

RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002118-MR

RICHARD K. PURCELL

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 99-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING  
\*\* \*\*

BEFORE: COMBS, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Richard K. Purcell has appealed from a judgment and sentence on a plea of guilty entered by the Marshall Circuit Court on September 5, 2000. In a conditional plea of guilty pursuant to RCr<sup>1</sup> 8.09, Purcell pled guilty to one count of theft by deception over \$300.00,<sup>2</sup> three counts of theft by deception

---

<sup>1</sup>Kentucky Rules of Criminal Procedure.

<sup>2</sup>Kentucky Revised Statutes (KRS) 514.040.

under \$300.00,<sup>3</sup> and one count of being a persistent felony offender in the second degree (PFO II).<sup>4</sup> Having concluded that the trial court entered insufficient findings of fact in its order denying Purcell's motion to dismiss pursuant to KRS 500.110, we must vacate the judgment of conviction and sentence and remand this matter for further proceedings.

On May 4, 1999, Purcell was served with a criminal summons for three misdemeanor charges of theft by deception under \$300.00 and a warrant for his arrest for one felony charge of theft by deception over \$300.00. At the time Purcell was served with these documents, he was incarcerated in the Graves County Jail on unrelated charges. Purcell testified that on May 5, 1999, he delivered two stamped envelopes containing copies of a motion pursuant to KRS 500.110 (wherein he sought final disposition of his case within 180 days) to a Graves County Deputy Jailer to be mailed to the Clerk of the Marshall District Court and to the Marshall County Attorney. However, the Marshall Circuit Court Clerk and the Marshall County Attorney testified that this motion was never received by their respective offices. On November 8, 1999, after the 180-day period had elapsed, Purcell mailed a pro se motion to dismiss his case for failure to prosecute to the Marshall Circuit Court Clerk and the Marshall County Attorney. This motion was not filed of record until

---

<sup>3</sup>Id.

<sup>4</sup>KRS 532.080(2).

November 15, 1999, the same date a Marshall County grand jury returned an indictment against Purcell, charging him with three counts of misdemeanor theft by deception, one count of felony theft by deception and one count of being a persistent felony offender in the first degree (PFO I). Purcell was arraigned on these charges on that same date - November 15, 1999. On January 4, 2000, Purcell filed, by and through counsel, another motion to dismiss pursuant to KRS 500.110, and the trial court held an evidentiary hearing on the motion on April 4, 2000. At the conclusion of the hearing, the trial court found that neither the Marshall Circuit Court Clerk's Office or the Marshall County Attorney's Office had received Purcell's motion for a speedy disposition, which he claimed to have tendered for mailing on May 5, 1999. The trial court denied Purcell's motion to dismiss his case for failure to prosecute.

Purcell then entered into a plea agreement with the Commonwealth. In exchange for amending his PFO I charge to a PFO II charge, and a recommended prison sentence of seven years, Purcell agreed to plead guilty to one count of theft by deception over \$300.00, with a five-year prison sentence; three counts of theft by deception under \$300.00, with 12-month jail sentences on each conviction; and to being a PFO II. The three 12-month jail sentences were to run concurrently with each other and concurrently with the felony sentence. The five-year felony sentence was to be enhanced to seven years based on the PFO II

conviction.<sup>5</sup> Purcell reserved the right to appeal the issue of whether he had been denied a speedy trial. The trial court accepted Purcell's conditional plea on April 17, 2000, and he was sentenced in accordance with the plea agreement on September 5, 2000. This appeal followed.

Purcell claims that his right to a speedy trial under the United States Constitution, the Kentucky Constitution, and KRS 500.110 was violated because it took nearly one year for the Commonwealth to bring him to trial even though he had filed a motion demanding a trial within 180 days. In response to both the constitutional claims and the statutory claim, the Commonwealth argues that Purcell's right to a speedy trial did not attach until his indictment was returned, and that Purcell entered into a plea agreement soon after he was indicted. Because the state and federal constitutional claims are distinct from the statutory claim under KRS 500.110, we address each separately.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."<sup>6</sup> Applying this right

---

<sup>5</sup>The plea agreement provided that if restitution were made by the time of sentencing that Purcell's sentence would have been for five years instead of seven years. Apparently, Purcell was unable to pay this restitution which included bad checks for \$598.00, \$231.20, \$180.64, and \$71.00.

