's trial for February 12, 2003.

A jury trial commenced in this case on February 12, 2003. In a conference prior to trial, Carpenter renewed his previous motion to dismiss the indictment for failure to provide him a speedy trial. The trial court denied this motion to dismiss because Carpenter had been tried at the earliest date possible. During this conference, the Commonwealth agreed to dismiss all charges except two counts of sexual abuse in the first degree and the PFO I charge.

As mentioned previously, the jury found Carpenter guilty on the first count of sexual abuse, but found him not guilty on the second count of sexual abuse. The jury also found Carpenter guilty of being a PFO I, and recommended a sentence of 15 years. The trial court entered an order on April 17, 2003, formally sentencing Carpenter in accordance with the jury's recommendation. This appeal followed.

Carpenter has raised two arguments on appeal. First, he argues that the trial court erred in failing to dismiss the indictment against him following his motion for a speedy trial pursuant to KRS 500.110 and the expiration of the 180-day time period. Second, Carpenter argues that the trial court denied

his due process rights when it refused to excuse a juror for cause.

Carpenter's first claim of error fails because he did not comply with the requirements set forth in KRS 500.110, which provides as follows:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this 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 and 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.

In construing KRS 500.110, it is helpful to consider cases which interpret the Interstate Agreement on Detainers (IAD),⁷ codified

⁷ "The Interstate Agreement on Detainers (IAD) is a compact entered into by 48 states, the United States, and the District of Columbia to establish procedures for resolution of one State's outstanding charges against a prisoner of another State." New York v. Hill, 528 U.S. 110, 111, 120 S.Ct. 659, 662, 145 L.Ed.2d 560 (2000). "The IAD was adopted in Kentucky in 1974, four years prior to KRS 500.110." Dunaway v. Commonwealth, 60 S.W.3d 563, 567 (Ky. 2001).

KRS 440.450 states that the purpose of the IAD is "to encourage the expeditious and orderly disposition of such charges and determination of the

at KRS 440.450 through KRS 440.990.⁸ "KRS 500.110 was adopted after the IAD and [uses] the same language. In addition, the reasons supporting the IAD seem to apply with equal force to the intrastate statute."⁹

The record in this case indicates that on February 19, 2002, Carpenter filed his motion for disposition of "all pending charges before this Court and jurisdiction" pursuant to KRS 500.110. At the time this motion was filed, Carpenter was incarcerated in the Eastern Kentucky Correctional Complex; however, a detainer was not issued against him on the instant charges until March 14, 2002, almost a month after he filed his motion for a speedy trial. This Court, in Huddleston v. Jennings,¹⁰ stated:

The "triggering mechanism" which brings [KRS 500.110] into play is the lodging of a detainer against a prisoner. The purpose of the statute is not to ensure the speedy disposition of every charge, or even of those charges which potentially could form the basis for a detainer being lodged. Its purpose is to provide for the speedy disposition only of such charges as have actually resulted in a detainer being lodged.

proper status of any and all detainers based on untried indictments, informations or complaints."

⁸ Dunaway, 60 S.W.3d at 567.

⁹ Id.

¹⁰ 723 S.W.2d 381, 383 (Ky.App. 1986).

Thus, pursuant to Huddleston, at the time Carpenter filed his speedy trial motion he was not entitled to the relief he requested under KRS 100.110.

Furthermore, even if Carpenter's motion had been properly filed, we conclude that he waived his right to a speedy trial by failing to object when the trial court set a trial date outside the 180-day period. "[T]he most basic rights of criminal defendants are . . . subject to waiver[.]'"¹¹ A defendant may waive his right to a speedy trial or "waiver may be effected by action of counsel."¹² Counsel may especially waive a defendant's right to a speedy trial when the waiver occurs due to a scheduling matter, because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls."¹³ In Ward v. Commonwealth,¹⁴ this Court held:

Ward waived his right to complain of the [IAD] violation by acquiescing to be tried outside the required time period and by failing to raise the issue of alleged noncompliance with the IAD on the numerous occasions when he was before the trial court prior to the expiration of the 120 days.

