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RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

NO. 2005-SC-000609-MR

RAFI ALI — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 03-CR-00609-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Rafi Mukthar Ali's first murder trial ended in mistrial declared after the jury deadlocked. On retrial, Ali was convicted of murder and of being a first-degree persistent felony offender (PFO I). He was sentenced to thirty-five years' imprisonment. On direct appeal to this Court, Ali argues that the second trial exposed him to double jeopardy and abridged his right to a speedy trial. We disagree and affirm the judgment.

I. FACTS.

The grand jury indicted Ali and a co-defendant in December 2003 for the murder of LaShawn Hughes. Six months later, Ali filed a motion for a speedy trial; and his first jury trial commenced one month after that.

At the first trial, several witnesses testified to seeing Ali shoot Hughes in retaliation for Hughes's severely beating Ali's cousin. Ali contends that these

eyewitnesses were intimidated into giving false testimony. He contends that the only eyewitness to the shooting—one who immediately called 911 and who was not connected with "the Covington street crowd"—stated that Ali did not match her description of the shooter. Another witness, Delmar Johnson, provided Ali with an alibi by testifying that he was driving Ali to Hamilton, Ohio, when Hughes was shot.

A. The First Trial—Double Jeopardy Facts.

Testimony in the first trial lasted approximately six days before the case was submitted to the jury before noon on August 4, 2004. Around 7:30 that evening, the trial judge informed counsel that she had interrupted jury deliberations by entering the jury room to take the jurors' dinner order. While there, the judge reported, a juror asked, "Is there a time? How long do we go on?" After leaving the jury room, the judge informed counsel that she had entered the jury room and that she had refused to answer questions while there. The judge then suggested to counsel that she would play back some testimony that the jurors had requested to review and give them an "Allen charge."[1] The Commonwealth's Attorney expressed concern about giving this charge

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[1] Referring to Allen v. U.S., 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896), in which the United States Supreme Court approved a judge's instructions to a potentially deadlocked jury: "that in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, [on] the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." Kentucky Rules of Criminal Procedure (RCr) 9.57 has superseded the "Allen charge" but use of the term persists. RCr 9.57 states that:

before the jurors had clearly indicated that they were deadlocked. In apparent deference, the trial court refrained from giving the charge that evening.

After giving the jury a dinner break and after replaying requested testimony, the court sent the jury back to their deliberations. As the evening wore on, the court discussed with counsel whether to ask the jury if they were close to a verdict and wished to continue deliberating that night or if they preferred to recess for the night to return the next day as defense counsel suggested. Around 10:00 p.m., the judge sent the jury a note asking, "Do you want to call it a night?" The jury replied with a note asking, "Does that mean we go home and come back in the morning?" The trial court replied by note, "yes, please." The court recessed for the night around 10:30.

Jury deliberations resumed the following morning about 9:00. Around noon, the trial court again mentioned the "Allen charge," to which the prosecutor again

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(1) If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:

(a) in order to return a verdict, each juror must agree to that verdict;

(b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;

(d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and

(e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

(2) The Court shall not poll the jury before a verdict is returned.

The trial court ultimately instructed the jury according to RCr 9.57 (rather than Allen); nonetheless, the trial court used the general term "Allen charge."

protested, and again the trial court deferred. Deliberations continued into the afternoon. When the jury requested clarification of a phrase used in instructions, the trial court interpreted this as showing deadlock. At about 3:30 in the afternoon, the Commonwealth and defense counsel agreed for the court to ask the jury whether it was "moving forward." Despite some reluctance, the Commonwealth acquiesced in the trial court's decision to give the "Allen charge." The jury was brought into open court and after being asked by the court if they were "moving forward," answered "yes." The trial court then gave the charge with the substantial elements required by RCr 9.57, and the jury resumed their deliberations shortly before 4:00 p.m.

Just a few minutes later, the jury sent the judge a note asking how to proceed. The judge expressed to counsel her impression that the jury was truly deadlocked and sent the jury a note asking if more time would help. The jury replied by note, "We apologize, but unfortunately not." The judge told counsel she would then declare a mistrial due to "manifest necessity." The Commonwealth stated its objection to the mistrial. Defense counsel made no objection. The judge then brought the jury into open court, declared a mistrial, and discharged the jury.

