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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000896-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 04-CR-00074

MARK VANCLEVE — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: The Commonwealth of Kentucky appeals from an order of the Kenton Circuit Court dismissing an indictment for first-degree sexual abuse brought against appellee Mark Vancleve on the basis that his right to a speedy

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

trial had been violated. Sixth Amendment of United States Constitution; Section 11 of Kentucky Constitution. We reverse.

According to the Uniform Citation issued in connection with Vancleve's arrest, the nine-year old alleged victim reported to both of her parents that appellee had "touched her private parts." The alleged victim is Vancleve's niece. The citation also states that "[w]hile being interviewed after being given a Miranda warning the defendant admitted to touching his niece's vagina, under her shorts, approx 2 weeks ago on one occasion. He also indicates he's sorry."

Vancleve was arrested on December 30, 2003. He was arraigned in district court on December 31, 2003. On January 7, 2004, a preliminary hearing was held at which time probable cause was established and the cause was waived to the grand jury. Vancleve was released upon a $2,500.00 cash bond.

On February 20, 2004, Vancleve was indicted for first-degree sexual abuse. Kentucky Revised Statutes (KRS) 510.110. The indictment alleged that between February 1, 2003, and December 29, 2003, Vancleve subjected another person to sexual contact, who was incapable of consent because she was less than 12 years of age. The appellant was arraigned on March 3, 2004, at which time he pled not guilty. Vancleve remained free on bond.

Reciprocal discovery was ordered and the case was set for a status hearing on April 13, 2004. On March 31, 2004, the Commonwealth filed a Discovery Inventory and Acknowledgment. On the same day, the Commonwealth also filed a Recommendation on Plea of Guilty. The recommendation offered Vancleve five years incarceration probated for five years and, as a condition of probation, six months to serve.

On April 13, 2004, a status hearing was held. At the hearing defense counsel noted that he had received discovery (with the exception of the grand jury proceedings) and that it was anticipated that pretrial motions would be forthcoming. The trial court entered an order reflecting the status hearing events, noting that discovery was complete, and a pretrial conference date was set for May 11, 2004.

On May 11, 2004, Vancleve's retained counsel filed a motion to withdraw from the case. At the hearing on the motion the trial court granted counsel's request to withdraw, set a status conference date for May 25, 2004, and told Vancleve to have a new attorney retained at that time. At the May 25 conference, Vancleve appeared without an attorney. On May 26, 2004, the trial court appointed a public defender to represent the appellant. A status conference was held on June 8, 2004, at which time new counsel indicated that he was still reviewing discovery issues.

A pretrial conference was held on June 29, 2004, at which time Vancleve requested a trial date. A trial date was set for September 1, 2004. On August 3, 2004, the Commonwealth filed a motion to continue the trial because the lead detective in the case was to be unavailable at that time due to mandatory training. A hearing on the motion was convened on August 17, 2004, but was passed until August 24, 2004, as it was anticipated that Vancleve would plead guilty.

On August 24, 2004, the parties entered into a plea agreement under which Vancleve would be sentenced to five years, probated for five years upon the condition that he serve six months. The agreement also provided that no other charges were to follow. Vancleve entered a plea in court on August 24, 2004, and sentencing was set for October 5, 2004.

At the October 5, 2004, sentencing hearing the trial court asked the Commonwealth why it was recommending probation. In response, the Commonwealth responded that probation was being recommended because the alleged victim was in counseling; the alleged victim's father did not want to pursue the matter or see Vancleve in prison; the father did not want to subject his child to a trial; and that the allegation was "just a touching." The trial court thereupon rejected the plea agreement upon the basis of the probation recommendation and the period of incarceration.

On October 26, 2004, a status hearing was held. At that time the trial court rejected the request of the parties to reconsider and accept the plea agreement. Vancleve then withdrew his guilty plea and requested a trial date. A new trial date was set for February 9, 2005.

On February 9, 2005, the case was called for trial. At that time the Commonwealth moved the court "to withdraw this matter with leave to refile." The basis for the motion was that the victim in the case – a nine-year old girl – was unavailable due to "illness and inability to testify." The Commonwealth noted that "she was able to testify at one time, but she has decompensated and that is why the Commonwealth has moved to withdraw without prejudice." Vancleve objected to withdrawal with leave to refile. Defense counsel stated that this case "has gone on long enough . . . as I remember, what has been said in this case is that they don't have any indication that the child witness will ever be able to testify in this matter, so I would ask for it to be either dismissed with prejudice or withdrawn without leave to refile." The trial court then asked the Commonwealth to restate its motion; which the Commonwealth indicated was a motion to withdraw the case with leave to refile. The trial court then announced that the case was "withdrawn."

