

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001510-MR

ROBERT DUDLEY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 04-CR-00717

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, Robert Dudley, appeals from an order and judgment of the Kenton Circuit Court, which denied his motion to dismiss the charges against him for violation of his right to a speedy trial and his amended motion to suppress evidence and reinstated judgment against him. Following a review of the record and applicable law, we affirm in part, reverse in part, and remand.

I. BACKGROUND

The early facts of this case were well-summarized in Dudley's first appeal to this Court, *Dudley v. Commonwealth*, No. 2014-CA-001284-MR, 2016 WL 194785 (Ky. App. Jan. 15, 2016) [hereinafter *Dudley I*], and we adopt them herein as follows:

In September of 2004, Sgt. Holstein, a Covington police officer, received several anonymous complaints indicating that a person driving a white Chevrolet Camero [sic] with an Ohio license plate that read "Priest 1" was involved in drug trafficking activity. Based on these complaints, Sgt. Holstein began surveillance on the white Camero [sic]. On September 6, 2004, after spotting the white Camero [sic], Sgt. Holstein radioed two other officers, Officer Pennington and Officer Valente, and requested they also follow the suspect. After following the vehicle for a short while, Officer Pennington and Officer Valente observed the vehicle make a turn without signaling. The two officers immediately called for a marked patrol unit to conduct a traffic stop on the Camero [sic] for failure to use a turn signal.

Shortly thereafter, Spc. Ernst, along with his K-9 partner, Orry, arrived in a marked patrol unit and conducted the traffic stop. Spc. Ernst, having knowledge that the driver of the vehicle was known to carry a weapon, ordered the driver to exit the Camero [sic] and slowly walk backwards towards the police cruiser. Meanwhile, Sgt. Holstein, Officer Pennington, and Officer Valente arrived on the scene. Sgt. Holstein asked the driver to produce his operator's license and he was then identified as Dudley. Dudley was patted down and neither drugs nor weapons were found. A female passenger, later identified as Lisa Garcia, was checked for warrants and released.

While Holstein explained to Dudley why he had been pulled over, Spc. Ernst walked Orry around the Camero

[sic]. On Orry's second walk around, he alerted on the passenger's side of the vehicle for the presence of drugs. Officers then asked Dudley for permission to search his vehicle, but Dudley refused. After Dudley signed a refusal of consent to search, he was allowed to leave, and the Camero [sic] was impounded pending a search warrant. A warrant was obtained the next day, and the ensuing search uncovered cocaine, a digital scale, a black mask, and a handgun.

Dudley was arrested in Kenton County on September 7, 2004. After spending approximately ninety days in custody, Dudley was released because his charges had been pending for more than sixty days and the grand jury had not returned an indictment. Kentucky Rules of Criminal Procedure (RCr) 5.22(3). On December 10, 2004, a Kenton County grand jury returned an indictment against Dudley charging him with possession of a handgun by a convicted felon and possession of a controlled substance in the first degree. Dudley was scheduled to be arraigned on December 13, 2004; however, he failed to appear because he was in custody in Hamilton County, Ohio, on a parole violation. A bench warrant for Dudley's arrest was issued on December 20, 2004.

After his case was reassigned to a different division in the Kenton Circuit Court, a new warrant for Dudley's arrest was executed on January 27, 2011. On December 12, 2012, after Dudley was arrested in Ohio on an unrelated charge, authorities in Ohio notified authorities in Kentucky that Dudley was in custody. Dudley was brought back to Kentucky pursuant to his request for relief under the Interstate Agreement on Detainers on February 14, 2014. Following his return from Ohio, Dudley was arraigned in the Kenton Circuit Court on February 20, 2014. In accordance with the Agreement on Detainers, his trial was held within 180 days.

Prior to trial, Dudley filed numerous motions, including a motion to dismiss the indictment for lack of a speedy trial, and a motion to suppress the evidence produced in the search of his vehicle. Hearings were held, and the

court entered a written order denying all of Dudley's pretrial motions. Dudley then moved to sever the counts in the indictment, which the circuit court granted.

