RENDERED: MAY 28, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002157-MR

KENNETH MCBRIDE — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Kenneth McBride (hereinafter appellant) appeals his conviction in the Montgomery Circuit Court for one count of theft by unlawful taking and one count of being a persistent felony offender in the first degree. We affirm.

Appellant alleges that the trial court failed to afford him his right to a speedy trial in violation of the Sixth Amendment to the Federal Constitution, Section Eleven of the Kentucky Constitution, and his right to be brought to trial

within 180 days under KRS 500.110. Appellant was arrested on March 14, 2001, and indicted by a grand jury on April 4, 2001. Appellant was initially tried by a jury on February 19 and 20, 2002. The jury became deadlocked, and a mistrial was declared. Appellant filed a motion on February 28, 2002, for a speedy trial pursuant to RCr 9.02, Kentucky Constitution Sections 11 and 14, and the Sixth Amendment to the United States Constitution. A trial date was set for August 21, when it was continued due to the failure of the Commonwealth's expert witness, under subpoena, to appear. Appellant was retried on September 9, 2002.

First, we agree with the Commonwealth that appellant may not argue that he was not brought to trial within the 180 day period of KRS 500.110. KRS 500.110 applies only when a defendant is incarcerated for one offense and a detainer has been lodged against him to answer for another offense, not where a defendant is seeking a speedy trial of an offense for which he is being held in pre-trial incarceration. Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000). Appellant is unaware whether or not a detainer had been lodged at the time of his motion for speedy trial. He never asserted a request for a final disposition under that statute. Thus, this argument is not properly before this Court.

Appellant preserved his argument that he did not receive a speedy trial under the United States and Kentucky Constitutions. In Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972), the United States Supreme Court established four factors for a court to analyze to determining whether a defendant's right to a speedy trial has been violated: (1) the length of delay, (2) the reason for the delay, (3) assertion of the right, and (4) prejudice caused by the delay. The first step is to determine if the delay was presumptively prejudicial to the defendant; if not, the defendant's speedy trial rights were not violated and the inquiry ends. Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 569 (2001), citing Barker, 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117.

Whether a delay was presumptively prejudicial depends on the nature of the charges and the length of the delay. Dunaway, 60 S.W.3d at 569. Appellant was indicted for theft by unlawful taking over $300, rape in the first degree and for being a persistent felony offender (PFO) in the first degree. In this case, consideration of the length of delay depends on whether we look at only the span after the mistrial (which coincides with the filing of appellant's speedy trial motion) until the retrial, or the entire length of time between indictment and the retrial. We determine that the only time we

must consider is the interval between mistrial and retrial. In Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998) and Ferguson v. Commonwealth, Ky., 401 S.W.2d 225 (1965), Kentucky's highest court was only concerned in its speedy trial inquiry with the period between the reversal of the defendant's conviction and the second trial. In Icgoren v. State, 103 Md.App. 407, 653 A.2d 972, 978 (1995), the Court of Special Appeals of Maryland reviewed cases on this issue from various jurisdictions, and found the weight of authority supported considering only the period between declaration of mistrial and retrial. Thus, we examine only the interval between the mistrial on February 20, 2002, and the trial on September 9 and 10, 2002, a time period of approximately six months and three weeks.

We do not perceive that a delay of less than seven months, for a case of this degree of complexity, was presumptively prejudicial. Cf. Dunaway, 60 S.W.3d at 569 (13½ month delay in robbery and PFO case was presumed prejudicial). Since the time of delay is not presumptively prejudicial, no further analysis of the Barker factors is warranted. We conclude appellant was not denied the right to a speedy trial.

Appellant's second argument is that there was insufficient evidence of intent to deprive the victim of her vehicle to support his conviction for theft by unlawful taking over $300. The Commonwealth responds that this claim is not

preserved for review because appellant did not make this particular argument in his motion for a directed verdict at the close of the evidence, and there was sufficient evidence of intent to deprive. We agree.

Appellant made a general motion for directed verdict of acquittal on the basis that the Commonwealth "failed to sustain their burden of proof." A motion for directed verdict is not the proper method of challenging the sufficiency of the evidence on a particular issue. Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988). Appellant did not argue that there was not sufficient evidence of intent to deprive his girlfriend of her car. Thus, appellant needed to do more to preserve the specific issue he raises on appeal.

Furthermore, we find sufficient evidence on this charge. The appellate standard of review is whether under the evidence as a whole it would be clearly unreasonable for the jury to find the defendant guilty. The evidence indicated that appellant intended to leave Darnella Bradley for good following their violent argument. Ms. Bradley testified that appellant said he was going to leave and asked her to have sex with him "one last time." She testified that she complied so he would leave. Then, at his direction, they packed up appellant's belongings and put them in garbage bags. Appellant forced Ms. Bradley to leave in the truck with him and he drove to a

friend's house. When that friend apparently was not home, appellant drove onto the interstate highway. Ms. Bradley testified that at this point she begged appellant to go back and offered him money to do so. They drove to a hotel, and Ms. Bradley was still trying to give appellant money. He told her, "No, we are just going to go home. We are not going to stay here." Ms. Bradley testified that she then ran into the lobby of the hotel, and as she did so she observed appellant drive out of the parking lot in her vehicle.

Ms. Bradley testified that appellant had no vehicle, but she had given him duplicate keys to her vehicle. She agreed that they had shared the vehicle. But she stated that she had not given him permission to take the vehicle. She said that she did not know where appellant intended to go. She testified there was no agreement with appellant that he would come back the next day and bring her the truck. Ms. Bradley asserted that he stole her truck, that she did not give consent for him to take her truck to Tennessee. Appellant was stopped by police in the truck in Bell County, near the Tennessee border. We find sufficient evidence was produced at trial for a reasonable jury to conclude appellant had intent to deprive Ms. Bradley of her truck.

For the foregoing reasons, we affirm appellant's convictions in the Montgomery Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky