

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000064-MR

LEROME BRANTLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 05-CR-002740

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: Lerome Brantley appeals the Jefferson Circuit Court's order finding that the continuance of his criminal case from March 1, 2006 through August 15, 2006, was based upon good cause and was both necessary and

¹ Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

reasonable. After a careful review of the record, we affirm because the circuit court did not err in its findings and Brantley's claims of speedy trial violations that allegedly occurred on post-appeal remand were waived.

I. FACTUAL AND PROCEDURAL BACKGROUND

Brantley was a prisoner at the Fountain Correctional Facility in Alabama when a blood sample was obtained from him pursuant to a search warrant. *See Brantley v. Commonwealth*, No. 2006-CA-001356-MR, 2008 WL 109239, *1 (Ky. App. Jan. 11, 2008) (unpublished). In February 2005, that sample was found to match DNA from a July 2000 reported rape and robbery in Jefferson County, Kentucky. *See id.* Several months later, "the Jefferson County Commonwealth's Attorney filed a detainer with the Alabama Department of Corrections. On June 15, 2005, Brantley made his request under the Interstate Agreement on Detainers (IAD) for a final disposition of all outstanding charges." *Id.* Brantley was brought to Kentucky to face the charges. *See id.*

Brantley was indicted on September 14, 2005. The following day, Brantley entered a plea of not guilty and the court told Brantley and his stand-in counsel that the case was scheduled for trial on March 1, 2006. *See id.* At the pretrial conference on November 8, 2005, Brantley's attorney was present, and the court asked Brantley's counsel and the prosecutor "if the March 1, 2006, trial date was still good for them, [and] both the prosecutor and defense counsel responded that it was." *Id.* at *2. At a December 2005 pretrial conference, defense counsel

informed the court that Brantley, who had been brought to Kentucky under the IAD, wanted to be tried within the 180-day IAD time limit. *See id.*

“On February 16, 2006, [defense counsel] filed a motion to dismiss the indictment for failure to comply with the IAD.” *Id.* Several weeks later,

[t]he court denied the motion to dismiss and announced that it would issue a written order with a new trial date. Brantley’s counsel said she objected to a trial date outside the 180 days. The record indicates, however, that the court found that Brantley had waived the terms of the IAD from September 15th to March 1st. Therefore, the court asked what month would be good for the parties for trial, and Brantley’s counsel again reiterated that she wanted immediate trial. The prosecutor requested August. In its order, the court reassigned the jury trial for August 15, 2006, finding that the Commonwealth’s motion for continuance “based upon its investigative officer . . . being in training in Atlanta for a period of three months, constituted a necessary or reasonable continuance for good cause.”

Id.

On May 23, 2006, Brantley entered conditional guilty pleas to the charges of first-degree rape and first-degree robbery in exchange for the Commonwealth’s sentence recommendation of ten years for each offense to run concurrently with each other and with the Alabama sentence. *See id.* The pleas were conditioned on Brantley being able to appeal the IAD issue. *Id.* Brantley was sentenced in accordance with the Commonwealth’s recommendation in the plea agreement.

Brantley then appealed the IAD issue to this Court, and this Court stated that his “sole argument [was] that the indictment should have been

dismissed because he was not brought to trial within the 180-day period required by Article III of the [IAD].” *Id.* at *3. This Court found that “Brantley waived his rights under the IAD” between September 15, 2005 and March 1, 2006 “because he was aware of the March 1, 2006, jury trial date when he was arraigned on September 15, 2005, and no written motion to dismiss was filed for an additional five months, until the time under the statute had passed.” *Id.* However, the Court held that the trial court “erred in granting the continuance of the trial from March to August 15, 2006,” and noted that “Brantley’s counsel asserted his right to [a] speedy trial several times at both of the hearings in March.” *Id.* Therefore, this Court held that “under the IAD, the trial court must find that the continuance requested by the Commonwealth was based on good cause and was both necessary and reasonable.” *Id.*