A jury trial on Dudley's charge of being a felon in possession of a handgun was held on June 3, 2014. Dudley was found guilty and sentenced to five years' imprisonment. On July 7, 2014, Dudley pleaded guilty to the charge of possession of a controlled substance and received eighteen months to be served consecutively with his five-year sentence in the present case.

Dudley I, at *1-2.

Following his plea of guilty, Dudley appealed his conviction and sentence to this Court as a matter of right. On appeal, Dudley claimed that the circuit court erred in denying his motion to suppress evidence obtained during the search of his vehicle. As basis for this count of error, Dudley argued that the traffic stop was unreasonable as it was predicated on an anonymous tip. *Id.* at *3. Additionally, Dudley argued that his constitutional right to a speedy trial was violated because there was a ten-year delay between the date of his arrest and the date of trial. *Id.* at *4.

A panel of this Court affirmed the circuit court's finding that the traffic stop was valid and found the motion to suppress was properly denied. The Court noted that the officers stopped Dudley because he failed to signal when turning; thus, the stop was valid. The Court then addressed Dudley's contention that the officers had unreasonably prolonged his detention following the traffic stop and pat-down. In determining that the circuit court did not err in denying Dudley's motion to suppress, this Court stated as follows:

The trial court found that Orry was present when Spc. Ernst stopped Dudley's vehicle and thus there was no undue delay in allowing Orry to check for drugs. In light of the officer's testimony, Officer Pennington's police report, the Covington Police Department's Full Call Report, and the refusal of consent form, the trial court's factual findings are supported by substantial evidence and are therefore not clearly erroneous. The dog-sniff occurred within minutes of the stop while the officers were performing tasks and making "ordinary inquiries incident to [the traffic] stop." *Rodriguez* [*v. United States*, 135 S.Ct 1609, 1615, 191 L.Ed.2d 492 (2015)] (quoting *Illinois v. Caballes*, 543 U.S. at 408, 125 S.Ct. 834 (2005)).

A dog-sniff that initiates before the lawful purpose of the traffic stop is complete is lawful as long as it does not make the length of the traffic stop unreasonable. *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky. App. 2005). While the record is silent on precisely how long it took for Orry to alert on the presence of narcotics, it does indicate that the time between the beginning of the dog sniff and when Dudley was allowed to leave was only twenty-nine minutes. Thus, sometime within those twenty-nine minutes . . . the officers had probable cause to search. *Id.* at 886. Any subsequent detention beyond the time necessary to effectuate the traffic stop was constitutionally permissible because the officers had probable cause. *Id.*

Dudley I, at *3.

Looking next to Dudley's contention that his constitutional right to a speedy trial had been violated, this Court found that the circuit court had not conducted a proper analysis or made factual findings as required under *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and *Preston v. Commonwealth*, 898 S.W.2d 504 (Ky. App. 1995). *Dudley I*, at *4. Accordingly,

this Court remanded the case to the circuit court to conduct a proper *Barker* analysis, with findings of fact. *Id.*

On July 7, 2016, Dudley filed another motion to dismiss in the Kenton Circuit Court, again arguing that his constitutional right to a speedy trial had been violated. In that motion, Dudley contended that he had been highly prejudiced by the delay in the prosecution of his case. Specifically, Dudley noted that he had been unable to obtain, despite discovery requests, records concerning the training of the K-9 officer, the reliability of the K-9, and other documents concerning the dog; that the car in which the firearm was allegedly found was no longer in evidence and the Covington Police Department did not know where it was located; and that the female passenger who was in Dudley's car the night he was stopped for the traffic violation was unable to be located. That same day, Dudley also filed an amended motion to reconsider suppression of evidence. In that motion, Dudley noted that the Supreme Court of Kentucky had recently rendered an opinion in *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016), which overturned *Epps* and *Johnson* to the extent that those cases differed from the Court's acknowledgment of *Rodriguez* in *Davis*. Because the *Dudley I* court had relied on the precedent found in *Johnson* and *Epps* when affirming the circuit court's finding that the traffic stop and search of Dudley's car were constitutional, Dudley argued that the circuit court must reconsider his motion to suppress.

