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RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0988-TG

DATE 5-20-04 ELA Grayson, DC

GEORGE SMITH — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
CRIMINAL NOS. 01-CR-0044 AND 01-CR-0124

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, George Smith, was convicted in the Graves Circuit Court of criminal attempt to commit murder and first degree wanton endangerment. He was sentenced to a total of twenty-five years imprisonment and appeals to this Court as a matter of right.

On the evening of March 31, 2000, Denise Beasley and her four-year-old daughter were sitting on their living room couch when gun shots were fired through the screen of an open window. Before she was able to grab her daughter and hide in a closet, Beasley was struck four times in the arms and chest. During the ensuing investigation, police discovered that Beasley's sister, acting as a confidential informant, had purchased crack cocaine from Appellant several days prior to the shootings.

Beasley had been with her sister at the time of the transaction. Appellant thereafter became a suspect not only in the shooting at Beasley's residence, but also in a similar incident at Beasley's brother's residence.

In February 2001, Appellant was indicted in the Graves Circuit Court on one count of criminal attempt to commit murder resulting from the shooting of Beasley. In June 2001, Appellant was also indicted for the first-degree wanton endangerment of Beasley's daughter. Following a trial on the consolidated charges in July 2002, Appellant was found guilty of both charges and sentenced to twenty-five years imprisonment. This appeal followed.

I.

Appellant first argues that his conviction was obtained in violation of KRS 500.110, which requires that a person serving a term of imprisonment within the state be tried within 180 days on any new indictment which causes a detainer[1] to issue. After reviewing the record and video proceedings, we disagree.

Appellant, with court-appointed counsel, was arraigned on the attempted murder charge in March 2001. On June 22, 2001, the trial court entered an order setting a trial date of July 16, 2002. The order reflects that notice was mailed to Appellant's counsel of record at that time. In July 2001, with different court-appointed counsel, Appellant was arraigned on the wanton endangerment charge.[2] On July 30, 2001, Appellant filed a pro se "Motion for a Fast and Speedy Trial" requesting that the trial court set the matter for trial "at the earliest possible convenience of the Court pursuant to the 6th and

[1] A detainer is "a request filed by a criminal justice agency with the institution in which the prisoner is incarcerated, asking the institution to either hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985).

[2] The charges were later consolidated for the purposes of trial.

14th Amendments to the United States Constitution and Section 11 of the Kentucky Constitution . . . ." Appellant averred that he was incarcerated in the Marshall County Jail on other charges. The certificate of service indicates that although the motion was filed in the Graves Circuit Court it was not served upon the Commonwealth's attorney.

At an August 27, 2001, hearing to dispose of several motions, newly-appointed counsel for Appellant requested an earlier trial date "if at all possible." The trial court explained that the July 2002 scheduled date was the first available three-day time slot in the trial court's docket. The trial court further recalled that Appellant's former counsel agreed to the date since Appellant was already incarcerated in Marshall County on other drug-related charges. The trial court pointed to its busy docket in commenting that it found no reason "to tear apart the schedule" since Appellant was already in jail. Accordingly, the request for an earlier trial date was denied. Importantly, at no time during the hearing was any reference made to Appellant's pro se motion. In fact, a further review of the record confirms that the prosecutor, the trial court, and even Appellant's counsel were unaware of the motion for a speedy trial at that time.

It was not until an in-chambers conference on the morning of trial, that defense counsel moved to dismiss Appellant's case on the grounds he was denied a speedy trial and, for the first time, directed the court's attention to Appellant's July 2001 pro se motion. Both the trial court and the prosecutor stated they had no prior knowledge of the motion and indeed the certificate of service reveals that the Commonwealth was not served. It is apparent from defense counsel's comments during this conference that she was moving for dismissal at the direction of her client and that she had no personal knowledge as to whether Appellant had sufficiently asserted his right to a speedy trial. The trial court, again noting that the court's docket had twelve murder cases at the time,

denied the motion to dismiss on the grounds that an earlier trial date simply had not been available.

KRS 500.110 provides, in part:

> 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 cause to be delivered to 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[.]

Contrary to the Commonwealth's assertion that KRS 500.110 is not applicable because a detainer was not lodged against Appellant, the record reflects that the Graves Circuit Court issued a detainer on February 15, 2001. The detainer was released on October 28, 2002, after Appellant was sentenced in this case. Thus, Appellant was certainly able to avail himself of the statute. Notwithstanding, we conclude that Appellant failed to comply with the required notice provisions of KRS 500.110, since he did not "deliver to 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[.]" Nor can the August 2001 hearing be construed as sufficient notice since there was no mention of the motion and, in fact, counsel did not specifically demand a speedy trial but rather requested an earlier trial date "if at all possible."

Even though Appellant failed to qualify under KRS 500.110, he still has a constitutional right to a speedy trial. As we recently noted in Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 569 (2001), a defendant's right to a speedy trial is analyzed using the four-part test set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct.

