

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29439-1-III

Appellant,

)

)

) **Division Three**

v.

)

)

STEPHEN WADE HOLMES,

) **UNPUBLISHED OPINION**

)

Respondent.

)

)

Kulik, C.J. — In 2003, Spokane County issued an arrest warrant for Stephen Wade Holmes. Mr. Holmes became aware of the warrant in 2005 while he was incarcerated in a Nevada prison. He requested disposition of the charges under the Interstate Act on Detainers (IAD). The request was sent to Spokane County Superior Court but not to the prosecutor.

In 2010, Idaho police arrested Mr. Holmes on the outstanding warrant and transported him back to Spokane. The Spokane County Superior Court dismissed the charges based on a violation of the 180-day time limit for trial under the IAD. The trial court found that Mr. Holmes triggered the time limit in 2005 when he requested

disposition, even though the prosecutor's office never received his request. The State appeals the dismissal.

Here, the IAD required that the State lodge a detainer to the Nevada prison. The State did not do so because it did not receive the request. Thus, the 180-day time limit did not begin to run and, therefore, was not violated. We reverse the dismissal.

FACTS

In July 2003, the State charged Mr. Holmes with two counts of possession of a controlled substance and one count of indecent exposure. After Mr. Holmes failed to appear for arraignment, Spokane County issued an arrest warrant. Less than two months later, the Humboldt County sheriff's office in Winnemucca, Nevada, notified the Spokane County police department that Mr. Holmes was living within its jurisdiction and provided Spokane police with Mr. Holmes's residential address. The Spokane County prosecutor's office did not attempt to have Mr. Holmes located and arrested because Nevada was not a "free" state for extradition. Clerk's Papers (CP) at 52.

In 2005, during his confinement in a Nevada prison, Mr. Holmes became aware of the charges pending in Spokane. Mr. Holmes contacted his Nevada prison classification casework specialist and obtained the paperwork needed to request final disposition of the Washington charges under the IAD. The form instructed Mr. Holmes to answer the

questions and then return the form to the casework specialist.

The form also contained a copy of the IAD. The IAD states that the prisoner needs to have “caused to be delivered” to the prosecuting attorney, and to the court of jurisdiction, written notice of the place of the prisoner’s confinement, and his request for final disposition of his charges. CP at 8. The prisoner is instructed to give the notice of disposition to the corrections officer having custody over him. The corrections officer is to promptly forward the notice, and a certificate of inmate status, to the “appropriate prosecuting official and court by registered or certified mail.” CP at 55.

On April 26, 2005, Mr. Holmes forwarded the completed paperwork for final disposition to the casework specialist. The casework specialist sent the request for final disposition and the certificate of inmate status to the Spokane County Superior Court. The paperwork was received by the Spokane County clerk on May 2. The Spokane County prosecutor’s office did not receive Mr. Holmes’s request for final disposition and was unaware of Mr. Holmes’s incarceration in Nevada.

In June 2010, Mr. Holmes was questioned by Idaho police regarding a noise complaint. Idaho police then arrested Mr. Holmes based on the outstanding Spokane County warrant. Mr. Holmes was extradited to Spokane County and booked on the outstanding charges on June 18. He was arraigned on June 29, and his trial was set for

August 23.

On August 4, Mr. Holmes filed a motion to dismiss based on the State's failure to comply with the IAD's provision requiring trial within 180 days. The trial court agreed and dismissed the charges. The court determined that the 180-day time limit began in 2005 when Mr. Holmes made his request for final disposition. The court also determined that receipt by the prosecutor's office was not necessary to trigger the 180-day time limit for trial as long as Mr. Holmes provided a written request for final disposition to his custodian or corrections officer.

The State appeals the dismissal, contending that the trial court erred by concluding that Mr. Holmes had activated his right to a trial under the IAD. Mr. Holmes does not respond to the State's assignment of error under the IAD but, instead, raises a new issue. Mr. Holmes maintains his Sixth Amendment right to a speedy trial was violated.

ANALYSIS

IAD. Interpretations of the speedy trial requirements of the IAD are reviewed de novo because "[i]nterpretation of statutes is a matter of law subject to independent appellate review." *State v. Karp*, 69 Wn. App. 369, 372, 848 P.2d 1304 (1993).