This Court also found that the trial court’s determination that there was good cause for a continuance because the lead investigator was in training in Atlanta for three months was incorrect because the record revealed that the investigator would have returned from Atlanta in late March and would have been available if the trial was scheduled for early April. *See id.* at *4. Thus, the Court held that “although the trial court found good cause for the continuance, it failed to find good cause as to the five and one-half month length of the continuance.” *Id.* Therefore, the trial court’s decision was vacated and the case was remanded for “the trial court to determine whether continuing the case for five and one-half

months following Brantley's assertion of his right under the IAD was for good cause and was necessary or reasonable." *Id.*

In January 2008, the Commonwealth filed a motion in the circuit court titled "Commonwealth's Motion for a Hearing as Required by the Kentucky Court of Appeals." (Capitalization changed). However, in the body of the motion, the Commonwealth did not request a hearing, but merely requested the circuit court to make the factual findings that this Court had required in its opinion. In his response to the Commonwealth's motion, Brantley advised the circuit court that because the decision of this Court was not yet final until the time passed for filing either a petition for rehearing or a motion for discretionary review, the circuit court did not have jurisdiction to hold a hearing and enter a decision at that time. Brantley then asked the circuit court to order the Commonwealth to make arrangements for Brantley to be transported back to Kentucky from Alabama so that an evidentiary hearing could be held to resolve the factual issues.

The record contains a letter from this Court dated February 29, 2008, informing the circuit court that this Court's decision had become final. In March 2008, defense counsel moved to dismiss the indictment or, in the alternative, to order the Commonwealth to ensure Brantley was transported back to Kentucky so that the circuit court could hold a hearing. The motion also stated that "[i]t continues to be the defendant's position that the time limitations imposed by the [IAD] have expired and he does not waive any arguments or agree to any delay with respect to those matters." Approximately a year later, in March 2009, the

Commonwealth responded to the motion to dismiss, noting that there was a new prosecutor assigned to the case and that in February 2009, Brantley had filed another motion to dismiss. The Commonwealth's response stated it did "not believe a hearing on the issue [was] necessary, as the [circuit court's] written orders and video record serve to document the reason for setting the August 2006 trial date." Brantley replied, arguing that a hearing was necessary and that the Commonwealth should arrange for Brantley to be transported to Kentucky for the hearing. Brantley again reiterated his position that the "time limitations imposed by the [IAD] have expired," and the delays should be charged against the Commonwealth.

In May 2009, defense counsel again filed a motion to dismiss the indictment. This time, counsel argued that the indictment should be dismissed "for violation of state and federal constitutional and statutory speedy trial rights." The motion asserted, in pertinent part, as follows:

While the time period for speedy trial purposes does not include the amount of time between conviction and reversal, the clock again begins to run upon reversal by the appellate court. *Dickerson v. Commonwealth*, 278 S.W.3d 145, 150 (Ky. 2009). Thus the time period for speedy trial purposes, according to *Dickerson, supra*, began to run again on February 9, 2008, the date that the opinion became final according to the Court of Appeals record.² As of the filing of this motion, 437 days have passed since then.

[] Even if Mr. Brantley had not requested final disposition under the IAD, the 437-day delay in this case, standing alone, is certainly presumptively prejudicial, as

² The opinion actually became final on February 29, 2008, according to the record.

delays of twenty-three months and less have been found by the appellate court to be presumptively prejudicial for constitutional speedy trial purposes. *Dickerson*, 278 S.W.3d at 150.

(Emphasis changed).

In early December 2009, approximately twenty-two months after this Court's decision became final, the circuit court entered its order on remand from this Court. The circuit court made the following relevant findings of fact:

The trial court rescheduled the jury trial for August 15, 2006 after the Commonwealth indicated in open court that August was the first available date the Assistant Commonwealth's Attorney could try the case because he currently had several murder trials scheduled between March 14, 2006 and August 2006.

[] Specifically, the Assistant Commonwealth's Attorney had one murder trial scheduled in March 2006, one in April 2006, two in May 2006 and one in July 2006.

This Court concludes, having reviewed the record, that the continuance from March 1 to August 15, 2006 was based upon good cause and was both necessary and reasonable.

We note that the circuit court made no mention in its order of Brantley's motions to dismiss that were filed following remand by this Court.

Brantley now appeals, contending that: (a) the circuit court should have held a hearing before entering its findings of fact on remand; and (b) Brantley was denied his right to a speedy disposition by the post-appeal delay.

