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RENDERED: DECEMBER 22, 2005
AS MODIFIED: JANUARY 26, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 3-23-06 ELIA GROVE PDC

2004-SC-000364-MR

DARRYL BATTS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. BARRY WILLETT, JUDGE
99-CR-02134

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Darryl Batts, was convicted of ten counts of First-Degree Robbery, one count of First-Degree Possession of a Controlled Substance, and one count of First-Degree Persistent Felony Offender status. He now contends that the trial court erred (1) by refusing to suppress the drugs found on his person at the time of his arrest; (2) by omitting an element of First-Degree Robbery from the jury instructions; (3) by denying his request to use psychological records to impeach the testimony of a witness for the prosecution; (4) by allowing the prosecution to use its peremptory challenges in a racially-discriminatory manner; (5) by failing to enter a directed verdict on his behalf; and (6) by denying his motion to dismiss the indictment for violation of speedy trial rights. Finding no error, we affirm Appellant's convictions.

II. BACKGROUND

On August 16, 1999, Louisville police received a phone call from a retired police officer, James Owen, about some suspicious behavior he had observed. According to Owen, he had noticed a suspicious vehicle near a local Dairy Mart. Owen saw a black man, later identified as Darryl Robertson, step out of the vehicle, a blue Mercury Grand Marquis, and attempt to cover the license plate with a towel. Despite Robertson's efforts to conceal the license plate number, Owen was able to read and record some of the obscured number as 329-AL. Robertson reentered the car and was driven by another man to the Dairy Mart, where Robertson got out of the car and walked into the store. A few minutes later, Robertson returned to the car, and he and the other man drove away. Based on his experience as a police officer, Owen suspected the men were "casing" the Dairy Mart in preparation for a robbery.

Detective Mark Handy, a member of the Louisville Police Department, called Owen several days later to discuss his tip. Detective Handy was investigating a series of robberies in the Louisville area involving a car similar to the one described by Owen. Detective Handy asked Owen to accompany him to Appellant's home in an attempt to identify the vehicle he had seen, and Owen agreed. A blue Mercury Grand Marquis was parked outside Appellant's home, and Owen identified it as the one he had seen the previous week at the Dairy Mart. The license plate number on the vehicle matched the partial number Owen had recorded.

After Owen's identification, Louisville police initiated surveillance of the vehicle outside Appellant's home. On August 24, 1999, after receiving information about a robbery in southern Indiana involving a car similar to the blue Mercury Grand Marquis, police began searching for Appellant's car. Later that day, they found it sitting empty

outside a residence, but neither Appellant nor Robertson were in sight. Officers waited for the men to return to the car. Later, as Appellant and Robertson approached the car, the police confronted and arrested them for robbery. The police then searched the two men and found a small amount of cocaine in Appellant's sock. The police then took the two men to police headquarters, where they were kept in separate areas. Although Appellant denied the charges against him, Robertson confessed to the robberies and Appellant's involvement in them.

Appellant and Robertson were indicted on eighteen counts of First-Degree Robbery each. Appellant was also charged with First-Degree Possession of a Controlled Substance and being a First-Degree Persistent Felony Offender. Appellant was tried in December 2003. The jury convicted him on ten counts of First-Degree Robbery, one count of First-Degree Possession of a Controlled Substance, and one count of being a Persistent Felony Offender in the First-Degree. Appellant was sentenced to fifty years in prison. He appeals to this court as a matter of right. Ky. Const. § 110(2)(b).

III. ANALYSIS

We address the issues in the order in which they appear in Appellant's brief.

A. Suppression of Drugs

Appellant first claims that his motion to suppress the cocaine found on his person should have been granted. Appellant's arrest was warrantless and was based only on probable cause. Appellant argues that there was no probable cause, thus rendering his arrest and the subsequent seizure of the cocaine from his sock unlawful.

We believe the police had probable cause to arrest Appellant in this case. They had received information from Owen, a retired police officer, concerning suspicious

behavior outside a Dairy Mart in Louisville. According to Owen, the two men who were "casing" the Dairy Mart drove a blue Mercury Grand Marquis, which matched the description of a car that had been observed at the scene of other robberies. Owen identified the car in front of Appellant's home as the same car he had seen behind the Dairy Mart. Soon thereafter, the police received a call from Indiana about a possible robbery involving a get-away car fitting the description of the blue Mercury Grand Marquis. Later, they found Appellant with the car. The combination of these facts, especially Owen's description of the "casing" behavior and identification of the car, was sufficient to give the police probable cause to arrest Appellant.

Appellant also argues that even if his arrest was lawful, the search of his person, which led to the discovery of the cocaine, exceeded the permissible scope of a search incident to arrest because it had no reasonable relationship to the charge. Appellant's argument is predicated on the language: "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968). This argument confuses the scope of the search allowed under a Terry stop, which requires only that the police have a reasonable suspicion, with that allowed under an arrest, which requires the higher standard of probable cause.

Whereas a Terry stop is limited to a "pat down" or a "stop and frisk," a full search is allowed incident to a lawful arrest. It has long been the law that "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." Carroll v. United States, 267 U.S. 132, 158, 45 S.Ct. 280, 287, 69 L.Ed. 543 (1925) (emphasis added); see also Chimel v.

California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."); United States v. Childs, 277 F.3d 947, 952 (7th Cir. 2002) (noting specifically the distinction: "a person stopped on probable cause may be searched fully, while a person stopped on reasonable suspicion may be patted down but not searched"). To answer Appellant's claim more bluntly, a search incident to arrest is simply not limited to a search for evidence related to the charge that serves as the basis of the arrest. The search of Appellant was not part of a mere Terry stop. Rather, it was part of a full (and lawful) arrest, thus seizure of the cocaine was lawful.

B. Incorrect Jury Instructions

Appellant argues that the jury instructions were incomplete because they did not require the jury to find that Appellant intended for Robertson, the principal, to commit the robberies and because they omitted an element of first-degree robbery, namely, the element of the use or threat of immediate use of physical force upon the victim. Appellant did not object to the jury instructions at trial and now asks us to review his claim for palpable error pursuant to RCr 10.26.

The trial court instructed the jury on fourteen counts of First-Degree Robbery using an instruction in the following form:

> You will find the defendant guilty of First-Degree Robbery under this instruction if you believe from the evidence beyond a reasonable doubt all of the following:

> A. That in Jefferson County on or about the [__] day of August, 1999, Darryl Wayne Robertson stole or attempted to steal money from [person and location];
>
> B. That in the course of doing so and with the intent to accomplish the theft, Darryl Wayne Robertson was armed with a BB gun;
>
> C. That the defendant acted in complicity with Darryl Wayne Robertson.

The instructions also included the following definition of "complicity":

> **Complicity** – Means that a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of an offense, he solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such a person in planning or committing the offense.

As to Appellant's first claim about the failure to instruct on intent, we have previously stated that "[o]ften, th[e] element of intent is satisfied by giving a separate instruction defining complicity." Crawley v. Commonwealth, 107 S.W.3d 197, 200 (Ky. 2003). The separate complicity definition used in this case is identical to the one we approved in Crawley. Thus, the intent aspect of the instruction was not even an error, much less a palpable one.

We agree with Appellant that the trial court improperly failed to instruct on the element of the use or threat of immediate use of physical force upon the victim. See id. ("Robbery requires not only the element of an intent to accomplish a theft, but also the element of the use or threat of immediate use of physical force upon the victim."). However, we cannot say that this error rose to the level of palpable error. In the context of harmless error analysis, we have previously noted that prejudice is presumed when the jury is instructed erroneously. E.g., McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1992) ("[E]rroneous instructions to the jury are presumed to be prejudicial; that an

appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error.").

But mere prejudice does not necessarily rise to the level of "manifest injustice" as required under RCr 10.26, the palpable error rule. "Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial." Graves v. Commonwealth, 17 S.W.3d 858, 864 (Ky. 2000). Here, numerous witnesses to the robberies gave statements describing Robertson brandishing a weapon and demanding money from the cashier or other victim. Robertson himself testified that he would point the gun at the victim and demand money, sometimes cocking the gun in a menacing fashion. Although no witnesses testified that explicit threats were made to these individuals, pointing a gun at an individual and ordering him or her to hand over money includes an implicit threat of violence. Furthermore, the jury instructions, as given, at least required the jury to find that Robertson was armed with a gun when committing his robberies in order to find Appellant guilty. In light of these facts, it is unlikely that the result would have been different had the instructions been correct. As such, there was no manifest injustice and thus no palpable error.

C. Impeachment of Robertson

Appellant contends that the trial court improperly denied him the opportunity to use psychiatric records to impeach Robertson. In response to a question about his mental health history, Robertson testified that he had never experienced hallucinations. This statement contradicted psychological reports that the trial court had received from KCPC. Those records indicated that Robertson had complained of hallucinations during

a hospitalization in 1985, fourteen years before the robberies and eighteen years before the trial. Based on the contradiction between Robertson's testimony and the medical records, Appellant's lawyer moved to introduce the records to impeach Robertson. Relying on Commonwealth v. Huber, 711 S.W.2d 490 (Ky. 1986), the trial court ruled that although Robertson's testimony did conflict with the records, they could not be admitted because they were too remote in time and thus collateral to the relevant time period of the robberies and the trial.