The IAD is an interstate compact designed to address issues that may arise when an individual is incarcerated in one jurisdiction while also facing charges in another

jurisdiction. RCW 9.100.010. Several steps are required to trigger a defendant's rights under the IAD. *State v. Welker*, 157 Wn.2d 557, 563, 141 P.3d 8 (2006); *see* RCW 9.100.010.

First, the state with pending charges against the defendant (the receiving state) lodges a detainer against the defendant in the foreign (sending) state. *Welker*, 157 Wn.2d at 563. A detainer is a request to an institution where a prisoner is held to either hold the prisoner or notify the requesting agency when the prisoner will be released. *State v. Welker*, 127 Wn. App. 222, 228, 110 P.3d 1167 (2005) (quoting *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985)), *aff'd on other grounds by Welker*, 157 Wn.2d 557. A defendant may not file a valid request for speedy disposition under the IAD until a detainer is filed against him. *Welker*, 157 Wn.2d at 565. However, a prosecutor's knowledge of an incarcerated defendant's whereabouts in a foreign penal institution prompts a good faith and due diligence duty to file a detainer. *Id.* at 566.

"Then, penal officials in the sending state must inform the defendant of the detainer against him and inform him of his right to request final disposition of those charges in the receiving state under the IAD." *Id.* at 563 (citing RCW 9.100.010 (art. III(c) of IAD)).

Finally, the defendant must invoke his IAD rights by causing an appropriate

request for disposition of the charges to be delivered to the court and to the prosecutor of the county where the receiving state's charges are pending. *Welker*, 157 Wn.2d at 564 (citing RCW 9.100.010 (art. III(b) of IAD)). The request and a certificate from the official having custody of the defendant must be sent by registered or certified mail. *State v. Roberson*, 78 Wn. App. 600, 605, 897 P.2d 443 (1995). "A prisoner must strictly comply with these requirements to trigger the 180-day clock." *Id.*

From the time the prosecutor receives that request, the prosecutor's office then has 180 days to bring the defendant to trial in the receiving state. *Welker*, 157 Wn.2d at 564 (citing *Fex v. Michigan*, 507 U.S. 43, 52, 113 S. Ct. 1085, 122 L. Ed. 2d 406 (1993); *State v. Morris*, 126 Wn.2d 306, 313, 892 P.2d 734 (1995)). The 180-day time limit "does not begin to run until actual delivery to the court and prosecuting officer of the jurisdiction that lodged the detainer." *Roberson*, 78 Wn. App. at 606.

Here, the first step required to initiate rights under the IAD did not take place. The State did not lodge a detainer against Mr. Holmes. The State did not request that the Nevada prison incarcerating Mr. Holmes hold him or notify the State at the end of Mr. Holmes's imprisonment. Therefore, rights under the IAD were not implicated because it was necessary for the State to lodge a detainer against Mr. Holmes before he could initiate his rights.

Additionally, the State did not have a good faith and due diligence duty to file a detainer because there is no evidence that the State was aware that Mr. Holmes was incarcerated in Nevada. Even though the State knew of Mr. Holmes's residential address in 2003, the State's duty of good faith and due diligence under the IAD did not apply when Mr. Holmes was at large. The State does not have a good faith duty to extradite a defendant who is out of state and not in custody because the defendant is not amenable to arrest or summons. *State v. Hudson*, 130 Wn.2d 48, 56-57, 921 P.2d 538 (1996). The State was not required to file a detainer. Correspondingly, Mr. Holmes did not have rights under the IAD.

Even if a detainer should have been filed, Mr. Holmes's request for final disposition did not meet the requirements of the IAD. In *Fex*, the United States Supreme Court ruled that the 180-day time period for trial under the IAD commences when the prosecuting official and the superior court of the jurisdiction that filed the detainer receive the request for disposition. *Fex*, 507 U.S. at 52. The Court outright rejected Mr. Fex's contention that "a prisoner's transmittal of an IAD request to the prison authorities commences the 180-day period even if the request gets lost in the mail and is never delivered to the 'receiving' State." *Id.* at 47-48. The Court concludes that it is self-evident that no one can "cause something to be delivered" unless delivery actually occurs.

