IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 20, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000411-MR

FINAL
DATE 06/08/2010

EDRIC CALDWELL — APPELLANT

V.

ON APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, SPECIAL JUDGE
NO. 2006-CR-00053

COMMONEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Edric Caldwell appeals as a matter of right from a May 14, 2008 judgment of the Fulton Circuit Court convicting him of first-degree robbery, first-degree assault, and of being a persistent felony offender (PFO) in the first degree. Caldwell was sentenced, in accord with the jury's recommendation, to fifteen years for the robbery conviction and fifteen years for the assault conviction, to run consecutively, and enhanced by the PFO adjudication to a total of thirty-five years imprisonment. Caldwell's convictions stem from an attack upon and robbery of Coy Robinson just outside of Robinson's home. The ensuing investigation led police to suspect Caldwell, who was ultimately charged and convicted in connection with these events. Appealing his convictions, Caldwell raises two claims of error: 1) that the trial court erred by refusing to dismiss the indictment and 2) that his right to a speedy trial was

denied. We reject both contentions and, accordingly, affirm Caldwell's convictions.

RELEVANT FACTS

Around midnight on August 19, 2006, Coy Robinson was attacked upon arriving at his home in Hickman, Kentucky. Robinson owned a liquor store and had just left the store, bringing with him a paper sack containing six "bank bags." Robinson was walking toward the door of his home, bag in hand, when he was robbed and brutally beaten. One of the attackers absconded with one of the bank bags, which contained customers' checks. Robinson could not describe his attacker, but thought that there were two people present during the attack. Officer Ray Smith of the Hickman Police Department responded to the scene and called an ambulance to transport Robinson to the hospital. Officer Smith investigated the area and found a magazine clip for a .357 Springfield magnum lying on the ground.

Subsequently, Caldwell apparently communicated with Dwayne Winfield and offered to sell Winfield two guns, including a .357 Springfield magnum for which he had lost the magazine clip. After this communication, Winfield made contact with Officer Chris Cummings of the Union City (Tennessee) Police Department. Officer Cummings knew Winfield from prior associations stemming from Winfield's own encounters with law enforcement officers. Officer Cummings listened in on a subsequent telephone conversation between Winfield and Caldwell. According to Officer Cummings, Caldwell offered to sell two handguns, one of which was a .357 Springfield magnum without the clip.

Officer Cummings then reported these events to the police chief of Hickman, Caldwell's city of residence. Police Chief Tony Grogan informed Officer Cummings that Caldwell was a possible suspect in another matter and that a .357 magazine clip had been dropped at the scene in that case.

Officer Cummings proceeded to have Winfield set up a gun buy that was to take place outside of Wal-Mart in Union City. Officer Cummings parked and waited for Caldwell to enter Tennessee on Highway 5 at which point Caldwell and his female passenger were pulled over and Caldwell was arrested. A prior records check had revealed that Caldwell's license was suspended. Incident to his arrest for driving on a suspended license, a search of Caldwell's vehicle led to discovery of a .38 caliber pistol. Prior to towing the vehicle, an inventory search was executed. A .357 Springfield magnum without a magazine clip was discovered inside a box in the trunk of the vehicle.

Consequently, Caldwell was indicted by a Fulton County Grand Jury for first-degree robbery, first-degree assault, possession of a handgun by a convicted felon, and being a first-degree PFO. The handgun possession charge was severed; the trial on the remaining charges is the subject of this appeal. Caldwell seeks relief in this Court based upon the trial court's failure to dismiss the indictment and based upon an alleged violation of his right to a speedy trial.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion By Refusing to Dismiss the Indictment.

Caldwell contends that the trial court committed reversible error by

refusing to dismiss the indictment. This argument was properly preserved through Caldwell's timely motion to dismiss the indictment. The basis for Caldwell's motion was that Police Chief Grogan gave false testimony before the grand jury and that such testimony grossly misled the grand jury. Specifically, before the grand jury, Police Chief Grogan testified that Caldwell had admitted in a taped interview to possessing the two guns while in Hickman, Kentucky, and to transporting the guns to Tennessee for the purpose of selling them. In fact, although Caldwell had admitted ownership of the .38 caliber pistol, he had denied having any knowledge of the .357 Springfield. Furthermore, Caldwell had not stated in the interview that he was taking the guns to Tennessee in order to sell them. Caldwell contends that, absent these false statements, the grand jury would likely not have indicted him, primarily due to a lack of evidence to support the allegation that Caldwell possessed the guns while in Kentucky.

Conversely, the Commonwealth urges that there was sufficient evidence to support the indictment despite the factual inaccuracies, which consisted primarily of Police Chief's Grogan's attributing statements made by other witnesses to Caldwell. The Commonwealth contends that Chief Grogan merely erred in identifying the source of his information, but the majority of the information itself was accurate. For example, Chief Grogan had learned from Winfield, the confidential informant, that Caldwell was coming to Tennessee to sell the guns. Further, when pulled over in Tennessee, Caldwell's female passenger stated that the two had driven from Kentucky to Tennessee without

stopping. Therefore, although Caldwell denied any knowledge of the .357 Springfield, others witnesses' statements created inferences to the contrary. Ultimately, the trial court agreed with the Commonwealth that Chief Grogan's erroneous testimony did not warrant dismissal of the indictment.

A trial court's decision concerning the dismissal of an indictment is reviewed for an abuse of discretion. *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000). Thus, we must determine whether the trial court's decision was arbitrary, unreasonable, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999). Moreover, we emphasize that a trial court must acknowledge that a strong presumption of regularity attaches to grand jury proceedings. *Baker*, 11 S.W.3d 585.

Although Kentucky decisional law in this area is sparse, in *Commonwealth v. Baker, supra*, our Court of Appeals confirmed a trial court's supervisory power to dismiss an indictment for prosecutorial misconduct. There, a mother was charged with abusing her two children. Although the facts were that she hit the children with a wooden stick, the prosecutor elicited false testimony from a grand jury witness to the effect that the mother had struck the children with an aluminum bat. The trial court found that the prosecutor had intentionally elicited the false testimony for the purpose of elevating the degree of the assault charged and, accordingly, the trial court dismissed the indictment.

In affirming the trial court's decision, the Court of Appeals explained that to obtain relief, "a defendant must demonstrate a flagrant abuse of the grand

jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Baker*, 11 S.W.3d at 588 (*citing Bank of Nova Scotia v. United States*, 487 U.S. 250, (1988)). Expounding upon these requirements, the Court of Appeals quoted *United States v. Roth*, 777 F.2d 1200 (7th Cir. 1985), as follows:

> The first requirement, that the government know the evidence was perjured, is intended to preserve the principle that an indictment cannot be challenged on the basis of the insufficiency of the evidence on which the grand jury acted. . . . What makes the government's knowing use of perjured testimony different is that it involves an element of deceit, which converts the issue from the adequacy of the indictment's evidentiary basis to fraudulent manipulation of the grand jury that subverts its independence. The second requirement in the cases, that the indictment would not have been issued except for the perjured testimony, confines judicial intervention to cases of prejudicial misconduct, that is, to cases where the misconduct made a difference to the defendant.

Baker, 11 S.W.3d at 588-89 (*quoting Roth*, 777 F.2d at 1204).

Applying these principles to the case at hand, we must agree with the Commonwealth that Caldwell has failed to show the flagrant abuse of the grand jury process or the consequent prejudice necessary to warrant relief. Certainly, Chief Grogan's statements improperly transformed statements of others or inferences created thereby into admissions made by Caldwell. However, two critical elements differentiate this case from *Baker*. In *Baker*, the trial court found the prosecutor's actions in eliciting the false grand jury testimony to be knowing or intentional and the trial court also deemed the false

testimony to be material to the charge because it supported an indictment for a higher degree of assault than was supported by the true state of the evidence. Thus, the Court of Appeals held that the trial court did not abuse its discretion in dismissing the indictment, although the Court of Appeals did reverse the trial court's determination that the dismissal should be with prejudice. Here, the trial court determined that Chief Grogan's statements did not rise to the level of flagrant misconduct, nor prejudice Caldwell so as to require dismissal of the indictment. Given these findings and the distinctions between this case and *Baker*, we cannot say that the trial court abused its discretion in refusing to dismiss the indictment.

II. Caldwell Was Not Denied His Right to a Speedy Trial.

Caldwell contends that he was denied his right to a speedy trial. This issue was preserved by Caldwell's oral request at arraignment and subsequent written motions for a speedy trial. Caldwell was arraigned on September 28, 2006, was tried on the severed possession of a handgun by a convicted felon (PHCF) charge about sixteen months later,[1] and was tried on the remaining charges about nineteen months after the arraignment on April 16, 2008.

