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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000681-MR

UWA KEN JESUOROBO — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE STEVE JOHN L. ATKINS, JUDGE
ACTION NO. 12-CR-00190

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CHIEF JUDGE ACREE; J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Uwa Ken Jesuorobo brings this appeal from an April 9, 2014, final judgment of the Christian Circuit Court, upon a jury verdict, finding him guilty of robbery in the first degree and criminal mischief in the second degree and sentencing him to ten-years' imprisonment. We affirm.

During the early morning hours of January 3, 2012, a man dressed in military fatigues robbed a gas station in Hopkinsville, Kentucky. The man fled with approximately $1,850 from the cash register and safe. An arrest was not immediately made. Several weeks after the robbery, the Hopkinsville Police Department received a phone call from authorities at McDill Air Force Base in Tampa, Florida. Jesuorobo was stationed at McDill, and his wife reported to McDill authorities that Jesuorobo committed a robbery in Kentucky. Jesuorobo's wife claimed that while the couple was in Kentucky visiting family, Jesuorobo robbed a gas station in Hopkinsville. Upon questioning by military officials, Jesuorobo admitted to robbing the gas station.

On May 18, 2012, Jesuorobo was indicted upon one count of robbery in the first degree and one count of criminal mischief in the second degree. On April 26, 2013, Jesuorobo filed a motion to dismiss wherein he asserted his right to a speedy trial. Jesuorobo subsequently filed several more motions seeking a speedy trial. The motions were denied.

On January 21, 2014, the case was tried before a jury. During trial, Jesuorobo admitted his involvement in the robbery but claimed the gas station clerk, who was an acquaintance of his wife, was also involved. Jesuorobo alleged that his wife arranged for the clerk to cooperate when Jesuorobo robbed the store. Following the jury trial, Jesuorobo was found guilty of first-degree robbery and second-degree criminal mischief. He was sentenced to a total of ten-years' imprisonment. This appeal follows.

Jesuorobo initially contends he was denied his right to a speedy trial as provided by Kentucky Revised Statutes (KRS) 500.110.

KRS 500.110 specifically reads:

> 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 . . . .

Simply stated, KRS 500.110 "applies only when a defendant is incarcerated for one offense and a detainer has been lodged against him to answer for another offense." *Gabow v. Com*, 34 S.W.3d 63, 69 (Ky. 2000) *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). KRS 500.110 does not apply, however, where "a defendant is seeking a speedy trial of an offense for which he is being held in pre-trial incarceration." *Gabow*, 34 S.W.3d at 69.

In the case *sub judice*, Jesuorobo has not alleged that while serving a sentence of imprisonment a detainer was lodged against him for a separate untried offense. Rather, Jesuorobo is merely seeking a speedy trial upon the offense for which he was being held in pretrial incarceration. *See Gabow*, 34 S.W.3d 63.

Therefore, KRS 500.110 is clearly inapplicable, and Jesuorobo's contention of error is without merit.

Jesuorobo next contends he was denied the right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution.

The constitutional right to a speedy trial is analyzed by applying a four-factor balancing test as established in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *See also Dunaway v. Com.*, 60 S.W.3d 563 (Ky. 2001). Pursuant to *Barker*, the four factors to be balanced are: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay." *Dunaway*, 60 S.W.3d at 569 (citing *Barker*, 407 U.S. 514).

The first factor to be considered pursuant to *Barker* is the length of the delay. It has been recognized that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Baker*, 407 U.S. at 530. To determine whether a delay is presumptively prejudicial to defendant, the court must consider the length of the delay in light of the charges against defendant. *Dunaway*, 60 S.W.3d 563.

In the case *sub judice*, Jesuorobo was indicted on May 18, 2012, upon one felony (robbery in the first degree) and one misdemeanor (criminal mischief). His trial did not begin until January 21, 2014, some twenty months after the indictment. Under these circumstances, we believe a twenty-month delay is

presumptively prejudicial. *See Dunaway*, 60 S.W.3d 563. We must now consider the remaining factors under *Barker*.

The second factor to consider under *Barker* is "the reason for the delay." *Dunaway*, 60 S.W.3d at 569. The reason for delay falls into three categories:

> [1] [A] "deliberate attempt to delay the trial in order to hamper the defense"; (2) a "more neutral reason such as negligence or overcrowded courts"; and (3) "a valid reason, such as a missing witness."

Dunaway, 60 S.W.3d at 570 (quoting *Barker*, 407 U.S. at 531). The *Dunaway* Court noted that different reasons for the delay are allocated different weight. *Id.* And, even a neutral reason may weigh more heavily against the Commonwealth because "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." *Dunaway*, 60 S.W.3d at 570 (quoting *Barker*, 407 U.S. at 529).

Jesuorobo specifically complains that the Commonwealth requested a continuance of the June 10, 2013, trial date because the detective from MacDill that interrogated Jesuorobo was unable to attend. This delay resulted in the trial being moved from October 31, 2013, to January 21, 2014. We view the Commonwealth's request for a continuance due to the unavailability of an essential witness as a valid reason for a continuance. This delay does not weigh in favor of a speedy trial violation. Jesuorobo's other specific contention is that the "October 31, 2013 [trial] date was cancelled because of retained [defense] counsel's conflict

of interest; although Hon. Fletcher entered his appearance in the case on November 2, 2012, he failed to appreciate that he had an actual conflict of interest of having previously represented [victim] until October 24, 2013." Jesuorobo's Brief at 7. A delay caused by defense counsel's failure to recognize a conflict of interest cannot be attributed to the Commonwealth or the court. Upon the whole, we believe that the second *Barker* factor – the reason for delay – does not weigh in favor of a speedy trial violation in this case.