The trial court ruled correctly. As we noted in Huber:

> The prior mental treatment of a witness is not relevant as to the credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about. The mere fact that a particular witness has been treated for any kind of psychiatric problem in the past is of no significance in the impeachment of that witness unless it can be shown that the psychiatric problems relate in some way to the credibility of the witness.

Id. at 491. Appellant's attorney failed to show that Robertson's hallucinations in 1985 had any relevance to the time of the robberies or the time of the trial. Absent such a showing, impeachment of Robertson's statement about hallucinations would be nothing more than impeachment on a collateral fact, that is, one that "could not have been introduced into evidence for any purpose absent the contradiction." Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.05[2], at 272 (4th ed. 2003).

Appellant attempts to evade the effect of Huber by claiming that it has been abrogated to some extent by Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994). Eldred, however, addressed when psychological records are discoverable, not when they are admissible. Id. at 702 ("[I]f a trial court is confronted with articulable evidence that raises a reasonable inquiry of a witness's mental health history, the court should

permit a defendant to discover that history." (internal quotation marks and indications of alteration omitted)). Thus, it is clear that Eldred is inapplicable to this case.[1]

D. Batson Challenge

Appellant claims that the prosecutor purposefully excluded black jurors from the venire on the basis of race, thus violating Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The jury panel initially consisted of forty jurors, eleven of whom were black. Three jurors, one of whom was black, were excused for cause. Thus, when the parties exercised their peremptory strikes, the jury panel consisted of thirty-seven jurors, ten of whom were black. In exercising his peremptory strikes, the prosecutor eliminated five of the ten black jurors on the panel. After both parties exercised their peremptory strikes, twenty-one jurors, five of whom were black, remained. The trial court randomly drew off seven jurors, leaving fourteen jurors (twelve plus two alternates) to hear the case. All five of the black jurors who remained after the peremptory strikes were eliminated by the seven random strikes.[2]

The next day, Appellant objected, claiming that the complete elimination of black jurors was a Batson violation. In response, the prosecutor offered his reasons for exercising peremptory strikes against five of the black jurors. Appellant claims that those reasons were mere pretext.

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[1] We also note that Appellant has failed to mention that Eldred itself has been abrogated in part on this issue by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), which held that a more restrictive approach was called for and required receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence before an in camera review of a witness's psychotherapy records will be authorized.

[2] Neither parties' brief discusses the fact that the last five black jurors were struck as the result of the random draw-off. In fact, both parties claim, incorrectly, that all the remaining black jurors were removed by the prosecutor's exercise of his peremptory strikes.

First, the prosecution claimed that Juror 67602 was struck because of her "vocal" nature and her conviction that the criminal justice system treated blacks unfairly. Juror 16121 was struck because the prosecutor thought his position as a minister and his concomitant persuasive speaking ability would allow him to unduly persuade the other jurors, thus allowing him a large degree of control over deliberations. Juror 26336 was struck because the prosecutor thought he had no desire to serve as a juror, had said he would be more worried about his job than the case, and had supplied little information on his jury information form. Juror 63763 was struck because of a past criminal conviction (he had pled guilty to violation of a no-contact order). Finally, Juror 49600 was struck because she had been caught sleeping during the lengthy voir dire and had said nothing in response to voir dire questioning. The trial court held that these reasons were sufficiently race-neutral. We agree and hold that the prosecutor's use of peremptory strikes against these jurors was not a Batson violation.

Appellant further urges us to accept the reasoning of Justice Combs's dissent in Commonwealth v. Snodgrass, 831 S.W.2d 176 (Ky. 1992), and require that any race-neutral reasons offered by the prosecutor be based on responses to questions during voir dire, that is, answers given under oath. Such a restriction, however, would prevent prosecutors from taking advantage of information gained through the direct observation of the demeanor of potential jurors and would force them to be bound by the answers given by jurors, even though such answers contradict other information known to the prosecutors. Moreover, the additional questioning and separate evidentiary hearings that would result from acceptance of Justice Combs's dissent would unnecessarily burden the trial process and, in effect, further raise the requirements for exercising

peremptory challenges toward the level required for exercising for-cause challenges. We decline Appellant's invitation to overrule Snodgrass.

Appellant also claims the trial court erred by not inquiring into whether the prosecutor's proffered race-neutral reasons might also apply to the white jurors who remained on the jury. It is true that the United States Supreme Court has recently held that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination ... ." Miller-El v. Dretke, __ U.S. __, 125 S.Ct. 2317, 2324 (2005). Appellant, however, has failed to offer any evidence that non-black jurors who were similarly situated to the stricken black jurors were allowed to serve, and, as previously noted, we will not burden the trial court with the duty to engage sua sponte in an unnecessarily lengthy voir dire investigation.

