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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-000985-MR

WESLEY S. ANGLIN

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT  
HONORABLE BRUCE T. BUTLER, JUDGE  
ACTION NO. 09-CR-00057

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Wesley S. Anglin appeals from a judgment sentencing him to thirteen years in prison after a jury found him guilty of one count of robbery in the first degree.<sup>1</sup> Having reviewed the record, the briefs and the law, we affirm.

### FACTS

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<sup>1</sup> Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

On or about March 18, 2009, under false pretenses, Anglin convinced Corey Vincent to drive him and Joseph Meredith to meet someone. Vincent borrowed a car and picked up Anglin and Meredith and several pieces of luggage. Vincent was directed to drive the pair to the Gates of Hell Cemetery near the Breckinridge County-Hardin County line. Upon arriving at the cemetery, Anglin and Meredith attacked Vincent repeatedly, placed him in a sinkhole, covered his body with debris, left him for dead, and left the cemetery in Vincent's vehicle. On their way out of town, Anglin and Meredith picked up a juvenile and drove as far as Texas before being arrested and extradicted to Kentucky.

On May 7, 2009, Anglin was indicted on one count of first-degree robbery and being a persistent felony offender (PFO).<sup>2</sup> Both Anglin and Meredith were offered sentences of ten years in return for pleas of guilty for beating Vincent and taking the car he was driving. Anglin rejected the offer; Meredith accepted the offer and testified for the Commonwealth at Anglin's trial.

Trial was initially set for March 25-26, 2010, but was rescheduled for September 14-15, 2010. Just four days before trial was to begin, Anglin's attorney was allowed to withdraw<sup>3</sup> and a new attorney was appointed to handle the case. To give new counsel time to prepare, trial was delayed and ultimately occurred on

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<sup>2</sup> Due to Anglin being less than 21 years of age, the PFO charge was dismissed.

<sup>3</sup> The attorney stated in an affidavit accompanying his motion to withdraw that there had been a breakdown in communication between he and Anglin.

May 18-19, 2011. The change in attorneys occurred with Anglin's knowledge<sup>4</sup> and approval. Sentencing occurred on May 25, 2011. This appeal followed.

## ANALYSIS

Anglin's first of four allegations of error is that KRS 532.055, commonly known as "Truth-in-Sentencing," is unconstitutional. Anglin argued this issue to the trial court in *pro se* pleadings filed on June 23, 2010, and July 30, 2010, and to this Court in a petition for writ of prohibition filed on December 13, 2010. Neither of the motions, (nor the petition), was served on the Office of the Attorney General (OAG) as required by KRS 418.075 which reads in pertinent part:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

- (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

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<sup>4</sup> Anglin filed numerous *pro se* pleadings during the pendency of the indictment. At one point he asked that his attorney be named standby or hybrid counsel. Following a *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), hearing, the trial court denied the request for standby counsel, ordering that only the attorney would conduct the trial but Anglin could participate in pre-trial motions and hearings. A month later, Anglin filed a memo with the trial court stating counsel had refrained from acting as legal counsel and moved the trial court to remove counsel, sanction him and appoint a new attorney to represent him.

Anglin's failure to notify the OAG of his constitutional challenge is fatal to his claim before this Court. *Jacobs v. Commonwealth*, 947 S.W.2d 416, 419 (Ky. App. 1997).

Furthermore, Anglin's theory that the Supreme Court declared KRS 532.055 unconstitutional in *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987) is wrong. In *Reneer*, the Supreme Court stated:

We reiterate that this court has the power to preempt the statute by the promulgation of different rules of procedure at any time we determine it necessary. We reserve the right to consider any abuses or injustices alleged to be caused by K.R.S. 532.055 when presented by a proper case, but until such time as we do so, we decline to hold K.R.S. 532.055 unconstitutional, and we accept its provisions for the time being under the principle of comity.

Thus, our Supreme Court never declared the statute unconstitutional, in fact, it specifically declined to do so. We have no basis and no authority to do otherwise.

Anglin's second claim is that the trial court erred in denying his motion to dismiss due to a violation of his right to a speedy trial. We discern no such violation.

