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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001157-MR

AARON EADS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 03-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

COMBS, CHIEF JUDGE: Aaron Eads appeals from the judgment of the Laurel Circuit Court convicting him of third-degree burglary, second-degree arson, and theft by unlawful taking of property valued at less than \$300. Eads argues: (1) that he was denied due process of law by the trial court's interlocutory order granting an *ex parte* motion of the Commonwealth for a continuance of the trial, (2) that his state and federal

constitutional rights to a speedy trial were violated, (3) that he was entitled to a directed verdict of acquittal on all charges, and (4) that the trial court erred in excluding the testimony of his expert witness. Finding no reversible error, we affirm.

In the early morning hours of December 7, 2002, Eads was pulled from a burning building by a neighbor, Derek Dickenson. The building, a bait shop near Eads's home, was closed for the season. After pulling Eads from the shop, Dickenson said that Eads acted as though he intended to strike him. Purportedly acting in his own defense, Dickenson hit Eads in the head, knocking him to the ground. Dickenson then returned to the building to smother the fire.

When police officers arrived, they discovered candy bars and cigars in Eads's pockets -- the same brands as those sold in the shop. Eads was incoherent and in obvious need of medical attention. The officers arranged for him to be transported to a hospital where he was treated for smoke inhalation, a closed head injury, a fractured skull, and severe burns to his lungs and upper airways.

Eads was arrested upon being discharged from the hospital. Because the Commonwealth failed to secure an

indictment against him within sixty days as required by RCr¹ 5.22(2), he was released from custody on February 25, 2003. Eads was arrested again on March 21, 2003, after the Laurel County Grand Jury returned an indictment charging him with the crimes of burglary in the first degree, arson in the second degree, and a misdemeanor theft charge. As he was unable to pay the bond, which was initially set at \$15,000, he remained incarcerated until his trial in April, 2004.

At Eads's arraignment, the court set the matter for a pre-trial conference on April 18, 2003. At that conference, his attorney requested another pre-trial conference, which was set for May 16, 2003. On May 16, 2003, yet another pre-trial conference was scheduled for June 20, 2003. At the June pre-trial conference, Eads requested a reduction in his bond. The request was denied. The court set the matter for trial to commence on October 14, 2003.

The trial was continued in October at the Commonwealth's request. In asking for the continuance, the prosecutor cited the need to give priority to another case simultaneously scheduled for trial and noted that one of the Commonwealth's witnesses in Eads's case was on vacation. The court re-scheduled the trial for December 4, 2003. Again, a motion to reduce bond was made and denied.

¹ Kentucky Rules of Criminal Procedure.

On December 3, 2003, the prosecutor moved, *ex parte*, for a continuance of the trial because he was unable to locate his key witnesses. He told the judge that he had the agreement of Eads's attorney for the continuance. The motion was granted.

Upon learning of the continuance, Eads's counsel attempted to contact Judge Messer to voice her objection. Due to an illness in his family, the judge had gone home early and was unavailable. Eads's counsel then filed a written motion seeking a dismissal of the charges against Eads. She denied that she had agreed to a continuance and asserted for the first time that Eads's right to a speedy trial was being violated.

Following a brief hearing on the morning of December 4, 2003, the trial court explained that it had granted the *ex parte* motion the previous day based on the Commonwealth's assurance that Eads's counsel had agreed to the continuance. The judge also explained that due to his child's illness, he was not certain whether he would be able to try the case as scheduled. The court passed the merits of the motion to dismiss to a later date in order to give the Commonwealth an opportunity to respond. However, the court reduced Eads's bond to \$5,000 full cash.

On December 19, 2003, the trial court denied the motion to dismiss the criminal charges and set a new trial date of February 10, 2004. The judge was emphatic that the case

either would be tried that day or dismissed. Nevertheless, the trial was again continued due to a trial in progress. Eads was finally tried on April 6, 2004 -- one year and four months after his original arrest and a little more than a year after his indictment and re-arrest.

At trial, Eads testified that on the evening of the fire at the bait shop, he and two other friends had consumed a fifth of bourbon spiked with Xanax and had started to drink another bottle. After that point, he told the jury that he had absolutely no memory of any of the events that occurred on the evening of the fire. He had no recall until he woke up in the hospital. In addition to his intoxication defense, Eads speculated that he might have been carried into the building by someone else who wanted him to be blamed for the fire.

The jury found Eads guilty of an amended charge of burglary in the third degree, arson in the second degree, and theft. It recommended a sentence of one year for the burglary, ten years for the arson (these sentences to run consecutively), and twelve months for the misdemeanor theft crime. On May 25, 2004, Eads was sentenced to serve eleven years in prison. This appeal followed.