Id. at 47. The Washington Supreme Court adopted the holding of *Fex* in *Morris*. *Morris*, 126 Wn.2d at 313. The *Morris* court concluded that having receipt by the prosecutor and superior court provides a verifiable and easily ascertained measuring event rather than delivery to the warden. *Id.*

Mr. Holmes did not serve a copy of his request for final disposition to the prosecutor's office nor did he send his request via certified mail. While he did fill out the request for final disposition and return it to his caseworker, this action alone was not sufficient. Accordingly, Mr. Holmes did not comply with the conditions required to trigger the application of the provisions of the IAD. He did not have a right to trial within 180 days.

The State did not violate Mr. Holmes's right to trial within 180 days under the IAD because Mr. Holmes's rights under the IAD were never activated.

Speedy Trial Right. A claim of a manifest constitutional error is reviewed de novo. *State v. Walters*, 146 Wn. App. 138, 144, 188 P.3d 540 (2008).

For the first time on appeal, a party may raise the issue of a manifest error involving a constitutional right. RAP 2.5(a)(3). The court applies a four-step process in examining errors raised for the first time on appeal: (1) the court first determines if the error involves a constitutional issue; (2) then it determines if the error is manifest,

meaning it had practical and identifiable consequences; (3) next, it decides if the constitutional issue has merit; and (4) last, it looks to see if the error was harmless. *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004). An alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

“Both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. 10) provide criminal defendants the right to a speedy public trial.” *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). A constitutional right to a speedy trial is a separate right from procedural rules with a time for trial provision. *Hudson*, 130 Wn.2d at 57. Contrary to the IAD, the State is not relieved of its Sixth Amendment speedy trial responsibilities when the defendant is incarcerated in another state. *State v. Davis*, 69 Wn. App. 634, 638, 849 P.2d 1283 (1993) (quoting *State v. Newcomer*, 48 Wn. App. 83, 87, 737 P.2d 1285 (1987)).

For the first time on appeal, in his respondent’s brief, Mr. Holmes contends that the nearly seven-year delay between the filing of charges and arraignment violated his right to a speedy trial under the Sixth Amendment to the United States Constitution. This error had practical and identifiable consequences because it delayed Mr. Holmes’s disposition of the charges. Hence, Mr. Holmes’s allegation consists of a manifest error of

constitutional magnitude. Furthermore, the necessary facts needed to evaluate Mr. Holmes's Sixth Amendment right to a speedy trial can be found in the trial court record pertaining to Mr. Holmes's right to trial under the IAD. An examination of the merits of Mr. Holmes's alleged Sixth Amendment violation is proper.

Constitutional Claim. The constitutional right to a speedy trial is not violated by the expiration of a definite time but, rather, by the expiration of a reasonable time. *Monson*, 84 Wn. App. at 711. The Sixth Amendment speedy trial right attaches when a charge is filed or an arrest is made that holds one to answer to a criminal charge, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999).

As a threshold matter, a defendant must show that the length of the pretrial delay was presumptively prejudicial. *State v. Iniguez*, 167 Wn.2d 273, 283, 217 P.3d 768 (2009). A presumption of prejudice cannot be assumed based on a specific passage of time. *Id.* at 292. "Presumptively prejudicial" does not "'indicate a statistical probability of prejudice'" but, instead, simply marks the point at which the courts deem the delay unreasonable enough to trigger the analysis found in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *Iniguez*, 167 Wn.2d at 283 n.3 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). The court considers the length of the delay as an important factor in determining a

presumption of prejudice, but the court also considers the complexity of the charges and the reliance on eyewitness testimony. *Iniguez*, 167 Wn.2d at 292.

Once the defendant demonstrates presumptive prejudice, the court considers the *Barker* factors to determine whether a defendant has been deprived of his constitutional right to a speedy trial. *Id.* at 283. The court balances the conduct of the prosecutors and the defendant when considering the following four *Barker* factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Iniguez*, 167 Wn.2d at 283 (citing *Barker*, 407 U.S. at 530).

Here, the State filed charges against Mr. Holmes in July 2003, initiating Mr. Holmes's right to a speedy trial under the Sixth Amendment. Mr. Holmes was finally arrested in June 2010. Seven years passed between the charging and the arrest. Additionally, the charges against Mr. Holmes were not complex, and eyewitness testimony would likely be needed regarding Mr. Holmes's indecent exposure charge. Mr. Holmes's pretrial delay is presumptively prejudicial and meets the threshold. Further inquiry into the *Barker* factors is needed.

