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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000856-MR

RICHARD T. MORROW — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CR-00306

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Richard T. Morrow appeals from an April 21, 2004, final judgment of the Pulaski Circuit Court entered upon a jury verdict finding him guilty of robbery in the first degree and sentencing him to thirteen years' imprisonment. We affirm.

On December 10, 2002, appellant was indicted by the Pulaski County Grand Jury upon one count of robbery in the first degree. The indictment was returned following an armed robbery

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

on the morning of December 4, 2002, at the Science Hill Drug Store in Science Hill, Kentucky. Oxycontin and a small amount of cash were taken. On March 8, 2004, a jury trial was held whereupon the appellant was found guilty of robbery in the first degree. By judgment entered April 21, 2004, appellant was sentenced to thirteen years' imprisonment. This appeal follows.

Appellant asserts four errors occurred at trial. We will address each error separately. Appellant contends the trial court erred by denying his motions to strike two prospective jurors, Benjamin Van Hook and Evelyn Oblisk, for cause. Because of the relationship of Van Hook and Oblisk to the Science Hill Drug Store, appellant argues the two were unable to render an impartial verdict.

Ky. R. Crim. P. (RCr) 9.36 requires that a prospective juror be excused if there is a reasonable belief he cannot render a fair and impartial verdict based upon the evidence. RCr 9.36 vests the trial court with discretion to determine "bias from particular circumstances or relationships between the juror and the accused or the case." Bowling v. Commonwealth, 942 S.W.2d 293, 299 (Ky. 1997). Bias of a prospective juror will not be presumed; rather, it must be proved by the alleging party. Hicks v. Commonwealth, 805 S.W.2d 144 (Ky.App. 1990). Absent an abuse of discretion, the trial court's determination will not be disturbed on appeal.

In this case, Van Hook stated he was a regular customer of the Science Hill Drug Store but did not know the names of any of the drug store's clerks. Van Hook also acknowledged that he attended college with a pharmacist employed there but did not know if the pharmacist was working when the robbery occurred. Juror Oblisk stated she was employed by a pharmacy in Somerset, Kentucky, from December 2002 through August 2003. Oblisk maintained that her interaction with the Science Hill Drug Store was limited to an occasional phone conversation for the purpose of transferring a prescription. Oblisk claimed that her previous employment would not prevent her from being impartial in this case.

Appellant did not demonstrate that Van Hook or Oblisk were biased. Although both jurors acknowledged a minimal relationship with the Science Hill Drug Store, there was no evidence demonstrating that appellant's right to a fair and impartial trial was violated. As no prejudice was demonstrated by appellant, we do not believe the trial court abused its discretion by denying appellant's motions to strike Van Hook and Oblisk for cause.

Appellant next contends the trial court erred in the administration of the jury selection process. Specifically, appellant contends the trial court failed to comply with the mandates of Kentucky Revised Statutes (KRS) 29A.100 and KRS

29A.080. Appellant complains that only 38 or 39 of the 69 prospective jurors were present when *voir dire* began and that the trial court did not follow the mandates of KRS 29A.080 and KRS 29A.100 when it excused jurors from service.

KRS 29A.100 states, in relevant part, as follows:

> (2) The Chief Circuit Judge may . . . excuse a juror from service . . . . The reasons for excuse or postponement shall be entered in the space provided on the juror qualification form.
>
> (3) In his or her discretion the judge may excuse a juror from service entirely, . . . When excusing a juror, the judge shall record the juror's name, as provided in KRS 29A.080, and the reasons for granting the excuse.

KRS 29A.080 states, in relevant part, as follows:

> (1) The Chief Circuit Judge . . . shall determine . . . whether the prospective juror is disqualified for jury service . . . . This determination shall be entered in the space provided on the juror qualification form.