The circuit court held a telephonic hearing on Dudley's motion to dismiss the charges against him for violation of his right to a speedy trial on July 8,

2016. At the hearing, Dudley testified that when he was released from custody in December of 2004 under RCr 5.22(3) he believed that the charges against him had been dismissed. Dudley testified that neither his previous counsel, nor any other individual, informed him that he was still subject to an indictment despite being released from custody. Dudley noted that he had been arrested and taken into custody in Ohio on at least five separate occasions between his release from custody in Kentucky and 2011; Kentucky did not have a detainer against Dudley during that time, which would have let him know that he was still subject to indictment. Further, Dudley testified that one of his arresting officers from Kentucky testified at his parole hearing in Ohio in 2005, but did not indicate that there was a warrant out for Dudley in Kentucky. Dudley stated that he did not discover that the Commonwealth had issued a warrant for his arrest and a detainer for him until January or February of 2013, when he was trying to make bond on a charge arising from a 2012 arrest in Ohio. Following his sentencing in Ohio on those charges, Dudley filed a request to be returned to Kentucky in accordance with the Interstate Agreement on Detainers¹ in January of 2014.

Additionally, Dudley testified to prejudice he has suffered resulting from the delay between his arrest and his indictment. Dudley noted that, by the time of his trial in Kentucky, his Camaro had been lost. He testified that pictures shown by the Commonwealth at trial, which were allegedly of the interior of his Camaro, were not actually his vehicle. Dudley was not able to contest this,

¹ Kentucky Revised Statutes (KRS) 440.450. To make such a request under the Interstate Agreement on Detainers an inmate must have been sentenced and in custody.

however, as he did not know where his Camaro was. Further, Dudley stated that because of the detainer now issued against him, he was incarcerated in a higher security prison in Ohio than he would be without the detainer. Dudley indicated that this caused him to be incarcerated further away from his family, which was a burden on both them and himself. Being incarcerated in the higher security prison also made Dudley ineligible for certain programs, for which he would otherwise be eligible, that would allow for him to earn early release for good behavior.

At the close of the hearing, the Commonwealth was ordered to file a response to Dudley's motion to reconsider suppression of evidence. In its response, the Commonwealth noted that a panel of this Court had already affirmed the circuit court's denial of Dudley's original motion to suppress. Accordingly, the Commonwealth argued that the law-of-the-case doctrine prohibited the circuit court from considering the motion.

On September 6, 2016, the circuit court entered an Order and Judgment Upon Remand, by which it denied Dudley's motion to dismiss and his motion to reconsider suppression of evidence and reinstated judgment against him. To determine whether Dudley's right to a speedy trial had been violated, the circuit court utilized the four factors set out by the United States Supreme Court in *Barker*: (1) the length of the delay; (2) whether the delay was more the fault of the defendant or the government; (3) the defendant's assertion of his right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay.

Looking at the length of the delay, the circuit court noted that the ten-year delay between indictment and trial created a presumption of prejudice. However, the circuit court found that the remaining three factors weighed against Dudley. As to whether the delay was more the fault of the Commonwealth or Dudley, the circuit court found that the blame fell on Dudley. The court noted that the primary reason that Dudley was not brought to trial shortly after being indicted was because Dudley had been arrested and placed in custody in the state of Ohio. Thus, the court concluded, Dudley was the cause for his absence. While the circuit court noted that the Commonwealth had failed to place a detainer on Dudley while Dudley was in custody, the court concluded that Dudley was still primarily responsible as he had failed to determine the outcome of his felony charges in Kentucky and committed the crimes in Ohio that caused him to be unable to appear in Kentucky. Looking to the third factor, the circuit court found that Dudley had not asserted his right to a speedy trial until he filed his request to be returned to Kentucky under the Interstate Agreement on Detainers. The circuit court concluded that Dudley should have known that matters were pending against him in Kentucky, but failed to take action to learn the status of the case against him. Accordingly, the circuit court found that Dudley had been negligent in waiting so long to assert his right to a speedy trial. Finally, as the circuit court could not find any evidence that the Commonwealth's denying Dudley evidence had caused Dudley prejudice, it found that Dudley had suffered no prejudice as a result of the

delay. Other than denying Dudley's motion to reconsider suppression of evidence, the circuit court declined to address the issue.

This appeal followed.

