

Commonwealth of Kentucky
Court of Appeals

NO. 2024-CA-1360-MR

WILLOW CHERRY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JULIE M. GOODMAN, JUDGE
ACTION NO. 18-CR-01114

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND McNEILL, JUDGES.

ACREE, JUDGE: Appellant Willow Cherry pleaded guilty to second-degree manslaughter after six years of litigation in Fayette Circuit Court. He appeals as a matter of right, alleging a violation of his right to a speedy trial. We affirm his conviction.

BACKGROUND

On February 19, 2018, Peter Lian was reported missing under suspicious circumstances. Peter's wife, Birdie Eaton, told police she last saw her husband while he was arguing with her brother, Willow Cherry ("Cherry"), a few days earlier on February 16, 2018. On that date, Peter, Birdie, Cherry, and Cherry's wife, Misty, were at Peter's apartment in Fayette County, Kentucky. Peter and Cherry began arguing and the disagreement turned physical. Frightened, Birdie left the apartment with her three-year-old daughter and Misty. The three went to the pool house for roughly fifty minutes.

Upon her return to the house, Birdie could hear Peter groaning for help from their bedroom. But she was frightened and did not check on Peter.

Birdie went back to the pool house and spoke with Misty, who "asked her not to call the police because Mr. Cherry would go to jail on an outstanding warrant." (Record ("R.") at 23). Birdie did not call police. She did not go into the bedroom. Instead, she went to her child's room after Cherry assured her "that 'Peter had left.'" (*Id.*) Despite seeing items in the apartment that Peter commonly carried with him, including his cell phone, Birdie did not question Cherry further. No one contacted law enforcement that night.

The next morning, Cherry drove Peter's vehicle to the house of his step-father, Whitney Eaton, Birdie's father. Whitney asked why Cherry was

driving Peter's vehicle. Cherry said Peter gave it to him and asked Whitney to help him clean blood from the vehicle. Whitney refused. According to Whitney, Cherry said, "Peter just wouldn't stop fighting." (*Id.*) Whitney noticed Cherry was holding Peter's cell phone, took it from Cherry, and told him to leave.

Whitney then called Birdie who then searched the home, but Peter was not there. However, she saw blood in the bedroom where Peter was groaning the night before. Scared, she left to go stay with Whitney.

Birdie contacted police because she had not heard from Peter all weekend. Detectives obtained a search warrant for Peter's apartment and pulled up the bedroom carpet. Underneath was "substantially more blood than what appeared on the surface, indicating someone had cleaned up the surface blood." (*Id.*) Additionally, detectives found various items of clothing covered in blood, including washcloths, a child's pajamas, and men's brown pants. Because of Cherry's "height and weight . . . and size of the pants, it [wa]s believe[d] that the pants . . . were worn by [Cherry] at the time of the assault and [alleged] murder." (R. at 49). Police also found a large amount of blood in the back storage area of Peter's vehicle. Police identified Cherry as a person of interest.

On June 26, 2018, four months after Peter was last seen, Cherry was arrested and arraigned on a charge of tampering with evidence. Misty posted his bond and Cherry was ordered to participate in a mental-status evaluation.

On September 25, 2018, the Commonwealth obtained a superseding indictment adding a murder charge and, on October 5, 2018, Cherry was arraigned on the murder charge. Cherry's counsel told the court his client's family contacted him regarding his "severe mental issues that have been documented in his past and they have raised concerns that [he was] not receiving the medication in the jail that he need[ed]," including "psychotic medication." (Video Record ("VR") 10/05/18 at 1:12:57).

The court inquired whether Cherry needed to go to the Kentucky Correctional Psychiatric Center ("KCPC"). Cherry's counsel opted not to formally request an evaluation because of his pending request to withdraw. Consequently, the court *sua sponte* ordered Cherry to participate in an evaluation. Cherry was admitted to KCPC on November 14, 2018 and returned to jail by mid-December.

At a December 19, 2018 status hearing, Cherry moved for a speedy trial before consulting with his counsel. After such consultation, his counsel informed the court of a revised request: "I am recommending that Mr. Cherry withhold his request until [a couple of] things are done [first], and after that if he wants a speedy trial, I will be behind him." (VR 12/19/18 at 1:45:25). First, defense counsel wanted an opportunity to review discovery sought to be introduced into evidence. Second, counsel requested a defense expert to independently evaluate Cherry, stating "assuming the court will grant the *ex parte* motion I've

brought along for funds for a mental health expert, [I recommend we wait] until *my* expert renders an opinion to me because it will be central to trial strategy.” (*Id.* at 1:45:00).

