

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002160-MR

VERLON SCOTT

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS WALLER, JUDGE  
ACTION NO. 92-CR-000034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, DYCHE, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, Verlon Scott (Scott), appeals from the judgment of the Bullitt Circuit Court convicting him of trafficking in a controlled substance in the first degree and sentencing him to 10 years' imprisonment. Scott argues on appeal that he was denied the right to a speedy trial, that there was insufficient evidence to support the jury's verdict of guilty, and that the Commonwealth improperly introduced evidence of other crimes and bad acts. Finding no error on appeal, we affirm his conviction and sentence.

On March 24, 1992, the Bullitt County Grand Jury indicted Scott for trafficking in a controlled substance. The

indictment charged that on July 26, 1990, Scott sold Detective Robert Davis of the Kentucky State Police fifty capsules of Tylox, a schedule II narcotic, for \$135.00. Approximately five years after the indictment had been issued, Scott was tried before a jury and was found guilty as charged. On August 27, 1997, the court entered the final judgment of conviction, assessed a \$10,000.00 fine, and sentenced Scott to ten years' imprisonment. This appeal followed.

Scott first argues that he was denied the right to a speedy trial. In Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972), the United States Supreme Court set forth a balancing test involving four factors for analyzing claims for the denial of the right to a speedy trial. These factors are: (1) the length of the delay; (2) 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 alone is determinative of whether a defendant's right to a speedy trial has been violated.

A defendant's constitutional right to a speedy trial cannot be established by an inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and that of the defendant are weighed.

Id. at 514, 92 S.Ct. at 2184.

The length of the delay acts as a triggering mechanism. Barker, supra. A speedy trial analysis is set in motion when an accused alleges "that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 505 U.S. 647, 112

S.Ct. 2686, 2609, 120 L.Ed.2d 520, 528, (1992), citing Barker, supra. "Presumptive prejudice" is not actual prejudice but simply a point at which the delay may be deemed unreasonable enough to trigger a Barker inquiry. Once an inquiry has been triggered, the court must evaluate factors two and three: the reason for the delay and whether the defendant asserted his right to a speedy trial. Such assertions by the defendant are "entitled to strong evidentiary weight." Barker at 531, S.Ct. at 2193, 33 L.Ed.2d at 117.

The fourth factor (and perhaps the most important) focuses upon what prejudice – if any – the accused suffered as a result of the delay. The mere possibility of prejudice will not support a speedy trial claim, and the defendant bears the burden of establishing actual prejudice. Preston v. Commonwealth, Ky., 898 S.W.2d 504 (1995), citing United States v. Loud Hawk, 474 U.S. 302, 315, 106 S.Ct. 648, 656, 88 L.Ed.2d 640, 654 (1986).

In this case, there was approximately a five-year delay between the issuance of the indictment against Scott and his trial. However, an examination of the record reveals that this lengthy delay was due to the fact that Scott could not be apprehended by the Kentucky authorities as he residing outside of Kentucky. His extradition occurred at last only as a result of a motion to dismiss the pending indictment, which he filed in circuit court on February 27, 1996; an affidavit signed by Scott and attached to the motion revealed that he was in Texas. The court denied his motion, and on March 20, 1996, Scott filed a motion for arraignment, submitting himself to the jurisdiction of

the Bullitt Circuit Court and waiving an extradition hearing in Texas. The court originally scheduled his trial for February 6, 1997; the court continued the trial due to the fact that it had a case already in progress. Scott's trial was rescheduled for August 7, 1997.

Under these particular circumstances, we do not find that Scott's constitutional right to a speedy trial was violated. Neither the Commonwealth nor the court was responsible for the four-year hiatus between the indictment and the return of Scott to Kentucky. More significant is the period of a year and a half that passed before Scott's trial once he had turned himself over to the Kentucky authorities. In bringing him to trial, the court was responsible for delay since it continued his case for reasons related to the schedule of its criminal docket. However, Scott did not object to this continuance. Rather, the only time Scott raised the issue of a speedy trial was in his motion to dismiss. It is highly questionable whether this belated reference to the speedy trial issue constituted an actual assertion of his right or that it could be construed to constitute proper preservation for appellate review. Furthermore, Scott failed to establish that he suffered any prejudice as result of the delay. Aside from raising questions as to the reliability of his memory and that of Detective Davis, he did not demonstrate any actual harm that he suffered. Thus, we cannot agree that Scott's constitutional right to a speedy trial was violated.