II. ANALYSIS

Dudley raises two counts of error on appeal. First, he alleges that the circuit court erred in failing to reconsider his motion to suppress evidence as he is entitled to retroactively benefit from the Supreme Court of Kentucky's opinion in *Davis*. Second, he contends that the circuit court erred in denying his motion to dismiss the charges against him on the grounds that his Sixth Amendment right to a speedy trial had been violated. We address each argument in turn.

A. Suppression of Evidence

Subsequent to this Court's rendering of the *Dudley I* opinion, the Supreme Court of Kentucky rendered the *Davis* opinion, which partially overturned two cases relied on in the *Dudley I* opinion to affirm the circuit court's denial of Dudley's motion to suppress. Dudley contends that this Court must reconsider its decision in light of *Davis*, as "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In addition to arguing that *Dudley I* is the law of the case and cannot now be overturned, the Commonwealth argues that there is no "new rule of law" to be applied to Dudley's motion to suppress. The Commonwealth notes that *Davis* simply followed the rule of law in *Rodriguez v.*

United States, 135 S.Ct 1609, 1615, 191 L.Ed.2d 492 (2015), which not only had already been decided when *Dudley I* was rendered, but was cited to in the *Dudley I* opinion.

The *Dudley I* opinion does cite to *Rodriguez*; however, the standard stated by the Court in analyzing the suppression issues raised by *Dudley* is the standard found in *Johnson* and *Epps* – that “[a] dog-sniff that initiates before the lawful purpose of the traffic stop is complete is lawful *as long as it does not make the length of the traffic stop unreasonable.*” *Dudley I* at *3 (citing *Johnson*, 179 S.W.3d at 884) (emphasis added). *Davis*, however, altered the standard from whether a dog-sniff made the length of the traffic stop unreasonable, as *Rodriguez* had clarified that “a police officer may not extend a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search – not even for a *de minimis* period of time.” *Davis*, 484 S.W.3d at 293. Therefore, the *Davis* court adopted the standard set out in *Rodriguez* and determined that “[t]he ‘key question’ is *not* whether the duration of Appellant’s roadside detention was unreasonable; rather, it is whether the sniff search was related to *the purpose* for which Appellant was stopped[.]” *Id.* at 294 (emphasis in original). Using this new standard, the *Davis* court found that a K-9 sniff-search of a vehicle’s exterior was unlawful when the vehicle had been pulled over for a suspected DUI and two field sobriety tests had been administered, despite the fact that the entirety of the stop was thirteen minutes.

Thus, while *Rodriguez* had been decided and was cited by this Court in *Dudley I*, this Court presumably did not read *Rodriguez* as altering the standards used in *Johnson* and *Epps*. The *Davis* opinion, rendered after this Court had decided *Dudley I*, clarified that the standard had changed. Nonetheless, we find that the new rule of law is irrelevant to Dudley's suppression claims. Dudley has contended throughout these proceedings that the K-9 sniff-search of his vehicle occurred approximately one hour after he was stopped for the traffic violation, following his repeated refusals of consent to search his vehicle. In contrast, the officers' testimony at the suppression hearing indicated that the K-9 search occurred *concurrent with* one of the officer's explaining to Dudley why he had been pulled over. The officers' testimony was corroborated by an investigative report prepared by one of the officers on the scene. The circuit court chose to believe the testimony of the officers, and adopted that testimony into its factual findings when denying Dudley's motion to suppress. As the circuit court's factual finding was supported by substantial evidence, it is deemed conclusive. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007).

As the facts indicate that the K-9 sniff-search occurred simultaneous with the officers' explaining to Dudley why he had been stopped, the sniff-search did not add *any* time to the otherwise proper traffic stop. Therefore, the outcome of Dudley's motion to suppress remains the same under either the rule-of-law used in *Dudley I* or the new rule-of-law as articulated in *Davis*.

