

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000469-MR

GUS DURELL JONES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 02-CR-01052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

VANMETER, JUDGE. Appellant Gus Durell Jones appeals the judgment from the Fayette Circuit Court entering a conditional guilty plea and sentencing him to five years imprisonment for possession of a handgun by a convicted felon. The issue on appeal is whether appellant's right to a speedy trial was violated. For the reasons stated hereafter, we affirm.

On May 14, 2001, a Lexington Fayette County police officer arrested appellant for possession of a handgun by a

convicted felon, possession of crack cocaine and possession of marijuana. On July 12, 2001, appellant was indicted on similar charges by a grand jury in the United States District Court for the Eastern District of Kentucky. On July 23, 2001, a Fayette County grand jury dismissed the state charges against appellant due to the pending federal charges. For reasons unclear in the record, on September 17, 2002, the United States District Court entered an order dismissing appellant's federal indictment.

On October 7, 2002, a Fayette County grand jury returned an indictment against appellant for possession of a handgun by a convicted felon, first-degree possession of a controlled substance and possession of marijuana. Appellant was arraigned on October 11, at which time his counsel requested one month to review discovery materials. A November 8 status conference was rescheduled for November 22, so that appellant could have additional time to review tapes that were in the Commonwealth's possession.

On November 21, appellant filed a motion to dismiss alleging that his state indictment violated the double jeopardy clause, the due process clause and his constitutional right to a speedy trial. In order for the Commonwealth to respond to appellant's motion to dismiss, the November 22 status conference was passed to December 6, at which point the circuit court, after hearing arguments of counsel, overruled appellant's motion

to dismiss. The next status conference was scheduled for January 17, 2003 and appellant's trial was set for February 19, 2003.

On February 5, 2003, the Commonwealth filed a pretrial motion, which was heard on February 7. At this point, rather than proceeding to trial, appellant entered a conditional guilty plea to possession of a handgun by a convicted felon.¹ After appellant waived his right to a sentencing hearing, the circuit court sentenced him to five years imprisonment. This appeal followed.

Appellant contends that the state and federal authorities violated his constitutional right to a speedy trial by delaying court proceedings for seventeen months and dismissing two indictments against him. Appellant argues that since this right was violated, dismissal is "the only possible remedy." *Strunk v. United States*, 412 U.S. 434, 439, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56, 61 (1973).

In *Dunaway v. Commonwealth, Ky.*, 60 S.W.3d 563, 569 (2001), the court analyzed a defendant's right to a speedy trial according to a four-part test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). This test involves an examination of: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his

¹ The drug possession charges were dismissed.

right; and (4) the prejudice to the defendant caused by the delay.² *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. The speedy trial analysis "begins by determining if the delay was presumptively prejudicial to the defendant; for if it was not, the defendant's rights were not violated, and the inquiry ends." *Dunaway*, 60 S.W.3d at 569. See also, *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117.

Appellant argues that a seventeen-month delay is presumptively prejudicial. We disagree. In *Commonwealth v. Hale*, Ky., 96 S.W.3d 24, 33 (2003), the court stated:

In order to "preserve[] our two systems of courts from actual conflict of jurisdiction," the United States Supreme Court has held that either sovereign--federal or state--has the right to exclusive custody of a prisoner who has been convicted of violating the laws of that sovereign and is "permitted to exhaust its remedy . . . before the other court shall attempt to take it for its purpose."

(quoting *Ponzi v. Fessenden*, 258 U.S. 254, 260, 42 S.Ct. 309, 310, 66 L.Ed. 607, 611 (1922)). Here, it is reasonable to assume that by dismissing appellant's state indictment, the state authorities were merely trying to avoid a potential conflict of jurisdiction with the federal authorities. The state authorities waited until appellant's federal charges were

² In *Barker*, the court held: "A defendant's constitutional right to a speedy trial cannot be established by any 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." 407 U.S. at 514, 92 S.Ct. at 2182, 33 L.Ed.2d at 101. No one factor is ultimately determinative by itself. *Gabow v. Commonwealth*, Ky., 34 S.W.3d 63, 70 (2000).

dismissed before reinstating his state charges, which does not appear from the record to be an intentional or deliberate attempt to hinder appellant's defense.

Moreover, in *United States v. MacDonald*, 456 U.S. 1, 7 n.7, 102 S.Ct. 1497, 1501, 71 L.Ed.2d 696, 701 (1982), the court noted "that if charges are initially dismissed and later reinstated, the period between the dismissal and reinstatement is not to be included in computing the time within which a trial must commence."³ In the present case, no state criminal prosecution was pending on which appellant could have been tried from July 23, 2001, the date of the state's dismissal, to October 7, 2002, the date the Fayette County grand jury reinstated appellant's indictment. During the intervening period appellant was only subject to federal criminal prosecution; thus, that time is not considered in determining the length of appellant's delay for trial. Accordingly, it follows that appellant encountered less than a six-month delay in court proceedings from October 7, 2002, until his trial date scheduled for February 19, 2003. Based on the record as a

³ In *MacDonald*, the court explained that "[a]ny undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." 456 U.S. at 7, 102 S.Ct. at 1501, 71 L.Ed.2d at 701. In the present case, appellant raised a due process violation in his motion to dismiss before the circuit court however, this issue was not preserved for appeal.

whole, the length of delay was not presumptively prejudicial and therefore, the inquiry ends.⁴

We also note, that appellant never asserted his right to a speedy trial,⁵ other than filing a motion to dismiss. A motion to dismiss for failure to provide a speedy trial "is not a formal demand for a speedy trial." *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13, 22 (1998). See also, *McDonald v. Commonwealth*, Ky., 569 S.W.2d 134, 137 (1978), cert. denied, 439 U.S. 1119, 99 S.Ct. 1028, 59 L.Ed.2d 79 (1979). In addition, although appellant argues that he may have been prejudiced by the mere fact that he was incarcerated during the delay,⁶ he has not identified any prejudice with respect to his ability to present his defense if the case had proceeded to trial.⁷ Therefore, we conclude that appellant's constitutional speedy trial right was not violated in any manner.

⁴ In *Dunaway*, the court held a thirteen and one-half month delay was presumptively prejudicial. 60 S.W.3d at 569.

⁵ In *Barker*, the court emphasized that the defendant's failure to assert his speedy trial right "will make it difficult for the defendant to prove that he was denied a speedy trial." 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed.2d at 118.

⁶ See *Barker*, 407 U.S. at 532-33, 92 S.Ct. at 2192-93, 33 L.Ed.2d at 117-8.

⁷ In *Barker*, the court identified three interests bearing on prejudice to the defendant: "(1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532-33, 92 S.Ct. at 2192-93, 33 L.Ed.2d at 117-8.

For the foregoing reasons, the judgment and sentence of the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

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