Defense counsel clarified that he was “withdrawing temporarily” the speedy trial request. (*Id.* at 1:46:03). The court asked if Cherry agreed, to which he responded “Yes, sir, I’m behind my attorney at this point.” (*Id.* at 1:45:16). Defense counsel requested a status date in February 2019, and the parties ultimately agreed to a hearing date of March 29, 2019.

At that hearing, defense counsel requested a continuance because he was still in the process of obtaining a report from his mental health expert. In July 2019, KCPC determined Cherry to be competent to stand trial. However, the competency hearing date set for July was continued *at the defense’s request* because Cherry was assaulted in jail and sustained a head injury. Because of the injury’s potential impact on competency, defense counsel sought a renewed evaluation and removed the upcoming July hearing from the court’s calendar.

The case sat idle for the next several months. Eventually, on March 11, 2020, the Commonwealth moved the trial court to schedule a status hearing because “[i]t d[id] not appear that there [wa]s a court date pending and significant time ha[d] passed since the last status hearing.” (R. at 138).

On March 13, 2020, defense counsel was still awaiting the evaluation. The parties and the court collaboratively set a status hearing for April 2020.

Three days later, the Kentucky Supreme Court implemented statewide COVID-19 measures. This prompted Cherry's counsel to file a motion for emergency bail or an evidentiary hearing, arguing incarcerated persons "are at an increased risk of contracting the disease" while in jail. (R. at 146). The trial court agreed to a \$50,000 bond, but Cherry was ultimately unable to secure the funds.

The next status conference was held on October 29, 2020, at which defense counsel requested yet another continuance based on Cherry's competency being at issue. When Cherry's attorney requested the case be passed to the next date in February, the court responded, "Alright, now, this is a 2018 case though." (VR 10/29/20 at 11:31:02). Cherry's counsel indicated the doctor working with Cherry recommended further evaluations which required additional expert hires.

For the next year-and-a-half, Cherry's counsel continued to request additional time. Various reasons generated the requests, including continued mental health evaluations and a change of counsel.

In April of 2022, purportedly with little remaining patience, Cherry mailed the court a *pro se* motion to "[n]otify the court of speedy trial." (R. at 201). This letter initiated a series of personal letters and *pro se* motions Cherry sent to the court; he estimates he sent approximately 108 letters.

Another status hearing was held on May 12, 2022. The court asked the parties at the bench, “What are we going to do, Mr. Cherry keeps writing. I sent you all copies of everything. I don’t mind it . . . [but] I’m a little worried. What are we going to do with him?” (VR 05/12/22 at 10:08:33). Cherry’s attorney was newly assigned to his case and indicated further investigation was needed. Here, Cherry himself verbally reiterated his personal request for a speedy trial. The court expressed frustration and some sympathy for Cherry’s concerns expressed in his letters but agreed to counsel’s continuance request.

Cherry’s counsel requested yet another continuance on July 14, 2022, and again on September 1, 2022. Yet again, on October 13, 2022, defense counsel sought another continuance.

At a December 22, 2022 status hearing, Cherry’s attorney again requested additional time to follow up with his psychological evaluator. The court said it wanted the hearing to take place “as quickly as possible.” (VR 12/22/22 at 12:11:04). By this point, the Commonwealth, too, was seemingly eager to move the case along. The Commonwealth asked the court for an order to get Cherry’s evaluation done sooner rather than later.

The court ordered another KCPC evaluation, which was acknowledged by KCPC on January 19, 2023. On February 9, 2023, Cherry’s attorney requested additional time. Again, on April 27, 2023, Cherry’s attorney

requested additional time. Again, the trial court expressed concern, stating: “This is a 2018 case, so what are we doing?” (VR 4/27/23 at 10:54:03). The court then asked whether the parties would consider mediation “based on the time he’s been in there and everything [they had] been facing.” (*Id.* at 10:55:11). Cherry’s attorney replied, “As of now, I do not believe that the defense is in a position to accept a plea.” (*Id.* at 10:55:16). Cherry then mentioned his right to a speedy trial again. The trial court told Cherry that “both the Commonwealth and defense . . . [we]re doing all they c[ould].” (*Id.* at 10:56:38).

