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(FILE NO. 2007-SC-0375-D)**

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2005-CA-001796-MR

TORREY CROSS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 03-CR-001118

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Torrey Cross appeals from the final judgment of the Jefferson Circuit Court sentencing him to fourteen years' imprisonment based on his conviction for Possession of a Firearm by a Felon and guilty pleas to Wanton Endangerment in the First Degree, Escape in the Second Degree, Theft by Unlawful Taking over \$300, and being a Persistent Felony Offender in the First Degree. Cross raises three issues on appeal: (1)

that he was denied a speedy trial and that he was denied due process of law when the circuit court denied his motion to dismiss without first conducting a hearing to consider the factors relevant in determining whether he was denied a speedy trial; (2) that the circuit court committed reversible error by striking a juror for cause; and (3) that he was denied due process of law when the Commonwealth failed to inform him about tests on the firearm and the results of those tests. For the reasons set forth below, we affirm.

Because the facts regarding the issues are specific to those issues, they will be set forth at the beginning of the section dealing with each issue. We set forth the common facts below.

#### FACTS

On the night of March 16-17, 2003, Cross went to a local night club. While at the night club, Cross and another patron, Kenneth Moore, had a verbal dispute. At trial, Moore and his wife, Sharonda, testified that Cross indicated during the dispute that he was carrying a gun. Sharonda alerted a security guard that Cross had a gun, and the security guard escorted Cross from the night club, removed the gun from Cross's pocket, and handcuffed Cross. The police responded to a call from security personnel, and they placed Cross under arrest and charged him as set forth above.

Cross testified that Moore, who was in a wheelchair, pulled the gun from under the seat of the wheelchair. According to Cross, he then took the gun from Moore and was going to give the gun to a security guard; however, the security guard accosted Cross before he could do so.

## SPEEDY TRIAL

Cross argues that he was denied due process because he was not tried on the charged offenses for more than two years after his indictment. The Commonwealth argues that any delay was not so long as to merit dismissal of the charges and that Cross suffered no prejudice as a result of any delay. A clear understanding of the procedural history is central to resolving this issue. Therefore, we will set forth that rather lengthy history from Cross's indictment to his trial.

On April 23, 2003, the grand jury indicted Cross on the following charges: (1) Possession of a Firearm by a Convicted Felon; (2) Wanton Endangerment in the First Degree; (3) Escape in the Second Degree; (4) Theft by Unlawful Taking over \$300; and (5) being a Persistent Felony Offender in the First Degree. Following the indictment, this case was assigned to the Sixteenth Division of the Jefferson Circuit Court. The circuit court entered an order on April 29, 2003, accepting Cross's not guilty plea and scheduling the matter for a June 6, 2003, pretrial and September 9, 2003, trial.

The parties attended the pretrial conference scheduled for June 6, 2003. Cross's counsel indicated that Cross had another criminal case pending in the Fifth Division of the Jefferson Circuit Court (“the Fifth Division case”) and that the Fifth Division case was scheduled for trial in August of 2003. The Commonwealth and Cross's counsel indicated that they were discussing resolving both the Fifth Division case and

this case; therefore, the circuit court scheduled a second pretrial conference for July 24, 2003.

On July 9, 2003, Cross's attorney filed a motion to withdraw. The circuit court granted that motion on July 15, 2003, and referred the case to the public defender's office. The public defender's office acknowledged receipt of the referral on July 18, 2003.

On July 24, 2003, the parties attended the second pretrial conference. At that pretrial conference, Cross's counsel indicated that Cross had requested a competency evaluation in the Fifth Division case. Pursuant to an oral motion by defense counsel, the circuit court referred Cross for a competency evaluation in this case. The parties agreed that the competency evaluation already scheduled in the Fifth Division case could be used in both proceedings. Believing that the competency evaluation would be completed before September 9, 2003, the circuit court scheduled this matter for a competency hearing on September 9, 2003.

On or about July 31, 2003, Cross filed a *pro se* motion for a “Fast and Speedy Trial of All Untried Indictments Informations or Complaints” or, in the alternative, that all charges against him be dismissed. In support of his motion, Cross cited KRS 500.110, Section 11 of the Kentucky Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.

