

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000961-MR

DAMARIO PRAY

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 05-CR-00181

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Damario Pray appeals his conviction of three counts of first-degree robbery and one count of intimidating a witness. We affirm.

On February 22, 2005, Bonnie Porter (“Porter”) was working at Nu Yale Dry Cleaners. At 6:57 pm, a man wearing a black hooded sweatshirt and a camouflage bandanna entered the store and demanded all of the money from Porter. The robber also

¹ Senior Judge Daniel T. Guidugli 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.

demanded Porter's rings and identification and instructed her to lie on the floor. Porter later testified that she witnessed the barrel of a gun sticking out from the robber's sleeve. The robber then warned Porter not to inform anyone of the robbery and left. Porter then drove to her home in Fort Knox and, along with her husband, reported the incident to the Radcliff Police Department.

On March 2, 2005, Alaa Musleh (“Alaa”), owner of Al's Market, was beginning to close his store and count his register. A man, wearing a black hooded sweatshirt and a camouflage bandanna and bearing a gun, entered and demanded that Alaa surrender his money. The robber told Alaa's brother, Ali Musleh (“Ali”) to lie down on the floor. After receiving the money, the robber asked for the store's security tape. Alaa went into the office to retrieve the tape and the robber followed him. As Alaa was handing the tape to the robber, Ali hit him in the head with a screwdriver. Alaa seized the robber's gun, a BB gun, and struck the robber with it. Alaa and Ali restrained the man, Damario Pray, until the police arrived.

After police arrived, Appellant was transported to the police station by Lieutenant Sam Ennis. Once at the station, Appellant was taken to an interview room and advised of his rights. He admitted to robbing Al's Market and signed a statement to that effect. He then admitted to also robbing the cleaners and gave a videotaped statement.

On May 17, 2005, a Hardin County grand jury indicted Appellant on the charges of first-degree robbery (three counts) and intimidating a witness (one count). On

June 7, 2005, Appellant was arraigned on the above charges and plead not guilty. A trial was set for March 9, 2006. On July 5, 2005, Appellant filed a motion seeking a speedy trial. The trial court heard the motion on July 12, 2005 and decided that the March 9, 2006 court date was not a violation of Appellant's right to a speedy trial. On March 9-10, 2006, Appellant received a jury trial and was convicted on all counts. The jury recommended three concurrent ten year sentences for the robbery charges and a five year consecutive sentence for the intimidation charge for a total sentence of 15 years. The trial court's final judgment and sentencing reflected the recommendation of the jury. This appeal followed.

The only issue presented on appeal is the right to a speedy trial. There is some question as to whether or not Appellant appropriately preserved the issue of speedy trial for appeal. Although he filed a motion requesting a speedy trial, he failed to later raise the issue during or after the jury trial. Nonetheless, Appellant's claim would be appropriate for appellate review under RCr 10.26 if we were to determine that a palpable error had been made.

If a defendant's right to a speedy trial is violated, then the only remedy is dismissal of the conviction. *Strunk v. United States*, 412 U.S.434 (1973). What does and does not constitute a speedy trial must be determined on a case by case basis. *Barker v. Wingo*, 92 S.Ct. 2182 (1972). The *Barker* balancing factors are: 1) length of delay; 2) reason for the delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. *Id.* at 2192.

Appellant was required to wait almost ten months between his indictment and his trial. During this period, appellant was incarcerated with a \$75,000 full cash bond. When, eight months before his trial, appellant moved for a closer trial date, the reason he was given for the delay was the trial court's case load. Under the circumstances, we believe this delay to be unavoidable. The Circuit Court informed Appellant that there were over 200 cases, per division, that were awaiting trial. Eight months would provide the courts with approximately 170 working days to dispose of these 200 plus cases. This does not take into consideration days that the court is closed or canceled for various reasons. Nor does it take into consideration multi-day trials or days on which the court is working but not holding trials. It would be unreasonable to expect the court to dispose of such a case load any faster.

Appellant argues that his trial could and should have been moved to a closer date by rescheduling someone who had not motioned for a speedy trial. We do not agree. Simply because someone has failed to file a motion for a speedy trial does not mean that their right is superseded by someone else's. To find so would allow for the creation of a motion-centered bidding war, placing anyone without an attorney at a complete disadvantage. A system of preferential treatment masked under the guise of a motion requirement is hardly consistent with the goals of our justice system. Given the circumstances of the trial court's case load, it does not appear that Appellant's trial was scheduled unnecessarily late or for poor cause.

We agree that, although Appellant may not have properly preserved the issue for appeal, he did assert his right through the July 5, 2005 motion. He, in no way, waived his right to a speedy trial. Therefore, this prong of the balancing test tilts in his favor.

The final factor, prejudice to the defendant, appears to weigh in favor of the court. We have seen no evidence that the Circuit Court was allowing the Commonwealth to build a stronger case against the defendant. Nor has it been argued that the court was attempting to weaken the defense. In fact, this case appears to be fairly cut and dry. The Commonwealth possessed both written and recorded confessions from the defendant, evidence which time would neither destroy nor enhance. We also take note that Appellant was given credit for time served, showing that he did not serve any time incarcerated that is not now accounted for. Any prejudice in this situation would be minimal.

In conclusion, we do not believe the length of time between Appellant's trial and indictment to be palpable error. Furthermore, application of the *Barker* balancing factors does not support a finding that the lapse in time violated Appellant's right to a speedy trial.

For the foregoing reasons we affirm the convictions of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky