

RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000655-MR

HILDRETH YOUNG

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

VANMETER, JUDGE: Hildreth Young appeals from a judgment entered by the Monroe Circuit Court after a jury convicted him of possession of a handgun by a convicted felon. Young argues that there was insufficient evidence to support the verdict and that he was denied his constitutional right to a speedy trial. We affirm.

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 KRS 21.580.

On or about December 26, 2002, an altercation occurred between Young's son and several men in front of the son's home. Witnesses testified at trial that after blows were thrown Young's son called out for him to retrieve a gun, Young appeared on the front porch brandishing a firearm. Young denied at trial that he was in possession of a firearm. The investigating police officers, however, testified that Young admitted at the scene that he "just kind of waved it, flashed" a gun around. The officers further testified that Young's daughter-in-law retrieved a gun from just inside the door of the house when they asked upon their arrival whether there was a gun in the house. The daughter-in-law, by contrast, testified that the gun belonged to her, that Young was unaware of the gun, and that upon the officer's inquiry she retrieved the gun from a locked outdoor storage facility.

Young was indicted on charges of retaliating against a participant in the legal process,² possession of a firearm by a convicted felon,³ and persistent felony offender in the first degree (PFO 1).⁴ On August 22, 2003, Young made a *pro se* motion for the withdrawal of his court-appointed counsel and requested the appointment of new counsel. This motion was granted. On October 14, 2003, Young filed a *pro se* motion requesting a speedy trial. This motion, along with Young's November 5, 2003, motion to dismiss for lack of prosecution, was heard on November 19 and

² KRS 524.055.

³ KRS 527.040.

⁴ KRS 532.080(2).

trial was set for January 8, 2004. Young was found guilty only on the charge of possession of a firearm by a convicted felon and, in accordance with the jury's recommendation, he was sentenced to one year imprisonment. One week later, on January 15, Young again moved for dismissal of the charges for lack of prosecution. This motion was denied and final sentencing occurred on February 18, 2004. This appeal followed.

Young initially argues that the trial court erred by failing to find that the evidence was insufficient to support his conviction because there was no showing that the firearm was operational. While Young did not preserve this issue for review he requests that this court consider the issue under RCr 10.26 so as to avoid manifest injustice. RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and injustice has resulted from the error.

We are not persuaded that Young is entitled to relief in order to prevent the occurrence of manifest injustice.

Young consistently argued at trial that he was never in possession of the gun. On appeal, he seems to assert that even if he was in possession of the gun, there was no evidence that the gun was an operational "firearm" which could "expel a projectile by the action of an explosion."⁵ However, neither KRS 527.010(4) defining "firearm," nor KRS 527.040 setting out the

⁵ KRS 527.010(4).

elements of possession of a firearm by a convicted felon, specifies that the weapon must be functional. In any event, even if the weapon was required to be functional Young has made no showing, or even an allegation, on appeal that the weapon in question was not functional. In the absence of any indication that the alleged error affected Young's substantial rights, he is not entitled to relief on appeal.

Finally, Young argues that the trial court erred by failing to find that he was denied his constitutional right to a speedy trial. We disagree. As described in *Barker v. Wingo*,⁶ and *Tamm v. Commonwealth*,⁷ the issue of whether a defendant's constitutional right to a speedy trial has been violated must be considered in light of four factors: "(1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant."⁸ Here, the record shows that the alleged criminal action occurred on December 26, 2002. Young was indicted in February 2003, and trial was set for August 22. The trial was postponed when, on the scheduled trial date, Young made and the court granted Young's *pro se* motion requesting that his appointed counsel be dismissed and that new counsel be appointed. In October and

⁶ 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

⁷ 973 S.W.2d 13, 22 (Ky. 1998).

⁸ *Id.* at 22.

November Young asserted his right to a speedy trial,⁹ and those motions were heard in November 2003. Young's trial then was conducted on January 8, 2004. Given the fact that the trial was delayed due to Young's own motion, as well as the absence of probative evidence to show that Young was prejudiced by the delay, the trial court did not err by failing to find that he was denied his right to a speedy trial.

For the reasons discussed above, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David T. Eucker
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

⁹ KRS 500.110.