On September 9, 2003, counsel for Cross indicated that Cross had not undergone the competency evaluation. The circuit court asked defense counsel if she was

aware that Cross had filed the motion for speedy trial. Counsel responded that she was aware that Cross had filed the motion, and she stated that she had advised Cross that he could not stand trial until the competency evaluation had been completed. The circuit court then re-scheduled the competency hearing for November 18, 2003. On November 18, 2003, the parties advised the circuit court that they had received the report from the competency evaluation, and that they had agreed that Cross was competent to stand trial. After some discussion regarding schedules, the circuit court then scheduled this matter for trial on March 16, 2004. We note that Cross did not object to this trial date.

On March 17, 2004, the circuit court entered an order re-scheduling the trial to September 21, 2004. As a reason for re-scheduling the trial, the trial judge noted that she was in trial on another matter on the March 16, 2004, trial date. We note that the record does not contain any objection from Cross to the re-scheduled trial date.

On September 21, 2004, the circuit court entered an order noting that the Commonwealth had made a motion for a continuance of the trial date<sup>1</sup> because counsel for the Commonwealth was involved in another trial. The circuit court granted that motion and scheduled a third pretrial conference for November 4, 2004, and a trial for January 26, 2005. Again, we note that the record does not contain any objection from Cross to the Commonwealth's motion.

On November 5, 2004, the circuit court entered an order scheduling this matter for a continued pretrial conference on November 30, 2004. In that order, the circuit court noted that Cross had a motion to sever counts of the indictment pending.

<sup>1</sup> The record before us does not contain a copy of that motion.

Following the November 30, 2004, pretrial conference, the circuit court entered an order stating that a plea offer had been made and that it would remain open until December 27, 2005. The circuit court also re-scheduled this matter for a trial on January 26, 2005.

On January 20, 2005, the Commonwealth filed a motion to reassign the trial date stating that it had been unable to find and serve a material witness, Shannon Leach. As with prior motions to re-schedule, the record does not contain any indication that Cross objected to that motion. The circuit court entered an order on January 26, 2005, rescheduling the trial for March 29, 2005. That order notes that defense counsel was in trial in another division and that Shannon Leach had failed to appear.

On April 14, 2005, Cross filed a motion to reschedule his trial because defense counsel had surgery scheduled for the second day of trial. The circuit court granted the motion and rescheduled the trial for June 15, 2005. The trial took place on June 15 and 16, 2005, and the jury found Cross guilty of possession of a handgun by a convicted felon. Cross subsequently pled guilty to the other charges in the indictment.

Cross argues that he did not receive a speedy trial and that the circuit court should have held a hearing prior to denying his motion to dismiss for failure to hold the requested speedy trial. At the outset of our analysis, we note that CR 76.12(4)(c)(v) provides that the appellant shall set forth at the beginning of the argument section of a brief where in the record an issue was preserved and in what manner. Cross has not set forth in his brief where we can find in the record a motion for a hearing on his request for

a speedy trial or a copy of any order denying any such motion. In our review of the record, we have not been able to find any order from the circuit court specifically addressing Cross's motion to dismiss nor any order denying a motion for a hearing on the motion to dismiss.<sup>2</sup>

Faced with this record, we must determine if the issue regarding the circuit court's failure to hold a hearing on Cross's motion to dismiss is properly before us. It is axiomatic that the Court of Appeals does not have authority to review issues not raised or decided by the trial court. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225 (Ky. 1989), *Matthews v. Ward*, 350 S.W.2d 500 (Ky. 1961), and *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (1940). Cross did not specifically request a hearing on his motion to dismiss for failure to hold a speedy trial and has not identified any order from the circuit court denying any such motion; therefore, that issue is not properly before us and we will not address it.

As to whether Cross received a speedy trial, we hold that Cross preserved that issue when he filed his *pro se* motion. Furthermore, we hold that the fact that the circuit court held a trial acted as a *de facto* order denying Cross's motion to dismiss. Therefore, that issue has been preserved for appeal.

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<sup>2</sup> We note that Cross pointed out in his brief that the circuit court acknowledged receiving correspondence from Cross in November of 2003 and that correspondence from Cross requested certain relief from the court. However, the correspondence from Cross did not request a hearing on his motion to dismiss for lack of a speedy trial. Furthermore, the circuit court advised Cross's counsel to file, if appropriate, the motions Cross discussed in his correspondence. The record does not reflect that any of those motions were filed.