At status hearings for the next several months, Cherry’s counsel continued to seek additional time to conduct mental health evaluations and Cherry himself continued to mention his desire for a speedy trial and his right thereto. On September 26, 2023, the trial court informed Cherry—in response to his personal letters to the court—that “[t]here wasn’t a situation where [Cherry was not] getting a speedy trial considering [his] health issues [and] considering the COVID situation.” (VR 9/26/23 at 09:20:39). Further, his desire for a speedy trial failed to consider that “no one in th[e] courtroom—the attorneys or the judge—had any control over” the reasons for delay. (*Id.* at 09:21:02). The court entered an order to this effect on October 3, 2023.

Cherry filed a notice of appeal from that order, and this Court obtained jurisdiction until we entered an order on February 19, 2024 dismissing the

appeal as interlocutory. Cherry sought discretionary review in the Supreme Court which was denied and his appeal became final on July 16, 2024. *See Cherry v. Commonwealth*, No. 2024-SC-0128 (Ky. July 16, 2024).

Before finality in that appeal, on February 15, 2024, Cherry, *pro se*, filed with this Court a petition for a writ alleging, among other things, he was not getting a speedy trial. *See Cherry v. Judge Julie Muth Goodman*, No. 2024-CA-0195-OA (Ky. App. Sep. 6, 2024) (finality).

Meanwhile, the Commonwealth offered to amend the charge to second-degree manslaughter with a recommended seven-year sentence. Cherry's attorney requested a future status date to provide time to consider the offer.

At a February 29, 2024 status hearing, the trial court questioned whether it lost jurisdiction as a result of Cherry's pending appeal. It declared status hearings could continue but no substantive issues could be addressed until Cherry's appeal was final.

Another status hearing was held in early July, before finality in Cherry's appeal, and although no substantive action was taken, the Commonwealth's offer—equating to his immediate release from jail due to his credit for time served—remained open for Cherry to consider.

A few days after finality in Cherry's interlocutory appeal, the trial court conducted another status hearing. The parties agreed to reschedule trial

because of his pending *pro se* writ and ongoing competency issues. A competency hearing was set for September; in the meantime, Cherry sent another letter to the court “request[ing] movement in the above styled case with due speed.” (R. at 831).

The competency hearing was rescheduled twice after this: once as requested by both parties and once because Cherry’s medical expert was not available for the rescheduled date. The hearing was ultimately rescheduled for December 18, 2024. Prior to this date, Cherry accepted the Commonwealth’s offer and pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). As a result, the Commonwealth dismissed Cherry’s tampering with evidence charge, amended his murder charge to second-degree manslaughter, and recommended a term of seven years’ imprisonment, which allowed Cherry to be immediately released from jail after his paperwork was processed. The trial court accepted Cherry’s *Alford* plea and he was released from jail.

Cherry appeals, arguing his right to a speedy trial was violated.

ANALYSIS

We analyze alleged violations of the right to speedy trial under the four-factor balancing test described in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *Henderson v. Commonwealth*, 563 S.W.3d 651,

661 (Ky. 2018). The Supreme Court of the United States described the test as follows:

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: [1] Length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant.

Barker, 407 U.S. at 530, 92 S. Ct. at 2192 (enumeration added). No single factor alone is determinative, rather, “they are related factors and must be considered together with such other circumstances as may be relevant.” *Stacy v.*

Commonwealth, 396 S.W.3d 787, 795 (Ky. 2013) (quoting *Barker*, 407 U.S. at 530–32, 92 S. Ct. 2182). “In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.” *Barker*, 407 U.S. at 533, 92 S. Ct. 2182. We now apply them.

I. Length of Delay

The length of delay, or “the time between the earlier of the arrest or the indictment and the time the trial begins[,]” must be viewed within the contextual demands of each case. *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001). “To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy

charge.” *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. This case is both a serious and complex murder case without a body.

Willow turned himself into custody on September 27, 2018. His case was resolved by plea on October 2, 2024. Therefore, the delay between arrest and conviction was over 72 months. Although our case law does not provide for a specific timeframe that is presumptively prejudicial, we generally consider delays of over one year to be presumptively prejudicial. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 199 (Ky. 2013). For example, in *Henderson, supra*, a 56-month delay in a complex case involving a wealth of physical evidence, DNA evidence, and testimony was “clearly presumptively prejudicial.” *Henderson*, 563 S.W.3d at 662. We accordingly find the 72-month delay in this case to be presumptively prejudicial.