Likewise, Carpenter was present at a hearing held on March 12, 2002, when the trial court scheduled December 11,

¹¹ Hill, 528 U.S. at 114 (quoting Peretz v. United States, 501 U.S. 923, 926, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991)).

¹² Hill, 528 U.S. at 114.

¹³ Id. 528 U.S. at 115.

¹⁴ 62 S.W.3d 399, 404 (Ky.App. 2001).

2002, as the trial date for these charges. Carpenter and his counsel were certainly aware at that time that Carpenter had filed a pro se motion for speedy trial. Carpenter was before the trial court numerous times prior to the expiration of the 180-day period, and therefore, he had ample opportunities to request a trial date within the statutory-time frame. Pursuant to Hill and Ward, Carpenter's silence constituted a waiver of his motion for a speedy trial.¹⁵ Thus, Carpenter is entitled to no relief on this issue.

Carpenter's second claim of error is that he was denied a fair trial because he had to use a peremptory strike to challenge Juror No. 35, Regina Fields, after the trial court refused to strike her for cause. RCr 9.36 provides that "[w]hen there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." "The determination of whether to exclude a juror for cause lies within the sound discretion of the trial court."¹⁶ "Unless the action of the trial court is clearly erroneous, we will not reverse it."¹⁷

¹⁵ See also Parks v. Commonwealth, 89 S.W.3d 395, 397 (Ky. 2002) (stating that defendant's right to speedy trial under the IAD was waived when defense counsel made no response to the trial judge's proposed trial date outside of the IAD time limits).

¹⁶ Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982) (citing Peters v. Commonwealth, 505 S.W.2d 764 (Ky. 1974)).

¹⁷ Id. (citing Scruggs v. Commonwealth, 566 S.W.2d 405 (Ky. 1978)).

During voir dire it was revealed that Fields had been employed by the former Commonwealth's Attorney and had also been employed for four months by the Commonwealth's Attorney who tried Carpenter's case. During these four months, the indictment was returned against Carpenter for the instant sexual abuse charge. During the voir dire questioning, Fields stated that her position with the Commonwealth's Attorney's office was mainly secretarial in nature, that she did not have any contact with grand jury proceedings except to notify the grand jurors of when sessions were to be held, and that she did not recall handling any portion of Carpenter's case. She also stated that during her employment at the Commonwealth's Attorney's office, she did not prepare any documents that were used during grand jury proceedings. Fields stated that her association with the Commonwealth's Attorney's Office as a former employee would not impact her ability to listen to the evidence presented and to render a fair and impartial verdict.

Carpenter moved the trial court to strike Fields for cause, which it denied. The trial court stated that before it can strike a juror for cause under RCr 9.36 there must be a "reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence." Since Fields stated she could render a fair and impartial verdict based on the evidence, the trial court refused to strike her for

cause. Both Carpenter and the Commonwealth used a peremptory strike to remove Fields from the venire.

RCr¹⁸ 9.40¹⁹ entitles each party in a criminal case to eight peremptory challenges; however, the rule provides that if the trial court desires one or two alternate jurors to be seated, the number of peremptory challenges is increased by one on each side. The trial court announced from the bench at the close of voir dire that it intended to seat an alternate juror, and that each side would be allowed nine peremptory challenges. However, Carpenter only utilized eight of the nine peremptory strikes afforded to him by the trial court.

It has been a long-standing rule in this Commonwealth that in order to preserve a claim of error for the trial court's refusal to remove a prospective juror for cause, a party must first use one of his peremptory challenges to remove that

¹⁸ Kentucky Rules of Criminal Procedure.

¹⁹ RCr 9.40 states, in part, as follows:

- (1) If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.
- (2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side and each defendant shall be increased by one (1).

prospective juror.²⁰ Thus, since Carpenter did not preserve this issue under the requirements set forth in Thomas, he is not entitled to any relief on appeal.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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²⁰ Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993)(quoting Abramson, Kentucky Practice, (Criminal Rules) Vol. 9, Sec. 25.50 (1987)). See also Gamble v. Commonwealth, 68 S.W.3d 367, 374 (Ky. 2002).