KRS 29A.100 and KRA 29A.080 clearly require the trial judge to record the name of any excused juror and to enter the reason for the excuse on the juror qualification form. Substantial compliance with jury selection procedures is essential to providing a defendant with an impartial jury. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988).

The record in this case includes a list of all the persons on the jury panel for appellant's trial. The record

does not include juror qualification forms for any of the prospective jurors.

It is well-established that the burden is upon an appellant to ensure that this Court is supplied with the record necessary to decide the appeal. Fanelli v. Commonwealth, 423 S.W.2d 255 (Ky. 1968). An appellate court is to presume that any portion of the record not supplied would support the decision of the trial court. Colonial Life & Accident Ins. Co. v. Weartz, 636 S.W.2d 891 (Ky.App. 1982). As appellant has not caused the juror forms to be included as part of the record, we must presume such forms would comply with the statutory mandates and would support the trial court's decision.

Appellant next alleges that the trial court erred by overruling his objection to the Commonwealth's use of a peremptory challenge to strike Bobby Napier, the only African-American on the jury panel. Appellant argues that the Commonwealth's use of this peremptory challenge was in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In Batson, a three-part test was established for determining whether the prosecution wrongfully removed a prospective juror solely based upon race. Id. In Commonwealth v. Snodgrass, 831 S.W.2d 176 (Ky. 1992), the Kentucky Supreme Court summarized the three-part test as follows:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Id. at 178 (citations omitted).

Appellant concedes that the first and second steps of Batson were satisfied but contends the third step was not. Appellant specifically asserts the trial judge did not properly evaluate the Commonwealth's explanation for striking Napier to determine whether it was merely a pretext for discrimination.

In Harris v. Commonwealth, 134 S.W.3d 603 (Ky. 2004), the Court discussed the third step of Batson as follows:

> During this step, the trial judge must evaluate the reasons offered by the prosecutor to determine if they are valid and neutral and not simply a pretext for discrimination. The trial judge's decision is accorded great deference on this issue because the judge is in the best position to evaluate the credibility and demeanor of the prosecutor. This decision will not be overturned unless it is clearly erroneous.

Id. at 611-612 (citations omitted).

In the case *sub judice*, the Commonwealth gave the following reason for striking Napier:

> Yes, sir, I struck Mr. Napier, the reason being that he was on the original Catron panel. During the entire eight hours that

> we were there swearing the jury, interviewing the jury, he was unattentive [sic], chewing on a straw and about fell asleep, and that's noted by three people at my office, so that would be my non-racial reason for striking Mr. Napier, my own personal observations of him in a prior voir dire. Id.

Appellant's Brief at 17.

Appellant argues that inattentiveness is not a sufficient race-neutral explanation for exercise of a peremptory challenge and relies heavily upon the case of Washington v. Commonwealth, 34 S.W.3d 376 (Ky. 2000). We believe Washington is clearly distinguishable and are not persuaded by appellant's argument. In Washington, the Court stated:

> The most disturbing aspect of this case is the prosecutor's insistence that he did not strike Mr. Newberry. Notably, when he was shown the strike sheet, his immediate response was "Oh my God." Given the prosecutor's initial denial, followed by his obvious surprise at the fact he had struck Mr. Newberry, subsequent explanations for the strike were disingenuous.

Id. at 379. The court in Washington obviously focused upon the prosecutor's insistence that he had not stricken the juror, the prosecutor's surprise upon being informed that he had, and his subsequent disingenuous explanations.

The circumstances in the present case are clearly distinguishable. Here, the Commonwealth did not deny striking Napier. Rather, the Commonwealth immediately responded to the

Batson challenge with a sufficiently race-neutral reason. As such, the circuit court did not err by overruling appellant's challenge to the Commonwealth's exercise of a peremptory challenge to strike Napier.

Appellant's final contention is that his right to a speedy trial pursuant to KRS 500.110, the United States Constitution and the Kentucky Constitution was violated.