In assessing whether a defendant's speedy trial right was violated, we are guided by the four factors enumerated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972); namely, (1) the length of the delay, (2)

[1] This trial ended in a mistrial and the PHCF charge was dismissed following Caldwell's conviction on the other charges.

the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. No single factor is dispositive. *Id.*

As to the first factor, there is a point at which the length of the delay becomes presumptively prejudicial. This Court has held delays of shorter duration than the one presented here to be presumptively prejudicial. *See, e.g., Bratcher v. Commonwealth,* 151 S.W.3d 332, 344 (Ky. 2004) (eighteen-month delay presumptively prejudicial); *Dunaway v. Commonwealth,* 60 S.W.3d 563, 569 (Ky. 2001) (thirteen and one-half month delay found to be presumptively prejudicial). Accordingly, we deem the nineteen-month delay to be presumptively prejudicial. The first consideration, then, weighs in Caldwell's favor.

A detailed chronology of events is necessary for proper evaluation of the second and third considerations. As stated, Caldwell was arraigned on September 28, 2006, and orally asserted his right to a speedy trial. A subsequent written motion was made and a pretrial hearing was conducted about a month later. During the hearing, it was determined that a special judge would be necessary because the regular judge had previously served as the prosecutor in this case. Trial was set for March 5, 2007. A special judge was appointed, who moved the trial date up a few days to February 27, 2007. On Caldwell's motion, the PHCF charge was severed. On February 9, 2007, the prosecution was granted a continuance because testing would not be complete on the weapon by the trial date. In May 2007, the trial court set a trial date of October 24-25, 2007 on the PHCF charge. In July 2007, Caldwell, *pro se,*

moved to dismiss the indictment for lack of a speedy trial and, alternatively, sought bond modification. Both motions were denied. In mid-October 2007, the prosecution was granted a continuance based on scheduling conflicts of two law enforcement witnesses in Tennessee. Trial of the PHCF charge was set for February 12, 2008. Immediately prior to trial, Caldwell sought dismissal on speedy trial grounds. The motion was denied and the PHCF trial commenced on February 12, 2008, but ended in a mistrial. Thereafter, the trial court granted Caldwell's motion to reduce his bond and trial on the remaining charges was scheduled for April 16, 2008. Prior to trial, Caldwell again sought dismissal based on speedy trial grounds. The motion was denied and the trial commenced on April 16, 2008.

Although the Commonwealth requested two continuances, valid reasons were presented for the requests: 1) lab testing on the weapon was not complete and 2) scheduling conflicts of a material witness. The remainder of the delay, the trial court found, was caused by a change in prosecutors, a change in public defenders, and a change in judges. Given these circumstances, a nineteen-month delay was not unreasonable nor was the delay entirely attributable to the Commonwealth's two requested continuances. Thus, while Caldwell's repeated invocations of his speedy trial rights weigh in his favor, the reason for the delay was principally neutral.

As to the fourth consideration, Caldwell contends that he was prejudiced by the delay because his first public defender went into private practice during the delay and he had to start over with a second public defender. Although

Caldwell asserts that these events caused him considerable anxiety, he does not identify any specific hindrances relative to his case caused by the change in public defenders or the delay in general. As noted by this Court in *Bratcher*, 151 S.W.3d at 345, "[c]onclusory claims about the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice." As such, even though a nineteen-month delay is troublesome given the relative simplicity of this particular case, Caldwell has failed to demonstrate any actual prejudice. In light of the reasonable, neutral reasons for much of the delay and the absence of actual prejudice, Caldwell has not established a speedy trial violation.

CONCLUSION

Although Caldwell proved that erroneous testimony was provided to the grand jury, that testimony did not constitute a flagrant abuse of the process that fatally tainted the proceedings. Moreover, the error did not permit the charge of an offense or degree of offense greater than that which was otherwise appropriate. Accordingly, Caldwell's attempt to show an abuse of trial court discretion in refusing to dismiss the indictment falls short. Caldwell's speedy trial claim must also fail when each of the four *Barker* factors is carefully considered.

Accordingly, the May 14, 2008 judgment of the Fulton Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Todd Dryden Ferguson
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204