Eads first argues that he is entitled to a reversal of his convictions based on the trial court's continuance of the trial set for December 4, 2003. Because the motion was heard

without notice to Eads or to his counsel and without his presence or that of his counsel, Eads argues that both his right to due process and his right to counsel were violated. Citing Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), and Chapman v. California, 386 U.S. 18, 23 at n.5, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), he contends that the error constitutes a "structural defect"; that is, an error which defies harmless error analysis.

We agree that Eads had a right to receive notice of the Commonwealth's intention to move for a continuance and to have his counsel present to object to the motion. Fundamental dictates of due process required that he should have had "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). In this instance, a "meaningful time" would have been a time prior to the trial court's ruling on the motion rather than after the trial had been postponed. It was error for the trial court to entertain the *ex parte* motion on the very eve of trial and to grant the Commonwealth's request for a continuance based on the prosecutor's uncorroborated representation that Eads had no objection to the motion.

Nevertheless, we disagree with Eads's argument that a "structural error" was involved. Although the ruling was made without notice to Eads and without affording him the right to be heard, we are persuaded that harmless error analysis should be applied. The Supreme Court has defined a "structural error" as one that results in prejudice *per se* and precludes application of the harmless error rule. A structural error "transcends the criminal process." Fulminante, 499 U.S. at 311. Such an error "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310. It essentially taints the entire atmosphere in which a trial takes place.

Examples of structural error include withholding the right of counsel at trial (Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)) and failing to insure that a waiver of counsel was knowingly and intelligently made (Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004)). In the case before us, the error in hearing and granting the *ex parte* motion for a continuance affected only a single aspect of the criminal proceeding and did not remotely taint or prejudice the proceeding as a whole. It had no impact on the jury's ultimate finding of guilt.

Having reviewed the record and the court's explanation for permitting a second delay of the proceedings, we agree with

the Commonwealth that the error was harmless. A ruling on a motion for a continuance is one which is afforded considerable discretion. Furnish v. Commonwealth, 95 S.W.3d 34 (Ky. 2002); RCr 9.04. At the time of the ruling, Eads had not asserted his right to a speedy trial. Because of the Commonwealth's reasons for seeking a continuance as well as the judge's own personal problem possibly preventing him from conducting the trial as scheduled, it is unlikely that the court would have been ruled differently even if Eads's counsel had been notified of the hearing and had had the opportunity to object. Thus, we conclude that Eads is not entitled to a reversal of his conviction based on the continuance of the trial date of December 4, 2003.

Eads next argues that his right to a speedy trial was violated by the sixteen-month delay between his arrest and trial. The time that transpired between his arrest and his trial exceeded one year. Therefore, it was "presumptively prejudicial" for purposes of triggering the four-part balancing analysis set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). See, Bratcher v. Commonwealth, 151 S.W.3d 332, 344 (Ky. 2004) (eighteen-month delay between indictment and trial presumptively prejudicial); Dunaway v. Commonwealth, 60 S.W.3d 563, 569 (Ky. 2001) (thirteen-and-one-half month delay presumptively prejudicial). Accordingly, we

shall analyze Eads's claim based on the following four factors: "(1) the length of the delay, (2) the reasons for the delay, (3) [Eads's] assertion of his right to a speedy trial, and (4) prejudice to [him]." Bratcher, 151 S.W.3d at 344. All four factors must be considered, and no single factor may be treated as "ultimately determinative by itself." Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000).

As noted above, since the length of the delay was more than a year, it was presumptively prejudicial under the first factor. However, the delay was slightly more than sixteen months after the initial arrest relating to the arson and burglary at the bait shop. The second factor, the reason for the delay, must be evaluated in conjunction with the length of time involved; the reason for the delay was primarily due to the success of the Commonwealth in obtaining continuances of two previously established trial dates. Part of the delay was also caused by Eads's failure to ask for a trial date prior to June 2003 -- six months after his initial arrest. An additional part of the delay was attributable to the court's schedule and an on-going trial in February. While responsibility for the delay is attributable in some measure to both parties, the greater weight of the responsibility rests on the Commonwealth. Thus, factors one and two tilt slightly in favor of Eads.

However, factors three and four do not work in Eads's favor. Eads did not assert his right to a speedy trial until he filed his motion to dismiss on December 3, 2004 -- after the trial had been scheduled twice and had been continued nearly a year after his arrest. Eads contends that his motions for a bond reduction in June 2003 and in October 2003 should be construed as constituting notice to the court that he was asserting his rights to a speedy trial. However, bond reduction motions are not deemed to be the equivalent of a motion for a speedy trial. See, Tamme v. Commonwealth, 973 S.W.2d 13, 22 (Ky. 1998).

