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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001635-MR

CHARLES COSBY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 17-CR-00312

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: This is a criminal case in which the Appellant, Charles Cosby, was convicted of first-degree trafficking under two grams of methamphetamine, possession of drug paraphernalia, and being a persistent felony offender. He received a sentence of fourteen years. Cosby now appeals as a matter of right and contends: (1) that he was denied his constitutional right to a speedy trial and (2)

that the Commonwealth presented improper testimony regarding his prior convictions during the penalty phase of the trial. Finding no error after our review, we affirm.

We discuss the record only as necessary to resolve the issues before us. On May 12, 2017, Cosby was arrested for trafficking methamphetamine less than two grams (KRS¹ 218A.1412); possession of marijuana (KRS 218A.1422); and for buying and/or possession of drug paraphernalia (KRS 218A.500). On June 19, 2017, a Henderson County grand jury indicted Cosby on one count of first-degree trafficking less than two grams (methamphetamine); one count of possession of drug paraphernalia; one count of possession of marijuana; and one count of being a persistent felony offender (PFO) (KRS 532.080) in the first degree.

Cosby's trial was set for September 29, 2017. Ultimately, it was continued six times:

1. The first trial date was continued at the Commonwealth's request until November 3, 2017, because the lab reports were not ready.

2. The November 3, 2017, trial date was continued at the Commonwealth's request until November 28, 2017, again because the lab reports were not ready.

¹ Kentucky Revised Statutes.

3. The November 28, 2017, trial date was continued until January 24, 2018, because the Commonwealth had not subpoenaed the lab chemist for the trial date.

4. The January 24, 2018, trial date was continued to March 9, 2018, due to illness on the trial judge's part.

5. The March 9, 2018, trial date was continued to April 4, 2018, because the Commonwealth had discovered a K9 unit report from the day of Cosby's arrest.

6. The April 4, 2018, trial date was continued to May 10, 2018, because a necessary witness was out of town.

Defense counsel moved to dismiss the charges against Cosby, but the trial court denied the motion.

The May 10, 2018 trial ended in a mistrial because the jury could not reach a verdict. The case was re-tried on August 9, 2018. A jury found Cosby guilty of first-degree trafficking under two grams of methamphetamine, possession of drug paraphernalia, and being a PFO, recommending a sentence of fourteen years, which the trial court imposed.

On November 2, 2018, Cosby filed a notice of appeal to this Court from the judgment of conviction and sentence entered on October 8, 2018.

Cosby's first argument on appeal is that he was denied his constitutional right to a speedy trial.

The right to a speedy trial is guaranteed by both the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. When a speedy trial violation is raised on appeal, a reviewing court must consider four factors to determine if a violation occurred: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004). We must balance these factors by first considering each factor individually and then weighing them together. *Smith v. Commonwealth*, 361 S.W.3d 908 (Ky. 2012).

....

Only presumptively prejudicial delays will trigger the speedy trial inquiry. . . .

This Court has generally considered delays of over one year to be presumptively prejudicial. . . .

Goncalves v. Commonwealth, 404 S.W.3d 180, 198-99 (Ky. 2013).

In the case before us, the Commonwealth concedes that the length of the delay -- from Cosby's arrest on May 12, 2017, until his case went to trial on August 9, 2018 -- is presumptively prejudicial. However, the fact of presumptive prejudice "is not alone dispositive and must be balanced against the other factors. Presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable

enough to trigger the *Barker* enquiry.” *Lang v. Commonwealth*, 556 S.W.3d 584, 587 (Ky. 2018) (footnotes and internal quotation marks omitted).

Thus, we must consider the reasons for the delays in Cosby’s case.

When a delay such as this one is attributable to the government, a reviewing court must distinguish among deliberate, bad faith delays meant to hamper the defense; delays that result from negligence or other neutral reasons, such as overcrowded courts; and delays for valid reasons, such as a missing witness. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182. The first, not surprisingly, weigh heavily against the state in the speedy-trial balancing test. The second also count against the state since “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant,” *id.* but such neutral are not viewed as dimly by the court. Finally, the last—delays for “valid reason[s]”—do not offend the Constitution and “should serve to justify appropriate delay.” *Id.*

Goben v. Commonwealth, 503 S.W.3d 890, 905 (Ky. 2016).

As Cosby notes, the first two continuances occurred because the lab reports had not been received. The Commonwealth submits that these two delays were not within its control and that they are neutral in nature, citing *Day v. Commonwealth*, No. 2004-SC-000039-MR, 2006 WL 2707960, at *4 (Ky. Sept. 21, 2006) (Delay in receiving lab reports “is a neutral reason and we cannot say that it was the Commonwealth’s fault.”). We agree.

The third continuance was granted because the Commonwealth did not have time to subpoena the chemist, having only just received the lab report. We also consider that this delay resulted from a neutral reason.

Cosby believes that although it was not “entirely clear in the record,” the fourth continuance was caused by the trial judge’s illness. That also is a valid reason for delay.

Cosby explains that the fifth continuance was due to the Commonwealth’s discovery of a K9 unit report from the date of arrest. At pages 12-13 of his Appellant’s brief, Cosby states that “[t]he Commonwealth waited until four days before the March 9, 2018, trial date to find and disclose the report to Charles.” The Commonwealth contends at page 6 of its brief that “[t]his report was apparently unknown by the parties and both counselors needed a continuance to obtain and review that information in preparation for trial.” The Commonwealth notes that Cosby did not object to this request for continuance. We are not persuaded that this delay was the result of a deliberate attempt on the Commonwealth’s part to hinder the defense; therefore, we consider it to be neutral in nature.