II. Reason for Delay

There are “three categories of 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.’” *Dunaway*, 60 S.W.3d at 570 (quoting *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). “[D]ifferent weights should be assigned to different reasons.” *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. A deliberate attempt to delay the trial should be weighted heavily against the government, while a more neutral

reason should be weighted less heavily but nevertheless considered since such circumstances rest with the government. *Id.* However, a valid reason should serve to justify an appropriate delay. *Id.*

The Commonwealth directs us to four “valid” reasons, all of which serve to justify the delay. First, “the trial court and Cherry’s attorneys questioned his competency to stand trial from the beginning,” which resulted in multiple requests for medical evaluations that repeatedly prolonged his case. (Appellee Br. at 22). We will not reiterate the multiple continuance requests Cherry’s counsel made on this basis, but suffice to say Cherry’s counsel offered as the reason for the delays benefitted his own trial strategy.

Cherry now suggests that since he was found competent to stand trial, any queries into his competency post-head-injury recovery were unnecessary. We consider such a suggestion entirely disingenuous because the overwhelming majority of continuances were Cherry’s *own* counsel’s request calling the psychological evaluations “central to trial strategy.” (VR 12/19/18 at 1:45:08). Although we cannot be certain, it appears from the record that had Cherry’s counsel forgone his own expert, a significant portion of the time between indictment and resolution would have been eliminated.

The delays attributed to Cherry’s competency questions and perpetuated at the request of Cherry’s own attorneys continued until the onset of

the COVID-19 pandemic, which is the second “valid” reason for delay. The trial court was required to operate under Kentucky Supreme Court Administrative Order No. 2020-08, issued on March 12, 2020, which suspended trials beginning March 16, 2020. The trial suspension lasted until August of 2020, at which point trials were able to resume.

The pandemic “is not a get-out-of-the-constitution-free card[.]” *Berry v. Commonwealth*, 680 S.W.3d 827, 835 (Ky. 2023). When the COVID-19 pandemic is cited as a reason for delay, the proper inquiry is: “did the Commonwealth forego taking reasonable actions to promptly prosecute the case that it could have taken in spite of the pandemic but nonetheless claims the pandemic as a reason for not taking those reasonable actions[?]” *Id.* Here, the answer to that question is no. We examined the record closely and find no basis to claim “that the Commonwealth used the Covid-19 pandemic as a convenient excuse to not prosecute a case promptly even within the strictures imposed by the pandemic and response thereto.” *Id.*

Nothing suggests that Cherry would have been ready for trial during the five-month administrative suspension of trials because of the pandemic. Cherry’s counsel’s requests for continuances spanned the period both before and after the suspension.

A third reason for delay was staffing struggles at the Department of Public Advocacy (“DPA”). Throughout litigation, staffing issues resulted in no less than eight attorneys appearing on Cherry’s behalf and a delay in securing co-counsel for trial. We consider this a more “neutral” reason, akin to the “overcrowded courts” category of the *Barker* analysis. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192.

Finally, Cherry’s two separate pursuits of relief in this Court—the interlocutory appeal and the petition for a writ—were delays of the trial court’s jurisdiction caused by Cherry himself. *Smith v. Commonwealth*, 636 S.W.3d 421, 443 (Ky. 2011) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 656, 88 L. Ed. 2d 640 (1986) (“[A]n interlocutory appeal” even if pursued “by the [g]overnment ordinarily is a valid reason that justifies delay.”)).

We ask “whether the government or the criminal defendant is more to blame for [the] delay” and that question yields a straightforward answer here. *Stacy*, 396 S.W.3d at 796 (alteration in original) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)). A thorough review of the events causing delays in Cherry’s case leads us to the conclusion that the delays were for valid reasons, none of which were attributable to the Commonwealth.

III. Defendant's Assertion of Right

The next factor to consider is Cherry's assertion of his right to a speedy trial. "While the defendant has a right to a speedy trial regardless of whether he makes a demand, assertion of the right is a factor to consider." *Dunaway*, 60 S.W.3d at 571 (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). While such assertions are "entitled to strong evidentiary weight," a defendant's assertions "must be viewed in light of [defendant's] other conduct." *Dunaway*, 60 S.W.3d at 571 (citations omitted). For example, in *Loud Hawk*, the Court determined six months of frivolous petitions made alongside speedy trial claims were "reminiscent of Penelope's tapestry." 474 U.S. at 314 (citing HOMER, THE ODYSSEY, BOOK II, lines 91-105¹). That is to say, a defendant's sincerity in making speedy trial assertions must be taken into consideration.

