

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2006-CA-001700-MR

NATHANIAL TAYLOR BARTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 05-CR-001692

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: A criminal defendant's right to a speedy trial is secured by the Sixth Amendment to the United States Constitution. We must decide whether a delay of thirteen months between arraignment and trial violated Nathaniel Barton's right to a speedy trial. Based on the circumstances of this case, we conclude that it did not, and we therefore affirm the judgment of the Jefferson Circuit Court.

On December 28, 2004, Barton and Joni Shephard were arrested for possession of methamphetamine, marijuana, and drug paraphernalia.<sup>1</sup> At the time of his arrest, Barton was on parole. As a result of the arrest, Barton's parole was revoked,<sup>2</sup> with a deferral of any further consideration for nine months.

In March 2005, the Commonwealth dismissed the charges against Barton prior to a preliminary hearing in Jefferson District Court. However, on May 25, 2005, by direct submission to the Jefferson County Grand Jury, both Barton and Shephard were indicted for Possession of Marijuana, Use or Possession of Drug Paraphernalia, and First Degree Possession of a Controlled Substance (Methamphetamine).<sup>3</sup> By this time, Barton was in the custody of the Kentucky Department of Corrections (DOC) at the Roederer Correctional Complex in LaGrange, Kentucky. On June 6, 2005, Barton was arraigned in the Jefferson Circuit Court. In addition to the usual arraignment formalities, Barton's counsel stated to the court, "Judge, we're going to be looking for a fairly quick trial date in this matter." The judge initially mentioned the possibility of either October or November, but settled on a trial date of November 15, 2005 after consulting her calendar. Counsel mentioned an October date would be preferable, but the court advised no dates were available. Counsel and the court concluded by discussing a July pretrial and a possible suppression motion. At the July 2005 pretrial, no mention of the trial date was made other than that the trial was to occur on November 15.

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<sup>1</sup> The record is not clear, but apparently Barton was initially charged with additional crimes for which he was not indicted.

<sup>2</sup> The bases for the parole revocation were possession of a firearm, possession of a controlled substance (methamphetamine), and possession of a controlled substance (marijuana). At the final parole revocation hearing, the Parole Board found Barton had committed technical violations, and revoked his parole.

<sup>3</sup> In addition, Shephard was indicted for Tampering with Physical Evidence.

On the date set for trial, Barton was not transported from Roederer. The reason for this failure is not apparent from the record. While the record contains ten separate Orders for Appearance of Prisoner entered for various court dates, it does not contain such an order for November 15. When the court asked counsel how they would prefer to proceed, the Commonwealth candidly advised the court that it had been unable to secure the appearance of a witness for that day and that it would have requested a continuance in any event. At that point, Barton's counsel informed the court that he had made an oral motion for a speedy trial at arraignment, and that he objected to any continuance due to Barton's parole revocation and his belief that the Parole Board had deferred further consideration of the matter in order to consider the outcome of the trial on the instant charges. The trial judge responded that although she would have denied any motion for a continuance, the trial could not proceed in any event since Barton was not present. The court and counsel thereupon set a second trial date for January 31, 2006. The Commonwealth also secured an additional indictment against Barton for first-degree Persistent Felony Offender on November 15. The record, however, does not disclose whether the indictment was returned before or after the in-court proceedings on that day.

On January 31, all parties were present, but Shephard's counsel was unavailable due to the unexpected length of a criminal trial in an unrelated matter. While the Commonwealth apparently was prepared for trial, it advised the court of its preference to try both defendants together. Barton's counsel responded that he understood the Commonwealth's position, and stated "We're ready for trial and expected to be tried today." After a discussion of an outstanding suppression motion and the fact that Shephard's participation was precluded since her counsel was unavailable, the court

set a suppression hearing in March and the trial date for July 11, 2006. In agreeing to that date, Barton's counsel stated that Barton did not waive his right to a speedy trial by acquiescing in the new trial date. No motion for a separate trial was made.

In July 2006, Barton filed a motion to dismiss the charges against him for violation of his constitutional right to a speedy trial. Parenthetically, we note that although the written motion discusses the constitutional right to a speedy trial, counsel argued before the trial court only that KRS<sup>4</sup> 500.110 required Barton to have been tried within 180 days of his request for a trial date. The court denied the motion, ruling that written notice of his request was required. The court continued that even if written notice was not required, because of the case's procedural history, good cause had been shown for all the continuances and they had been reasonable. Following the court's ruling, in exchange for dismissal of the PFO count, Barton entered a conditional guilty plea to the principal charges, and received a total sentence of two years.<sup>5</sup> This appeal follows.

From Barton's brief, we are uncertain whether he is claiming a violation of KRS 500.110, or a violation of his constitutional right to a speedy trial as guaranteed by U.S. CONST. amend. VI and Ky. CONST. § 11. While the basic rights secured by the statute and the constitutions are essentially the same, different grounds and case law apply to each. *See Dunaway v. Commonwealth*, 60 S.W.3d 563, 565-69 (Ky. 2001) (recognizing distinct speedy trial protections provided by constitution and by statute).

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

<sup>5</sup> Under the plea bargain, Barton agreed to a sentence of two years on the felony charge of Possession of Methamphetamine and 12 months on each of the misdemeanor charges of Possession of Marijuana and Possession of Drug Paraphernalia, with the misdemeanor sentences running concurrent with the felony sentence.

KRS 500.110,<sup>6</sup> setting out the statutory right to a speedy trial, applies to a person in custody in a penal or correctional institution. It requires that a detainer<sup>7</sup> has been lodged for an untried indictment, information or complaint, requires the defendant to serve written notice on the prosecuting officer and the court, and requires trial within 180 days after such notice. The procedural requirements and remedy are purely statutory.

In interpreting KRS 500.110, our courts require strict compliance with the procedural notice requirements. *See, e.g., Donahoo v. Dortch*, 128 S.W.3d 491, 494 (Ky. 2004) (statute clearly requires written notice); *Dunaway*, 60 S.W.3d at 568-69 (defendant not entitled to relief because no longer in custody); *Rushin v. Commonwealth*, 931 S.W.2d 456, 459-60 (Ky.App. 1996) (defendant not entitled to relief since no evidence existed that detainer had been filed at the time the defendant filed notice). In this instance, the record is clear that Barton never gave written notice to the Commonwealth

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<sup>6</sup> This statute provides as follows:

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.

<sup>7</sup> As noted in *Dunaway*, “[a] detainer is ‘a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution to either hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.’” 60 S.W.3d at 566 (quoting *Carchman v. Nash*, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985)).

Attorney or the court. Thus, the trial court did not err in denying Barton's motion to the extent he alleged a violation of his statutory right to a speedy trial under KRS 500.110.

By contrast, the constitutional right to a speedy trial, as developed through case law, does not require that a person seeking a speedy trial be in custody, that written notice be provided, or that a trial occur within a specified time period. *See Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998). Rather, in analyzing a speedy trial claim, the court first looks to the length of the delay to determine whether the delay was "presumptively prejudicial." 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case[.]" 407 U.S. at 530-31, 92 S.Ct. at 2192, 33 L.Ed.2d at 117, including the nature of the charges and length of the delay. *Dunaway*, 60 S.W.3d at 569. In this case, the delay following the indictment was approximately thirteen months,<sup>8</sup> and the charges of possessing methamphetamine, marijuana, and drug paraphernalia were not complex. We conclude that the delay was presumptively prejudicial. *See Dunaway*, 60 S.W.3d at 569 (delay of thirteen and one-half months on serious and moderately complex charges was held to be presumptively prejudicial). Having reached that threshold conclusion, we proceed to consider the three remaining factors in balancing a defendant's speedy trial claim: (1) the reasons for the delay, (2) whether and how the defendant

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<sup>8</sup> As noted in *Powell v. Commonwealth*, 237 S.W.3d 570, 573 (Ky.App. 2007), the right to a speedy trial attaches from the time formal criminal charges are instituted. However, once the charges are dismissed, the speedy trial guarantee no longer applies. While true that Barton was continuously in custody from and after December 28, 2004, the record reflects that the instant charges were dismissed in March 2005, and he was held following that time by the DOC since his parole had been revoked.

asserted his speedy trial right, and (3) the amount of prejudice suffered by the defendant. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117.

