

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001504-MR
NO. 1998-CA-001833-MR

ANTHONY WHEELER

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
INDICTMENT NO. 97-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND VACATING IN PART

** ** * * *

BEFORE: DYCHE, GARDNER¹ and HUDDLESTON, Judges.

HUDDLESTON, Judge: Anthony Wheeler appeals his convictions on various charges, including wanton endangerment in the first degree (Kentucky Revised Statute (KRS) 508.060) and operating a motor vehicle while his license was suspended (KRS 189A.090). The issues we are called upon to decide are: (1) whether the trial court erred in failing to grant a directed verdict on the charge of first-degree wanton endangerment; (2) whether the trial court denied Wheeler a speedy trial in violation of his Sixth Amendment right;

¹ Judge Gardner concurred in this decision prior to leaving the Court on January 2, 2000.

and (3) whether the trial court erred when it ruled that Wheeler could be convicted of operating on a driver's license suspended for driving under the influence when the period of suspension had expired at the time of the offense.

The essential facts are undisputed. Kentucky State Police Trooper Brian Evans was traveling westbound on State Highway 60 in Bath County when he noticed that a car had drifted across the center line of the road. Evans initiated a traffic stop, and the car pulled into a driveway. Before Evans could approach the car, the vehicle sped off. As the vehicle was leaving, the driver, Anthony Wheeler, who is Evans's second cousin, exclaimed "see you later." Evans and Trooper Eric Stone pursued Wheeler's vehicle, which was also occupied by Wheeler's brother, Eric.

Highway 60 is a winding, hilly, rural road. The speed limit on the road is fifty-five miles per hour. The pursuit continued for four to five miles, with the vehicles reaching speeds of almost eighty-five miles per hour. The troopers ended the chase by boxing in Wheeler's car and forcing him off the road. When the troopers tried to arrest him, Wheeler attempted to flee, but was apprehended. Evans administered a Breathalyzer test on Wheeler and determined his blood-alcohol concentration to be .202, well in excess of the legal limit.

On April 17, 1997, Wheeler was charged in an indictment with three counts of first degree wanton endangerment, one count of operating a motor vehicle while under the influence of alcohol (third offense), one count of driving on a DUI-suspended license (third offense), one count of carrying a concealed deadly weapon

and one count of being a persistent felony offender (PFO) in the second degree. The case was set for trial September 17, 1997.

On April 29, the Commonwealth filed a written offer on a plea of guilty on the charges of DUI and carrying a concealed weapon. On July 30, Wheeler's attorney filed a motion to exclude Wheeler's prior charge and conviction for driving on a DUI suspended license from 1994. The trial court denied the motion.

On October 2, the trial court held a hearing for Wheeler to enter a plea of guilty. However, Wheeler decided not to plead guilty and proceeded to discharge his attorney. After the trial court allowed him to proceed pro se, Wheeler asked the court to grant him a "fast and speedy trial." The trial was rescheduled for October 27 and the court asked the public advocate to be available to assist Wheeler if needed.

On October 28, at the request of the Commonwealth, the trial court ordered a competency evaluation of Wheeler and continued the trial. On November 20, the court continued the trial until December 18. On December 18, the court continued the trial until January 15, 1998, because the Kentucky Correctional Psychiatric Center (KCPC) had not yet released him. On January 15, 1998, the court again continued the trial because KCPC had not filed its psychiatric report. The record is silent as to the actual date the KCPC finally filed its report with the trial court.

On May 13, the court appointed new counsel for Wheeler and scheduled a status conference for May 21, and at that conference, the court set the case for trial on June 8. Wheeler's attorney requested and was granted additional time to prepare for

trial. The court noted that the courthouse was undergoing renovation, and informed the parties that it was possible the trial would not be held in August, which could result in the trial being delayed until October.

On June 3, Wheeler's attorney moved to dismiss the indictment based on an alleged violation of Wheeler's right to a speedy trial. The trial court denied the motion on June 5. Wheeler also filed a motion in limine to suppress reference to his prior DUI convictions and the persistent felony offender count of the indictment.

On June 8, 1998, a jury found Wheeler guilty on all counts and recommended that he serve his sentences consecutively. On July 16, the court sentenced Wheeler to serve ten years as a PFO in the second degree, with his sentences to be served concurrently.

On appeal, Wheeler argues that he was improperly convicted of wanton endangerment in the first degree when he should have been convicted of the lesser charge of wanton endangerment in the second degree. Wanton endangerment in the first degree is defined as "when, under circumstances manifesting extreme indifference to the value of human life, [a person] wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person."²

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will

² Kentucky Revised Statute (KRS) 508.060.

occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.³

Wanton endangerment in the second degree is defined as when a person "wantonly engages in conduct which creates a substantial danger of physical injury to another person."⁴

In Commonwealth v. Benham,⁵ the Supreme Court restated the standard for a directed verdict:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

³ KRS 501.020(3) (emphasis supplied).

⁴ KRS 508.070.

⁵ Ky., 816 S.W.2d 186, 187 (1991).