B. Violation of Right to a Speedy Trial

Dudley next contends that the circuit court erred in determining that his right to a speedy trial had not been violated. To review a trial court's *Barker* analysis, we must apply constitutional standards to the facts of the case. *Goben v. Commonwealth*, 503 S.W. 3d 890, 903 (Ky. 2016). Therefore, "we employ a dual standard of review: *de novo* for legal questions and clear error for questions of fact." *Id.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" This right is also guaranteed by the Kentucky Constitution. Ky. Const. § 11. In determining whether a defendant's speedy trial rights have been violated, courts balance four factors set out by the United States Supreme Court in *Barker*: (1) the length of the delay; (2) the reasons for delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. 407 U.S. at 530-32, 92 S.Ct. at 2192. "We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533, 92 S.Ct. at 2193.

1. Length of Delay

To trigger an inquiry into the next three factors, the length of delay must be found to be "presumptively prejudicial." *Id.* at 530, 92 S.Ct. at 2192. Whether a length is presumptively prejudicial does not depend solely on the length of time at issue; it "must depend on the particular context of each case."

McDonald v. Commonwealth, 569 S.W.2d 134, 136-37 (Ky. 1978). “Whether a delay is presumptively prejudicial depends, in part, on the charges involved. That is, ‘the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.’” *Dunaway v. Commonwealth*, 60 S.W.3d 563, 569 (Ky. 2001) (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192). Length of delay is measured as “the time between the earlier of the arrest or the indictment and the time the trial begins.” *Id.* (citing *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 3023, 46 L.Ed.2d 205 (1975)). In this case, Dudley was arrested on September 7, 2004. The case did not go to trial until June 3, 2014. As the charges brought against Dudley were not complex, we agree with the trial court that a delay of almost ten years is presumptively prejudicial.

2. Reason for the Delay

Finding that the approximately ten-year delay is presumptively prejudicial, we must now examine the remaining three factors. The *Barker* court set out three categories of reasons for delay: (1) “deliberate attempt[s] to delay the trial in order to hamper the defense”; (2) “more neutral reason[s] such as negligence or overcrowded courts”; and (3) “valid reason[s], such as a missing witness[.]” *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. Different reasons for the delay, even reasons that fall into the same category, should be accorded different weights. *Dunaway*, 60 S.W.3d at 570. “For example, delay due to negligence, which is a neutral reason, would weigh more heavily in favor of a speedy trial violation than court overcrowding, which is also classified as a neutral reason.” *Id.*

“Further, the [*Barker*] Court was clear that even a neutral reason weighs against the state because ‘the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial.’” *Id.* (quoting *Barker*, 407 U.S. at 529, 92 S.Ct. at 2191).

Here, the parties agree on the reason for the delay. Dudley was not present at his arraignment on December 13, 2004, or at the rescheduled arraignment on December 17, 2004, because he had been taken into custody in Ohio. Two handwritten notes in the record indicate that court personnel were aware that the reason for Dudley’s absence was because he was in custody in Ohio. Dudley testified that he was unaware that an indictment had been entered against him – no evidence was presented to show otherwise. The record shows that a bench warrant was issued for Dudley’s arrest on December 20, 2004; however, the Commonwealth acknowledged that no warrant was served on Dudley until 2014. Despite the fact that the Commonwealth was aware that Dudley had been taken into custody in Ohio there was no detainer or holder filed until 2012. When he was informed of the holder, Dudley filed a request under the Interstate Agreement on Detainers to be returned to Kentucky.

Based on these facts, the circuit court concluded that Dudley was to blame for the delay. We disagree. These facts do not indicate a situation where the defendant was purposefully evading prosecution. The facts indicate that Dudley was unaware that he was subject to an indictment in Kentucky, and that the Commonwealth, despite knowing where Dudley was and how to make contact

with him, did nothing to inform him of that fact for almost ten years. This is not the fault of Dudley. The delay is attributable to the Commonwealth's negligence in failing to place a holder or detainer on Dudley and failing to execute the warrant against him. *See Doggett v. United States*, 505 U.S. 647, 652-53, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (finding that, when the defendant had left the county following indictment and testified that he was unaware of the indictment, the government had offered no evidence to show that defendant knew of the indictment, and the government made no serious effort to locate the defendant for six years, the delay in trial was a result of government negligence).

3. Assertion of right

Dudley was arraigned on his 2004 charges on February 24, 2014. On May 19, 2014, Dudley moved the circuit court to dismiss the case under Section Eleven of the Kentucky Constitution requesting that the court consider the “extreme length of time between seizure of the vehicle and the trial date, the loss of material evidence, and in the [sic] inability to present an adequate defense.” On June 3, 2014, Dudley filed a second motion to dismiss, in which he cited to the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution and specifically stated that his fundamental right to a speedy trial had been violated.