On March 28, 2005, the trial court entered an order captioned "Order of Dismissal." The order purported to "sustain" the Commonwealth's motion to dismiss, and dismissed the indictment against Vancleve with prejudice. The Commonwealth filed a "Motion to Reconsider," which was denied. This appeal followed.

We first address the procedural posture of the case based upon the trial court's somewhat ambiguous order dismissing the indictment. The order states "that the motion of the Commonwealth to dismiss the Indictment is **SUSTAINED**." However, the Commonwealth's motion was to dismiss the case without prejudice and with leave to refile, whereas the trial court's order dismissed the case with prejudice. Hence, the order did not grant, nor sustain, the Commonwealth's motion. Further, the trial court is not unilaterally permitted to dismiss an indictment under Kentucky Rules of Criminal Procedure (RCr) 9.64.[3]

The order also states that "the Defendant is entitled to a speedy and public trial. After being under the cloud of an

[3] RCr 9.64 provides as follows: "The attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness." Hence, under RCr 9.64 the trial court's authority is limited to granting its permission to dismiss upon the terms proposed by the Commonwealth. We do not construe the rule as permitting the trial court to dismiss an indictment <u>with</u> prejudice upon the Commonwealth's motion to dismiss <u>without</u> prejudice.

Indictment for almost twelve months, a party who announces ready for trial is entitled to go forward." Based upon this statement in the order, and because Vancleve had not moved to dismiss upon speedy trial grounds, we construe the order as dismissing, sua sponte, the indictment for violation of Vancleve's right to a speedy trial under the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. We review this appeal under that premise.

Claims of speedy trial right violations are evaluated under Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). "A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and that of the defendant are weighed." Id. at 514, 92 S.Ct at 2184. Barker requires that a reviewing court consider four factors to determine whether a defendant had been denied his right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant. Id. at 530, 92 S.Ct. at 2192. "No single one of these factors is determinative by itself." Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000), overruled in part on other grounds by Crawford v. Washington, 541 U.S. 36, 60-61,

124 S.Ct. 1354, 1369-70, 158 L.Ed.2d 177 (2004), as recognized in Jackson v. Commonwealth, 187 S.W.3d 300, 304 (Ky. 2006).

The first Barker factor is the initial hurdle for an appellant claiming a violation of this speedy trial right. The length of the delay must be "presumptively prejudicial" in order to reach consideration of the remaining factors: "The inquiry must first be triggered by a presumptively prejudicial delay. There is no bright line rule for determining what length of delay suffices to trigger the inquiry, but actual prejudice need not be proven to establish a presumptively prejudicial delay." Id. The length of the delay in this case was over thirteen months between the time of Vancleve's arrest and the scheduled commencement of trial. While the complexity of the case has some effect on whether a given delay is presumptively prejudicial, the United States Supreme Court has noted that "lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett v. United States, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520 (1992). As such, we conclude that the thirteen month delay here is presumptively prejudicial. However, "'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker inquiry." Id. Thus, we must still consider

the remaining factors in the Barker balancing test to determine whether Vancleve's rights were violated.

The second factor, the reason for the delay, is a crucial area of concern under Barker, because it amounts to a determination of who is to blame for the delay. With regard to this factor, the Barker Court noted:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

Delay in this matter was initially caused by the withdrawal of Vancleve's retained counsel and the substitution in lieu thereof by appointed counsel. Following the appointment of a public defender, additional delay was caused by new counsel's efforts to review discovery and become acquainted with the case. The Commonwealth was not at fault for this phase of the delay, and if fault was to be assigned, the fault was the appellant's.

After the appointment of new counsel, the matter was then, it originally appeared, expeditiously resolved by a plea

agreement entered into by the parties on August 24, 2004.[4] The plea agreement, we note, was for the maximum sentence permissible for a Class D felony, five years. However, because under the plea agreement Vancleve would only have to serve six-months as a condition of probation (leaving four and one-half years of shelf-time), the trial court rejected the agreement. The trial court's rejection of the plea agreement was the fault of neither the appellant nor the Commonwealth.

