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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001213-MR

FRENCH MYERS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 11-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: French Myers appeals an order of the Montgomery Circuit Court denying his motion to dismiss for failure to prosecute under Kentucky Revised Statutes (KRS) 500.110. We affirm.

Myers was indicted for theft by deception and for being a persistent felony offender on June 10, 2011. A detainer was later filed in March of 2012 with the warden at the Kentucky State Penitentiary where Myers was serving a previous

sentence. On April 11, 2012, Myers filed a *pro se* motion to dismiss for failure to prosecute, claiming that he requested disposition of the indictment on May 11, 2011, which was one month before the return of the indictment and ten months before the detainer was filed. The court record does not reflect that any such motion was filed in May of 2011.

On June 8, 2012, Myers filed a *pro se* motion asking for disposition of pending charges pursuant to KRS 500.110. He also requested an order requiring the Commonwealth's Attorney to set the case for final disposition. Although the motion was not noticed to the Commonwealth's Attorney, the Commonwealth filed a response on July 17, 2012. The response indicated that the Commonwealth received a copy of the motion on July 9, 2012, and that the Commonwealth did not oppose a speedy trial. The Commonwealth also stated that the 180-day statutory period would expire on December 5, 2012. After the Commonwealth's response, no action was taken until December 12, 2012, when the court entered an order requiring Myers to appear at an arraignment on December 14, 2012.

At the arraignment, Myers was appointed counsel by the court. The court stated that the case had been delayed due to an issue with the proof of service of the warrant. Myers discussed his *pro se* motion and the court acknowledged that it had been filed. The court proceeded to set the case for trial on April 2, 2013, without objection. After the trial date was announced, Myers indicated his intent to file a motion to proceed *pro se*.

On January 10, 2013, Myers filed a *pro se* motion asking for dismissal of the charges for failure to receive a speedy trial under KRS 500.110, stating that more than 180 days had passed since he filed his request for a final disposition pursuant to the statute. Counsel for Myers filed a substantially similar motion four days later. These motions were heard at a pretrial conference on February 8, 2014. The trial court stated that the purpose of the statute was to protect a defendant who is up for parole from being prejudiced by an outstanding indictment and that Myers would not be so prejudiced; therefore, the court denied the motion. Thereafter, Myers entered into a conditional guilty plea in which he reserved the right to appeal the trial court's ruling on his motion to dismiss under KRS 500.110. A final judgment and sentence on that guilty plea were entered on July 2, 2013. This appeal followed.

Myers claims that he did not receive a trial within 180 days of his request for final disposition as outlined in KRS 500.110. The statute provides that:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this 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 and 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.

KRS 500.110. Myers argues that he invoked his right to a speedy trial under the requirements of this statute by delivering notice of where he was incarcerated and a request for final disposition; therefore, his motion was improperly denied.

The Commonwealth first contends that the motion was not served on the prosecutor as required by KRS 500.110, noting that the Commonwealth's Attorney was not listed in the certificate of service. The Commonwealth argues that under *Donahoo v. Dortch*, 128 S.W.3d 491 (Ky. 2004), the defendant has the burden of "establishing service on the Commonwealth's Attorney of his request for a final disposition[.]" *Id.* at 495 (footnote omitted). However, this situation is easily distinguishable from that of the *Donahoo* case. In *Donahoo*, the Commonwealth argued in its response to the defendant's motion that the Commonwealth had never received notice of the defendant's request for a speedy trial, and the Commonwealth's Attorney filed an affidavit supporting the claim that the defendant had failed to serve his motion on the Commonwealth. In this case, the Commonwealth acknowledged in its response to the motion that its office received a copy on July 9, 2012. Additionally, the Commonwealth stated that it did not oppose Myers's request for a speedy trial. Because the Commonwealth by its own admission received the motion on July 9, 2012, the notice requirements of KRS 500.110 were satisfied.