In evaluating an alleged speedy trial violation, we weigh four factors: (1) length of delay, (2) reasons for delay, (3) defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant. *McDonald v. Commonwealth*, 569 S.W.2d 134, 136 (Ky. 1978) (citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182,

33 L.Ed.2d 101 (1972)). About two years elapsed between indictment (May 6, 2009) and trial (May 18-19, 2011), but it was only about eleven months from the day Anglin filed his request for a speedy trial (June 22, 2010) until trial began. While the length of delay was presumptively prejudicial, *See, Cain v. Smith*, 686 F.2d 374, 381–82 (6th Cir. 1982) (eleven and a half month delay was presumptively prejudicial), the delay was attributable to Anglin. He ignored his first attorney’s advice, asked that his first attorney be dismissed and sanctioned, and requested appointment of a new attorney. Anglin acknowledged in his brief that he was “OK” with his first attorney, Hon. Richard Hardin, withdrawing and trial being postponed until his new attorney could prepare the case for trial.

Had trial commenced on September 14, 2010, as scheduled, only 84 days would have elapsed between Anglin’s speedy trial request and the beginning of trial. As it happened, Anglin’s own choices resulted in additional delay that we cannot attribute to anyone but him. “A delay attributable to the defendant tolls the constitutional speedy trial clock.” *DeLoach v. State*, 722 So.2d 512, 517 (Miss.,1998) (citing *Ross v. State*, 605 So.2d 17, 22 (Miss., 1992)). After weighing the four factors identified in *Barker*, we affirm the trial court’s decision to deny Anglin’s request for relief.

Anglin’s third claim is that the trial court erred in allowing witnesses to refer to the scene of the robbery as “The Gates of Hell” Cemetery. We discern no error.

Anglin and Meredith attacked Vincent in a cemetery very near the boundary line between Breckinridge and Hardin Counties. To prove venue, the Commonwealth needed to establish the location of the cemetery which is known variously as Grand View Cemetery and Kasey's Cemetery, but is most commonly called "The Hell's Gate Cemetery" or "The Gates of Hell Cemetery." Anglin filed a motion *in limine* seeking to exclude the cemetery's nickname because it connoted negative images, was irrelevant, and was too prejudicial to be admitted under KRE<sup>5</sup> 401 and 403.

The Commonwealth opposed the motion, stating Anglin told Vincent to drive to "Gates of Hell" and the cemetery's "name is the name." When the trial court asked whether the witnesses would know the spot is named "Kasey's Cemetery," the Commonwealth responded, "probably not."

During a break in testimony, the prosecutor stated he wanted to avoid a venue issue and would call the Property Valuation Administrator to establish the location of the cemetery. Defense counsel offered to stipulate the cemetery was in Breckinridge County if the Commonwealth would not refer to it as "Hell's Gate." The Commonwealth declined the stipulation.

We review the trial court's ruling that the name was relevant for an abuse of discretion. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). The robbery in this case occurred in one of many cemeteries located in Breckinridge

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<sup>5</sup> Kentucky Rules of Evidence.

County. To establish venue, it was necessary to identify where the crime occurred. We discern no abuse of discretion in the trial court's decision to allow the cemetery to be called by its nickname since that is the name by which it is commonly known.

Anglin's fourth and final allegation of error is that the trial court improperly overruled his objection to the Commonwealth's brief mention during penalty phase closing argument that Anglin had been offered a sentence of ten years. Because no admonition was requested by the defense, we deem no reversible error to have occurred.

The Commonwealth's remark was in response to defense counsel's statement in closing argument that Meredith had received a ten-year sentence for his role in the robbery, and because Anglin was remorseful and regretted his actions he should receive a lesser sentence. The prosecutor responded, "It's true, Mr. Meredith got ten years; Mr. Anglin was offered the same." Defense counsel immediately objected and at the bench argued the Commonwealth had improperly revealed an offer of compromise. The trial court noted defense counsel had mentioned Meredith was sentenced to serve ten years. Defense counsel responded that his mention of Meredith's sentence had no reflection on any offer made to Anglin. The trial court overruled the objection and the Commonwealth resumed its argument. The entire summation for both sides, with the bench conference, lasted less than five minutes.

We see no error. The prosecutor's comment was fleeting and an admonition to the jury to disregard the remark, had one been requested, would have cured any error.

It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition. *Carpenter v. Commonwealth*, Ky., 256 S.W.2d 509 (1953); *Neeley v. Commonwealth*, Ky., 591 S.W.2d 366 (1979). A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672 (1985).

*Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). In the absence of a request for a curative admonition we have no grounds upon which to grant relief.

For the foregoing reasons, the judgment and sentence entered by the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

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