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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001307-MR

CARLOS CLARK — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 17-CR-00232

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Carlos Clark appeals a Perry Circuit Court order denying his motion to dismiss for failing to conduct a speedy trial. We vacate the order only and remand with instructions that the circuit court properly analyze Clark's motion pursuant to *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

FACTS AND PROCEDURE

Clark was arrested on June 29, 2016, and charged with operating a motor vehicle under the influence (DUI), second offense; instructional permit violation; and possession of an open alcoholic beverage container in a motor vehicle. Clark was arraigned on August 30, 2016.

At a pretrial conference, Clark refused the Commonwealth's plea offer and a jury trial was set for April 27, 2017. On February 27, 2017, the circuit court rescheduled the trial *sua sponte* to June 30, 2017. On that date, the circuit court granted the Commonwealth's motion for a continuance and rescheduled the jury trial for September 8, 2017.[1] On September 5, 2017, the jury trial was again rescheduled for December 1, 2017.[2]

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[1] The circuit court granted the continuance on the basis that a necessary witness was not present despite reasonable actions by the Commonwealth to locate and notify the witness. Clark's counsel objected to the continuance, but did not object to the September 8, 2017, date offered by the Commonwealth.

[2] Prior to this hearing, Judge William Engle III served as a special judge in Perry Circuit Court. From the time of this hearing to this appeal, Judge Alison Wells presided over Clark's case. The record indicates the scheduling difficulties coincided with the transition in judges. At the hearing the following exchange took place:

> Court Clerk: Judge I think there is a, our docket says, "Jury Trial, September 8," that was reset we just need to pass that to a later date.
>
> Judge: Pass that to what?
>
> Clark's counsel: Just whatever date the jury trial is going to be. I don't know if they've reset it, it was set for the 8th. I don't know if they've already set another one. If there is we'll stick with that date. We're just asking for a re-trial date.
>
> Judge: Ok, December 1st at 8:15.

On December 1, 2017, the Commonwealth moved to amend Clark's DUI, second offense, to DUI, fourth offense, based on the ten-year look-back law. Clark's prior DUI offenses occurred in 2008, 2010, and 2013.[3] Prior to 2016, the look-back period under KRS[4] 189A.010(5) was five years. However, KRS 189A.010(5) increased the look-back period to ten years, effective April 9, 2016. The Commonwealth offered no explanation as to why Clark was not originally charged under the ten-year look-back law, given that he was arrested and charged three months after the statute was enacted.

On December 15, 2017, Clark was indicted by a Perry County grand jury on a felony count of operating a motor vehicle under the influence of alcohol/drugs, fourth offense, as well as the additional charges. On January 26, 2018, Clark moved to dismiss the charges for violating his right to a speedy trial.

On February 1, 2018, a hearing was held to arraign Clark and discuss his motions to dismiss and to amend his bail. The circuit court gave the Commonwealth time to reply to the motion to dismiss and took it under submission. The parties appeared before the court on February 22, 2018, to argue Clark's motion. By order entered February 26, 2018, the court denied the motion.

[3] Clark had numerous convictions for DUI and driving on a suspended license; however, only the three prior DUI offenses listed fall within the statute's ten-year look-back period.

[4] Kentucky Revised Statutes.

The circuit court's order outlined Clark's indictment, his motions to dismiss and to amend bail, listed his prior related convictions, and memorialized the dates for his pre-trial conference and jury trial. (Record (R.) at 45). But the order included no analysis as to the length of delay, reasons for delay, Clark's assertion of his right to a speedy trial, or any prejudice he incurred because of the delay. Although those factors were argued by the parties at the February 22, 2018, status hearing, the circuit court failed to set out its own analysis.

On July 31, 2018, the circuit court accepted Clark's guilty plea and reserved his right to appeal the speedy trial issue. This appeal followed.

ANALYSIS

In this Court, both Clark and the Commonwealth repeat the substance of the arguments they made in the circuit court, properly discussing the disputed facts and procedure in this case in the context of the four-part analysis from *Barker v. Wingo*. However, appellate review is not an opportunity for a "do-over." The appellate court's focus is the work of the circuit court as shown in its rulings, orders, and judgments. Here, the order denying Clark's motion to dismiss for lack of a speedy trial does not consider *Barker*, does not indicate the court undertook a proper analysis, and does not state any factfinding upon which its order is based.

As our Supreme Court has said, a circuit court's consideration of the speedy-trial question "involv[es] mixed questions of constitutional law and fact,"

so that the appellate court reviews "*de novo* for legal questions and clear error for questions of fact." *Goben v. Commonwealth*, 503 S.W.3d 890, 903 (Ky. 2016) (citations omitted). "[T]he speedy trial analysis is fact-specific and date-oriented . . . ." *Smith v. Commonwealth*, 361 S.W.3d 908, 913 (Ky. 2012). It is "a fact intensive analysis . . . ." *Stacy v. Commonwealth*, 396 S.W.3d 787, 796 (Ky. 2013). The appellate court cannot review for clear error regarding the circuit court's factfinding if the circuit court fails to make the factfinding necessary for a *Barker* analysis. That is the state of the record now before this Court.