<sup>6</sup>U.S. Const. amend. VI.

to an individual defendant's case requires an ad hoc balancing test approach, which consists of four main factors: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant.<sup>7</sup> The first factor, length of delay, requires a determination that is necessarily dependant upon the peculiar circumstances of each case.<sup>8</sup> Longer delays will be tolerated in serious and complex cases, but not in trials of less complicated cases.<sup>9</sup> As to the factor concerning prejudice to the defendant, courts should consider the interests of defendants which the speedy trial right was designed to protect: to prevent oppressive pretrial incarceration, to minimize the anxiety and concern of the accused, and to limit the possibility that the defense will be impaired.<sup>10</sup> The right to a speedy trial guaranteed by the Kentucky Constitution, Section 11, has been interpreted by applying the above-enumerated, four-part Barker test.<sup>11</sup>

Applying these various factors to the case sub judice, we conclude that Purcell's constitutional right to a speedy trial was not violated. First, the length of the delay was not

---

<sup>7</sup>Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, 116-17 (1972).

<sup>8</sup>Id. 33 L.Ed.2d at 117.

<sup>9</sup>Id.

<sup>10</sup>Id. 33 L.Ed.2d at 118.

<sup>11</sup>Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 569 (2001).

oppressive.<sup>12</sup> Purcell was arrested on May 4, 1999, and his trial was scheduled for April 5, 2000, less than one year after the arrest. Second, and most importantly, we fail to see how the delay substantially prejudiced Purcell. At the time of his arrest, Purcell was already incarcerated in the Graves County Jail on an unrelated charge. This fact greatly diminishes the risk of Purcell being subjected to oppressive pretrial incarceration and undue anxiety and concern. We further conclude that Purcell was not substantially prejudiced by having to prepare his defense from his jail cell. Purcell did not even attempt to contradict the Commonwealth's factual claims, having pleaded guilty shortly after his motion to dismiss was denied. Therefore, we hold that Purcell's constitutional right to a speedy trial was not violated.

While Purcell's constitutional right to a speedy trial was not violated, he also has a statutory right to a trial within 180 days, under KRS 500.110, provided certain prerequisites have been satisfied. 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

---

<sup>12</sup>United States Supreme Court opinions addressing delay in cases where the accused is involved in criminal processes of another jurisdiction have involved delays of six and seven years between indictment and trial. While there is no magical numerical threshold for a violation, the 11-month delay involved in this case is noticeably shorter than the delay in other cases on point. See Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); and Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

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.

The failure of a trial court, absent good cause shown, to bring an incarcerated defendant to trial within the 180-time period requires that the indictment be dismissed.<sup>13</sup>

Unfortunately, the record does not contain the necessary findings of fact to allow us to make a determination regarding the trial court's denial of Purcell's KRS 500.110 claim. The trial court made only one factual finding before denying Purcell's motion to dismiss the indictment: that the Marshall Circuit Court Clerk and the Marshall County Attorney did not receive Purcell's motion for a speedy trial. The trial court "assumed" that Purcell mailed the motion, but when pressed for a specific factual finding, the trial court failed to make a finding of fact on this critical issue. Furthermore, while the Commonwealth has not raised the issue, from the record on appeal it is not clear to this Court whether a detainer had been lodged

---

<sup>13</sup>Spivey v. Jackson, Ky., 602 S.W.2d 158, 159 (1980).

against Purcell at the time he allegedly mailed his motion for a speedy trial.<sup>14</sup> The lodging of a detainer is the "'triggering mechanism' which brings this statute into play[.]'"<sup>15</sup> In other words, if Purcell had mailed his motion prior to a detainer being lodged against him, the right to a final disposition with 180 days would not apply. Given this, two findings of fact are critical to the disposition of Purcell's appeal. First, the trial court must make a specific finding of fact regarding whether a detainer had been lodged against Purcell prior to his tendering of the two stamped envelopes to the Graves County Jail officials for mailing to the Marshall County officials. If a detainer had not been lodged, then Purcell was not entitled to relief under KRS 500.110. Second, the trial court must make a specific finding of fact regarding whether Purcell tendered the two stamped envelopes to the Graves County Jail officials for mailing to the Marshall County officials. Without this finding, it is impossible to properly analyze the meaning of "caused to be delivered" as contained in the statute. If the detainer had been lodged and if the motion had been tendered for delivery, then the

---

<sup>14</sup>A detainer is "'a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution to either hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.'" Dunaway, supra at 566 (quoting Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985)).

<sup>15</sup>Huddleston v. Jennings, Ky.App., 723 S.W.2d 381, 383 (1986).



trial court must make the ultimate determination of whether Purcell is entitled to relief pursuant to KRS 500.110.

Accordingly, the judgment and sentence of the Marshall Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks  
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Vicki L. Wise  
Assistant Attorney General  
Frankfort, Kentucky