

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002006-MR

TIMOTHY SMITH

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 96-CR-000365

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: EMBERTON, KNOFF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant's sole argument in this appeal from a criminal judgment is that he was denied his constitutional right to a speedy trial. Upon reviewing the record and the applicable law, we reject appellant's claim of error and, thus, affirm.

On November 6, 1996, appellant, Timothy Smith, was indicted on charges of third-degree burglary, theft by unlawful taking over \$300, and resisting arrest. The offenses for which appellant was indicted were committed on October 26, 1996. At appellant's arraignment on November 11, 1996, appellant made a motion for a speedy trial. On May 13, 1997, appellant filed a

motion to dismiss the indictment for violation of his right to a speedy trial. This motion was denied.

Trial was initially set for April 30, 1997. However, due to the length of another trial on the docket, the court was forced to reassign appellant's trial date for June 30, 1997. Appellant was convicted of third-degree burglary, theft by unlawful taking over \$300, resisting arrest, and second-degree persistent felony offender, for which he received a sentence of twelve (12) years' imprisonment. From this judgment of conviction, Smith now appeals.

Appellant's sole argument on appeal is that the trial court erred in refusing to dismiss the charges for violation of his constitutional right to a speedy trial. Appellant maintains that the delay of over seven months before appellant was tried constituted a speedy trial violation.

In order for the courts to apply the speedy trial analysis in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the defendant must establish that the delay between accusation and trial was presumptively prejudicial. Preston v. Commonwealth, Ky. App., 898 S.W.2d 504 (1995). In Cain v. Smith, 686 F.2d 374 (6<sup>th</sup> Cir. 1982), the Court held that an eleven and a half-month delay between the time of arrest and trial in a routine robbery case was presumptively prejudicial. Similarly, in Mann v. Commonwealth, Ky. App., 561 S.W.2d 335 (1978), it was held that a seven and a half-month delay between the time the defendant made a demand for a speedy trial and trial was prejudicial where the delay was occasioned by two

continuances requested by the Commonwealth and where the Commonwealth failed to make a proper showing of the need to prepare itself. Our Supreme Court, however, found no presumptive prejudice in Brown v. Commonwealth, Ky., 934 S.W.2d 242 (1996) where there was a ten-month delay between indictment and trial.

In the instant case, we cannot say that the over seven-month delay was presumptively prejudicial. Nevertheless, even if we apply the speedy trial analysis, we adjudge that appellant was not denied his right to a speedy trial.

The four factors to be considered by the court in determining whether the defendant's right to a speedy trial has been violated are as follows: (1) the length of the delay; (2) whether the delay was more the fault of the defendant or the government; (3) the defendant's assertion of his right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay. Barker v. Wingo, 407 U.S. at 530. While a delay of over seven months was perhaps longer than it should have been in this case, the length of time was not unreasonably long. Although the appellant did assert his right to a speedy trial early on in the case, the major delay in the case was the fault of neither appellant nor the Commonwealth. The trial court had no choice but to postpone the trial date because of a trial in progress which took a day longer than anticipated. Finally, appellant does not allege how he was prejudiced by the delay, and we see no indication in the record that appellant was so prejudiced.

For the reasons stated above, the judgment of the  
Daviness Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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