IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000100-MR

DATE 1-11-07 E.M.C.

RALPH SCOTT — APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On December 25, 2001, the Paducah Police Department issued a dispatch describing a van that was suspected of being used in a criminal incident in McCracken County. Officer James Davis who was on patrol located a van matching the description parked in the lot of a Shell Mart. He observed a woman in the driver's seat and Appellant, Ralph Scott, in the passenger's seat. As Officer Davis approached the van, Appellant put his right hand in his pocket. Appellant failed to comply when Davis requested that he remove his hand from his pocket. Davis drew his weapon and walked toward the passenger side of the van. As he did so, he observed Appellant withdraw his hand and pitch something over his left shoulder into the back seat. Davis directed Appellant to exit the van, handcuffed him and conducted a pat-down search. He then flashed a light in the vehicle and saw what was ultimately determined to be about twenty grams of crack cocaine in the floorboard behind the driver's seat. Appellant was

arrested and during a search incident to arrest, Officer Davis discovered $1,352.00 in small bills in Appellant's pants' pockets.

Appellant was charged and convicted, upon a jury verdict, of first-degree trafficking in a controlled substance, second offense and of being a persistent felony offender (PFO) in the second degree. He was sentenced to twenty years imprisonment on the trafficking conviction which was enhanced to thirty years by the PFO conviction. On appeal to this Court as a matter of right,[1] Appellant raises two arguments; namely, that he was deprived of a fair trial because of prosecutorial misconduct and that his right to a speedy trial was violated.

Turning first to the speedy trial issue, which is unpreserved, Appellant requests this Court to review the issue for palpable error pursuant to RCr 10.26. The right to a speedy trial is guaranteed by the Sixth Amendment and §14 of the Kentucky Constitution. In its brief to this Court, the Commonwealth notes lack of preservation and proceeds directly to an analysis under the balancing test set out by the United States Supreme Court in Barker v. Wingo.[2] Thus, we must address the proper standard of review for speedy trial claims that are wholly unpreserved.

While preservation of an issue, generally, is the responsibility of the party asserting error, speedy trial clams are unusual in that the primary burden of bringing cases to trial lies with prosecutors and courts, regardless of whether a defendant demands a speedy trial.[3] However, the U.S. Supreme Court has designated the defendant's efforts to obtain a trial as one of four primary factors to be considered. The

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[1] Ky. Const. § 110(2)(b).
[2] 407 U.S. 514, 92 S.Ct 2182, 33 L.Ed.2d 101 (1972). See also Bratcher v. Commonwealth, 151 S.W.3d 332 (Ky. 2004).
[3] Id.

Court "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[4] Thus, we conclude that RCr 10.26, which requires a showing of "manifest injustice," is complimentary of the Barker balancing test.

While Barker requires that each speedy trial claim be reviewed on an individual basis, it sets out four primary factors to aid in the evaluation. These factors are the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[5] The first inquiry must focus on the length of the delay, and only if the length is presumptively prejudicial to the defendant is it necessary to proceed to balance the other factors.[6]

In the instant case, Appellant was arrested on December 25, 2001, and indicted on February 14, 2002. Arraignment was scheduled on March 15, 2002, but Appellant did not appear. It was later determined that Appellant's failure to appear was due to his incarceration in the McCracken County Jail on unrelated charges. In fact, he was not arraigned until February 20, 2004. Thus, the record reveals that Appellant was in jail on March 15, 2002, and the proof of service of the arrest warrant and summons reveals that he was in jail on February 11, 2004. While it is not explicit in the record that Appellant was in jail during the interim, the trial court's order of February 20, 2004, recalling a bench warrant issued due to Appellant's failure to appear on March 15, 2002, indicates that Appellant had been in jail throughout this period. Appellant's first trial on October 21, 2004, ended in a mistrial and his second trial was held on November 4, 2004.

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[4] Id. at 532.
[5] Id. at 530.
[6] Id.

Accordingly, though Appellant was indicted less than two months after his arrest, an additional two years elapsed before he was arraigned, and more than eight months passed before he was tried. After Appellant's first trial ended in a mistrial, he was re-tried within a couple of weeks. Thus, the ultimate delay between Appellant's arrest and his trial was just shy of three years. As the length of the delay must be evaluated in light of the nature of each case,[7] and this case reveals no legal or evidentiary complexities, we hold the delay to be presumptively prejudicial to Appellant.[8] In fact, the Commonwealth virtually concedes the likelihood of such a presumption.