While admitting that he did not preserve the issue, Ali contends that no "manifest necessity" existed for the mistrial and, thus, that he was improperly subjected to a second trial for the same offense in violation of his rights against double jeopardy.

B. The Second Trial—Speedy Trial Concerns.

Several days after the mistrial, the trial court granted Ali's original trial counsel's motion to withdraw. Ali obtained new trial counsel; discovery proceeded; and retrial was scheduled for January 12, 2005. On December 20, 2004, Ali filed a motion

for funding for transcripts to be prepared from the videotapes of the first trial, stating that transcripts were necessary to present his theory of the case at trial and to allow the trial to proceed in an efficient manner. On December 28, 2004, a grand jury indicted Ali for PFO I.

On January 10, 2005, two days before the second trial was scheduled to begin, the Commonwealth moved for a continuance, stating that the prosecutor assigned to the case was not prepared to begin trial due to his recent busy trial schedule. The Commonwealth stated that it needed more time to subpoena witnesses and to arrange for witnesses in custody to be transported to the trial to testify. Defense counsel renewed the earlier speedy trial demand made by Ali and moved to dismiss the charges due to violation of speedy trial rights. The trial court expressed a reluctance to continue the trial but also expressed an unwillingness to dismiss charges that had already gone to trial. Defense counsel suggested that the charges be dismissed and that the parties brief the issue of whether the dismissal was with or without prejudice, stating this would give the Commonwealth a chance to "regroup" if the dismissal was without prejudice and that, in the meantime, perhaps Ali could be transported to a different correctional facility to serve out his remaining sentence on an unrelated parole revocation charge. The trial court sent defense counsel to inquire of Ali whether he might be more agreeable to a continuance if the trial court arranged for transfer to a more comfortable correctional facility. The trial court also pointed out that a continuance might give the defense a chance to obtain transcripts before trial.

After meeting with Ali, defense counsel reported that Ali did not agree to the delay and continued to assert his speedy trial rights. The trial court announced that

it would not dismiss the charges and was granting the continuance over Ali's speedy trial objection. The trial court also stated it would move Ali to a better facility and that it would grant the motion for transcripts. Following this ruling, Ali entered his plea of not guilty to the PFO charge. The new trial date was set for April 6, 2005.

On April 4, 2005, Ali moved for a continuance because he was unable to secure the attendance of some witnesses for the scheduled trial date. The continuance was granted, and trial was reset for July 2005.

At the second trial, as at the first, several witnesses testified to seeing Ali shoot the victim. The one witness who had called 911 after witnessing the shooting testified that Ali did not match her description of the shooter. Ali took the stand and testified that although he had been upset about LaShawn Hughes beating his cousin, and although he had made remarks that others might find threatening, he had left the scene of his cousin's beating in Delmar Johnson's car and had been dropped off at Ali's mother's house in Hamilton, Ohio. He testified that he was not at the scene when Hughes was shot.

The Commonwealth called Delmar Johnson as a rebuttal witness. Johnson testified—contrary to his testimony in the first trial—that he had not driven Ali to Hamilton, Ohio, the night of Hughes's shooting. Defense counsel confronted this witness with his conflicting testimony from the first trial. Upon cross-examination, Johnson claimed he had received threats after the first trial related to his testimony without stating the nature of the threats or indicating an approximate time frame in which they occurred. Johnson admitted that he now faced serious felony charges himself. These charges arose in the interim between trials, and Johnson was aware

that he might face perjury charges relating to Ali's first trial. Defense counsel elicited a response from Johnson that suggested that he might have understood that perjury charges would not be brought regarding his testimony in the first trial if he testified differently at the second trial. The Commonwealth's Attorney adamantly argued at a bench conference that he did not promise immunity from prosecution for perjury. Ali alleges that due to the initial January trial date being reset, this witness was pressured into changing his testimony.