2182, 33 L.Ed.2d 101 (1972), which examines: (1) the length of delay, (2) the reason asserted for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay.

The Dunaway, supra, opinion contains an in-depth and thorough analysis of each Barker factor and we will not reiterate such herein. Id. at 569-572. We do note that Appellant was arrested on the instant charges in February 2001, and was not tried until July 2002, resulting in a delay of approximately sixteen months. Such delay must be considered presumptively prejudicial. However, the record also reflects that Appellant changed counsel four times prior to August 2001. Furthermore, the trial court noted on the record that the July 2002 trial date was the first three-day time slot available due to the crowded docket, and that defense counsel of record agreed to that date.

Finally, we consider the most important factors in this case to be the fact that Appellant never asserted his right to a speedy trial, other than merely asking for an earlier date at the court's convenience, as well as his total failure to allege that he suffered any prejudice from the delay. Appellant has not asserted that the delay impaired his right to a fair and impartial trial. As such, we cannot conclude that Appellant's constitutional rights were violated in any manner.

II.

Appellant next argues that the trial court erred in applying the violent offender statute during the penalty phase. It is Appellant's position that criminal attempt to commit murder is an inchoate offense and the statute was not intended to apply to crimes that were not completed. Further, Appellant complains that the Commonwealth failed to prove that Beasley suffered a serious physical injury.

KRS 439.3401 provides, in pertinent part:

(1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim. The court shall designate in its judgment if the victim suffered death or serious physical injury.

(3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

While the applicability of KRS 439.3401 to inchoate offenses has not been expressly addressed by this Court, we have recently affirmed a conviction wherein the statute was applied to the crime of criminal attempt to commit murder. Brooks v. Commonwealth, Ky., 114 S.W.3d 818 (2003). Furthermore, Appellant has misconstrued the nature of an inchoate offense. An "Inchoate Offense" is defined as "A step toward the commission of another crime, the step itself being serious enough to merit punishment. In criminal law, the three inchoate offenses are attempt, conspiracy, and solicitation." BLACK'S LAW DICTIONARY 1108 (7th Ed. 1999). However, as further explained,

> "These preliminary crimes have sometimes been erroneously described as 'inchoate' offenses. This is misleading because the word 'inchoate' connotes something which is not yet completed, and it is therefore not accurately used to denote something which is itself complete, even though it be a link in a chain of events leading to some object which is not yet attained. . . . [T]he performance of a criminal attempt must always have been reached before the end is gained. In all these instances it is the ultimate crime which is inchoate and not the preliminary crime, the position indeed being just the same as in the example . . . of a man who stole a revolver and committed other crimes in order to effect his purpose of murder. There the murder was inchoate, but the larceny and other crimes (including the attempt) were completed."

BLACK'S LAW DICTIONARY, supra, at 1109 (Quoting J.W. Cecil Turner, Kenny's Outlines of Criminal Law 77 (16th ed. 1952)).

The crime for which Appellant stands convicted, attempted murder, was completed; it is a Class B felony and if found to have resulted in a serious physical injury or death, the defendant is a violent offender within the scope of KRS 439.3401.

We likewise find no merit in Appellant's argument that Beasley did not suffer a serious physical injury. Although the guilt phase instructions included the definition of "serious physical injury,"[3] the jury was not required to find that Beasley suffered a serious physical injury to convict Appellant of attempted murder. The penalty phase instructions, however, also contained the definition of serious physical injury and did require the jury to determine from the evidence whether Beasley suffered a serious physical injury. The jury made such a finding.

Beasley testified that she was shot four times, with one bullet remaining lodged in her chest near her heart. As we recently held in Brooks, supra, "Although medical testimony may be the preferred method of proving the serious physical injury requirement, lay testimony may be considered." Id. at 824. See Johnson v. Commonwealth, Ky. App., 926 S.W.2d 463 (1996). The jury was permitted to, and did, use common sense in finding that being shot four times with a .32 caliber weapon created a substantial risk of death, and that Beasley suffered serious physical injuries. Since the attempted murder charge was a Class B felony and the victim suffered a serious physical injury, Appellant was properly a subject for the violent offender limitation provided in KRS 439.3401. Accordingly, the trial court did not err in applying the statute.

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[3] "Serious Physical Injury" – Means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged impairment of the function of any bodily organ. See KRS 500.080(15)

III.

Finally, Appellant claims error in the trial court's refusal to remove a juror for cause who had allegedly formed an opinion of Appellant's guilt. During voir dire, defense counsel engaged in the following colloquy:

> Defense: I need to ask right now, need to see a show of hands, of everyone who could find George Smith not guilty right now before hearing any evidence? . . . Mr. Wilford, you did not raise your hand . . .
>
> Juror: [unintelligible] . . . he wouldn't be here.
>
> Defense: So you assume that he is guilty?
>
> Juror: I don't know that.
>
> Defense: But you are not saying he is innocent either, right?

