

RENDERED: May 1, 1998; 2:00 p.m.
NOT TO BE PUBLISHED
MODIFIED: May 15, 1998; 2:00 p.m.

NO. 96-CA-003368-MR

DAVID CARTER

APPELLANT

v.

APPEAL FROM McCracken Circuit Court
HONORABLE JAMES RON DANIELS, JUDGE
ACTION NO. 91-CR-0076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING WITH DIRECTIONS

* * * * *

BEFORE: EMBERTON, HUDDLESTON and MILLER, Judges.

EMBERTON, JUDGE. David Eugene Carter brings this appeal from an order by McCracken Circuit Court denying his Ky. R. Crim. P.

(RCr) 11.42 motion to vacate his ten-year sentence for robbery.

Appellant alleges that his trial counsel failed to properly investigate violations of the Interstate Agreement on Detainers (IAD) which allegedly occurred in the course of his prosecution on the robbery charge. We reverse.

In February 1990, appellant, then sixteen years of age and a resident of Missouri, participated in a robbery in McCracken County, Kentucky. In April of 1990, McCracken District Court commenced proceedings to extradite appellant to face charges on the robbery; however, at the time, appellant was awaiting sentencing on unrelated charges in Missouri.¹ On October 18, 1990, the McCracken County Commonwealth Attorney's office lodged a detainer against appellant with the Jackson County Detention Center in Kansas City, Missouri. On January 4, 1991, appellant executed the required forms to request disposition of the Kentucky charges pursuant to the IAD. Ky. Rev. Stat. (KRS) 440.450. These documents were received through certified mail by the Commonwealth Attorney's office on January 10, 1991. The parties disagree whether either McCracken Circuit Court or McCracken District Court received copies of these documents. On April 3, 1991, appellant was extradited to Kentucky. The case was subsequently transferred to circuit court and on May 13, 1991, appellant was indicted for first-degree robbery. On July 12, 1991, appellant's trial counsel filed a motion to dismiss based upon the allegation that 180 days had elapsed since the appropriate authorities received appellant's IAD request for disposition forms.² Following a hearing, the

¹ On December 14, 1990, appellant was sentenced to twenty-five years on the Missouri charges.

² It is undisputed that if the proper Kentucky authorities received service of the documents on January 10, 1991, the 180-

trial court denied appellant's motion on the basis that the Commonwealth Attorney, upon whom appellant had served his IAD documents, did not have jurisdiction until the May 13 grand jury indictment, and consequently, the 180-day rule was not triggered until that date. After two continuances, trial began on November 6, 1991. This date was 306 days after appellant gave his request to the Missouri officials, 300 days after appellant's IAD request for disposition had been received by the Commonwealth Attorney, 217 days after appellant was transported to Kentucky, and 177 days after the indictment was handed down in circuit court.

Appellant was convicted of first-degree robbery and sentenced to ten years. On direct appeal, this court affirmed appellant's conviction. On March 20, 1995, appellant filed a RCr 11.42 motion to vacate sentence and conviction. On April 4, 1995, the trial court issued an order denying appellant's motion to vacate without granting an evidentiary hearing. This order was appealed. On September 20, 1996, this court rendered an opinion which ordered that appellant's case be remanded to the McCracken Circuit Court for an evidentiary hearing on the merits of appellant's RCr 11.42 motion. An evidentiary hearing was held on December 9, 1996. On December 10, 1996, the trial court entered an order again denying appellant's motion. This appeal followed.

day rule would have been triggered on that date and the time limit would have lapsed on July 9, 1991.

Although this is an appeal of an order denying appellant's motion on a claim of ineffective assistance of counsel, appellant's brief is structured as though this were a direct appeal. This appeal is based upon alleged ineffective assistance of counsel. In view of this, we will review appellant's arguments on appeal as they relate to this issue. Under Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the standard to be used in considering an allegation of ineffective assistance of counsel has two components: first, that counsel made errors so serious that his or her performance fell outside the wide range of professionally competent assistance; and, second, that the deficient performance so prejudices the defendant that but for counsel's errors, there is a reasonable likelihood that the result would have been different. The burden is on the movant to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969).