The Commonwealth implies the circuit court did not need to analyze the motion under *Barker* because Clark waived his right to a speedy trial. (Appellee's brief, pp. 2, 6). We are unpersuaded by that argument. Although the Supreme Court of the United States said that "a defendant has some responsibility to assert a speedy trial claim," it then immediately stated this did not allow a "depart[ure] from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made." *Barker*, 407 U.S. at 529, 92 S. Ct. at 2191. Necessarily, to decide the Commonwealth's waiver argument, the circuit court "must, of course look to the facts which allegedly support the waiver." *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314 (1966) (footnote omitted) (waiver of right to

confront witnesses). The Commonwealth alleged certain facts supporting its waiver argument, but the circuit court made no factual findings and did not hold Clark waived his right to a speedy trial. We cannot weigh the facts alleged to determine if a waiver occurred; we can only apply the proper review standard to determine if the court decided the issue without legal error or abuse of its discretion. Because the circuit court did not decide the issue, our hands are tied as to whether Clark waived his right.

"There is a presumption against the waiver of constitutional rights," including the right to a speedy trial. *Id.*, 384 U.S. at 4, 86 S. Ct. at 1247 (citation omitted). Without the circuit court's factfinding regarding waiver, we cannot conclude, as a matter of law, that Clark waived the right. Therefore, we return to a consideration of the appealed order to determine if it properly found Clark was not denied a speedy trial. As with the waiver argument, there is no fact analysis upon which this Court can apply legal principles on appellate review.

When deciding whether a defendant has been denied a speedy trial, the circuit court must consider four factors: "(1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 198 (Ky. 2013) (citing *Barker*, *supra*, and *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004)). No single fact or factor is determinative. *Miller v.*

Commonwealth, 283 S.W.3d 690, 702 (Ky. 2009). Each presents a mixed question of fact and law. We briefly consider them separately.

"[T]he length of delay must be considered within the particular context of each case . . . measured as 'the time between the earlier of the arrest or the indictment and the time the trial begins.'" *Stacy*, 396 S.W.3d at 795 (citations omitted). Although the time can be measured by viewing the record, context requires consideration of additional facts. *Id.* at 796 (citation omitted) ("delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge").

"When reviewing the reasons for the delay, [the circuit court must] engage in a fact intensive analysis, as any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case. . . . [D]ifferent weights should be assigned different reasons given for the delay[.]" *Id.* (internal quotation marks and citation omitted). For example:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Miller, 283 S.W.3d at 700 (citation omitted). Whether delay was deliberate is an example of the elements of the issue that require a court to exercise discretion in finding facts supportable by substantial evidence.

Whether the defendant asserted his right seems like a simple question but requires a careful, well-considered answer. As a corollary to its waiver argument, the Commonwealth claims Clark did not seriously assert his right to a speedy trial soon enough. Whether this is so requires a fact-based determination by the circuit court along the lines of what was said in *Stacy*: "[A]lthough we do recognize that Appellant did in fact assert his right to a speedy trial, he did not vigorously do so." 396 S.W.3d at 798. The degree of Clark's vigor in pursuing his speedy trial claim is a question better suited to the circuit court's discretion.

"Of the interests enumerated, 'the last is the most serious.'" *Id.* (quoting *Smith*, 361 S.W.3d at 908 (citing *Barker*, 407 U.S. at 532, 92 S. Ct. 2182)). The last interest the circuit court must consider is the prejudice suffered by any delay. Prejudice can take many forms and the Supreme Court of Kentucky has offered three to consider: "(i) Prevention of Oppressive Pretrial Incarceration . . . (ii) Minimization of Appellant's Anxiety and Concern [and] (iii) Possibility of Impaired Defense[.]" *Id.* at 798-99. The order we are reviewing says nothing about prejudice.

In summary, the circuit court failed to undertake the proper review. The order addresses few pertinent facts or allegations, it does not address how such facts or averments play against the parties' four-part *Barker* analysis arguments, and it does not even cite *Barker*. The order simply identifies the sequence of procedural markers – indictment, motions, arraignments, hearings – up to the motion to dismiss. The order then summarily holds: "Based upon any and all of the foregoing, the motion to dismiss based on a fair and speedy trial argument is overruled." (R. at 45). This is insufficient and cannot be reviewed on appeal.

When matters of fact are left undetermined by the circuit court, this Court cannot determine them. When this Court attempted to do so in a similar context, the Supreme Court of Kentucky said, in *Roman Catholic Diocese of Lexington v. Noble*, "[T]he Court of Appeals should not have made a hypothetical decision concerning how it would have decided this case had the trial court exercised its discretion . . . ." 92 S.W.3d 724, 730 (Ky. 2002). "[W]e may not substitute our decision for the judgment of the trial court." *R.C.R. v. Commonwealth Cab. for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998) (citation omitted). That is as true when the circuit court makes no decision as when it does.

CONCLUSION

We have faced this situation before[5] and, consistent with our past and faithful to precedent, we reach the same conclusion. We hereby vacate the Perry Circuit Court's February 26, 2018, order denying Clark's motion to dismiss and remand with instructions that the court conduct a proper *Barker* analysis and make specific findings on each of the four *Barker* factors. We express no opinion regarding that analysis.

ALL CONCUR.

[5] In an unpublished opinion of this Court addressing a similar failure to address *Barker*, we said:

> Here, the trial court did not conduct a proper *Barker* analysis and thus failed to make factual findings on each of the prongs of the required four-factor analysis. We thus find ourselves unable to review adequately Dudley's claim that he was prejudiced by the nearly ten-year delay between his arrest and trial. Without more specific evidence explaining the reason for the delay, and whether or not Dudley knew of the indictment, we cannot make a proper determination whether good cause existed for the delay. Accordingly, we must remand to the trial court to conduct a proper *Barker* analysis and make specific findings on each of the four *Barker* factors. We express no opinion of what the result of the *Barker* analysis should be.

Dudley v. Commonwealth, No. 2014-CA-001284-MR, 2016 WL 194785, at *4 (Ky. App. Jan. 15, 2016).

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