

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000767-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE ATHOL LEE TAYLOR, JUDGE  
ACTION NO. 85-CR-00036

WILLIAM WESTBAY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND VANMETER, JUDGES.  
EMBERTON, CHIEF JUDGE. The Commonwealth appeals from an order of the Bullitt Circuit Court dismissing an indictment entered against William Westbay on July 5, 1985, charging him with murder. The circuit court held that the eighteen-year delay in prosecution denied Westbay's right to a speedy trial and dismissed the indictment. We agree with the well-reasoned opinion of the circuit court and affirm.

Westbay was indicted in July 1985, and following various pretrial procedures, his case was set for trial on November 26, 1985; over the next three years, however, the trial date on numerous occasions was continued. The record reveals that the continuances were the result of requests made at various times by the Commonwealth and at other times by Westbay, and at least two continuances were on the court's own motion. On December 15, 1988, an order was entered stating that by agreement of the parties, the case was removed from the trial docket to be reassigned on the motion of either party.

Nothing further happened in the case until the Commonwealth, through a special prosecutor, on January 2, 2003, filed a motion to assign the case for pretrial conference and for a trial date. On January 22, 2003, Westbay filed a motion to dismiss the indictment for lack of a speedy trial. On March 10, 2003, the circuit court dismissed the indictment.

The Sixth Amendment to the United States Constitution and Section 11 of the Bill of Rights to the Kentucky Constitution guarantee an accused the right to a speedy trial. The right is afforded for the benefit of the accused who may or may not be in custody awaiting trial and who has an interest in having his case heard promptly, but also for the benefit of

society. As noted by the court in Barker v. Wingo,<sup>1</sup> delay is often a defense tactic. Prosecuting witnesses become unavailable, their credibility may erode over time, and the passage of time alone sometimes brings with it a reluctance to dredge up the past. Thus, it is a right that is limited by the prosecution's right to prepare its case.<sup>2</sup> Additionally, it has been recognized that under both the Kentucky Constitution and the United States Constitution it is a right that can be waived.<sup>3</sup>

The Commonwealth argues that Westbay waived his right to a speedy trial, and therefore, the circuit court erred when it dismissed the indictment. In Mann v. Commonwealth,<sup>4</sup> the court, relying on Blair v. Commonwealth,<sup>5</sup> stated that the failure to demand a speedy trial constitutes a waiver. However, in Barker, supra, recognizing that the accused has no duty to see that the prosecution brings him to trial, the court clearly rejected the demand-waiver rule in favor of a balancing approach. Instead of a fixed rule, it provided a four-factor analysis:

A balancing test necessarily compels  
courts to approach speedy trial cases on an

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<sup>1</sup> 407 U.S. 514, 519, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101, 110 (1972).

<sup>2</sup> Clark v. Commonwealth, Ky., 293 S.W.2d 465, 466 (1956).

<sup>3</sup> Id.

<sup>4</sup> Ky. App., 561 S.W.2d 335 (1978).

<sup>5</sup> Ky., 458 S.W.2d 761 (1970).

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. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.<sup>6</sup>

The Barker analysis was cited with approval and followed in Preston v. Commonwealth.<sup>7</sup> Applying these same factors to the present case, there is no conclusion but that the circuit court correctly found that Westbay was denied his right to a speedy trial.

There was an inordinate delay in the prosecution of Westbay's case and there is no reasonable justification for taking eighteen years to prepare a murder case. The admitted difficulty in contacting witnesses and evidence after an eighteen-year delay sufficiently triggers a presumption of prejudice set forth in Barker that it needs no further discussion.

It is equally clear that the circuit court correctly found that the delay in this case is attributable to prosecutorial neglect. This is not a case where numerous motions for extensions of the trial date were requested by the accused or complex pretrial motions prolonged the trial date.

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<sup>6</sup> Barker, supra, at 407 U.S. 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 116.

<sup>7</sup> Ky. App., 898 S.W. 2d 504 (1995).

It appears that for unexplained reasons the case was simply dormant. Under Barker, supra, it is not fatal to an accused's speedy trial claim if a motion for a speedy trial is not made.

Finally, as to the prejudice Westbay suffered by the delay, under Barker, Westbay has the burden to establish actual prejudice. However, the court noted in Barker the difficulty of the accused's task. The effect of passage of time is lost or destroyed evidence, absent witnesses, and faded memories so that prejudice can rarely be shown. In Preston, the court explained:

"[W]e generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, . . . it is part of the mix of relevant facts, and its importance increases with the length of delay." *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 2692-2693, 120 L.Ed.2d 520, 530-531 (1992) (citations omitted).<sup>8</sup>

There is no doubt that the delay in Westbay's prosecution prejudiced his defense. It is impossible for this court to conceive that witnesses have not disappeared, their memories faded by the passage of time, and that evidence has not vanished. The length of the delay in this case is sufficient so that we must conclude that Westbay has demonstrated actual prejudice.

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<sup>8</sup> Id. at 507-508 (footnote 2).

We recognize that dismissal of an indictment is a severe remedy and one that may allow a guilty person to go free without trial. Such a disposition of an indictment is contrary to our basic legal premise that the guilty will be brought to justice. However, the right to a speedy trial and the overall fairness of our criminal justice system require that dismissal be the only remedy.<sup>9</sup>

The order dismissing the indictment is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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<sup>9</sup> Barker, supra, 407 U.S. at 522, 92 S.Ct. at 2188.