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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

2003-CA-000948-MR

MARK EDMOND BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CR-00556

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR
JUDGE.¹

MILLER, SENIOR JUDGE: Mark Edmond Brown brings this appeal from an April 2, 2003, final judgment and sentence of imprisonment of the Fayette Circuit Court. We affirm.

Appellant was indicted by the Fayette County Grand Jury on the felony offense of failure to comply with sex offender registration (Kentucky Revised Statutes (KRS) 17.510). The indictment also charged him as a persistent felony offender in the second degree (PFO II) (KRS 532.080).

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

After having pled guilty in 1998 to first-degree sexual abuse of his pre-teen daughter (Fayette County Indictment 98-CR-1329), appellant allegedly failed to register a change of address with his probation and parole officer. The jury found him guilty and recommended five-years' imprisonment, enhanced to ten years as a PFO II offender. The circuit court sentenced appellant in accordance with the jury's recommendation to ten-years' imprisonment to run consecutively with any other felony sentence. This appeal follows.

At the outset, the Commonwealth concedes that appellant's initial argument, that his failure to comply with sex offender registration is a misdemeanor offense and not a felony, has been rendered moot by the circuit court's order granting a Kentucky Rule of Civil Procedure (CR) 60.02 motion to amend appellant's conviction from a felony to a misdemeanor and from five-years' imprisonment (enhanced to ten years as a PFO II) to twelve months in accordance with Peterson v. Shake, Ky., 120 S.W.3d 707 (2003).²

Appellant next contends a violation of his right to a speedy trial under Section Eleven of the Kentucky Constitution

² Regarding the reference to the circuit court's order in this appeal, this Court entered an order March 26, 2004 which stated: "... appellant . . . states that 'Issue I' in his brief was resolved in his favor in the resolution of a Kentucky Rule of Civil Procedure (CR) 60.02 motion in the Circuit Court. The Court notes that appellant's brief was filed on February 3, 2004. Therefore, appellee is ORDERED to ADDRESS the mootness issue in its brief." Appellee conceded that the Supreme Court's opinion and circuit court's action rendered the argument moot.

and the Sixth Amendment to the United States Constitution. Analysis begins with the four-factor test in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, 117 (1972) which involves an examination of: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay. The factors are balanced and "[n]o single one of these factors is determinative by itself." Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000).

An analysis of the last three Barker factors begins by determining if the delay was presumptively prejudicial:

[L]ength of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors . . .

Barker, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117.

Determining whether a delay was presumptively prejudicial requires examining two elements: the charges and the length of the delay. "The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Id. 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. In this case, appellant was charged with failure to comply with sex offender registration and PFO II. We consider these charges, although serious, to be non-complex.

The second element, length of the delay, is the time between the earlier of the arrest or the indictment and the time the trial begins. Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Appellant was arrested on April 22, 2001, prior to his indictment. His trial began on March 4, 2003. The delay, therefore, between arrest and trial was approximately twenty-three months. While courts differ in the length of delay they require to find presumptive prejudice, in Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 570 (2001), the Kentucky Supreme Court found a thirteen and one-half month delay presumptively prejudicial in a first degree robbery and PFO I case. We conclude that a twenty-three month delay given the non-complex nature and facts of this case is presumptively prejudicial.

Our conclusion that appellant's twenty-three month delay was presumptively prejudicial leads to an examination of the remaining three Barker factors, beginning with the reason for delay. The Court enumerated three categories of reasons for delay: (1) a "deliberate attempt to delay the trial in order to hamper the defense"; (2) a "more neutral reason such as negligence or overcrowded courts"; and (3) "a valid reason, such as a missing witness." Barker, 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. The Court explained that different reasons should be allocated different weights, even reasons

within the same category. Id. For example, delay due to negligence, which is a neutral reason, would weigh more heavily in favor of a speedy trial violation than court overcrowding, which is also classified as a neutral reason. See Zurla v. State, 789 P.2d 588, 592 (N.M.1990) ("bureaucratic indifference should weigh more heavily against the state than simply case overload"). Further, the Court was clear that even a neutral reason weighs against the state because "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." Barker, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 115.