Finally, the fact that almost half of the prospective black jurors were eliminated during the random draw-off, after both parties had exercised their strikes, further undermines Appellant's Batson claim. The prosecutor had no hand in striking the final seven jurors, and thus his behavior was not the sole cause of all the black jurors being eliminated from the jury pool. And while we recognize that it was extremely unlikely for all five of the remaining black jurors to be eliminated during the random draw-off in this case, we must also acknowledge that such a result was not impossible.[3] Notably,

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[3] In fact, there is only about a 0.1%, or 1 in 1000, chance of this occurring under the given facts. In other words, when 5 of 21 jurors are black, it is highly unlikely that in randomly drawing off 7 of those jurors, all 5 of the black jurors would be eliminated. Though most readers will not be interested, we include the following discussion of how we arrived at this number to show that it was not pulled out of thin air.

In general, the probability of an event is determined by dividing the number of ways the event can occur by the total number of possible outcomes. This can be represented by the equation

Appellant neither claims nor points to any evidence in the record that the trial court acted in bad faith or pursuant to an improper motive in randomly striking the jurors. Although this result was certainly anomalous, we can only conclude that it was due to random chance. The vagaries of chance do not rise to the level of constitutional error. Indeed, they do not amount to error at all.

$$p(A) = \frac{x}{y}$$

where *p(A)* is the probability of event *A*, *x* is the number of ways the event can occur, and *y* is the total number of possible outcomes.

The difficulty in this situation consists of ascertaining the value of *x* and *y*. These numbers can be determined using the concept of "combinations" from combinatorial mathematics. A "combination" calculates the number of different ways there are of choosing *k* objects out of a larger group of *n* objects, where the order of choosing the objects does not matter. This number is the binomial coefficient "*n* choose *k*," which can be represented as

$$\binom{n}{k}.$$

The mathematical formula for calculating "*n* choose *k*" is:

$$\binom{n}{k} = \frac{n!}{k!\cdot(n-k)!}.$$

Using these concepts, we can calculate the probability that the trial court would strike all of the remaining black jurors when it randomly removed 7 jurors from the panel ("event A" discussed above). Simply stated, this probability can be determined by dividing the number of ways in which all 5 black jurors are eliminated by a 7 juror-draw by the total number of ways in which 7 jurors are eliminated from the 21 person pool.

The total number of ways to draw 7 jurors out of 21 is simply "21 choose 7." This number is going to be the denominator, *y*, in our probability calculation. Determining the numerator, x, is somewhat more complicated. It is necessary to recognize that in this situation, calculating the combination for drawing off <u>exactly</u> five black jurors is the same thing as calculating how many ways to draw off <u>exactly</u> two non-black jurors. This is because drawing exactly two non-black jurors when drawing 7 total jurors means that the other 5 must all be black jurors. The number of ways of drawing exactly 2 non-black jurors out of the 16 non-black jurors that are in the jury pool is "16 choose 2."

Applying these numbers to our probability formula, we reach the following result:

$$p(A) = \frac{\binom{16}{2}}{\binom{21}{7}} = \frac{\left(\frac{16!}{2!\cdot(16-2)!}\right)}{\left(\frac{21!}{7!\cdot(21-7)!}\right)} = \frac{120}{116\,280} = 0.00103199174$$

Rounding to one significant digit, this yields a probability of 0.001, or 0.1 percent. In terms of odds, the likelihood of this result is approximately 1 in 1000.

E. Directed Verdict

Appellant contends the trial court improperly denied his motion for a directed verdict. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). We look at all of the evidence in the light most favorable to the prosecution, Stopher v. Commonwealth, 57 S.W.3d 787, 802 (Ky. 2001), and we leave all questions as to credibility to the jury. Benham, 816 S.W.2d at 187.

Appellant claims he was convicted solely on the testimony of Robertson, who he describes as a "mentally-compromised, crack-addicted, lying thief." He points to the fact that Robertson signed an affidavit in 1999 stating that Appellant was not involved in the robberies, and claims Robertson appeared to have been coached in his testimony. Despite this, we still cannot say that the trial court erred by failing to grant a directed verdict. First, a reasonable jury could find the defendant guilty based solely upon the testimony of Robertson. The decision as to Robertson's credibility, specifically whether he lied on the stand in light of his prior affidavit, was solely within the province of the jury.

