

RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001212-MR

STEVE FANT

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN MINTON, JR., JUDGE
ACTION NO. 95-CR-0194

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: WILHOIT, Chief Judge, COMBS, and JOHNSON, Judges.

JOHNSON, JUDGE: Steve Fant (Fant) appeals from the judgment of conviction and sentence of the Warren Circuit Court entered on April 19, 1996, that found him guilty, pursuant to a conditional plea,¹ to receiving stolen property over \$300 (Kentucky Revised Statutes (KRS) 514.110), being a persistent felony offender in the second degree (PFO II) (KRS 532.080(2)), and sentenced him to serve eight years in the penitentiary. We affirm.

Fant was arrested in November 1994, after he was observed operating a vehicle that had been reported stolen to

¹ Kentucky Rules of Criminal Procedure 8.09.

police in Nashville, Tennessee. In early March 1995, Fant was released from custody on an unsecured \$5,000 bond. On March 15, 1995, he was indicted by the Warren County Grand Jury on the charge of receiving stolen property valued over \$300 and operating on a suspended license for driving under the influence, second offense (KRS 189A.090). Fant failed to appear in court for his arraignment on March 27, and a bench warrant was issued for his arrest. On March 29, 1995, the grand jury returned a separate indictment charging Fant as a persistent felony offender in the first degree (PFO I), (KRS 532.080(3)). He also failed to appear at the arraignment on this charge and another bench warrant was issued.

On April 29, 1995, Fant was arrested in Daviess County and charged with an unrelated crime of receiving stolen property over \$300, and with having no operators license. He was also held on the arrest warrants from Warren County. On August 18, 1995, while Fant was incarcerated in the Daviess County Jail awaiting resolution of the charges pending there, Fant apparently wrote a letter to the Warren County Attorney who forwarded it to the Warren County Commonwealth's Attorney. The letter read in part as follows:

. . . [C]ould you please send and get me so that we can get these charge's [sic] there taken care of and out of the way[.] [T]hey will not do anything here until your office takes care of your charge's [sic] first[,] so could you please let me know something real soon[?] I['ve] been in this jail now

for five months. . . .^[2]

On October 30, 1995, the charges in the Daviess Circuit Court were resolved after Fant pled guilty. He was sentenced to two years on the felony conviction, which sentence was to run concurrently with the ninety days he was sentenced to serve on the misdemeanor conviction.

On November 22, Fant was transported to Warren County where he was arraigned on the charges contained in the March indictments. A trial date of February 1, 1996, was set at that time, and Fant was returned to the Daviess County Jail. Inexplicably, the Warren County Sheriff failed to cause Fant to be delivered to the Warren Circuit Court on February 1, 1996, for his trial. On February 26, a new trial date of April 16, 1996, was set.

On April 9, Fant moved to dismiss the indictments "[g]iven the length of time" he had been in custody. At the hearing on the motion held on April 15, Fant argued that he was entitled to the benefit of the provisions of KRS 500.110 which provide that a defendant be tried within 180 days of a request for a "final disposition" of an indictment. The trial court concluded that Fant was not entitled to the protection of KRS 500.110 as (1) Fant was not a person serving a "term of imprisonment," as that term is contemplated by the statute, when he made his speedy trial request in August 1995, and (2) Fant had

² This quote is from the order of the trial court that denied Fant's motion to dismiss. Unfortunately, we have been unable to locate this letter in the record; but for the purposes of our review we have assumed that the letter was correctly quoted in the trial court's order.

not caused his request to be delivered to the Warren Circuit Court. Thereafter, Fant entered a guilty plea that was conditioned on his right to appeal the trial court's ruling regarding the application of KRS 500.110. On April 19, 1996, Fant was sentenced to prison for four years on the receiving stolen property conviction which was enhanced to eight years on the PFO II conviction. The Warren Circuit Court sentence was ordered to run consecutively with the two-year sentence imposed by the Daviess Circuit Court.

In this appeal, Fant argues that his statutory right to a speedy trial was violated by the Warren Circuit Court. Specifically, he contends that under KRS 500.110, he was entitled to be tried within 180 days after the detainer was lodged against him and after he requested a prompt trial. In other words, he claims he should have been tried within 180 days of August 18, 1995, the date of his letter to the Warren County Attorney. Because his trial was continued to April 1996, he argues the charges against him should have been dismissed. We disagree.

KRS 500.110 reads in pertinent part as follows:

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. .

. .

Clearly, as the trial court found, when Fant made his request for a final disposition of the charges pending against him in Warren County, he was not yet entitled to the protection offered by this statute. Fant did not enter a "term of imprisonment in a penal or correctional institution of this state," until October 30, 1995, when the Daviess County charges were resolved and Fant was actually sentenced to a term of imprisonment of two years. Although this Court stated in Huddleston v. Jennings, Ky.App., 723 S.W.2d 381, 383 (1986), that the "'triggering mechanism' which brings this statute into play is the lodging of a detainer against a prisoner", the statute requires, as a condition to its application in the first instance, that the status of the person seeking its protection be more than a mere detainee. Simply stated, the statute's protection does not apply unless the person in custody is serving a "term of imprisonment."

Although we are not aware of any authority in this jurisdiction construing the phrase "term of imprisonment" in this context, many jurisdictions, in considering identical language in the Interstate Agreement on Detainers (IAD),³ require that one's status to seek entitlement to the benefits of the IAD must be other than that of a pretrial detainee. For example, in United

³In Kentucky, the IAD is enacted at KRS 440 to 440.510.

States v. Dobson, 585 F2d 55 (3d Cir. 1978), the Court reasoned as follows:

It seems clear to us that the natural meaning of the phrase "serving a term of imprisonment" denotes no more or less than that definable period of time during which a prisoner must be confined in order to complete or satisfy the prison term or sentence which has been ordered. Thus, the very words of the statute would appear to exclude those held in custody for periods of time which are not defined in terms of duration, which are not certain, and which do not follow a conviction or determination of parole revocation.

Id. at 58-59 (emphasis original). See also Donald M. Zupanec, Annotation, Validity, Construction, and Application of Interstate Agreement on Detainers, 98 A.L.R.3d 160 (1980). Thus, we hold that had Fant made a proper application for a disposition of the charges pursuant to KRS 500.110, including delivery of the request to the Warren Circuit Court, the 180-day period, which began to run on October 30, 1995, when he was sentenced in Daviess Circuit Court, would not have expired until April 27, 1996, several days after his scheduled trial date of April 16, 1996.

Fant next asserts that even if he is not entitled to the benefit of KRS 500.110, this Court should construe his motion as one for dismissal for violation of his constitutional right to a speedy trial. Such a claim must be analyzed under the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), and the four factors it utilizes: "(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." Preston v. Commonwealth, Ky.App., 898 S.W.2d 504, 506 (1995). Fant has offered no evidence that the delay between the return of the indictments in March 1995, and trial date in April 1996, was unreasonable particularly considering that much of that delay was caused by his failure to appear in court to be arraigned and his commission of additional crimes and subsequent incarceration in another county. Fant was scheduled to be tried within six months of the disposition of the criminal charges in Daviess County. He has offered no hint of how he was prejudiced by this delay. As this Court stated in Preston supra, "[t]he possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated." Id. at 507. Accordingly, this argument is without any merit.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Mark Wettle
Louisville, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
Attorney General

Hon. Karen Quinn
Assistant Attorney General
Frankfort, KY