Appellant was arrested on April 22, 2001. He does not argue that the delay between arrest and the original trial date of August 21, 2002, constitutes a speedy trial violation as the delay was attributable in part to all parties' waiting for the Kentucky Supreme Court to rule on the status of the sexual offender registration statute. He instead asserts a speedy trial violation due to the seven-month delay between August 21, 2002, and March 4, 2003. Instead of going to trial on August 21, 2002, he entered a conditional guilty plea to both charges pursuant to North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 171 (1970). Appellant later moved to withdraw the plea, and on September 26, 2002 the circuit court granted appellant's motion, allowed counsel to withdraw due to a

conflict, directed that new counsel be appointed, and set a status hearing for October 18, 2002. Thus, the initial two-month delay is attributable to appellant. At the status hearing, on agreement of the parties, a February trial date was agreed upon. In Dunaway, supra, our Supreme Court held this type of delay "neutral." The record is silent as to the reason for the further one-month delay. On the morning of trial, appellant's counsel indicated to the circuit court that appellant wanted to have counsel removed due to a conflict and alternated between wanting the trial continued and going to trial. Regardless, the trial continued.

To summarize, deducting the two-month delay caused by appellant's guilty plea and withdrawal of that period leaves five months. Of that time, four-months' delay was due to conflicts with the parties' and circuit court's schedule; the record is silent as to the need for the final delay of one month. There is no evidence these delays were either intentional or avoidable. None of the delays was due to a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 115.

It is important to note that the delays herein, from the initial lengthy delay waiting for the Supreme Court decision on the status of the sexual offender registration statute to the

delay caused by appellant's guilty plea and withdrawal, were in some manner attributable to appellant. Trial postponement by the defendant "tolls the running of the constitutional speedy trial clock." DeLoach v. State, 722 So.2d 512, 517 (Miss.1998). The Barker Court also indicated that a defendant's own actions might thwart his speedy trial claim: "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine ..." Barker, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 115.

The third Barker factor is defendant's demand for a speedy trial. While the defendant has a right to a speedy trial regardless of whether he makes a demand, assertion of the right is a factor to consider. Id. 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. The record before us contains numerous pro se motions, several of which asserted appellant's right to speedy trial. Such assertions are "entitled to strong evidentiary weight" in deciding whether the defendant's rights were violated. Id. This factor weighs in favor of the defendant. As the Sixth Circuit has noted, however, a defendant's assertions "must be viewed in light of [defendant's] other conduct." United States v. O'Dell, 247 F.3d 655, 671 (6th Cir.2001), quoting United States v. Loud Hawk, 474 U.S. 302, 314, 106 S.Ct. 648, 656, 88 L.Ed.2d 640, 654 (1986). In that case, the court found that six months of frivolous petitions by

the defendant detracted from the sincerity of the defendant's assertion of his right. In the present case, appellant similarly filed numerous pro se motions. He also referred to delays in the circuit court but never voiced a single objection. As stated in Gabow at 70, "(i)f a defendant acquiesces in a delay, he cannot be heard to complain about the delay." Appellant's acquiescence to the trial date and vacillation on the morning of trial as to whether to go to trial or get a continuance mitigate his speedy trial claim. For these reasons, we conclude that appellant's assertion of his right weighs in his favor, but not as heavily as it might.

The Barker Court identified three interests bearing on the final factor, prejudice to the defendant caused by the delay: "(1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed.2d at 118. Of these three, the last is the most serious. Id. Appellant claims that all three prejudicial interests exist in his case. Although conceding that most of the almost two-year delay was attributable to him, he points to his nearly two years of incarceration awaiting trial. Appellant also points to his anxiety and concern as demonstrated by his repeated pro se motion practice and demands for a speedy trial. While delay can

cause anxiety and incarceration can prejudice the defense, in Barker the Court found only minimal prejudice due to a ten-month pretrial incarceration and nearly four years of anxiety producing, post-indictment proceedings. Barker, 407 U.S. at 534, 92 S.Ct. at 2194, 33 L.Ed.2d at 119. And as LaFave points out, "absent some unusual showing [, anxiety and concern] is not likely to be determinative in defendant's favor." LaFave et al., Criminal Procedure, § 18.2(e) at 684. Appellant has made no showing of unusual anxiety in his case. As for the last and most important factor, appellant asserts that he suffered impairment because if he had been tried earlier he could have found the transient witnesses he needed to establish his homelessness defense for failing to register. Appellant's assertion is merely speculative as he does not indicate if any attempt was ever made to locate any specific witnesses for the several times the case was set for trial before entry of the guilty plea or if he was unable to locate these witnesses because of the delay. Also, as indicated below, there is no "homeless" exception to the registration requirement.