To determine if the circuit court erred in not dismissing the charges against Cross, we will first examine Cross's right to a speedy trial under KRS 500.110, which provides that:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The parties have agreed that Cross was not subject to a detainer. The record shows that Cross and/or counsel were present or had the opportunity to object to the trial continuances granted by the court. Furthermore, the continuances were necessary and reasonable. Therefore, we hold that Cross's right to a speedy trial under KRS 500.110 was not violated.

Next, we will analyze whether Cross's constitutional right to a speedy trial was violated. A defendant's right to a speedy trial under the Sixth Amendment attaches when he is arrested and held to answer criminal charges. *Dillingham v. United States*, 423 U.S. 64, 65, 96 S.Ct. 303, 304, 46 L.Ed.2d 205 (1975). As noted by both Cross and the Commonwealth, the leading case regarding the right to a speedy trial is *Barker v.*



*Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In *Barker*, the Supreme Court of the United States set out a four part test to determine whether a defendant's right to a speedy trial has been violated: “Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.” *Id.* at 530.

Cross was arrested on March 17, 2003 and indicted on April 23, 2003. Therefore, his right to a speedy trial attached, at the earliest, on March 17, 2003. Cross was not tried until June 15, 2005, 821 days following his arrest and 784 days following his indictment. The delay in this case, regardless of which date is used as the triggering date, was significant, particularly in light of the straight forward nature of the charges and the proof. Therefore, under the first part of the *Barker* test, we hold that the delay was presumptively prejudicial. See *Gabow v. Commonwealth*, 34 S.W.3d 63, 70 (Ky. 2000) *overruled in part on other grounds; Barker*, 407 U.S. at 530.

Next, we must proceed to the second part of the *Barker* test – the reason for the delay. In *Barker*, the United States Supreme Court noted that a deliberate attempt to delay a trial “should be weighted heavily against the government.” More neutral reasons such as overcrowded dockets “should be weighted less heavily” against the government, and “a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Id.* at 531. The record reveals that the initial delay in bringing this matter to trial was occasioned by Cross's request for a competency evaluation and hearing. Later delays were occasioned by a missing witness, a conflicting trial by the court, a conflicting trial by the Commonwealth attorney, and surgery by defense counsel.

It does not appear from the record that any of the delay was occasioned by a deliberate attempt by the Commonwealth to delay the trial. Therefore, we hold that this part of the *Barker* test weighs in favor of the Commonwealth and against Cross.

The third part of the *Barker* test is whether the defendant has asserted and pursued his right to a speedy trial. Cross filed a motion for a speedy trial on July 31, 2003. However, after filing his motion, Cross did nothing to pursue the claimed right. As noted above, several of the delays were occasioned by Cross or his counsel and Cross did not object to any of the continuances. Therefore, we hold that this factor weighs in favor of the Commonwealth and against Cross.

The fourth part of the *Barker* test is the extent of prejudice to the defendant. As noted in *Barker*, the interests of the defendant that a speedy trial protects are: (1) preventing “oppressive pretrial incarceration”; (2) minimizing “anxiety and concern of the accused”; and (3) limiting “the possibility that the defense will be impaired.” *Id.* at 532. It is undisputed that Cross was incarcerated prior to trial in this matter. However, although the record is not clear, it appears that the majority of Cross's pretrial incarceration flowed from his conviction in the Fifth Division case, not from this case. Therefore, we hold that any pretrial incarceration was not oppressive.

In order to prevail on a claim that he suffered “anxiety and concern” as a result of delay in bringing a matter to trial, the “defendant must show anxiety which extends beyond that which 'is inevitable in a criminal case.' Rather, the requisite showing is one of 'psychic injury.’” *Preston v. Commonwealth*, 898 S.W.2d 504, 507 (Ky.App.

1995) *citing Hakeem v. Beyer*, 990 F.2d 750, 762 (3d Cir. 1993). Cross has offered no evidence that he suffered any anxiety that extended beyond the normal anxiety associated with any criminal case. Therefore, we hold that any anxiety and concern Cross may have suffered as a result of the delay in trial, did not rise to the level sufficient to establish that his right to a speedy trial had been violated.

