

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001743-MR

CARLTON SMITH

APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT  
v. HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 03-CR-00299

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Carlton Smith (Smith) brings this appeal from a "Judgment and Sentence on Plea of Not Guilty (Jury Trial)" from the Hopkins Circuit Court, entered August 3, 2004, adjudging him guilty of second-degree assault<sup>2</sup> and first-degree promoting contraband<sup>3</sup> and sentencing him to five years and one year, respectively, each sentence enhanced to ten years pursuant

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<sup>1</sup> 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.

<sup>2</sup> Kentucky Revised Statutes 508.020, a class C felony.

<sup>3</sup> Kentucky Revised Statutes 520.050, a class D felony.

to first-degree persistent felony offender (PFO I) status;<sup>4</sup> the enhanced sentences to run concurrently for a total of ten years' incarceration. We affirm.

The incident from which the charges arose took place on August 14, 2003, in the Hopkins County Detention Center. On that day Smith and victim Rick Hill (Hill) were residents of an eight man cell block consisting of a dayroom and four individual bedrooms accommodating two inmates each. About 11:00 a.m., Hill and another inmate had just finished watching television in the dayroom. It was Hill's day to choose which program to watch (the inmates alternated days on which to choose programs to watch) when Smith came in dressed in his boxers and a t-shirt and asked permission to watch a program. Hill agreed. An argument ensued between Hill and Smith over the volume of the television. Smith left the dayroom and Hill reduced the volume.

Smith returned to the dayroom dressed in his prison uniform and tennis shoes. He approached Hill, who was weaponless, with a stabbing motion. Hill, noticing the point of something protruding from Smith's hand, raised his hand to deflect the blow from hitting him in the eye. Smith stabbed Hill near the temple with an ink pen, leaving a three-inch opening from Hill's temple down to his cheek, where the pen tip

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<sup>4</sup> Kentucky Revised Statutes 532.080.

remained embedded. Smith then stabbed Hill five times in the throat, chest and hand, shattering the ink pen.

After being repeatedly stabbed, Hill swung back at Smith. Smith smashed a plastic coffee mug into Hill's face, knocking two teeth out, splitting his lip and lacerating his nose. Smith departed and Hill was left with blood running down his face.

Hill was treated at the prison medical facility for a lacerated left temple, lacerated right nostril, cut lip, and the loss of two teeth. He also had a contusion on his right foot, three scratches on his neck and two abrasions on his right shoulder.

A search of the cellblock following the incident yielded the cartridge of an ink pen, the top part of a pen, and a plastic coffee cup with blood on it.

Hill's version of events was corroborated by three inmates.

Not surprisingly, Smith's version of events differed from Hill's. According to Smith, the incident occurred following a pattern of harassment and badgering by Hill. Following the argument about the television volume, Smith says that Hill stepped toward Smith and struck him in the jaw. A shoving match ensued. Smith removed an ink pen cartridge from Hill's hand to prevent from being stabbed with it. Upon

possession of the ink pen cartridge, and in self-defense, Smith inadvertently struck Hill with the ink pen cartridge. According to Smith, he also suffered injuries.

Based on the above, on September 30, 2003, a Hopkins County Grand Jury indicted Smith for the charges upon which he was subsequently found guilty by a jury: second-degree assault, first-degree promoting contraband, and PFO I. (Indictment No. 03-CR-00299).

Before us, Smith argues that the trial court abused its discretion by 1) failing to grant a directed verdict on both the second-degree assault and first-degree promoting contraband charges, 2) failing to grant a new trial on the basis of newly discovered evidence, and 3) denying his speedy trial motion.

Smith proffers several reasons why the trial court erred in not granting his motion for a directed verdict. Specifically, Smith claims insufficient evidence that the ink pen constituted a dangerous instrument, that he was the aggressor and not acting in self-defense, or that he even possessed an ink pen.

Although the Commonwealth's argument is well taken that Smith could have stated his motions for directed verdict with more specificity, we nevertheless review the issues as the motions appear to meet the minimum required under Pate v. Commonwealth, 134 S.W.3d 593, 596-98 (Ky. 2004), and Kentucky

Rules of Civil Procedure (CR) 50.01, and pursuant to the palpable error standard of Kentucky Rules of Criminal Procedure (RCr) 10.26, as stated in Perkins v. Commonwealth, 694 S.W.2d 721, 722 (Ky.App. 1985):

(A) conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review.

Therefore, we analyze this claim of error under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 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 reserv[e] 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 the defendant is entitled to a directed verdict of acquittal.

Smith's initial insufficiency argument pertains to the second-degree assault conviction, which required a finding that he intentionally caused physical injury to another person by

means of a dangerous instrument as defined in Kentucky Revised Statutes (KRS) 500.080(3), in this case, an ink pen; and, the first-degree promoting contraband conviction, which required a finding that while in the detention facility he knowingly obtained or possessed dangerous contraband (which, pursuant to KRS 520.010(3), can include dangerous instruments as defined in KRS 500.080). Smith contends that the evidence of a dangerous instrument was insufficient, alleging that the only evidence presented was that an ink pen *cartridge* was used, and that no evidence was presented that an ink pen cartridge could cause serious physical injury.

Contrary to Smith's assertion, testimony from Smith, Hill, and the inmate witnesses that an ink pen was used in the stabbing provide evidence that Smith used an ink pen, not an ink pen cartridge, in his attack on Hill.