We will first address appellant's contention that KRS 500.110 was violated because his trial was conducted outside the 180-day time limit. KRS 500.110 provides as follows:

> 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.

Appellant asserts the following facts: on June 16, 2003, while incarcerated upon other charges, he filed a *pro se*

motion pursuant to Kentucky Revised Statues (KRS) 500.110 requesting final disposition of the untried robbery indictment; his attorney filed a motion for a speedy trial on August 15, 2003; and the detainer acknowledgement was filed on August 21, 2003.

The triggering mechanism that brings KRS 500.110 "into play is the lodging of a detainer against a prisoner." Huddleston v. Jennings, 723 S.W.2d 381, 383 (Ky.App. 1986). By appellant's own admission, the detainer had not yet been lodged at the time of appellant's *pro se* motion or his counsel's motion for a speedy trial was filed. As such, appellant's request for relief pursuant to KRS 500.110 was premature.

We will now address appellant's contention that his right to a speedy trial under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution was violated. The constitutional right to a speedy trial is analyzed by applying the four-factor test established in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). See also Dunaway v. Commonwealth, 60 S.W.3d 563 (Ky. 2001).

The first Barker factor to be considered is the length of the delay. The proper analysis involves determining whether the delay was presumptively prejudicial to appellant, which involves consideration of two elements: the charges against appellant and the length of the delay involved. Dunaway, 60

S.W.3d 563. In this case, appellant was charged with first-degree robbery. The length of time between the indictment and the trial was some fifteen months. Courts differ in the length of time required to find presumptive prejudice but we believe under the facts of this case 15 months was presumptively prejudicial. See id. Having found presumptive prejudice in the 15 month delay, we must now examine the remaining Barker factors. Preston v. Commonwealth, 898 S.W.2d 504 (Ky.App. 1995).

The second Barker factor to be considered is the reason for the delay. Barker, 407 U.S. 514. The Court in Barker, identified three general areas of delay: (1) a deliberate attempt to delay trial to hamper the defense; (2) a neutral reason such as negligence or overcrowded courts; and (3) a valid reason, such as a missing witness.

In this case, it is unclear why during the May 2003 pretrial conference the trial was set for March 8, 2004. At the August 2003 hearing on appellant's motion for a speedy trial, the court declined to advance the trial date because the Commonwealth needed to conduct DNA testing. The testing was necessary to determine whether hair from inside a ski mask found at the robbery scene belonged to appellant. The testing could not be performed in Kentucky and would have to be conducted out-of-state. Under the circumstances, we do not believe the

Commonwealth's request for DNA testing rises to the level of a deliberate attempt on the part of the Commonwealth to hamper the defense, and thus find the reason for the delay to be valid.

The third Barker factor to be considered is the demand for a speedy trial. Here, the motion simply referred to a constitutional right but no basis for appellant's argument was articulated. At the hearing on the motion, appellant's argument was based entirely upon KRS 500.110 and there was no mention of a constitutional basis for the claim. Appellant's less than vigorous assertion of his constitutional claim does not weigh in his favor.

The fourth and final factor in the Barker analysis is the prejudice caused by the delay. The Court in Barker identified three interests that have bearing on this issue: "(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." Dunaway, 60 S.W.3d at 563 (quoting Barker, 407 U.S. at 532).

Appellant's argument focuses upon his defense being impaired by the delay. Specifically, appellant complains that the delay hindered the memory of his alibi witness, Larry Burdie. Burdie's testimony revealed that Burdie did not wake up until after the robbery had occurred on the morning of December 4, 2002, and, thus, Burdie could not confirm whether appellant

was at his house at the time of the robbery. Burdie further testified that his memory of the events of the morning of the robbery was hampered because he had been up drinking all night before. Burdie's testimony does not reveal that a delay in the trial caused any prejudice to appellant's defense.

After balancing all of the factors identified in Barker, we conclude appellant's constitutional right to a speedy trial was not violated.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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