Additionally, Appellant's assertion that Robertson's testimony was the only evidence offered against him is simply incorrect. In fact, there were numerous other witnesses to these events. James Owen testified that he observed Robertson "casing" a local Dairy Mart while being driven by another person in a blue Mercury Grand Marquis with a partial license plate number 329-AL. A car matching this description was found outside Appellant's home, and Appellant was later arrested when he was approaching the car. Detective Ray Patterson testified that when he searched the car,

he found what appeared to be a black, semi-automatic weapon, which was later identified as a BB gun that had been used in several of the robberies. Rochelle Duncan, who was accosted by Robertson in a Winn-Dixie parking lot where he attempted to rob her, said that she saw Robertson get into the same blue Mercury Grand Marquis that was in front of Appellant's home and that another person was in the car. Correlle Marshall, Rose Fortney, Troy Vincent, and Natalie Robertson, who were victims of the robberies, further corroborated Robertson's testimony in many respects.

Though Robertson was the only person who confirmed Appellant's role in the robberies as the getaway driver, this testimony was not so implausible as to have required a directed verdict. Indeed, the testimony of the other witnesses, particularly the police officers who conducted surveillance at Appellant's home and observed the getaway car, provided another strong connection between Appellant and the crimes. Thus, the trial court properly denied the directed verdict motion.

F. Speedy Trial

Appellant raises the dual claim that his rights under KRS 500.110 and his right to a speedy trial under the Sixth Amendment were violated. Given the confusing and lengthy course of events between Appellant's indictment and his trial, including eight trial continuances, it is necessary to discuss briefly the timeline of the motions and other events leading up to trial before engaging in a discussion of the legal issues presented.

Appellant was indicted on August 31, 1999. When he was arraigned, his case was set for trial on February 22, 2000, and he was assigned a public defender. Appellant's court appearance on February 22, 2000 was treated simply as a pretrial hearing because discovery was not complete; the trial court continued the trial to August 15, 2000. Appellant and his attorney were present when the continuance was granted.

On April 17, 2000, a new attorney, on contract with the public defender's office, was assigned to Appellant's case because his prior attorney had left the public defender's office for private practice. On August 15, 2000, Robertson, Appellant's codefendant, pled guilty, and Appellant's trial was continued until March 13, 2001.

On the March 13, 2001 trial date, Appellant's attorney requested a continuance. The trial court offered dates in May 2001 and October 2001, and Appellant's attorney opted for the October date. In 2001, Appellant's contract public defender moved to withdraw from the case; the motion was granted. Appellant was assigned a new public defender, and the trial court rescheduled Appellant's trial for February 26, 2002. In December 2001, Appellant's attorney moved that the trial be continued again because he was to be out of the country on February 26, 2002. The motion was granted and the trial was rescheduled for June 18, 2002.

On February 27, 2002, Appellant filed a pro se motion to dismiss the indictment against him for the failure to grant him a speedy trial. On May 20, 2002, Appellant mailed a Notice of Submission of Case for Final Adjudication with regard to his motion to dismiss the indictment. On June 5, 2002, the trial court notified Appellant's attorney that the trial would have to be continued again because of a scheduling mistake by the court. That same day, Appellant's attorney moved the trial court to rule on all previously filed motions, including Appellant's pro se motion. On July 12, 2002, Appellant filed a pro se petition for mandamus against the trial court with the Court of Appeals. The petition asked for a writ of mandamus to compel the trial court to "review the facts and circumstances of the facts in th[is] ... case, and to determine ... whether [Appellant] has been denied his Sixth Amendment Right to a Fast and Speedy Trial."

The trial court finally ruled on Appellant's pro se motion on July 29, 2002. In doing so, the trial court engaged in the four part analysis required under Barker v. Wingo, 407 U.S 514, 530, 92 S.Ct. 2182, 2192 (1972), noting: (1) that the then 34 month delay was presumptively prejudicial; (2) that the delay had been caused by Appellant's attorney, the prosecutor, and the court, though most of the delay was due to Appellant's attorney; (3) that Appellant effectively asserted his speedy trial right by filing his pro se motion on February 27, 2002; and (4) that Appellant had presented no evidence of prejudice given that his parole related to earlier robbery convictions had been revoked and he was serving a twenty year sentence. The trial court then found that while the delay seemed excessive, there had been no violation of Appellant's speedy trial rights in light of the Barker factors. As a result of this ruling, the Court of Appeals later dismissed Appellant's petition for writ of mandamus as moot. Appellant's trial was also rescheduled for January 21, 2003 by order entered July 29, 2002.

On November 19, 2002, Appellant sent his attorney a profanity-laden letter accusing him of ineffective assistance of counsel and asking that he investigate and pursue the case more vigorously. On January 2, 2003, Appellant moved to have his public defender removed and to be assigned a new attorney. On March 3, 2003, Appellant's public defender also asked to be removed from the case due to a pending bar complaint filed by Appellant and irreconcilable differences between himself and Appellant. Appellant's attorney's motion to withdraw was granted on June 11, 2003, and new counsel was appointed on July 8, 2003.