We conclude, after balancing the Barker factors, that appellant's constitutional right to a speedy trial was not violated. Though appellant asserted his right and the length of delay was presumptively prejudicial, the reasons for the delay

were acceptable and the prejudice caused the appellant was minimal.

Next, appellant asserts insufficient evidence to support his conviction of failure to register as a sex offender. While admitting that this issue is not preserved for appeal as no renewal of his directed verdict motion was made at the conclusion of the evidence, appellant asks this Court to review this issue under Kentucky Rule of Criminal Procedure (RCr) 10.26 as a palpable error. In Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836-837 (2003) the Kentucky Supreme Court addressed palpable error upon a similar failure to renew a directed verdict motion for insufficient evidence:

A palpable error is one of that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court, and "[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." We recognize not only that "the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude," but also that the nature of the error alleged here is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtedly have affected Appellant's substantial rights. And, we likewise observe that the trial result necessarily would have been different if the trial court had directed a verdict in

Appellant's favor. Accordingly, we examine the merits of Appellant's allegation.

Citations omitted. Since a conviction based on insufficient evidence would undoubtedly deprive a criminal defendant of substantial due process rights, we will review appellant's insufficiency of the evidence argument under the standard articulated in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. 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.

The portion of the registration statute applicable to appellant provides:

If the residence address of any registrant changes, but the registrant remains in the same county, the person shall register, on or before the date of the change of address, with the appropriate local probation and parole office in the county in which he or she resides.

KRS 17.510(10)(a). Appellant does not disagree that he was required to register, pursuant to KRS 17.500(4), as a person over age eighteen who had committed a sex crime. He concedes that the Commonwealth proved that he had vacated his registered address. He asserts, however, that the Commonwealth failed to prove that he had found a new home elsewhere and that "(p)ersons who become homeless, and therefore do not "change" their "residence address," are not required to register under the plain language of 17.510." There is nothing, however, in the plain language of the statute that requires the Commonwealth to prove that the registrant has a new address. The only evidence of address that the Commonwealth is required to prove is that the residence address changed. Appellant concedes that this was proven. Pursuant to Benham, under the evidence as a whole, it is not clearly unreasonable for a jury to find guilt. Appellant's insufficiency argument thus fails.

Last, pursuant to KRS 17.510, appellant was required to register as a sex offender due to a guilty plea to first-degree sexual abuse (Fayette Circuit Court Indictment 98-CR-1329). He now asserts that the guilty plea did not meet constitutional muster under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) because he was never informed at sentencing of the requirement that he register as a sexual offender. "(F)ailure to give such advice about *future*

consequences fails to qualify as a constitutional defect."

McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 936 (1994)

(emphasis in original) (future consequence at issue was that appellant could be subject to an enhanced sentence based on his status as a persistent felony offender). Boykin requires a knowing, voluntary and intelligent waiver of all important constitutional rights. Boykin, 395 U.S. at 243, 89 S.Ct. at 1712, 23 L.Ed.2d at 79; Turner v. Commonwealth, Ky.App., 647 S.W.2d 500, 500-501 (1982):

However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.

As such, appellant's Boykin argument fails.

Despite the fact that the failure of the sentencing court to give appellant notice to register is not fatal to a voluntary guilty plea, appellant last argues that the circuit court was obligated by the filing of his pro se RCr 11.42 motion asserting involuntariness of the prior plea either to assume jurisdiction over the prior case and resolve the matter or to remand it to the original division for resolution. This

argument is answered by an order from the circuit court in the record denying his pro se RCr 11.42 motion.

Despite this order, the circuit court was not obligated to rule on appellant's pro se motions. Appellant was represented by counsel in this case and in the prior case involving the guilty plea. Due to the voluminous amount of pro se pleadings from appellant the circuit court advised him that the court would only entertain pleadings from appellant's counsel. Appellant has a right to represent himself without counsel or have counsel appointed to represent him on a specified limited basis. Wake v. Barker, Ky., 514 S.W.2d 692, 696 (1974). If appellant had wanted to proceed pro se or to limit the role of counsel, he needed to make an unequivocal request to do so. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581 (1975); Moore v. Commonwealth, Ky., 634 S.W.2d 426, 430 (1982).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy G. Arnold
Assistant Public Advocate
Frankfort, KY 40601

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Perry T. Ryan
Assistant Attorney General
Frankfort, KY 40601