The next factor to be considered is the reason for the delay. It is the Commonwealth's responsibility to assign reasons for its delay in bringing a case to trial.[9] The Commonwealth contends that the record contains at least an inference that Appellant's incarceration on unrelated charges contributed to the delay. However, there is also an inference that the Commonwealth could have discovered that Appellant was incarcerated in the same county on the day his arraignment was initially scheduled. The Commonwealth's awareness of Appellant's prior felony convictions in McCracken County is evidenced by its reference to them in the indictment for this crime. While there is no evidence that the Commonwealth deliberately attempted to delay, neither is there evidence of a valid reason for it. Thus, this factor also weighs in Appellant's favor.

The next factor to be considered is the defendant's assertion of his right to a speedy trial. While Barker rejected the contention that the failure to demand a speedy trial operates as an absolute waiver, it stressed that a defendant's assertion of his right

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[7] Id.
[8] See, e.g., Bratcher, 151 S.W.3d 332 (holding an eighteen month delay to be prejudicial).
[9] Barker, 407 U.S. 514.

is entitled to strong evidentiary weight in determining whether he has been deprived of that right.[10] "The more serious the deprivation, the more likely a defendant is to complain."[11] Here, Appellant did not assert his right to a speedy trial; he made no complaint in the trial court. Thus, his failure in this respect will be fatal to his claim unless we determine that the delay otherwise resulted in manifest injustice.[12]

Under both the Barker balancing test and RCr 10.26, we must examine the prejudice to Appellant resulting from the delay. The constitutional right to a speedy trial was designed to prevent prolonged pre-trial incarceration, to minimize anxiety of the accused, and to minimize the possibility that the defense will be impaired.[13] Accordingly, we must examine any prejudice to Appellant in light of these objectives.

While the record is sparse, it appears that Appellant's pre-trial incarceration, of whatever duration, was due to unrelated charges. However, Appellant contends that the delay prevented him from locating a witness, the driver of the vehicle. This contention, if substantiated, weighs heavily in Appellant's favor because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[14] An inference may be drawn that the length of the delay may have contributed to the difficulty in locating the witness. However, while Appellant's attorney stated to the trial court that he had searched but could not find the driver of the van, there is no indication that the witness would have been easier to locate if the trial had been sooner rather than later. Additionally, the record does not reveal how this witness

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[10] Id.
[11] Id. at 531.
[12] RCr 10.26.
[13] Barker, 407 U.S. 514.
[14] Id. at 532.

could have been helpful to Appellant's case. Thus, Appellant has not demonstrated how he was prejudiced by her absence at trial. We will not indulge in speculation favorable to Appellant where the lack of evidence in the record stems largely from Appellant's complete failure to assert his right to a speedy trial.

Finally, with respect to speedy trial, while we do not condone the delay that occurred in this case, we conclude that Appellant has failed to show that the delay resulted in manifest injustice.

Appellant also alleges that he was deprived of a fair trial due to prosecutorial misconduct during the Commonwealth's closing argument. As noted earlier, the driver of the vehicle did not testify. In closing argument, the Commonwealth informed the jury that Appellant's counsel had the power to subpoena witnesses but did not call the driver of the vehicle, insinuating that she would not have been helpful to Appellant's case. Appellant objected but the trial court overruled the objection. Appellant asserts that the Commonwealth's comments were inflammatory and impermissibly shifted the burden of proof to him. However, it was Appellant's counsel who initially raised the issue in closing argument and provided alternate defense theories based on supposition of the missing witness's role in the incident. "This Court has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence, as well as respond to matters raised by the defense."[15] The Commonwealth's comments were somewhat responsive to Appellant's closing argument and simply pointed out that

[15] Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (citing Lynem v. Commonwealth, 565 S.W.2d 141 (Ky.1978), and Hunt v. Commonwealth, 466 S.W.2d 957 (Ky.1971)).

Appellant had failed to offer any evidence to support his counsel's speculations.[16] The ruling of the trial court did not amount to an abuse of discretion.

Lastly, Appellant complains of the Commonwealth's "send a message" comments during closing arguments. As Appellant did not object to these comments, the issue is unpreserved. Appellant requests a review for palpable error under RCr 10.26. The Commonwealth asserts that the comments were proper because the jury was asked to send a message only to Appellant, not to the community. We do not believe that this distinction renders the "send a message" mantra acceptable. Nonetheless, we cannot say that the comments constituted an error so fundamental as to threaten Appellant's entitlement to due process of law, as is required to demonstrate manifest injustice.[17] However, had the issue been preserved, a more rigorous analysis would have been required. Thus, while such comments do not constitute manifest error in the instant case, we note that, generally, any benefit the Commonwealth perceives in utilizing such an argument is far outweighed by the risk of reversal on appeal.

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

Lambert, C.J., and Graves, McAnulty, Minton, Noble, Scott, and Wintersheimer, JJ, concur.

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[16] See Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002) (holding Commonwealth's comment that the Defendant could have called his mother as a witness, but did not, to be well within limits of acceptable comments).

[17] Martin v. Commonwealth, ___ S.W.3d ___ (Ky. 2006).

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