A petition for a writ of prohibition against the trial court, dated January 9, 2003, also appears in the record. The petition was based on the claim that the trial court was proceeding without jurisdiction, having failed to hold Appellant's trial within 180 days of

his February 26, 2002 motion to dismiss for failure to grant a speedy trial. In his petition, Appellant alleged that his February 26, 2002 motion was a request pursuant to KRS 500.110, which contains the 180 day trial requirement that is part of the Interstate Agreement on Detainers. The petition was filed under the same Court of Appeals case number as the prior petition for mandamus, and it is unclear whether the petition was actually filed with the Court of Appeals (no ruling on the petition appears in the record and the Court of Appeals' case information website does not indicate that this second petition was ever filed).

The trial court ordered another continuance at a January 14, 2003 pretrial hearing. In continuing the trial that was to be held the next week, the trial court noted that Appellant had recently moved to fire his attorney and that his petition for a writ of prohibition was pending before the Court of Appeals. Appellant's trial was continued to September 23, 2003. When the parties appeared on that date, a short continuance was granted by agreement of the parties to allow for final trial preparation. Appellant was finally tried on December 16, 2003.

1. KRS 500.110

The statute that Appellant now claims he invoked provides:

> 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 ... 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 <u>after he shall have caused to be delivered</u> to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and <u>his request for a final disposition to be made of the indictment</u> ...; 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.

KRS 500.110 (emphasis added). Failure to meet the statute's 180 day limitation can strip the circuit court of jurisdiction to try a criminal defendant. Spivey v. Jackson, 602 S.W.2d 158 (Ky. 1980).

However, a defendant can only claim the statute's protection after three things have occurred: (1) a detainer has been filed; (2) the defendant requests final disposition of the pending indictment; and (3) the defendant puts the prosecutor and trial court on notice of his place of imprisonment and his request for final disposition of his indictment. Id.; see also Donahoo v. Dortch, 128 S.W.3d 491 (Ky. 2004) (focusing on the detainer and notice requirements and noting that defendant has the burden of showing service of the notice on the prosecutor). Though there is no direct evidence of a detainer having been filed in this case, several reports from the prison where Appellant was incarcerated indicate that a detainer had indeed been filed, thus likely satisfying the first element of the statute.

Despite Appellant's plea for application of the rule of leniency, however, we simply cannot rule that Appellant actually requested final disposition of his indictment in the February 2002 motion. Appellant claims his discussion of the statute in the motion is enough to satisfy this requirement, but his only reference to KRS 500.110 is: "As such, this Defendant asserts that the requirements of KRS 500.110 that his right to a Fast and Speedy Trial will be afforded within 180 days once such a request is made, is inapplicable." This language comes in Appellant's discussion of the Barker v. Wingo factor that looks into whether the defendant has asserted his speedy trial right. Appellant discussed the statute only because he thought that its requirement that "final

disposition" be affirmatively invoked also applied to the more general Sixth Amendment speedy trial right.

Ultimately, however, the pro se motion asked only that the case be dismissed due to violation of Appellant's Sixth Amendment requirement of a speedy trial. Appellant never prospectively asked for final disposition of his indictment. Failure to put the prosecutor and the trial court on notice alone is grounds for denying relief under the statute. Donahoo, 128 S.W.3d at 495. Consequently, failure even to request final disposition must also be grounds for denying relief under the statute.

2. Sixth Amendment

Given the nature of Appellant's pro se motion to the trial court, and the way the issue is treated in Appellant's brief (namely as part of an extended discussion of Barker v. Wingo), his claim is analyzed more appropriately as a Sixth Amendment violation, rather than a statutory violation. As the trial court correctly noted, the Sixth Amendment speedy trial right is analyzed under a balancing test involving four factors: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right to a speedy trial; and 4) the resulting prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972).

The trial court was correct in its memorandum opinion denying Appellant's pro se motion to dismiss in that the length of the delay, then 34 months, was presumptively prejudicial. See Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000) (finding 34 month delay to be presumptively prejudicial); McDonald v. Commonwealth, 569 S.W.2d 134 (Ky. 1978) (three year delay). There is little question then that the ultimate delay between indictment and trial in this case, over four years, was presumptively prejudicial, thus requiring that we extend our inquiry to the other factors.

The trial court concluded that the delay, at least after 34 months, was due in large part to Appellant. During this period, Appellant changed counsel two times, and one of his attorneys made at least one of the motions to postpone the trial date. After the trial court ruled on the pro se motion, Appellant filed a bar complaint against his attorney and asked that his attorney be fired. This led to the appointment of his fourth attorney and, of course, further delay. Though we cannot quantify exactly how much of the delay was due to Appellant's difficulties with his many lawyers, it is clear that a significant portion of the delay was due to these conflicts. Only two of the continuances—when the codefendant pled guilty and when the trial court made a scheduling mistake—were caused solely by the trial court or the prosecutor. The other continuances were related to a change in Appellant's representation, the result of a motion by Appellant, or the product of an agreement to continue the case. We can only conclude that Appellant was responsible in large part for the delay.