The fact that Dudley did not assert his right to a speedy trial until 2014 would weigh heavily against him had he known of the indictment. However,

as he did not know of the indictment until 2014, we cannot fault him for not asserting the right until that time. *See id.* at 653-54, 112 S.Ct. at 2691.

4. Prejudice to Dudley

The circuit court's order found that there was "no evidence that the delay in bringing the case to trial in 201[4] caused prejudice to [Dudley] by denying him evidence" as sufficient evidence of the crimes Dudley was charged with was presented at his trial. Accordingly, the circuit court found that Dudley failed to carry his burden in proving prejudice due to delay.

Prejudice is "assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. The *Barker* Court identified three interests related to prejudice to the defendant caused by a delay: (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." *Id.* Of these three interests, the third is the most serious. *Id.*

Dudley, of course, claims only the third type of prejudice. He contends that his defense was impaired in that he was unable to locate the female passenger who had been riding with him when he was stopped by the police in September of 2004; by the fact that the testifying officers had limited independent recollection of the stop and K-9 sniff-search and had to rely on their reports; by the fact that his Camaro had been lost; and by the fact that the K-9's scent tracking records had been either lost or destroyed by the time of his trial. The

Commonwealth contends that Dudley's assertions of prejudice are entirely speculative and, accordingly, cannot be relied on as grounds for reversal.

“*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony ‘can rarely be shown.’” *Dogget*, 505 U.S. at 655, 112 S.Ct. at 2692-93 (citing *Barker*, 407 U.S. at 521, 92 S.Ct. at 2187).

“Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” *Id.* at 655, 112 S.Ct. at 2693. “While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is a part of the mix of relevant facts, and its importance increases with the length of delay.” *Id.* at 655-56, 112 S.Ct. at 2693 (citation omitted).

Therefore, the crux of our analysis rests on what role presumptive prejudice should weigh in Dudley's speedy trial claim. The almost ten-year delay between Dudley's indictment and his trial is quite extraordinary in light of the relatively simple nature of the case. We note that this is not an instance where the Commonwealth intentionally delayed Dudley's trial so as to purposefully prejudice his defense. Nonetheless, it *is* a case where the delay was caused by the Commonwealth's neglect to prosecute. While the Commonwealth has noted that Dudley's asserted prejudice is speculative, it has offered no persuasive rebuttal to Dudley's assertions. The Commonwealth states that the missing K-9 records, missing witness, and missing Camaro are irrelevant to Dudley's defense, as a

firearm and cocaine were found in Dudley's Camaro pursuant to a valid search warrant. It is true that the contraband was found pursuant to the warrant.

Nonetheless, without the witness and the K-9 records, Dudley was potentially left without evidence to support his motion to suppress.² Based on the great length of the delay, which was caused by the Commonwealth's negligence, we find that the presumptive prejudice to Dudley is sufficient to entitle Dudley to relief on Sixth Amendment Grounds. *See Doggett*, 505 U.S. at 658, 112 S.Ct. at 2694 ("When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence nor persuasively rebutted, the defendant is entitled to relief." (internal citations omitted)).

III. CONCLUSION

Based on the above analysis, we affirm the circuit court's order on the motion to suppress, but reverse as the court's order finding that Dudley's Sixth Amendment rights were not violated. Accordingly, we remand the case for the charges against Dudley to be dismissed.

² For example, as part of his motion to suppress, Dudley could have argued that the dog was not reliable. "A positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs" *Morton v. Commonwealth*, 232 S.W.3d 566, 570 (Ky. App. 2007). When challenged as part of a motion to suppress, the Commonwealth must show that the dog is trained and reliable. The Supreme Court set forth the framework as follows: "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test." *Florida v. Harris*, 568 U.S. 237, 248, 133 S.Ct. 1050, 1058, 185 L.Ed.2d 61 (2013). The age of this case made it impossible for Dudley to attack the dog's reliability and training.

TAYLOR, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS.

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