At the time of the trial court's rejection of the agreement and Vancleve's withdrawal of his guilty plea, it was October 26, 2004. At this point, none of the fault for the delay could be attributable to the Commonwealth. A trial date was timely set for February 9, 2005, and there is no evidence that the Commonwealth could have done anything to have had the trial set at an earlier time.

On February 9, 2005, when the case was called for trial, the first delay that could be attributed to the prosecution-side of the case occurred. At that time the Commonwealth indicated that it could not proceed to trial because the alleged victim in the case was unavailable due to "illness and inability to testify." As such, this anticipated

[4] While the Commonwealth had filed a motion to continue the September 1, 2004, trial date because the lead detective was scheduled to be unavailable, that factor was superseded by the plea agreement and is irrelevant to our review. The motion for a continuance caused no delay.

delay – the delay at issue before us – was attributable to a missing witness.

A valid reason, such as missing witness, should serve to justify appropriate delay in bringing a defendant to trial. Barker v. Wingo, 92 S.Ct. 2182, 407 U.S. 514, 33 L.Ed.2d 101 (1972). See also U.S. v. Howard, 218 F.3d 556 (6th Cir. 2000) (Defendant's Sixth Amendment right to speedy trial was not violated by three-month continuance before his first trial and five-month continuance before his second trial; although defendant repeatedly asserted his speedy trial rights, government's delays were not motivated by bad faith or attempt to obtain tactical advantage, but were caused in part by unavailability of witness, and defendant failed to identify how his defense was prejudiced by delays).

In summary, the absence of a witness is a justifiable reason to delay a trial. Particularly as here, when no fault at all is attributable to the Commonwealth, and the delay is attributable to medical reasons associated with the alleged sexual abuse of a nine-year old child, the matter was not ripe for dismissal upon speedy trial grounds. Relevant as well is that barely three months prior the trial court had rejected a plea agreement obtained by the Commonwealth which would have imposed upon Vancleve the maximum sentence available for the crime charged.

As such, upon application of this prong of the Barker test (and, as discussed below, the prejudice prong of the test), we believe that the trial court erred in dismissing the indictment with prejudice.

The next factor in the Barker inquiry centers upon whether or not the defendant actually asserted his right to a speedy trial. While the Barker Court noted that assertion of the right is not an absolute prerequisite, "[t]his does not mean . . . that the defendant has no responsibility to assert his right." Barker, 407 U.S. at 528, 92 S.Ct. at 2191. The Commonwealth claims that Appellant never asserted his right because he never explicitly did so, or, if he did do so, it was not until the day of the trial. However, while Vancleve may not have formally invoked his right, he did make efforts to set a trial date and objected to the Commonwealth's efforts to dismiss without prejudice. We conclude that this was sufficient to constitute an assertion of the right, thus allowing the third factor of the inquiry to weigh in Vancleve's favor. *Cf.* Cain v. Smith, 686 F.2d 374, 384 (6th Cir. 1982) (holding that "a demand for a reasonable bail is the functional equivalent of a demand for a speedy trial").

Prejudice to the defendant is the most compelling of the factors in the Barker balancing test. As noted above, the determination that the length of delay was presumptively

prejudicial does not decide this factor. Instead, we must engage in a substantive analysis of whether Appellant was actually prejudiced by the fourteen month delay.

Prejudice should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. The Supreme Court has identified three such interests: (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.

Vancleve posted bail and did not have to endure pretrial incarceration. Nor would he be subject to incarceration upon dismissal of the indictment with leave to refile. Moreover, the Commonwealth's proposal – dismissal with leave to refile – should serve to minimize the anxiety and concern of the accused in that the cloud of indictment would be removed from appellant. Finally, there is no evidence that Vancleve's defense would be impaired by a reasonable delay in the proceedings pending recovery by the alleged victim. As such, we are persuaded that the prejudice prong of the Barker analysis weighs against dismissal with prejudice.

In summary, because the Commonwealth was not at fault at all for the delay, because the delay was not to gain a tactical advantage, and because prejudice to Vancleve will be

minimal upon dismissal with leave to refile, we are persuaded that the trial court erred in dismissing the matter with prejudice. We accordingly reverse the dismissal.

For the foregoing reasons the judgment of the Kenton Circuit Court is reversed, and the cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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