We now turn to the third factor of the *Barker* balancing test – defendant's assertion of his right to a speedy trial. *Dunaway*, 60 S.W.3d 569. A defendant's assertion of the right to a speedy trial "must be viewed in light of [defendant's] other conduct." *Dunaway*, 60 S.W.3d at 571 (citation omitted). In this case, it is undisputed that Jesuorobo asserted his right to a speedy trial by filing a motion on April 26, 2013. Jesuorobo also filed the same or similar motions on May 19, July 16, July 31, August 30, November 19, and December 26, 2013. Thus, Jesuorobo clearly asserted his right to a speedy trial. However, we must also consider whether Jesuorobo's right to a speedy trial was hampered by his own pretrial conduct. Jesuorobo's retained counsel moved to withdraw a week before trial was set to begin. Counsel claimed he was not aware that he had previously represented the victim in another criminal matter. Counsel claimed that his representation of Jesuorobo would likely lead to cross-examination of the victim upon matters covered by the attorney-client privilege. The court granted the motion to withdraw and provided Jesuorobo time to retain new counsel. Jesuorobo

failed to obtain counsel, thus requiring another delay. The court ultimately appointed new counsel for Jesuorobo. Therefore, some of the delay can be attributed to Jesuorobo's pretrial conduct. For these reasons, his assertion of the right to a speedy trial slightly weighs in Jesuorobo's favor but does not weigh heavily. *See id.*

The fourth factor to consider pursuant to *Barker* is prejudice to the defendant caused by the delay. *Barker*, 407 U.S. 514. This factor is intended to prevent oppressive pretrial incarceration, minimize any anxiety for the accused, and limit the chance the defense will be impaired. *Dunaway*, 60 S.W.3d 563 (citing *Barker*, 407 U.S. 513).

Relevant to this factor, Jesuorobo asserts his pretrial incarceration hindered his ability to gather evidence and contact witnesses. Yet, Jesuorobo does not identify any evidence or potential witnesses who otherwise were not available due to the delay in his trial. Jesuorobo also alleges he suffered "psychological damage" but fails to demonstrate any anxiety beyond what is inevitable in any criminal case. Jesuorobo's Brief at 8. Given the total lack of evidence of this factor, we believe Jesuorobo failed to demonstrate that he was prejudiced by the delay of his trial.

Therefore, considering the factors set forth in *Barker*, we conclude that Jesuorobo's right to a speedy trial was not violated. Although Jesuorobo asserted his right to a speedy trial and the length of the delay was presumptively prejudicial, the other factors (reasons for the delay and prejudice to Jesuorobo)

were minimal at best. *See Dunaway*, 60 S.W.3d 563. Accordingly, we conclude the court did not violate Jesuorobo's constitutional right to a speedy trial.

Jesuorobo also asserts that "[r]eversible error occurred . . . [when] the Judge failed to properly inform Mr. Jesuorobo as to his choices for proceeding *pro se* or through counsel." Jesuorobo's Brief at 8. Jesuorobo specifically maintains that the trial court badgered him into foregoing his right to hybrid counsel, and in so doing violated *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). We disagree.

The Sixth and Fourteenth Amendments to the United States Constitution provide a criminal defendant the right to proceed without counsel and represent himself during trial. *Depp v. Com.*, 278 S.W.3d 615 (Ky. 2009) (citing *Faretta*, 422 U.S. 806). And, in this Commonwealth, Section 11 of the Kentucky Constitution affords a defendant a more expansive right of self-representation – the right to hybrid representation. *Deno v. Com.*, 177 S.W.3d 753 (Ky. 2005). The right to hybrid representation allows a defendant to proceed as "co-counsel with his lawyer." *Swan v. Com.*, 384 S.W.3d 77, 93 (Ky. 2012). And, the right to proceed *pro se* or with hybrid representation can be waived by defendant. *Id.* It is recognized that such right may be waived through "defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." *Id.* at 94 (quoting *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982)).

In the case *sub judice*, Jesuorobo initially invoked his right to proceed *pro se* at trial. The trial court then scheduled a *Faretta* hearing for the purpose of determining whether Jesuorobo's waiver was being made voluntarily, knowingly and intelligently. At the hearing, the court went to great length to ensure that Jesuorobo understood the hazards that could arise and the benefits he would forego if he waived his right to counsel. A few minutes into the discussion, Jesuorobo stated he never intended to take the lead role; rather he just wanted to serve as co-counsel. As the hearing went forward, it became apparent that Jesuorobo did not completely understand the risks and benefits of acting as co-counsel. After a lengthy discussion at the hearing, Jesuorobo voluntarily elected to abandon his request altogether and simply allow counsel to represent him at trial.

We believe the record demonstrates that Jesuorobo freely abandoned his request to proceed *pro se* or with hybrid representation. The trial court did not coerce Jesuorobo into abandoning his request but simply clarified the risks and benefits of proceeding *pro se* or with hybrid representation. As Jesuorobo voluntarily abandoned his request, we believe that he effectively waived his right to proceed *pro se* or with hybrid representation during the hearing. *See Swan*, 384 S.W.3d 77. Consequently, the trial court was not required to make the *Faretta* findings, and no reversible error occurred.

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

ALL CONCUR.

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