Scott next argues on appeal that the court erroneously denied his motion for a directed verdict, contending that there

was insufficient evidence to establish that he was guilty of trafficking in a controlled substance. He maintains that the Commonwealth's case against him rested upon the testimony of Detective Davis, which he submits was unreliable due to the amount of time that had elapsed. Based upon this evidence, Scott maintains that it was unreasonable for the jury to find him guilty. We disagree.

In considering a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, (1991). " On appellate review, the test of a directed verdict is, if under the evidence as whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id. at 187. The reviewing court is not at liberty to re-evaluate or second-guess the weight and credibility of the evidence; these functions belong to the jury. Brown v. Commonwealth, Ky., 556 S.W.2d 599 (1977).

At trial, Detective Davis positively identified Scott as the man from whom he had purchased Tylox on July 26, 1990; he also testified as to the details surrounding the drug transaction. Scott was given ample opportunity to cross-examine the witnesses and to challenge the evidence against him. The jury was made aware of the fact that the alleged drug transaction had occurred more than seven years ago and that between 1990 and 1994, Detective Davis had conducted over two hundred undercover drug investigations. It was within the sole province of the jury

to assess the weight to be given to the evidence – including the reliability of Detective Davis's memory. Under the evidence as a whole, we find that it was not clearly unreasonable for the jury to return a verdict of guilty.

The final issue raised by Scott on appeal is whether the Commonwealth improperly introduced evidence of other crimes or bad acts. He argues that the court erred in permitting the Commonwealth to introduce evidence that Scott had used aliases and that he had told Detective Davis that he could also obtain false identification documents (such as a driver's license or passport) for him. This assignment of error is based upon the following exchange between Detective Davis and the prosecutor after Scott had recalled Davis as a witness:

**Prosecutor:** Now, in assembling your report, did you find Mr. Scott's name in that report? You have got Verlin Scott. Right?

**Davis:** Yes.

**Prosecutor:** Did you find any other names he used?

**Davis:** Yes, sir.

**Prosecutor:** Do you know how many?

**Davis:** No, sir. I don't have that -- I don't -- that's a separate document.

**Prosecutor:** Did you and he discuss when you made this buy other names that he might use?

**Davis:** He indicated to me that he could sell me fictitious driver's license, passports, those type documents on any name I wished.

Prior to trial, Scott had moved the court *in limine* to prohibit the introduction of any testimony as to his use of

aliases or his statements that he could obtain false identification documents. Following a discussion on the matter, the court denied the motions. Scott's motions *in limine* were specific, and they adequately brought the question of admissibility of the evidence to the attention of the trial court. Contrary to the Commonwealth's contention, we find that this issue has been properly preserved.

However, we do not agree that it was reversible error for the court to permit the Commonwealth to introduce this evidence. Evidence of other crimes or bad acts may be admissible as probative of intent, motive, knowledge, identity, plan or scheme, or absence of mistake or accident. Tucker v. Commonwealth, Ky., 916 S.W.2d 181, (1996); KRE 404(b). "Whether the probative value of evidence is outweighed by possible prejudicial effect is to be decided within the sound discretion of the trial judge." Dunbar v. Commonwealth, Ky., 809 S.W.2d 852 (1991). The Commonwealth contends that the challenged evidence was introduced to establish how Scott may have obtained Tylox, a prescription drug. At trial, Detective Davis testified that the Scott had the Tylox capsules in a prescription bottle. He stated that the label on the bottle indicated that the prescription had been filled by Kroger in Clarksville, Indiana, and that the prescription was for Gary Fields. However, the testimony regarding the contested evidence was in fact minimal, lasting only a few seconds. This testimony – both as to content and duration – was not sufficiently prejudicial to affect the outcome

of the trial. We find that its introduction was at the most harmless error.

We affirm the judgment of the Bullitt Circuit Court.

ALL CONCUR.

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