In December 2018, Cherry verbally asserted—and then temporarily rescinded—his right to a speedy trial before the court, and this was followed by a significant number of personal letters to the court where his speedy trial request was reiterated. However, "[i]n the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by *his counsel*." *Breazeale v. Commonwealth*, 600 S.W.3d 682, 694 (Ky. 2020) (alteration in original) (emphasis

¹ Odysseus' wife Penelope promised to choose a new husband but only after she finished weaving a burial shroud for her father-in-law, Laertes. She tricked 108 competing suitors for three years, weaving by day and unraveling the threads by night.

added) (quoting *Salisbury v. Commonwealth*, 556 S.W.2d 922, 927 (Ky. App. 1977)). “It will be an exceptional case where, as here, a delay caused by a defense attorney counts against the government, under the *Barker* analysis, and not the defense.” *United States v. Tigano*, 880 F.3d 602, 616 (2d Cir. 2018).

We acknowledge Cherry asked the trial court for a speedy trial on numerous occasions throughout his case. However, each request was made at odds with his counsel; his trial counsel repeatedly affirmed that obtaining a defense medical expert’s opinion—and thereby prolonging the pendency of trial—was a critical component of trial strategy. Cherry’s requests, viewed in light of the defense’s actions as a whole, does not indicate a sincere desire for a speedy trial. Absent exceptional circumstances, Cherry was bound by his counsel’s trial strategy. He identified none and none is what we found.

IV. Prejudice Caused by the Delay

Finally, we consider the prejudice caused by the delay. “It is the burden of the defendant to establish actual prejudice” and the mere possibility of prejudice is insufficient to support a speedy trial violation claim. *Miller v. Commonwealth*, 283 S.W.3d 690, 703 (Ky. 2009). There are three interests bearing on the prejudice to a defendant: “(1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired.” *Dunaway*, 60 S.W.3d at 571-72

(citation omitted). Of the three, the last—an impaired defense—“is the most serious.” *Id.*

Cherry argues he was prejudiced because he “languished in jail” where he “suffered violence at the hands of other inmates and his health and wellness were placed in danger” because of the COVID-19 pandemic. (Appellant Br. at 16). He also claims prejudice was suffered in the form of a “bond amount which [he] could not afford but was willing to finally accept and impose a plea which allowed his release from jail.” (*Id.* at 16-17).

While incarcerated, Cherry corresponded with the court through numerous letters and *pro se* pleadings wherein he often requested a trial date and objected to continued exploration of his mental health. These letters, he argues, demonstrate his “apparent” stress and anxiety. (Appellant Br. at 17). We agree with Cherry that awaiting trial could lend itself to anxiety and, to a certain extent, we believe Cherry suffered oppressive pretrial incarceration and anxiety. However, these are only two of the factors we consider.

Cherry does not assert, even generally, that his defense was impaired. To the contrary, Cherry’s trial counsel repeatedly requested continuances so he could obtain medical evaluations he claimed were “central to trial strategy.” If any effect was caused by the delay, it served to benefit the defense.

In *McDonald*, the Court determined that rather than honestly asserting the right to a speedy trial, the defendant “hoped to take advantage of the delay in order to obtain a dismissal of the charge, and . . . the prejudice to McDonald by reason of the delay was minimal if any prejudice resulted at all.” *McDonald v. Commonwealth*, 569 S.W.2d 134, 137 (Ky. 1978). We find this observation instructive. Absent even a generic claim of a “possibility that [his] defense [would have been] impaired,” Cherry cannot establish “the most serious” of the three interests bearing on prejudice. *Dunaway*, 60 S.W.3d at 571-72.

We weigh Cherry’s pretrial incarceration and anxiety against the stark absence of any prejudice. Though unfortunate, an earlier resolution likely could have been obtained if Cherry ceased to exacerbate the delay through a seemingly unattainable expert, an interlocutory appeal, or, at the least, accepting the Commonwealth’s plea offer—which would have resulted in Cherry’s release from jail—in a timely fashion. On balance, it was Cherry’s maneuvers that perpetuated the delay, not the Commonwealth’s.

CONCLUSION

Based on the foregoing, we find no violation of Cherry’s constitutional right to a speedy trial and AFFIRM.

ALL CONCUR.

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