

RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000738-MR

DENNIS GILBERT

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 01-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dennis Gilbert appeals from a March 19, 2003, order of the Grayson Circuit Court, denying his motion to withdraw his plea of guilty and to dismiss the indictment. We affirm.

On September 4, 2001, the Grayson County Grand Jury indicted Gilbert for second degree escape, Kentucky Revised Statutes (KRS) 520.030, and with being a second degree persistent felony offender (PFO II), KRS 532.080(2).¹ On November 19, 2002, Gilbert was returned to Grayson County from

¹ Gilbert, while in the custody of the Grayson County jail, walked away from an inmate work site in Leitchfield, on June 25, 1999. A criminal complaint was immediately issued which lay dormant until Gilbert was arrested in Indiana sometime in 2000.

Indiana and was present with counsel when arraigned. At arraignment, the pretrial conference and trial dates were specifically agreed to by Gilbert's counsel. On December 3, 2002, the Commonwealth offered, in exchange for a plea of guilty, a two year prison sentence for second-degree escape and dismissal of the PFO II count. On the same day, Gilbert and his counsel signed a Motion to Enter Guilty Plea waiving among other rights, his right to a speedy trial.

On February 18, 2003, Gilbert filed a motion to dismiss the indictment and to withdraw guilty plea. In support thereof, he alleged to have not been tried within the required time limit under Article III of the Interstate Agreement on Detainers (IAD) as codified in KRS 440.450. Gilbert pointed to documents filed May 15, 2001, demanding a trial within 180 days under the IAD. On March 12, 2003, the circuit court found that Gilbert waived his right to a trial under IAD time limits and, thus, denied the motion. On March 19, 2003, Gilbert was sentenced in accordance with his guilty plea. This appeal follows.

Gilbert argues that he was not tried within the required time limit set by the IAD; thus, the circuit court erred by denying his motion to withdraw guilty plea and dismiss

the indictment.² This Court need not reach the merits of whether the IAD was violated. We are of the opinion that Gilbert waived his right to complain of any alleged violation because he agreed to a trial date outside of the IAD time limit and because he failed to timely raise the issue of alleged noncompliance with the IAD in the circuit court.

In New York v. Hill, 528 U.S. 110, 120 S. Ct. 659, 145 L.Ed.2d 560 (2000), the United States Supreme Court held that a defendant implicitly waives the IAD's time limits where he or his counsel agrees to a trial date outside those limits. At arraignment on November 19, 2002, Gilbert's counsel did not raise the speedy trial issue before the circuit court and also agreed to a trial date outside of IAD's time limits. We believe Gilbert's agreement to a trial date beyond the IAD's time limit constituted a waiver. See Parks v. Commonwealth, Ky., 89 S.W.3d 395 (2002); Ward v. Commonwealth, Ky. App., 62 S.W.3d 399 (2001).

As such, we hold the circuit court did not err by denying Gilbert's motion to withdraw guilty plea and to dismiss the indictment.

² Contrary to the Commonwealth's assertion, it is not necessary for Gilbert to have entered a conditional plea of guilty under Ky. R. Crim. P. 8.09; the denial of a motion to withdraw guilty plea may be reviewed by this Court from a final judgment based upon the guilty plea. See Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8 (2002).

For the foregoing reasons, the judgment of the Grayson Circuit Court is affirmed.

MINTON, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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