Though the question of assertion of the right is not dispositive, it is a factor to be considered. Appellant never asserted his speedy trial right. Despite the trial court's conclusion otherwise, the February 2002 pro se motion to dismiss for lack of a speedy trial cannot be considered a motion for a speedy trial. See McDonald v. Commonwealth, 569 S.W.2d 134, 137 (Ky. 1978) ("We 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. The motion to dismiss presents an issue which must be decided by the trial court based on the delay prior to the motion. Here the trial court was never put on notice that McDonald demanded or wanted a speedy trial."). Additionally, Appellant was present most of the times when the trial court continued his trial date, yet the record fails to

indicate that he ever objected, even after he filed his motion to dismiss. "If a defendant acquiesces in a delay, he cannot be heard to complain about the delay." Gabow, 34 S.W.3d at 70; see also Wells v. Commonwealth, 892 S.W.2d 299, 303 (Ky. 1995); Preston v. Commonwealth, 898 SW.2d 504, 506 (Ky.App. 1995).

Finally, Appellant fails to show any prejudice. Prejudice to the defendant

> should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) 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.

Barker, 407 U.S. at 532, 92 S.Ct. at 2193 (footnote omitted).

Appellant was already serving a twenty-year sentence while awaiting trial (and, as noted above, failed to invoke any statutory protection he might have had in this respect). Thus, there was little impact on the first two interests identified in Barker. Appellant argues that he was prejudiced by the fact that his parole was revoked because of the indictment and his parole hearings were deferred twice because of the outstanding indictment during the four years he was waiting for trial. But this has little to do with the interests identified in Barker (and much more to do with the interests KRS 500.110 was designed to protect), especially since Appellant offers no proof that he would have been granted parole had the indictment in this case been resolved. As for the last interest to consider under the prejudice prong, Appellant does not even claim, much less show, impairment of his defense.

The length of the delay in this case clearly weighs in favor of Appellant. While the reason for the delay factor does not weigh completely against Appellant, since at least some of the delay was caused by the prosecutor or the trial court, most of the

delay is attributable to him or his attorney. Appellant's failure to request a speedy trial and failure to establish any prejudice further undercuts his claim of a Sixth Amendment violation. Balancing these factors, we conclude that Appellant was not denied his Sixth Amendment right to a speedy trial.

IV. CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction.

All concur. Lambert, C.J., also concurs by separate opinion in which Graves and Scott, J.J., join.

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NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0364-MR

DARRYL BATTS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. BARRY WILLETT, JUDGE
NO. 99-CR-02134

COMMONWEALTH OF KENTUCKY — APPELLEE

CONCURRING OPINION BY CHIEF JUSTICE LAMBERT

The initial venire in Batts' trial consisted of forty potential jurors, at least eleven of whom were African-American. Initially, the trial court dismissed one African-American juror because she indicated that it would be a hardship for her to find child care during the trial. At this time, a Caucasian male was also dismissed because the trial court believed he was trying to inflame the jury with his comments during the court's voir dire. Another potential juror whose race is unknown was dismissed for reasons unclear from the record.

After the attorneys conducted voir dire, the Commonwealth challenged one juror, an African-American female, for cause. The trial court denied the challenge. Accordingly, thirty-seven potential jurors remained when the attorneys exercised their peremptory strikes. Each side was allowed nine peremptory strikes. Defense counsel exercised all nine strikes and the Commonwealth used eight of its strikes. Five of the

Commonwealth's eight strikes were exercised against African-Americans. It is not clear from the record how many, if any, of defense counsel's nine strikes were exercised against African-Americans. Both counsel made their peremptory strikes simultaneously and, ultimately, one juror was stricken by both defense counsel and the Commonwealth. Thus, twenty-one potential jurors remained after peremptory strikes were announced. Of the twenty-one remaining jurors, five were African-American. The trial court then randomly struck seven of the twenty-one to seat twelve jurors and two alternates. Of the seven who were randomly stricken, five were African-American. Thus, the five African-Americans who remained in the jury pool after the exercise of peremptory strikes were all removed by the trial court's random draw-down, leaving no African-Americans on the jury.