Barker Factors. (1) *Length of delay.* This factor is not considered in the same manner as the threshold presumptive prejudice analysis. *Iniguez*, 167 Wn.2d at 293. The

length of the delay focuses on “the extent to which the delay stretches beyond the bare minimum needed to trigger” the *Barker* analysis. *Iniguez*, 167 Wn.2d at 293 (quoting *Doggett*, 505 U.S. at 652). A longer pretrial delay compels a court to give a closer examination into the circumstances surrounding the delay. *Iniguez*, 167 Wn.2d at 293.

The seven-year lapse between charging and arrest is lengthy. On its face, the delay appears to be excessive, making this factor weigh in favor of Mr. Holmes. However, a careful appraisal of the other factors is needed to see if the delay was unwarranted.

(2) *Reason for the delay*. Different weight should be assigned to different reasons for the delay. *State v. Iniguez*, 143 Wn. App. 845, 856, 180 P.3d 855 (2008) (quoting *Barker*, 407 U.S. at 531), *rev'd on other grounds by* 167 Wn.2d 273. The government has “some obligation” to pursue a defendant and bring him to trial. *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993). Central to this analysis is whether the government’s actions were diligent. *United States v. Aguirre*, 994 F.2d 1454, 1457 (9th Cir. 1993). If the actions of the government are diligent, the court looks to whether the government or the defendant is more to blame for the delay. *Id.*

In *Doggett*, the United States Supreme Court determined that the government’s negligence in failing to diligently pursue Mr. Doggett was the reason for the eight and

one-half year delay between indictment and arrest. *Doggett*, 505 U.S. at 652-53. For the first two and one-half years after filing charges, the government was unable to arrest Mr. Doggett because he was living out of the country and a formal extradition attempt would have been futile. *Id.* at 649-50.

Eventually, Mr. Doggett moved back to the United States, passing freely through customs. *Id.* He lived openly for nearly six years before the government located him through a simple electronic credit check. *Id.* At the time of arrest, Mr. Doggett was unaware of the charges against him. *Id.* at 653. The court decided that for the last six years of the delay, the government acted negligently by failing to diligently test their assumption that Mr. Doggett was living abroad. *Id.* at 653-54. “[I]f the Government had pursued [Mr.] Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail.” *Id.* at 656.

In contrast, in *Monson*, this court decided that the State acted reasonably during the 13-year delay between charging and arraignment because Mr. Monson was not amenable to arrest and difficult to locate. *Monson*, 84 Wn. App. at 711-12. During this period, the State’s attempts to serve Mr. Monson were unsuccessful, even though Mr. Monson lived openly in Montana, Washington, and New York. *Id.* at 706. When the border patrol in New York alerted the Spokane County sheriff’s office of Mr. Monson’s

location in New York, the sheriff's office decided not to extradite until 17 months later because Mr. Monson was not amenable to process. *Id.* at 706-07. The court determined that Mr. Monson's unamenability to arrest and the difficulty in tracing his whereabouts were the reason for the delay. *Id.* at 711.

Here, the reason for the delay distinguishes this case from *Doggett*. The reason for the delay in *Doggett* involved the government's failure to diligently search for Mr. Doggett while he was subject to United States jurisdiction. Mr. Holmes never asserts that he was in a location where Washington had jurisdiction. More similar to *Monson*, Mr. Holmes lived outside of Washington and kept his whereabouts unknown. Under the circumstances, the State did not act negligently for failing to diligently pursue Mr. Holmes while he lived outside of Washington's jurisdiction.

Mr. Holmes asserts that the State acted in bad faith by failing to arrest him while they were aware of his residential address in Nevada. However, in *Hudson*, the Washington Supreme Court ruled that the State does not have a good faith duty to extradite a defendant who is out of state and not in custody because the defendant is not amenable to arrest or summons. *Hudson*, 130 Wn.2d at 56-57. This ruling is supported by the decisions in *Doggett* and *Monson*. Mr. Holmes was out of the state and was not in custody during the delay; therefore, the State did not act in bad faith by deciding not to

extradite Mr. Holmes.