The jury found Ali guilty of intentional murder and PFO I and recommended a sentence of thirty-five years' imprisonment for the murder conviction. The jury declined to use the PFO I conviction to enhance this sentence. The trial court entered judgment imposing the jury's verdicts and recommended sentences, and this appeal followed.

II. ANALYSIS.

A. The Second Trial Was Not Barred By Double Jeopardy.

Ali contends that the retrial was barred by double jeopardy. We disagree. As noted earlier, Ali made no contemporaneous objection to the trial court's mistrial declaration. And even if we presume that Ali did not expressly consent to a mistrial, we find no abuse of discretion in the trial court's finding of "manifest necessity" to declare the mistrial following two days of jury deliberation and a deadlocked jury. In fact, a finding of manifest necessity for the mistrial might not even be necessary due to Ali's lack of objection.

In reviewing the propriety of the trial court's decision to declare mistrial due to jury deadlock, we consider the factors identified in United States v. Simonetti,[2] cited by Ali. We consider "whether the trial judge (1) considered alternatives to a mistrial, (2) afforded counsel an opportunity to be heard on the issue, and (3) decided precipitously or after sufficient reflection."[3]

Despite Ali's recent protests that the trial court seemed predisposed to find a deadlocked jury and triggered a mistrial by delivering a premature "Allen charge," the record reveals that the trial court properly considered alternatives to mistrial, afforded counsel an opportunity to be heard on this issue, and engaged in "sufficient reflection" before declaring a mistrial. Despite expressing concerns that the jury was approaching impasse, the trial court did not precipitously declare a mistrial. Over the course of the protracted deliberations, the court repeatedly allowed the jury to set the pace for deliberation and gave the jury ample leeway during approximately seventeen hours over two days.

The trial court delayed giving the RCr 9.57 charge until deliberations had been ongoing for several hours on the second day. We find that under the facts of this case, even though RCr 9.57 allows limited intervention by the trial court once a jury declares itself deadlocked, there was no prejudice here in giving these instructions before the formal declaration of deadlock. The RCr 9.57 instructions in no way suggested that the jury should abandon deliberations and resort to declaring itself deadlocked. Even when the jury, just minutes after receiving these instructions, asked "how to proceed," the trial court properly asked the jury whether more time would help

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[2] 998 F.2d 39 (1st Cir. 1993).

[3] *Id.* at 41.

them reach a unanimous verdict. Since the trial court gave the jury ample opportunity to take the time needed to reach a verdict, we cannot say that the trial court did not consider alternatives to mistrial.

Counsel were given an opportunity to be heard regarding mistrial and to suggest other options. The trial court's declaration of mistrial was given only after it had time for sufficient reflection and the jury had stated that more time would not help them.

We do take note of Ali's argument that the trial court improperly entered the jury room to inquire about dinner orders on the first day of deliberations. Ali is simply not entitled to relief on this ground since the trial court confined itself while in the jury room to asking about the jurors' needs and did not discuss how the jury was to deliberate. Ali has not shown how his substantial rights were abridged by the trial court's action.

B. Speedy Trial Issue.

As required by the United States Supreme Court, we must weigh four factors in determining whether Ali's speedy trial rights were violated, namely: (1) length of delay, (2) reason for delay, (3) whether defendant asserted his speedy trial rights, and (4) prejudice to the defendant.[4]

Regarding the length of delay, we acknowledge that nearly two years passed between Ali's arrest on October 12, 2003, and the jury's verdict of guilt on August 3, 2005. We have found delays of over one year "presumptively prejudicial."[5] But Ali really only complains about the delay between the originally scheduled retrial

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[4] Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

[5] *See, e.g.,* Bratcher v. Commonwealth, 151 S.W.3d 332, 344 (Ky. 2004) (finding eighteen months' delay "presumptively prejudicial" although, ultimately, finding no violation of the right to speedy trial).

date and the actual retrial date, which was six months—a substantial period but not a shockingly long one.