Defense counsel made a Batson challenge and the trial court required the Commonwealth to state the reasons for each of its five peremptory strikes against African-American jurors. One was used against the juror the Commonwealth had sought to strike for cause. During voir dire, this juror revealed that she had had a cousin wrongfully convicted of a rape, who, ultimately, had been found innocent after serving ten of his twenty-year sentence. One strike was used against a minister. The Commonwealth stated that this juror had great speaking skills and from his comments during voir dire, the Commonwealth feared that he would potentially influence jurors based on social and philosophical ideals rather than the evidence. The Commonwealth struck another juror because he stated that he needed to work during the day, he did not want to serve and he did not fill out the requested information on his juror form. When defense counsel stated that he would be interested to know whether the Commonwealth struck a Caucasian juror who had said that missing work would cause

him a hardship, the trial court checked the Commonwealth's strikes and it had, in fact, struck this juror as well. Another African-American juror was struck by the Commonwealth because she did not respond to any of the attorneys' questions and the Commonwealth said she was sleeping during voir dire. And, finally, the Commonwealth struck a black juror because he had previously pled guilty to a no-contact order. The trial court found that each of these reasons was an acceptable race-neutral reason.

As the facts heretofore set forth demonstrate, I have painstakingly reviewed the record in an effort to determine whether a Batson violation occurred. Based on my understanding of Batson and Miller-El v. Dretke[1], I am unable to say that there was such an error. Nevertheless, one must wonder how an all white jury could have been seated in this case when the forty juror venire started with at least eleven African-American jurors. Factually, of course, one African-American juror was excused on a plea of hardship and she, along with two other jurors who were also excused, brought the panel number to thirty-seven. Thereafter, the prosecution used five of its nine allotted peremptory challenges to remove African-Americans, but the trial court believed the reasons given were race-neutral. Finally, the five remaining African-American jurors were excused when a random draw to eliminate seven of twenty-one jurors included the remaining five African-American jurors.

Despite the absence of articulable legal error justifying relief on appeal, it astounds me that there could not have been at least one or two African-American jurors among the final fourteen when in fact there were eleven or more among the forty who began.

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[1] 2005 WL 1383365, __ U.S. __ (Ky. 2005).

I reluctantly conclude, therefore, that this Court's rule[2] whereby the number of peremptory challenges is established is too generous and should be reduced significantly. I have always believed that counsel and parties should have some ability to eliminate jurors who possess unrevealed personal animus, but allowing a sufficient number of peremptory challenges to permit elimination of all or most members of a racial minority is too many.

The 1999 Hearst Survey for the National Center of State Courts found that "fifty-six percent of respondents agree that "Most juries are not representative of the community."[3] Moreover, the Hearst Survey reveals a wide gap in the relative trust or distrust of judicial institutions between white and African-American citizens.[4] African-American citizens have a significantly higher level of distrust of the courts than do white citizens.[5] "Almost 70% of African-American respondents think that African-Americans, as a group get 'Somewhat Worse' or 'Far Worse' treatment from the courts."[6] The absence of black jurors in cases involving black defendants exacerbates this level of distrust, and judicial policy-makers should endeavor to correct the problem. I fear, however, that so long as litigants are awarded substantial numbers of peremptory challenges, they will use those challenges in a racially stereotypical manner. In most cases, observance of racial stereotypes is without a racial animus component, but will merely reflect observance of conventional perceptions of behavior based on race. When called upon to give race-neutral reasons for the use of peremptory challenges,

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[2] RCr 9.40.
[3] Nat'l Ctr. for State Courts, How the Public Views the State Courts: A 1999 Survey (1999), p.7, available at http://www.ncsc.dni.us/ptc/results/results.pdf.
[4] Id.
[5] Id.
[6] Id. at 8.

even minimally adept counsel will be able to state a reason that a trial judge cannot find to be pretextual.

For the foregoing reasons, I must concur.

Graves and Scott, JJ., join this concurring opinion.

Supreme Court of Kentucky

2004-SC-0364-MR

DARRYL BATTS — APPELLANT

V.

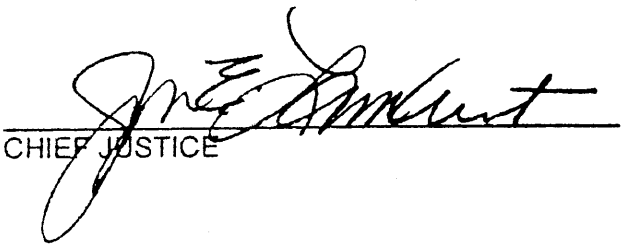
APPEAL FROM JEFFERSON CIRCUIT COURT
HON. BARRY WILLETT, JUDGE
NO. 99-CR-02134

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER OF CORRECTION

The Opinion of the Court entered December 22, 2005, is hereby corrected on its face by substitution of the attached page 1 of the majority opinion and page 1 of Chief Justice Lambert's Concurring Opinion in lieu of the original first pages of the opinions. The purpose of this Order of Correction is to correct an error on the Concurring Opinion as to publication and does not affect the holding of the Opinion.

ENTERED: January 26, 2006.



CHIEF JUSTICE