II. ANALYSIS

A. CLAIM REGARDING FAILURE TO HOLD A HEARING

Brantley first alleges that the circuit court should have held a hearing on remand. Specifically, Brantley argues that the circuit court could not, without a hearing, make the findings of fact necessary to support its conclusion that the continuance from March 1, 2006, to August 15, 2006, was for good cause, and was necessary and reasonable.

We first note that this Court's prior opinion vacating and remanding the case to the circuit court for a determination of whether the continuation was for good cause, and was necessary and reasonable, did not direct the circuit court to hold a hearing on remand. Additionally, we are unaware of any law that requires a hearing to make that determination, and Brantley has not cited any such law on appeal. Therefore, if there was proper factual evidence in the record to support the circuit court's findings on remand that the continuation was for good cause, and was necessary and reasonable, then there was no need for a hearing to gather further evidence.

On remand, the circuit court found that the continuance from March 1, 2006 to August 15, 2006, was based upon good cause, and was necessary, and reasonable because in a prior hearing, the Commonwealth requested an August 2006 trial date on the basis that "the Assistant Commonwealth's Attorney had one murder trial scheduled in March 2006, one in April 2006, two in May 2006 and one in July 2006." The court noted that "the Commonwealth indicated in open court that August was the first available date the Assistant Commonwealth's Attorney could try the case" due to the aforementioned schedule.

Upon review of the video recorded proceedings in which the Commonwealth made these assertions, we find that the circuit court did not err in these factual findings and that the court also did not err in determining that the Assistant Commonwealth's Attorney's trial schedule constituted good cause and was necessary and reasonable to justify the continuance. Therefore, the circuit court did not need to conduct another hearing following remand to determine whether there was good cause for the continuance that was necessary and reasonable. Consequently, Brantley's claim lacks merit.

Moreover, upon further consideration, we find that when Brantley entered his guilty pleas on May 23, 2006, the running of the speedy trial clock for the alleged IAD violation effectively stopped, as it is nonsensical for a defendant to claim that his rights were violated when a court failed to bring him to trial on charges for which he has entered valid guilty pleas. Brantley does not contend that his guilty pleas were invalid. Therefore, it is a moot point whether Brantley's speedy trial rights under the IAD were violated from the date he pleaded guilty on May 23, 2006, through the date trial had been scheduled to occur, *i.e.*, August 15, 2006. As for the question of whether his speedy trial rights under the IAD were violated from March 1, 2006, to the date of his guilty pleas, May 23, 2006, we determined, *supra*, that there was good cause for the continuance of the trial during that time that was also necessary and reasonable due to the Assistant Commonwealth's Attorney's trial schedule. Thus, Brantley's claim lacks merit.

B. CLAIM REGARDING POST-APPEAL DELAY

Brantley next contends that he was denied his right to a speedy disposition under both the IAD and the Due Process Clause when the circuit court took approximately twenty-two months to enter its factual findings after the case was remanded from this Court in February 2008. Brantley argues that the “post-appeal delay . . . was just shy of two years, well beyond the 180-day limit set out in KRS³ 440.450 [*i.e.*, Kentucky’s statute pertaining to the IAD].”

We first note that, as we mentioned, *supra*, the circuit court did not enter a ruling on Brantley’s post-appeal motions to dismiss, in which he argued that the post-appeal delay violated the IAD and the Due Process Clause. “It is the duty of one who moves the trial court for relief to insist upon a ruling, and a failure to do so is regarded as a waiver.” *Dillard v. Commonwealth*, 995 S.W.2d 366, 371 (Ky. 1999). Therefore, because Brantley did not insist upon a ruling on his motions to dismiss concerning post-appeal delay after the circuit court failed to rule upon them, he has waived these issues.