Finally, we hold that Cross's ability to mount a defense was not impeded by the delay. The only witness to testify on behalf of Cross was Cross. He has not pointed to any witnesses that were not available as a result of the delay nor has he pointed to any other evidence that would have been available had the trial occurred more expeditiously. Therefore, we hold that Cross did not suffer any prejudice by the delay in bringing this matter to trial.

Based on the above, we hold that Cross's right to a speedy trial was not violated, and we affirm the circuit court on that issue.

#### DISCOVERY

On April 29, 2003, the circuit court entered a discovery order. The Commonwealth responded to that order on June 6, 2003, stating that it had provided all discoverable documents then in its possession. Furthermore, the Commonwealth agreed to supplement its responses with any and all discoverable material it might subsequently obtain. On June 15, 2005, Cross asked the Commonwealth if it had any other discoverable evidence, and the Commonwealth responded that it did not.

During trial, the Commonwealth called police officer Paul Fenwick to testify, in pertinent part, about his test firing of the gun. The Commonwealth attempted to provide a target to Officer Fenwick for demonstrative use during his testimony. Cross objected to Officer Fenwick's testimony and to use of the target on the grounds that the Commonwealth had not disclosed that the test firing had occurred and that the Commonwealth had not provided Cross with any report regarding the test firing. The circuit court permitted Officer Fenwick to testify that he had test fired the gun and to the results of that test firing. However, the circuit court did not permit the Commonwealth to use the target during Officer Fenwick's testimony.

A conviction can be set aside because of a discovery violation only if there is "a reasonable probability that had the evidence been disclosed the result at trial would have been different." *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005) *quoting Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997). In light of this standard of review, we must first determine if the Commonwealth violated the discovery rules. RCr 7.24 provides in pertinent part that:

(1) Upon written request by the defense, the attorney for the Commonwealth shall disclose . . . (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

. . .

(9) If at any time . . . it is brought to the attention of the court that a party has failed to comply with this rule or an order

issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Cross argues that the failure of the Commonwealth to reveal prior to trial that Officer Fenwick had test fired the gun violated the circuit court's discovery order and RCr 7.24. The Commonwealth argues that RCr 7.24 and the circuit court's discovery order only required it to provide "actual physical documents and tangible things," not oral reports. Based on our review of RCr 7.24, we hold that it was error for the Commonwealth to fail to disclose that Officer Fenwick had test fired the gun and the results of that test. In doing so, we note that RCr 7.24 states that the Commonwealth shall disclose "results or reports of . . . scientific tests or experiments . . . ." The rule does not limit the disclosure to written reports or documents; therefore, we hold that the Commonwealth should have disclosed to Cross that the handgun had been test fired and the results of that test even though the Commonwealth did not have any written reports or documents to that effect.

However, our analysis does not end here, as we must next determine if the Commonwealth's failure to timely disclose the test firing and the results of that test would have resulted in a different outcome. As noted by Cross, the Commonwealth was required to prove that the handgun Cross possessed was capable of expelling a projectile. KRS 527.040 and 527.010 (4) and (5). Absent Officer Fenwick's testimony regarding his test firing of the gun, the jury could not have convicted Cross of the charged offense.

Therefore, Officer Fenwick's testimony was essential to the Commonwealth's case. However, the fact that Officer Fenwick's testimony was essential to the Commonwealth's case does not render the Commonwealth's failure to timely disclose the test results fatal to the Commonwealth. Cross must show that, had he known earlier of the test firing and the results of that test, the outcome of the trial would have been different. This, Cross has failed to do. Cross has argued that the Commonwealth should have disclosed the test results earlier; however, he has not shown how the late disclosure by the Commonwealth in anyway prejudiced him. When presented with the testimony from Officer Fenwick, Cross could have moved for additional time to have the gun tested himself or Cross could have established on cross-examination that the test firing was somehow defective; however, Cross did not do either. As noted by the Court in *Sanborn v. Commonwealth*, 892 S.W.2d 542, 556 (Ky. 1994), *cert. denied* 516 U.S. 854, 116 S.Ct. 154, 133 L.Ed.2d 98 (1995), a party seeking to exclude evidence because of a discovery violation, must take "every reasonable step to rectify the situation at trial before he can claim a mistrial at a later point in time." Presented with Officer Fenwick's testimony, Cross argued that the late disclosure prevented him from performing his own test firing of the gun. However, Cross did not request a recess in order to have the gun tested by his own expert, which would have been a reasonable step to rectify the situation. Therefore, Cross cannot now complain that he was harmed by the late disclosure of the test firing by Officer Fenwick.

