

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000955-MR

CHRISTOPHER MATTHEW McFARLAND

APPELLANT

V. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NOS. 97-CR-131 AND 97-CR-173

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 1998-CA-001087-MR

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V. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
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COMMONWEALTH OF KENTUCKY

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OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; KNOX and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: These appeals stem from a judgment entered by the Warren Circuit Court. Appellant entered a conditional plea of guilty to four counts of burglary in the third degree, one count of theft by unlawful taking over \$300, two counts of theft by unlawful taking under \$300, three counts of unlawful transaction with a minor in the second degree and three counts of criminal mischief in the third degree. He was sentenced to three years' imprisonment. On appeal, appellant contends that the court erred by denying his motion to dismiss the foregoing indictments on the ground that his right to a speedy trial was violated. We disagree. Hence, we affirm.

Appellant was convicted of four felony offenses in August 1995 and sentenced to ten years' imprisonment. In July 1996 he was granted parole as to those felonies. While on parole, appellant committed the additional felony offenses providing the basis for the offenses charged in the two indictments which are the subject of this appeal.

In the first indictment appellant was charged with burglary in the third degree, theft by unlawful taking, and three counts of unlawful transaction with a minor. Appellant was arraigned on these charges on September 8, 1997, and an attorney was appointed to represent him. A trial was scheduled for October 2, 1997. At this time, the court acknowledged that appellant had filed a motion for a speedy trial. Thereafter, on September 26, the court granted a motion filed by appellant's attorney to reschedule the trial to November 17, 1997.

Another indictment was issued charging appellant with three counts of burglary in the third degree, two counts of theft by unlawful taking under \$300, and three counts of criminal mischief in the third degree. Appellant did not file a motion for a speedy trial regarding these latter charges. On November 10, 1997, appellant was arraigned on the new indictment, and the court appointed the same attorney to represent him. His attorney requested that the court schedule separate trials as to the charges in each indictment on the same date in January 1998.

On January 8, 1998, appellant appeared in court and he and his counsel agreed to a March 2, 1998, trial date. During the hearing the court inquired as to whether both parties agreed that the proposed March trial date was consistent with appellant's earlier motion for a speedy trial and offered to schedule the trial at an earlier date. Eventually, all the charges were scheduled for trial on February 24, 1998.

On February 24, however, appellant requested a postponement of his trial after first indicating he would plead guilty. Since the jury had been discharged, the cases were continued to March 9. On that date, appellant's attorney was allowed to withdraw as his counsel and another attorney was appointed to represent him. A trial was rescheduled for April 1, 1998.

On March 20, appellant filed a pro se motion seeking an order dismissing the indictments on the ground of "prejudicial preaccusation delay by the Commonwealth." Appellant urged that the indictments should be dismissed because his speedy trial

guarantee had been violated. The court denied the motion and appellant subsequently entered a conditional guilty plea to all pending charges, reserving a right to appeal on the ground that he was denied a speedy trial. These appeals followed.

First, appellant contends that the court erred by failing to find that KRS 500.110 was applicable herein. We disagree.

In Huddleston v. Jennings, Ky. App., 723 S.W.2d 381, 383 (1986), this court stated that the purpose of KRS 500.110 "is not to ensure the speedy disposition of every charge, or even of those charges which potentially could form the basis for a detainer being lodged. Its purpose is to provide for the speedy disposition only of such charges as have actually resulted in a detainer being lodged." Thus, a criminal defendant clearly has no right to proceed under KRS 500.110 until a detainer is in fact lodged against him. Id.; Rushin v. Commonwealth, Ky. App., 931 S.W.2d 456 (1996).

Here, because no detainer was lodged against him, appellant had no right to demand a speedy disposition of the charges against him pursuant to KRS 500.110. Moreover, we perceive no merit in appellant's contentions that his motion for a speedy trial amounted to a detainer or that the court's order for his appearance amounted to a detainer.

Next, appellant contends that the court erred by finding that he and his attorney acquiesced in a delay of his trial thereby tacitly withdrawing his motion for a speedy trial. We disagree.

The record clearly shows that appellant was present in open court on several occasions and voiced no objection when his attorney requested continuances. Obviously, therefore, appellant cannot now complain that the continuances granted at his request deprived him of his right to a speedy trial. See Wells v. Commonwealth, Ky., 892 S.W.2d 299 (1995).

Finally, appellant contends that he was denied his constitutional right to a speedy trial. Again, we disagree.

A criminal defendant raising an issue as to the lack of a speedy trial must first establish that the delay between the accusation and trial was "presumptively prejudicial." Preston v. Commonwealth, Ky. App., 898 S.W.2d 504, 506 (1995), citing Doggett v. United States, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Thereupon a speedy trial claim must be analyzed consistent with the four factors set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). McDonald v. Commonwealth, Ky., 569 S.W.2d 134 (1978), cert. denied, 439 U.S. 1119, 99 S.Ct. 1028, 59 L.Ed.2d 79 (1979). These four factors include the length of the delay, the reasons for the delay, the defendant's assertion of his speedy trial right and whether the defendant was prejudiced. Id.

Here, appellant complains that there was a two hundred day delay between his arraignment and the last scheduled trial date. As discussed earlier, however, appellant either requested or acquiesced in all of this delay. Moreover, appellant fails to demonstrate how he was prejudiced by the delay. Certainly, the general claim of anxiety made by appellant is insufficient to

support his contention. See Preston, supra. Because a mere possibility of prejudice is insufficient to support a speedy trial claim, Brown v. Commonwealth, Ky., 934 S.W.2d 242 (1996), and appellant has failed to show that the length of time between his indictments and the disposition of the pending charges was presumptively prejudicial, we hold that the court did not err by denying appellant's motion to dismiss the indictments on the ground that his right to a speedy trial was violated.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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