As for reasons for the delay, a large part of the total delay arose from the original trial ending in mistrial and original trial counsel's withdrawal from the case, which resulted in new defense counsel needing more time after the original trial to prepare for the retrial. An additional three months' delay resulted from the Commonwealth's motion for continuance in January 2005 based on unpreparedness at that time and then, essentially, the overcrowded docket for both trial court and counsel over the next three months. The United States Supreme Court has stated that these types of reasons should be weighed against the government but not as heavily as indications that the government deliberately chose to delay trial to prejudice the defense:

> A more neutral reason such as negligence or overcrowded courts should be weighted less heavily [than deliberately seeking delay for trial advantage] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.[6]

The cause of the last three months' delay in trial, however, from April to July, was Ali's own motion for continuance; thus, these last three months must be attributed to him.[7] So the reason for about half of the complained-of delay—from

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[6] Barker, 407 U.S. at 531.

[7] U.S. v. Lindsey, 47 F.3d 440, 443 (D.C. Cir. 1995), judgment vacated on other grounds in Robinson v. U.S., 516 U.S. 1023, 116 S.Ct. 665, 133 L.Ed.2d 516 (1995) (holding that since any delay beyond one year was due to defendant's and co-defendants' own pretrial motions, no speedy trial violation was evident for sixteen month delay in light of lack of significant prejudice). *See also* 21A Am.Jur.2d *Criminal Law* § 1039 (1998) ("A defendant may not assert violation of his or her right to speedy trial where the delay in question was attributable to motions or proceedings instituted in his or her own behalf prior to or during trial, including

January 2005 to July 2005—must be attributed to the defense;[8] and, overall, the reasons for delay do not weigh heavily against the government.

On the other hand, Ali clearly did assert his speedy trial rights by filing a speedy trial motion before his first trial and by renewing this motion when the Commonwealth requested a continuance in January 2005. Although defense counsel may have been personally somewhat more receptive to a continuance if this would allow a transcript review and Ali's transfer to a different facility, Ali himself clearly chose to assert his speedy trial rights after meeting with counsel. This factor clearly weighs in Ali's favor.

As for prejudice, Ali was incarcerated during the interim on an unrelated charge and, therefore, was not subject to longer incarceration due to the delay in going to trial. Although, presumably, he suffered anxiety while awaiting his murder trial, he points to no specific proof of any particular manifestations of this anxiety. As for affecting his ability to defend himself at trial, Ali does not show that Delmar Johnson's testimony would have been different if the case had gone to trial in January 2005 since Johnson did not identify the nature or timing of any threats other than a general statement that threats were made against him after the first trial. In any case, if Johnson's testimony at the first trial was false, Ali was not entitled to suborn perjury at a

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those relating to continuances or postponements or in connection with appellate review.") (Footnotes omitted).

[8] Ali argues that he was ready for trial in January 2005, and the fact that other issues later surfaced requiring him to request a continuance is irrelevant. However, we cannot agree as when we take into account the total length of delay and reasons for the delay, we must take into account the defendant's own actions contributing to delay. Ali cites no authority that whether a speedy trial violation occurred is measured as of the day the defendant requests speedy trial relief; rather, authority requires that we consider the total length of delay and reasons for the delay and circumstances over time in determining if speedy trial violation occurred.

second trial. Furthermore, Johnson had not become unavailable due to death or illness, nor had he apparently lost his memory in the meantime;[9] and defense counsel cross-examined him concerning the dramatic change in testimony from the first trial to the second. Therefore, it appears that any prejudice suffered by Ali because of the continuance from January 2005 to July 2005 was minimal. In fact, Ali may have actually benefited in some regards from the delay since his counsel was able to obtain and presumably review transcripts from the first trial to prepare for the retrial.

Given the minimal prejudice suffered and the fact that about half the complained-of delay resulted from Ali's own actions, we conclude that he is not entitled to relief on the basis of violation of his speedy trial rights even in light of his assertion of these rights.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment.

All sitting. All concur.

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[9] *See* Barker, 407 U.S. at 532 (noting that prejudice is obvious when a witness dies or disappears during delay, or when a witness is "unable to recall accurately events of the distant past.") Delmar Johnson's change in testimony does not appear to reflect an inability accurately to recall the past but, rather, an indication that Johnson lied in giving testimony either at the first trial or at the retrial.

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