In *Dunaway*, 60 S.W.3d at 570, the court, quoting *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117, enumerated several possibilities as 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.’” In this case, the record reflects that the initial delay, from arraignment to November 15, 2005, was due to the court’s scheduling, which clearly creates a neutral delay. The next delay of two and one-half months, from November 15, 2005 to January 31, 2006, was due to DOC’s failure to transport Barton from prison to court for the November 15 trial. No reason appears for this snafu. Barton alleges that the Commonwealth deliberately caused this delay, as evidenced by its comment that it would have requested a continuance due to a missing witness, as well as its action in obtaining a PFO indictment against Barton on this date. However, a careful review of the record discloses that the primary, if not the sole, cause of the delay was Barton’s absence from court that day. While we could surmise that the trial court failed to enter an Order for Appearance of Prisoner, since none appears in the record for that date, or that DOC failed to process the order, it is also possible that Barton was unable to be transported that day due to illness or some other reason. Thus, we cannot conclude that the Commonwealth deliberately attempted to delay the trial, especially since the trial court stated on the record that if Barton had been present, the trial would have occurred. We therefore conclude that the delay from November 15 to January 31, 2006 was for a valid reason.

The final delay occurred from January 31, 2006 to July 11, 2006. The primary purpose for this delay was the fact that counsel for Barton's codefendant was unexpectedly absent due to unanticipated delays in a criminal trial in another division of the Jefferson Circuit Court. As noted in *Dunaway*, a delay due to a codefendant's request to reschedule is a valid reason for delay. 60 S.W.3d at 570. Further, the length of the six and one-half months delay was attributable to the trial court's schedule, which is a neutral reason for delay. *Id.* Here, each of the reasons for delay was either a neutral or valid reason.

The next factor in analyzing whether a defendant's right to a speedy trial has been violated pertains to whether and how the defendant asserted the right. In this case, Barton claims that he asserted his speedy trial right at arraignment. However, the record reveals that Barton's counsel stated merely that "we're going to be looking for a fairly quick trial date in this matter." No additional explanation was given at that time. On November 15, 2005, when Barton first explicitly mentioned "speedy trial," the trial judge noted that she normally made a notation when a defendant made an oral motion for speedy trial and that she had not made any notation in this matter. While assertions of the right are "'entitled to strong evidentiary weight' in deciding whether the defendant's rights were violated[.]" *Dunaway*, 60 S.W.3d at 571 (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117), we conclude that Barton's assertion was not made until November 15, 2005. Thus, Barton's "assertion of his right weighs in his favor, but not as heavily as it might." *Dunaway*, 60 S.W.3d at 571.

The last factor relates to the prejudice which a defendant may suffer as a result of (a) oppressive pretrial incarceration, (b) anxiety and concern, and (c) the

possibility of an impaired defense. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193, 117 L.Ed.2d at 118. The Supreme Court found especially critical the concerns about minimizing the possibility of impairment of one's defense. *Id.* In this case, Barton argues that he was prejudiced because the Parole Board repeatedly postponed its reconsideration of his parole while it awaited resolution of the instant charges. Conversely, the Commonwealth points out that the parole violation should be considered a collateral matter to this case. Even granting Barton the benefit of this point, and acknowledging the understandable pretrial anxiety he presumably experienced due to the uncertainty over the instant charges and their effect on any reconsideration of his parole, Barton's arguments create no valid claim of prejudice to his defense. Barton points to the Commonwealth's failure to secure a witness on November 15, 2005, and its securing of the PFO indictment on that date. However, as previously noted, the delay on November 15 was due not to the Commonwealth's attempt to bolster its case, but rather to the fact that Barton was not transported to court, which is a reason that under this record cannot be charged to the Commonwealth.

Having considered the speedy trial factors set forth in *Barker* and *Dunaway*, we conclude that the trial court did not err in denying Barton's motion to dismiss for a violation of his right to a speedy trial.

The Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

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