The Commonwealth further argues that Myers waived his right to a speedy trial under KRS 500.110 by agreeing through counsel to a trial date that was after the 180-day statutory period. In *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000), the United States Supreme Court addressed whether a statutory time limit may be waived by counsel assenting to a delay. In discussing the Interstate Agreement on Detainers (“IAD”), the Supreme Court held that although certain fundamental rights must be expressly waived by the defendant, “[f]or other rights, however, waiver may be effected by action of counsel.” *Hill*, 528 U.S. at 114, 120 S.Ct. at 664. The Supreme Court goes on to state that “[s]cheduling matters are plainly among those for which agreement by counsel generally controls.” *Id.* at 115, 120 S.Ct. at 664. The Supreme Court reasoned that “[r]equiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose.” *Id.* The Supreme Court also found support for its reasoning in the text of the statute, stating that “[i]n allowing the court to grant ‘good-cause continuances’ when either ‘prisoner *or his counsel*’ is present, [the statute] contemplates that scheduling questions may be left to counsel.” *Id.* (citation omitted) (emphasis in original).

The Kentucky Supreme Court adopted the *Hill* ruling in *Parks v. Commonwealth*, 89 S.W.3d 395 (Ky. 2002). In *Parks*, when the trial judge provided a date outside the statutory speedy trial window, neither the defendant nor his counsel objected, and the Kentucky Supreme Court held that “the agreement by

Parks to a trial date beyond the limits of the IAD constituted a waiver of his speedy trial rights.” *Id.* at 398.

Although the cases *supra* interpret the IAD, codified in KRS 440.450, their reasoning is appropriately applied to KRS 500.110. Both statutes have similar requirements and afford similar speedy trial rights to incarcerated defendants. Additionally, the language in the IAD relied upon by the *Hill* court to support its holding that the IAD contemplates that scheduling decisions may be made by counsel is similarly present in KRS 500.110. *Compare Hill*, 528 U.S. at 115, 120 S.Ct. at 664, *and* KRS 440.450 Art. III(1), *with* KRS 500.110.

Here, Myers was appointed counsel at the arraignment on December 14, 2012. When the court assigned a date for the trial that would occur more than 180 days after the date of Myers’s notice and request in his original *pro se* motion, neither Myers nor his counsel objected. Although Myers indicated at that time that he had a pending motion under KRS 500.110, his counsel did not indicate any objection to the proposed trial date. Pursuant to *Hill* and *Parks*, by agreeing to a trial date outside the 180-day period through counsel, Myers waived his right to a speedy trial.

Myers further argues that his attorney could not have waived his right to a speedy trial because at no time during the arraignment did he agree to be represented. We disagree. Although Myers did not verbally accept representation, once appointed, the attorney began immediately addressing the court on his behalf without his objection. While Myers did state at the end of the arraignment that he

intended to file a motion to represent himself, his indication that he would file a motion at a future date did not constitute a waiver of representation. “At a minimum, . . . ‘before a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead.’” *Commonwealth v. Terry*, 295 S.W.3d 819, 822 (Ky. 2009) (quoting *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Because Myers indicated that he would file a motion to represent himself at a future date, the court did not provide the required warning. Furthermore, Myers never filed a motion to proceed *pro se*, and the Department of Public Advocacy continued to represent Myers throughout the rest of the proceedings in the court below. Therefore, Myers was represented by the attorney appointed to him during the arraignment, and counsel’s agreement to a trial date outside the purported 180-day period constituted a waiver of Myers’s right to a speedy trial.

Finally, Myers contends that the Commonwealth violated his right to a speedy trial under the Sixth Amendment to the U.S. Constitution and Section 11 of the Kentucky Constitution. However, in his motion to enter into a conditional plea, Myers specifically waived his constitutional right to a speedy trial. The guilty plea was conditioned solely on the outcome of his appeal of the trial court’s denial of a speedy trial under KRS 500.110; therefore, this argument is not properly before this Court and we will not address it here.

Based on the foregoing, the judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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