Admittedly, the court mentions as dicta in *Hudson* that whether the State sends a notice to a defendant's known out-of-state address may be relevant to a constitutional speedy trial challenge. *Hudson*, 130 Wn.2d at 57-58. However, this statement by the court simply gives another circumstance to consider. In *Monson*, which was decided after *Hudson*, this court still determined that it was reasonable for the State not to take any action even though the State was aware of Mr. Monson's at-large location. *Monson*, 84 Wn. App. at 711-12.

The State acted reasonably and diligently in its pursuit of Mr. Holmes. The reason for the delay was the State's lack of knowledge regarding Mr. Holmes's whereabouts outside of Washington and his unamenability to process. This factor should weigh in favor of the State.

(3) *Assertion of the right.* A defendant's assertion of his right to a speedy trial is entitled to strong evidentiary weight when determining whether deprivation of the right is present. *Barker*, 407 U.S. at 531-32. The court considers the extent to which a defendant demands a speedy trial as well as the reasons behind the demand. *Iniguez*, 167 Wn.2d at 294-95. The failure of a defendant to assert the right weighs against the defendant's claim that he was denied a speedy trial. *Barker*, 407 U.S. at 532. However, when a

defendant is unaware of the charges against him, the fact that he did not assert his right will not be weighed against him. *See Doggett*, 505 U.S. at 653.

Mr. Holmes was unaware of the charges against him for the first 18 months of the seven-year period, so this period cannot be weighed against him. Mr. Holmes first found out about the Washington charges in 2005 while he was incarcerated in a Nevada prison. While it is true that in 2005 Mr. Holmes attempted to assert his right to a speedy trial, issues surrounding the assertion should be considered.

First, Mr. Holmes never alerted the Spokane County prosecutor's office that he was asserting his right to a speedy trial either under the IAD or the Sixth Amendment. Under the IAD, Mr. Holmes's failure to serve the prosecutor's office meant he did not assert his rights. Similarly, if Mr. Holmes wanted to assert his right to a speedy trial under the Sixth Amendment, he also needed to give notice to the Spokane County prosecutor's office. Mr. Holmes did neither.

Additionally, while Mr. Holmes was eager to have the Washington charges adjudicated under the IAD, he never claims to have made an effort to follow up with the request. After he was released from prison, Mr. Holmes did not keep Washington updated about his whereabouts. Although he had no obligation to bring himself to trial, he cannot be excused from all responsibility for not providing the State with an address

when he knew there were outstanding charges against him.

Four years passed between Mr. Holmes's release from prison in 2006 and his arrest on the Spokane warrant in 2010. Although Mr. Holmes should be given some credit for his attempted assertion, this factor still does not weigh in his favor because he never notified the prosecutor of his assertion under the IAD or Sixth Amendment. The extent of his assertion revolved around one incomplete request for disposition made over four years before his arrest. At most, this factor is neutral.

(4) *Prejudice*. Whether prejudice will be assumed depends on whether it is the defendant or the government who is responsible for the delay. *Aguirre*, 994 F.2d at 1456. If the government is negligent in pursuing the defendant, prejudice is presumed. *Doggett*, 505 U.S. at 657. On the other hand, if the government fulfills its obligation to pursue a defendant with reasonable diligence, the defendant must show specific prejudice to his or her defense. *Id.* at 656. Prejudice should be assessed in light of the defendant's interest in (1) preventing pretrial incarceration, (2) minimizing anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532.

As stated in the second factor, the reason for the delay was Mr. Holmes's unamenability to arrest. The State acted with good faith and diligence in its pursuit of

Mr. Holmes and was not negligent. Therefore, prejudice cannot be assumed. Mr. Holmes must show specific prejudice to his defense.

In his brief, Mr. Holmes assumed prejudice existed and, therefore, did not present evidence of specific prejudice to his defense. However, the trial court stated in its conclusions of law that Mr. Holmes's right to a speedy trial under the IAD was prejudiced because Mr. Holmes was deprived of the opportunity to serve concurrent sentences. The right to a concurrent sentence may lead to prejudice under the IAD, but it is not one of the three interests examined in relation to prejudice under the Sixth Amendment. Because Mr. Holmes does not show how he was prejudiced by the delay, this final and crucial factor weighs in favor of the State. Under the totality of the above factors, Mr. Holmes's constitutional right to a speedy trial was not violated.

We reverse the dismissal by the trial court. Dismissal is not supported under the IAD or the Sixth Amendment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to

No. 29439-1-III
State v. Holmes

RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.