With reference to our function as an appellate court, the Court said that:

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.⁶

Wheeler was properly convicted under KRS 508.060 for wanton endangerment in the first degree. Wheeler fled state troopers on a winding and hilly road, Highway 60, and reached speeds of up to eighty-five miles per hour at night. At the time of the chase, Wheeler was intoxicated and had a passenger in his car. Wheeler needlessly put the lives of the state troopers, his brother and himself in grave danger. In addition, he potentially placed other motorists in danger. The trial court did not err in denying Wheeler's motion for a directed verdict.

Wheeler's claim that the Commonwealth violated his Sixth Amendment right to a speedy trial⁷ is without merit. In support of his argument, Wheeler relies on KRS 500.110. However, KRS 580.110 is not applicable in this case. KRS 500.110 only applies if a defendant is being held in another jurisdiction and a detainer is

⁶ Id. (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983)).

⁷ The Sixth Amendment states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"

issued with outstanding charges.⁸ Initially, Wheeler was held on a detainer after his probation had been revoked for a 1994 conviction and he was returned to jail. Wheeler completed his sentence on August 1, 1997, prior to making the oral motion for a speedy trial.

Wheeler was not deprived of his right to a speedy trial. The seminal case on determining what constitutes a speedy trial is the United States Supreme Court case, Barker v. Wingo,⁹ where the Court said that:

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. . . . [W]e identify four such factors: Length of delay, the reason

⁸ KRS 500.110 provides:

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 to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

⁹ 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

for the delay, the defendant's assertion of his right, and prejudice to the defendant.¹⁰

There exists no definitive formula which can be used to determine when someone has been denied the right to a speedy trial. The court must consider the circumstances as to why there was a delay in the trial and what harm the defendant may have suffered.

To establish whether Wheeler's right to a speedy trial was violated, it is necessary to consider the totality of the circumstances. The grand jury indicted Wheeler on April 17, 1997. Wheeler's attorney proceeded to negotiate a plea bargain. However, Wheeler decided not to plead guilty and accept the plea bargain. He then discharged his attorney and proceeded pro se. Both Wheeler's change of heart on the plea bargain and his decision to fire his attorney resulted in a delay of the trial.

The trial court and the prosecutor also had concerns about the competency of Wheeler and whether he could stand trial. As a result, the trial court ordered a psychiatric evaluation. The court did not receive the evaluation until sometime after January 15, 1998, and before May 1998.

It is not clear from the record why the trial court did not hold any hearings on this case from January 15 to May 21. However, it is important to note that in Bath County the circuit court is not in continuous session. The same trial court judge serves a total of four counties in his judicial circuit.

¹⁰ Id. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 116. See also McDonald v. Commonwealth, Ky., 569 S.W.2d 134 (1978) (applying Barker v. Wingo).

In Wells v. Commonwealth,¹¹ the Supreme Court held that a defendant who requested a continuance cannot then claim that the continuance violated his right to a speedy trial. Wheeler's second attorney requested additional time to prepare for trial. As in Wells, because his own attorney requested a continuance, Wheeler cannot complain that the continuances granted at his attorney's request deprived him of his right to a speedy trial.¹²

We are not convinced that Wheeler suffered prejudice as a result of the delay. He speculates that witnesses' memories may have faded and that other witnesses who could have been discovered earlier may have been lost. This argument is unpersuasive in light of the size of Bath County and the fact that the delay was for approximately fourteen months. As the Supreme Court said in Brown v. Commonwealth,¹³ "Kentucky case law indicates that '[t]he possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated.'"¹⁴ We hold that the trial court did not violate Wheeler's right to a speedy trial.

Relying on Dixon v. Commonwealth,¹⁵ Wheeler's final claim is that we should vacate his conviction for operating a motor

¹¹ Ky., 892 S.W.2d 299 (1995).

¹² Id. at 303. See also McDonald, 569 S.W.2d at 137 (noting that the defendant did not object to any of the continuances granted by the trial court).

¹³ Ky., 934 S.W.2d 242 (1996).

¹⁴ Id. at 249 (quoting Preston v. Commonwealth, Ky. App., 898 S.W.2d 504, 507 (1995)).

¹⁵ Ky. App., 982 S.W.2d 222 (1998).

vehicle while his license was suspended pursuant to KRS 189A.090.¹⁶ In Dixon, this Court ruled that a person cannot be convicted under KRS 189A.090 for operating with a suspended license when the suspension period has expired. In light of this decision, we agree that his conviction on that charge should be vacated.

Accordingly, we affirm Wheeler's conviction for wanton endangerment. We vacate Wheeler's conviction on the charge of operating a motor vehicle while a license is revoked or suspended for driving under the influence.¹⁷

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹⁶ KRS 189A.090 provides, in part:

No person shall operate a motor vehicle while his license is revoked or suspended for violation of KRS 189A.010, nor shall any person who has no motor vehicle or motorcycle operator's license operate a motor vehicle while his privilege to operate a motor vehicle has been revoked or suspended for a violation of KRS 189A.010.

¹⁷ Our decision to vacate Wheeler's conviction on the charge of driving while his license was suspended will have no effect on the length of his sentence. The jury found that he was a PFO in the second degree based on his conviction of wanton endangerment. The trial court sentenced Wheeler to serve a sentence of ten years based on his PFO status and ordered all of his sentences to be served concurrently.