Based on the above, we perceive no error and affirm the circuit court's denial of Cross's motion to preclude Officer Fenwick's testimony regarding the test firing.

## STRIKING OF JUROR NO. 76268

During *voir dire*, the Commonwealth asked the members of the jury panel if anyone believed that, after a period of time, certain rights should be restored to convicted felons. Juror No. 76268 responded that “after a certain time there should probably be some rights restored. I feel there should be second chance . . . mistakes are made.”<sup>3</sup> When questioned if he could apply the law, Juror No. 76268 stated that he could.

In later questioning, the Commonwealth asked the panel members if they could, faced with 11 members in opposition, hold to their own convictions regarding guilt or innocence. Juror No. 76268 stated that he believed he might have some self doubt in that situation and that he might question if he had missed some part of the evidence. Therefore, he might re-evaluate his position based on what the majority of jurors were saying. However, he did not state that he would necessarily cave to the pressure.

Following *voir dire*, the Commonwealth moved to strike Juror No. 76268 for cause. In doing so, the Commonwealth noted Juror No. 76268's statement that convicted felons should be given a second chance and that a felon's rights should be restored after a period of time. Furthermore, the Commonwealth argued that, although Juror No. 76268 stated that he could follow the law, he did so reluctantly. Counsel for

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<sup>3</sup> We note that Juror No. 76268 is not visible on the video tape and that the sound quality during his questioning is poor. Therefore, we have done the best we could with what we have in the record.

Cross objected to the Commonwealth's motion to strike, stating that she did not believe Juror No. 76268's statement regarding following the law was made with any reluctance. The circuit court granted the Commonwealth's motion, noting Juror No. 76268's statement regarding his beliefs that rights should be restored to felons and his statement regarding his reaction to being a lone holdout against the other jurors. However, the circuit court noted that the later statement by Juror No. 76268 would not have been sufficient to disqualify him.

Cross argues that the circuit court committed reversible error by striking Juror No. 76268 for cause and that exclusion of Juror No. 76268 deprived Cross of a trial by "an impartial and representative jury under Sections 7 and 11 of the Kentucky Constitution and the 6th Amendment to the United States Constitution." The Commonwealth argues that striking Juror No. 76268 was within the circuit court's discretion and that the circuit court did not abuse that discretion.

We begin our analysis of this issue by noting that the standard of review on a prospective juror issue is whether the trial court abused its discretion when excluding or failing to exclude a juror. *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003); *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002). In determining if a juror should be excused for cause, the trial court must determine whether the challenged juror can conform his views to the requirements of law and render a fair and impartial verdict. RCr 9.36(1); *Mabe v. Commonwealth*, 884 S.W.2d 668, 670-71 (Ky. 1994). Finally, we note that a party must show prejudice to obtain reversal on appeal. *Hicks v.*



*Commonwealth*, 805 S.W.2d 144, 147 (Ky.App. 1990). As noted above, Juror No. 76268 stated that he believed that rights should be restored to felons. On further questioning, he stated that he could apply the law even if the law differed from his personal beliefs. The Commonwealth, when challenging Juror No. 76268, stated that he reluctantly agreed that he could apply the law. Cross's counsel, arguing against the Commonwealth's challenge, stated that she did not believe that Juror No. 76268's answer was made with any reluctance. The trial judge, who had the opportunity to both see and hear Juror No. 76268's responses, agreed with the Commonwealth that Juror No. 76268 should be stricken for cause. Clearly the trial judge was in a position to observe Juror No. 76268's demeanor when questioned. Granting the trial judge the deference due, we perceive no error. *See Wainwright v. Witt*, 469 U.S. 412, 425-26, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985).

Finally, Cross states that it was error for the circuit court to strike Juror No. 76268. However, Cross has not shown how that juror's exclusion from the jury panel resulted in any prejudice as required by *Hicks*. Therefore, we hold that the circuit court did not abuse its discretion in striking Juror No. 76268.

#### CONCLUSION

For the above reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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