Defense counsel thereafter moved to strike Juror Wilford for cause due to his inability to presume Appellant innocent. The trial court then posed the following questions:

> Judge: Mr. Wilford, on that response, do you believe that as he is seated here today before you without any evidence being presented, that George Smith should be considered innocent of the crime?
>
> Juror: He is here for some reason.
>
> Judge: He is here because he has been charged, I read the charge to you. It would be grossly unfair to ask any juror to decide any case without hearing any evidence, but if I were to ask you right now, and say you would have to vote one way or another how would you vote as to Mr. Smith, guilty or not guilty?
>
> Juror: [unintelligible]
>
> Judge: I understand you have not heard any evidence, and I told you the Indictment that I read to you was a charge, and that is not evidence in the case.

Although the poor sound quality of the videotape renders Juror Wilford's responses largely unintelligible, it is clear from the trial court's comments that Juror Wilford was explaining he could not decide the case until he had heard the evidence. In denying the motion to strike for cause, the trial court ruled consistently with Juror Wilford's answers. However, the trial court did note that defense counsel could further pursue the line of questioning, which she did not. The defense ultimately used a peremptory challenge to remove Juror Wilford.

Whether a juror should be removed for cause is a matter within the sound discretion of the trial court. Thompson v. Commonwealth, Ky., 862 S.W.2d 871 (1993). We do not believe that Juror Wilford's insistence on hearing the evidence prior to rendering an opinion equates to him having formed an opinion of Appellant's guilt. In Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 670 (1994), we held that "[t]he test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after hearing all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Here, the trial court properly determined that Juror Wilford was able to do so and, accordingly, removal for cause was not warranted.

The judgment and sentence of the Graves Circuit Court are affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, and Wintersheimer, J.J. concur. Keller, J., concurs by separate opinion in which Stumbo, J., joins.

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CONCURRING OPINION BY JUSTICE KELLER

I concur in the result reached in the majority opinion, but write separately because I disagree with portions of the majority opinion's analysis in Parts I and II. As to Part I, given that "[o]n July 30, 2001, Appellant filed a pro so 'Motion for a Fast and Speedy Trial' requesting that the trial court set the matter for trial 'at the earliest possible convenience of the Court pursuant to the 6th and 14th Amendments to the United States Constitution and Section 11 of the Kentucky Constitution[,]'"[1] I cannot agree with the majority opinion's suggestion that Appellant "never asserted his right to a speedy trial, other than merely asking for an earlier date at the court's convenience."[2] And, although Appellant's pro se motion was not properly served upon the Commonwealth, I believe that the motion constituted an assertion of his rights that, pursuant to Barker v. Wingo,[3] weighs in favor of Appellant's speedy trial claim. I agree,

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[1] Slip Op. at 2-3.

[2] Id. at 5.

[3] 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

however, with the majority's ultimate holding that Appellant's failure to demonstrate any prejudice from the timing of his trial demonstrates that there was no violation of his constitutional rights to a speedy trial.

As to Part II, I agree in principle with the majority's conclusion that "[s]ince the attempted murder charge was a Class B felony and the victim suffered a serious physical injury, Appellant was properly a subject for the violent offender limitation provided in KRS 439.3401." However, in light of the fact that the trial court's final judgment did not designate that the victim suffered serious physical injury – a factual finding that is a necessary predicate for the Department of Corrections to treat Appellant as a violent offender[4] – Appellant is not a violent offender, is not subject to KRS 439.3401's parole eligibility or good time disqualifications, and therefore cannot possibly have been prejudiced by the trial court's penalty phase jury instructions, which needlessly[5] required the jury to make a finding as to whether the victim suffered a serious physical injury. Although this allegation might become relevant if the Commonwealth takes note of the omission in the final judgment and files a motion pursuant to CR 60.02 in which it asks the trial court to amend the final judgment to reflect the fact that Appellant's victim suffered a serious physical injury, it is wholly moot at the present. Accordingly, I would dispose of Appellant's allegation of penalty phase

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[4] See KRS 439.3401(1) ("The court shall designate in its judgment if the victim suffered death or serious physical injury."); 501 KAR 1:030 § 3(1)(b) (stating that parole eligibility for a Class B felony conviction is calculated in accordance with KRS 439.3401 only "where the elements of the offense or the judgment of the court demonstrate that the offense involved death or serious physical injury to the victim.").

[5] See Brooks v. Commonwealth, Ky., 114 S.W.3d 818, 824 (2003) (holding that the trial judge, acting as fact-finder, properly determined for the purposes of the violent offender provisions of KRS 439.3401 that the injuries inflicted by Brooks on the victim were serious physical injuries).

error by holding that the trial court's failure to include the KRS 439.3401(1) "serious physical injury" finding in its final judgment rendered Appellant's allegation moot.

Stumbo, J., joins this concurring opinion.