Additionally, KRS 500.080(3) defines a dangerous instrument in relevant part as:

(A)ny instrument . . . article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury . . .

KRS 500.080(15) defines serious physical injury as physical injury (defined pursuant to KRS 500.080(13) as "substantial physical pain or any impairment of physical condition") as that creating a substantial risk of death or causing serious and

prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

Contrary to Smith's assertion, there was also evidence from Hill's treating physician that as a result of being stabbed with an ink pen Hill suffered injuries to the head and neck that were life-threatening. As such, considering the evidence as a whole, we do not find it unreasonable that the jury found that Smith possessed a dangerous instrument.

Smith's second insufficient evidence allegation also pertains to the second-degree assault conviction, more specifically lack of evidence that he was the aggressor. Smith presented a theory of self-defense and the jury was given a self-protection instruction. In contrast, Hill testified that Smith was the aggressor. Inmate witnesses gave conflicting statements and testimony as to who was the aggressor. As indicated above in Benham, in ruling on a directed verdict motion questions as to the credibility and the weight to be given testimony are reserved for the jury, which in this case believed the testimony placing Smith as the aggressor. Our standard of review, however, is to look at the evidence as a whole. In so doing, we conclude that it was not clearly unreasonable for the jury to find Smith as the aggressor and thus guilty of second-degree assault. The trial court correctly

denied Smith's motion for directed verdict as to the second-degree assault charge.

Smith's third insufficient evidence contention relates to the first-degree promoting contraband conviction, but again asserts lack of evidence that he possessed an ink pen. As we have concluded above that on the whole, it was not clearly unreasonable for the jury to find that Smith possessed an ink pen, we conclude that the trial court correctly denied Smith's motion for directed verdict as to this issue.

Smith next argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence. The newly discovered evidence consisted of an affidavit and testimony of an inmate named Christian. The proffered evidence indicated that if Christian had testified at trial, he would have stated that Hill was the aggressor. He did not, however, testify, because he was allegedly threatened and coerced by detention facility officials. At the hearing on the new trial motion, the accused official disputed Christian's allegation. Additionally, testimony was presented that at the trial the Commonwealth informed Smith's attorney that if he called Christian the Commonwealth was prepared to rebut Christian's testimony with that of another inmate who would testify that he heard Smith telling Christian what to say.

As an additional ground for a new trial, Smith presented the affidavit and testimony of a second inmate, Killough, indicating that after the trial Killough corresponded with Smith contradicting Killough's trial testimony as to Smith being the aggressor. At the hearing on the new trial motion, however, evidence was presented that Killough did not recant until he was moved back in the same facility with Smith.

After hearing the evidence, the trial court denied the motion "find[ing] and conclud[ing] that the evidence presented by the defense is not such that it raises a reasonable certainty that if this case was retried it would produce a different verdict."

Our standard of review of the trial court's denial of a new trial motion is as follows:

Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion.

Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky. 2000). "(N)ewly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial." *Id.* "The evidence 'must be of such decisive value or force that it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" Collins v.

Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997) (quoting Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967)).

We conclude that the trial court did not abuse its discretion in denial of the new trial motion, as the evidence presented by both Christian and Killough amounts to cumulative and impeaching testimony that would not change the result if a new trial were granted. See generally Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1990); Coots v. Commonwealth, *supra*; Jeter v. Commonwealth, 268 Ky. 285, 104 S.W.2d 979 (Ky. 1937). As stated in Foley, 55 S.W.3d at 814-15:

While some of these results may at first blush seem harsh, they are based on the principle that a defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial; and that mere hearsay evidence that a trial witness made a post-trial statement inconsistent with his previous testimony is insufficient.

Finally, Smith claims a speedy trial violation.<sup>5</sup> The offense occurred on August 14, 2003, and Smith was indicted on September 30, 2003. He was arraigned in October, 2003, and in November, 2003, trial was set for May 4, 2004, as well as an alternative date of January 13, 2004, should a previously set civil case settle. When the alternative January date became

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<sup>5</sup> U.S. CONST. amend VI.

available but the trial did not proceed, Smith filed a speedy trial motion. The trial was rescheduled and held on April 29, 2004, eight months from the incident, seven months from the indictment, and three and one-half months from his demand.

In Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, 117 (1972), the United States Supreme Court established four factors for a court to analyze to determine whether a defendant's right to a speedy trial has been violated: (1) the length of delay, (2) the reason for the delay, (3) assertion of the right, and (4) prejudice caused by the delay. The first step is to determine if the delay was presumptively prejudicial to the defendant; if not, the defendant's speedy trial rights were not violated and the inquiry ends. Dunaway v. Commonwealth, 60 S.W.3d 563, 569 (Ky. 2001), *citing* Barker, supra. Whether a delay was presumptively prejudicial depends on the nature of the charges and the length of the delay. *Id.*

We conclude that Smith was not denied the right to a speedy trial. Smith was indicted for second-degree assault, first-degree promoting contraband, and PFO I. While not a case of great complexity, we do not perceive that the delay herein was presumptively prejudicial. *Cf.* Dunaway, 60 S.W.3d at 569. As we conclude that the delay was not presumptively prejudicial, no further analysis of the Barker factors is warranted.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack N. Lackey, Jr.  
J. Michael Hearon  
Hopkinsville, Kentucky

BRIEFS FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
Bryan D. Morrow  
Assistant Attorney General  
Frankfort, Kentucky