The sixth continuance was granted because a necessary witness for the Commonwealth was unavailable. As the Commonwealth notes, Cosby “finally voiced an objection” to this request for a continuance. As the April 4, 2018, video

record reflects, the witness had been employed by the Detention Center. The court explained that when the Commonwealth attempted to contact or subpoena the witness, it learned that the witness was no longer employed there. When the Commonwealth tracked the witness down, he was out of town. The trial court admonished the Commonwealth, articulating that efforts should have been made prior to the day before trial to subpoena this individual. Nevertheless, it denied Cosby's motion to dismiss, having found that the individual was a necessary witness.

The Commonwealth cites *Barker* as authority that a "missing witness" is a valid reason for delay. That is correct. But in this case we consider the delay to be neutral in nature due to the Commonwealth's lateness in subpoenaing the witness.

The final reason for delay is the mistrial because the jury could not reach a verdict. As our Supreme Court explained in *Goncalves*, "[a]lthough the *Barker* court did not identify a mistrial caused by a hung jury as a valid reason for delay we believe that it is a self-evident valid reason for delay." 404 S.W.3d at 200.

In summary, there were no deliberate or nefarious reasons for delay on the Commonwealth's part. Two reasons -- the trial judge's illness and the mistrial -- were valid and do not weigh against the Commonwealth. The remaining

reasons were neutral and on balance we cannot say they weigh heavily against the Commonwealth.

We now consider Cosby's assertion of his right to a speedy trial.

"While the defendant has a right to a speedy trial regardless of whether he makes a demand, assertion of the right is a factor to consider." *Dunaway v.*

Commonwealth, 60 S.W.3d 563, 571 (Ky. 2001). Cosby contends that his repeated requests for bond reductions put the trial court on notice that he was invoking his right to a speedy trial. He cites *Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982), for the proposition that a motion for release is "the functional equivalent of a demand for a speedy trial." Cosby also cites *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), where the appellant also relied upon *Cain* for the same proposition. Our Supreme Court explained that the statement quoted by Cosby

originated in *United States v. Calloway*, 505 F.2d 311, 316 (D.C.Cir.1974), in which the defendant made **repeated and continued motions** for release pending trial. We are unprepared to hold that an isolated motion for bail "unequivocally puts the trial court on notice that the defendant demands a speedy trial." *McDonald v. Commonwealth*, [569 S.W.2d 134, 137 (Ky. 1978)].

Tamme, 973 S.W.2d at 22 (emphasis added).

Cosby also draws our attention to *Day, supra*, in which our Supreme Court held that although the appellant did not formally invoke his right to a speedy trial, "he did make multiple efforts to set a trial date and objected to the

Commonwealth’s multiple motions for continuances.” *Id.* at *4. The Court in *Day* concluded that the defendant’s action “was sufficient to constitute an assertion of the right, thus allowing the third factor of the inquiry to weigh in Appellant’s favor.” *Id.*

In the case before us, Cosby made numerous requests for bond reduction. But, as the Commonwealth notes, Cosby failed to consistently object to its motions and “the closest [he] came to asserting his right to a speedy trial was in April 2018 . . . when he made an oral motion to dismiss.” However, “[w]e cannot say that a motion to dismiss for lack of a speedy trial is the same as a motion for a speedy trial in that it unequivocally puts the trial court on notice that the defendant demands a speedy trial.” *McDonald*, 569 S.W.2d at 137. We are not persuaded that the third factor weighs in Cosby’s favor.

The fourth *Barker* factor is prejudice. Cosby argues that he suffered from anxiety and lived under the fear of trial while incarcerated; that he suffered financially because he was employed while out on bond and lost that job due to the continued court dates; and that “the delays diminished the memories of the witnesses in this case.” His claims are in essence conclusory.

Conclusory claims about the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice. . . . [A] long delay, while creating “presumptive prejudice” sufficient to continue the *Barker* analysis, does not necessarily create real prejudice to a defendant.

Bratcher, 151 S.W.3d at 345 (emphasis original). Accordingly, this factor does not weigh in Cosby’s favor.

After conducting our analysis pursuant to *Barker*, we conclude that Cosby’s right to a speedy trial was not violated.

Next, Cosby argues that the Commonwealth presented improper testimony regarding his prior convictions. He acknowledges that the issue is unpreserved but requests review pursuant to RCr² 10.26, which provides that:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), our Supreme Court explained that the required showing is the probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.

Specifically, Cosby contends that his “prior PFO convictions were read to the jury and the Commonwealth made sure to remind the jury of the PFO status during closing argument.” Cosby explains that pursuant to KRS 532.055(2)(a), the Commonwealth may offer evidence of “[t]he nature of prior

² Kentucky Rules of Criminal Procedure.

offenses for which [defendant] was convicted” at sentencing. In *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011), our Supreme Court held that “the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed.” Cosby explains that being convicted as a PFO is a criminal status, not a charge of an independent criminal offense. Furthermore, he argues that “the jury could have reasonably believed that the PFO convictions were a criminal charge of an independent criminal offense” and that but for the repeated reference to his prior PFO status, the jury might have been persuaded to recommend the minimum sentence of ten years instead of fourteen years. We agree with the Commonwealth that this reasoning is speculative and that Cosby has not made the required showing to demonstrate manifest injustice.

We AFFIRM the judgment and sentence of the Henderson Circuit Court.

ALL CONCUR.

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