Regardless, however, even if Brantley had not waived these issues, they lack merit. Brantley first contends that the post-appeal delay resulted in a denial of his speedy trial right under the IAD. Brantley does not cite any cases to this Court that suggest post-appeal delay results in a violation of the IAD. Kentucky Revised Statute 440.450, Article III, Section (1), which is the portion of the IAD that Brantley has brought his claims under, concerns when a prisoner against whom a detainer has been lodged must be brought to *trial*. The statute

³ Kentucky Revised Statute.

does not mention post-appeal delay. Once Brantley entered his guilty pleas on May 23, 2006, *i.e.*, before his initial appeal, the running of the speedy trial clock effectively stopped. Therefore, he has no basis under the IAD for challenging how long it took the circuit court to enter its findings on remand from this Court.

Second, Brantley alleges that his speedy trial rights under the Due Process Clauses of the federal and state constitutions were violated by the post-appeal delay. In support of this claim, Brantley cites *Dickerson*, 278 S.W.3d at 150. However, *Dickerson* is distinguishable from the present case. In *Dickerson*, the Kentucky Supreme Court noted that it had reversed Dickerson's initial convictions in October 2005, and that the speedy trial clock began to run on that date. But, the clock effectively stopped ticking when Dickerson subsequently pleaded guilty in September 2007. Dickerson again appealed, claiming that his speedy trial rights had been violated by the twenty-three month delay between the date the Supreme Court reversed his initial convictions and the time he entered his subsequent guilty plea. The Court found that although the length of time was presumptively prejudicial, there was no actual prejudice shown. Therefore, Dickerson's constitutional speedy trial rights had not been violated. *See Dickerson*, 278 S.W.3d at 150-152.

In the present case, Brantley cites *Dickerson* for the proposition that post-appeal delay may result in a violation of a defendant's constitutional speedy trial rights. However, *Dickerson* is distinguishable because in *Dickerson*, the defendant did not plead guilty until approximately two years after the case was

remanded to the trial court following the initial appeal. In the present case, Brantley pleaded guilty before his initial appeal to this Court. Therefore, pursuant to the Supreme Court's holding in *Dickerson*, once Brantley pleaded guilty, the constitutional speedy trial clock stopped ticking. Thus, Brantley's allegation that his constitutional speedy trial rights were violated during the post-appeal delay in this case, which occurred after he had pleaded guilty, lacks merit.

Furthermore, even if the post-appeal delay in this case could constitute a speedy trial violation under the federal and state constitutions, Brantley's allegation nevertheless fails. "In evaluating a claim of a speedy trial violation, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004).

Because twenty-two months passed from the time this Court's initial decision on appeal became final to the time the circuit court entered its decision on remand, the delay is presumptively prejudicial. *See Bratcher*, 151 S.W.3d at 344 (holding that an eighteen month delay between indictment and trial was presumptively prejudicial). "That prejudice, however, is not alone dispositive and must be balanced against the other factors." *Miller v. Commonwealth*, 283 S.W.3d 690, 700 (Ky. 2009) (internal quotation marks omitted). "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 [v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)] enquiry.”
Bratcher, 151 S.W.3d at 344 (internal quotation marks omitted).

In his motions to dismiss the indictment based on alleged violations of his constitutional right to a speedy trial, Brantley never alleged that he was actually prejudiced from the post-appeal delay. As the Supreme Court noted in *Dickerson*, even if a delay is presumptively prejudicial, “speculative and generic claims are insufficient to support a claim of prejudice,” and “[i]t is the burden of the defendant to establish actual prejudice.” *Dickerson*, 278 S.W.3d at 152 & n.19 (internal quotation marks omitted). In *Dickerson*, the Court noted that “[n]oticeably lacking from Dickerson’s brief [was] any concrete allegation of prejudice.” *Id.* at 151-52. The Court then held that although the delay in Dickerson’s case was presumptively prejudicial, Dickerson had “failed to show the delay caused actual prejudice.” *Id.* at 152. Therefore, the Supreme Court held that “even though at least some of the delay [was] attributable to the Commonwealth’s failure fully and timely to comply with its discovery obligations,” Dickerson was “not entitled to have the charges against him dismissed.” *Id.* at 152.

In the present case, because Brantley never alleged in the circuit court any actual prejudice resulting from the post-appeal delay, and he cannot “feed one can of worms to the trial judge and another to the appellate court,” *see Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), his claim that his federal and state constitutional rights to a speedy trial were violated by the post-appeal delay lacks merit.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR

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