

RENDERED: April 24, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1093-MR

TY EVANS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 95-CR-2633

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING WITH DIRECTIONS

** ** ** **

BEFORE: HUDDLESTON, JOHNSON, and MILLER, Judges.

MILLER, JUDGE. Ty Evans brings this appeal from an April 24, 1997 judgment of the Jefferson Circuit Court. We reverse and remand with directions.

The facts are these: On October 18, 1995, appellant was indicted by the Jefferson County Grand Jury for the offenses of criminal facilitation to commit first-degree burglary, criminal possession of a forged instrument, and for being a first-degree persistent felony offender. At the time, appellant was incarcerated in a federal facility outside Kentucky. Appellant was subsequently brought to Kentucky and lodged in the Jefferson County Jail. It appears from the record that he was arraigned before the Jefferson Circuit Court on September 3, 1996. On April 24, 1997, appellant entered a conditional plea of guilty

and was sentenced to five years' imprisonment. Ky. R. Crim. Proc. 8.09. This appeal followed.

Appellant contends the circuit court committed reversible error by failing to dismiss with prejudice the indictment against him. Specifically, he maintains that the Commonwealth failed to try him within 180 days as required by the Interstate Agreement on Detainers, codified in this Commonwealth as Ky. Rev. Stat. (KRS) 440.450. Appellant relies upon Article III(1) of that statute, which reads in relevant part as follows:

(1) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party 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 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

. . . .

The Commonwealth conceded that appellant made a request for final disposition of the charges pursuant to Article III(1) and that same was received by the "appropriate parties" on June 12, 1996. Article III(1) mandates that the trial must be held within 180 days from such date of notification. Thus, appellant's trial should have been held no later than December 9, 1996. It is undisputed that the circuit court set the trial date

for January 29, 1997, well outside the 180-day time limit of Article III(1).

Even though the record supports appellant's contention that Article III(1) was violated, the Commonwealth contends that such was not the case because: (1) the 180-day time limit was tolled and/or (2) appellant waived the 180-day time limit of Article III(1). The Commonwealth specifically argues as follows:

Taking into account the pretrial motions filed by defense counsel and the request for time to investigate whether the appellant had an agreement with federal officials that would preclude his prosecution in Kentucky and the further fact that defense counsel did not inform the court that that issue was not going to be pursued until the January 3, 1997, pretrial conference and further the fact that defense counsel was not ready for trial on January 29, 1997, the Commonwealth submits that the 180 day time limit under the Interstate Agreement on Detainers was not violated by the Commonwealth.

We reject the Commonwealth's attempt to "toll" the 180-day time limit based upon appellant's sundry pretrial motions. We note that these motions were run-of-the-mill pretrial motions and that no evidence suggest they were made with the intent to delay the trial.

As to appellant's "request for time to investigate" whether a federal agreement existed that precluded criminal charges in Kentucky, the record indicates that on October 24, 1997, defense counsel relayed to the court that it would take, at the most, 30 days to secure such documentation of a federal agreement. It appears, however, that such documentation was filed with the court on November 4, 1996. Thus, at the most, we can attribute a 10-day delay to appellant. This moves the

required trial date under Article III(1) to December 19, 1996; however, the January 29, 1997 trial date would still be well outside the 180-day time limit.

Additionally, we do not believe it incumbent upon appellant to ensure that the circuit court and the Commonwealth comply with the Interstate Agreement on Detainers Act. As noted in Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 314 (1994):

"[T]he States which are parties to the Agreement have the affirmative duty of complying with its terms." *United States v. Eaddy*, 595 F.2d 341, 344 (6th Cir. 1979). The prisoner need not demand that the prosecutor and court comply with the IAD. Such a requirement "would shift the burden of compliance with the provisions of the Agreement away from the Government, where Congress [and the Legislature] placed it, and onto the prisoner." *Id.* at 345. The Commonwealth, either the trial judge or the prosecutor, had the duty of keeping track of the IAD time limits and complying with them.

Upon the foregoing, we attach no significance to appellant's alleged failure to promptly and diligently notify the court or the Commonwealth of their duty under Article III(1).

As appellant requested a continuance on the date of trial (January 29, 1997), the Commonwealth claims that appellant somehow waived his entitlement to a trial within the 180 day time limit of Article III(1). We view appellant's request for a continuance **outside** the 180-day time limit as immaterial. Simply stated, his request in no way contributed to the Commonwealth's or the court's noncompliance with the 180-day time limitation of Article III(1).

The Commonwealth also contends that the circuit court's crowded docket is "good cause" under Article III(1) to excuse the

fixing of appellant's trial date outside the 180-day time limitation. We disagree. If such were the case, the Interstate Agreement on Detainers would have little effect and its primary purpose of assuring speedy trials would be severely subverted. We flatly reject such contention.

Last, the Commonwealth seeks to justify its noncompliance with Article III(1) by arguing that:

. . . [it] was precluded from immediately bringing appellant to trial in Kentucky after his request for disposition was made because appellant was first sent to other States for trial in those states before Kentucky could take custody of him, and as previously noted that period would also have to be excluded in computing the 180 day time limit.

We note, however, that the record is devoid of any evidence verifying which states appellant was detained by and the exact period of such detainment. In short, we think appellant was not "brought to trial within . . . (180) days," as required by Article III(1). As such, we believe the Commonwealth has failed in its burden to comply with the provisions of the Interstate Agreement on Detainers; consequently, the indictment against appellant should be dismissed with prejudice. See Lovitt v. Commonwealth, Ky., 592 S.W.2d 133 (1979).

For the foregoing reasons, the judgment of the circuit court is reversed, and this cause is remanded to the circuit court with directions to enter an order dismissing the indictment.

ALL CONCUR.

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