While failure to assert the right to a speedy trial does not wholly preclude a claim of constitutional deprivation, such a failure "will make it difficult for a defendant to prove that he was denied a speedy trial." Barker, 407 U.S. at 532. When the trial court continued the trial in February 2004, Eads did not renew his motion to dismiss -- nor did he mention any deprivation of his right to a speedy trial.

Under the fourth factor of prejudice, Eads has failed to demonstrate any prejudice to his defense that was actually caused by the delay. He has alleged that an unnamed defense witness moved out of the state and could not be located at the time of trial. This putative prejudice was mentioned for the first time in Eads's appellate brief. There is no supporting

evidence in the record revealing the identity of this witness or summarizing the substance of what his testimony would have been. It is wholly unclear what impact this witness might have had on the defense if the case had been tried sooner. After considering all four factors, we conclude on balance that Eads's right to a speedy trial was not violated and that the trial court did not err in denying his motion to dismiss the charges pending against him.

Next, Eads argues that the trial court erred in denying his motions for a directed verdict of acquittal on all of the charges.

To prove Eads guilty of arson, the Commonwealth had to prove, beyond a reasonable doubt, that he started a fire in the bait shop with the intent to destroy or damage it. KRS² 513.030. The Commonwealth presented no evidence that Eads started the fire, only that he was present in the building in an incapacitated state. That the appellant was passed out on a couch, with a fractured skull, is not evidence that he committed arson. No witness testified to seeing Appellant start the fire.

The Commonwealth could not explain Appellant's injuries. Appellant was on a ventilator and comatose after the fire, due to the head injury. Under the evidence presented, it was clearly unreasonable for the jury to find that Appellant could have formed the requisite intent to start a fire. A directed verdict of acquittal should have been granted. [Citations omitted.] Reversal is required and the charge should be dismissed. (Appellant's brief at p. 20.)

² Kentucky Revised Statutes.

Eads also argues that there was no evidence to establish that he was in the bait shop without permission of the owner, thus invalidating his conviction for burglary. In general terms, he argues that Dickenson had a grudge against him and that his testimony was not credible.

The standard which we apply in assessing whether a defendant is entitled to a directed verdict is well settled.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

The evidence at trial established that Eads was alone and had passed out when he was discovered by Dickenson in the burning bait shop. He had entered the building through a back window. He possessed merchandise from the shop in his pockets

even though the shop had been closed for business for the season. The evidence also established that several small fires had been started in the building when cans of fuel (the type normally used by campers) were punctured and their contents were ignited. Eads's clothing reeked of the accelerant. The emergency room doctor who treated Eads testified that the injuries to his lungs and airways were consistent with his great proximity to the origin of the fires. The doctor also explained that Eads's fractured skull could have resulted from a fall caused by being close to an exploding can containing the accelerant. In light of this evidence, we cannot conclude that the trial court erred in denying Eads's motions for a directed verdict.

Finally, Eads argues that the court erred in excluding the testimony of Mike Parks, a certified arson investigator. Parks had conducted and videotaped an experiment which demonstrated that if the fuel cans had been shot with a shotgun, they would have been destroyed. Eads sought to present this evidence in order to negate the Commonwealth's theory that the holes in the fuel cans were caused by a gun. Because no gun was found in the bait shop or on Eads's person, he argues that Parks's testimony would have discredited the Commonwealth's hypothesis as to the crime.

The trial court refused to allow the testimony of Parks or his videotape to be introduced into evidence. The court expressed concern about the relevance of the evidence, but it also based its ruling excluding the evidence on the fact that the tape had not been furnished to the Commonwealth until the day before trial.

We agree with the Commonwealth that no error occurred. While the Commonwealth initially theorized that the fuel cans had been punctured with a firearm (hence, the indictment for first-degree burglary, which was amended before trial to third-degree burglary), it made no attempt at trial to expand upon this point and to establish how the fuel cans had been punctured. It did not introduce any evidence linking Eads to any type of firearm. Eads's attorney elicited testimony from the Commonwealth's witnesses that no operable gun was located at the scene or on Eads himself.

We agree with the Commonwealth's observation that Parks's experiment would not have assisted the jury in its determination of whether Eads was responsible for puncturing the cans that started the fire at the bait shop. See, KRE³ 401. The evidence had no bearing on either of Eads's defenses; *i.e.*, that he was too intoxicated to form specific intent or that he was framed by someone else. We find no abuse of discretion by the

³ Kentucky Rules of Evidence.

trial court in excluding evidence of the experiment conducted by the arson expert.

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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