Appellant first argues that the robbery charge should have been dismissed prior to trial because he was not tried within 180 days after he made his request for final disposition of the charge. See KRS 440.450 Art. III(1). This argument was rejected in our opinion addressing appellant's direct appeal. In that opinion we held, in reliance on Fex v. Michigan, 507 U.S. 43, 113 S.Ct. 1058, 122 L.Ed.2d 406 (1993), that because neither

the district court nor the circuit court ever received appellant's IAD request, the commencement of the 180-day period was never triggered. On this appeal, we find nothing to alter the conclusion expressed in our opinion on the direct appeal. Although appellant alleges otherwise and has produced certified mail receipts proving the circuit court received a mailing from him on January 10, 1991, in the evidentiary hearing in this proceeding the trial court made the specific finding that the required IAD forms "were never received, docketed, or filed in the McCracken Circuit or District Court Clerk's Office." The trial court further found that "[t]he IAD forms were not in the envelope received at the McCracken Circuit or District Clerk's Office." Findings of fact by a trial court on a RCr 11.42 motion will not be reversed unless clearly erroneous. Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902 (1980). The movant has the burden of proof in a RCr 11.42 proceeding. Dorton v. Commonwealth, Ky., 443 S.W.2d 117 (1968). Here, the former McCracken County Deputy Clerk, Sandy Allen, testified that if there had been court papers which needed to be filed in the envelope received on January 10, 1991, she would have taken them to the proper clerk. The current Circuit Court Clerk, Mike Lawrence, testified that he has searched the records of the district court, the circuit court, as well as the miscellaneous filings of both courts and is unable to find appellant's request for disposition documents. Due regard shall be given to the

opportunity of the trial court to judge the credibility of witnesses. Ky. R. Civ. P. (CR) 52.01. Since the trial court's finding is supported by the evidence presented at the evidentiary hearing, it is not clearly erroneous and must be upheld. Wombles v. Commonwealth, Ky., 831 S.W.2d 172, 174 (1992); CR 52.01.

In view of the finding of fact that the appellant's modification was never received by the proper jurisdictional court as required by the IDA, it follows, per Fex, supra, that the 180-day rule was never triggered. Accordingly, trial counsel had no basis for obtaining dismissal on the grounds that the 180-day rule of the IAD was violated. It follows that trial counsel's performance did not fall outside the wide range of professionally competent assistance. Having failed the Strickland analysis, appellant's first argument does not support a claim of ineffective assistance of counsel.

Appellant next alleges that the IAD provision requiring that trial be commenced within 120 days of the arrival of a prisoner in the receiving state was violated. See KRS 440.450 Art. IV(3). Appellant arrived in Kentucky on April 3, 1991. Based upon this arrival date, to comply with the 120-day requirement, the trial would have had to commence by August 1, 1991. The trial was in fact held on November 6, 1991, 217 days after appellant's arrival in Kentucky. The trial court, in denying appellant's claim of ineffective assistance, concluded that,

Movant did not comply with Article IV of the IAD because the Missouri Department of Corrections made no response to the County Attorney's Request for Temporary Custody. Ellis v. Commonwealth, Ky., 828 S.W.2d 662 (1992). Therefore, Movant is not entitled to relief under Article IV of the IAD.

Pursuant to KRS 440.450 Art. IV(1), a written request for temporary custody was made by the McCracken County Attorney's office on January 29, 1991. It is not clear from its order what the trial court means by its conclusion that Missouri authorities "made no response."³ Presumably it means that the certificate requirement of KRS 440.450 Art. IV(2), was not complied with.

This section provides:

Upon receipt of the officer's written request as provided in [Article IV(1)], the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate⁴ stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them

³ Missouri officials extradited appellant to Kentucky, so it is erroneous to conclude that there was "no response."

⁴ Appellant's Missouri inmate records include a signed and notarized Agreement on Detainers Form III which properly sets forth each item of information required by this provision of the IAD. This document was received by the Commonwealth Attorney on January 10, 1991. However, as with the other documents mailed on January 4, 1991, the documents were apparently not received by the appropriate court.

of the request for custody or availability
and of the reasons therefor.

In support of its position that the Missouri Department of Corrections' failure to provide certification documents after the request for temporary custody was made is fatal to appellant's IAD claim, the trial court, in its order denying, cites Ellis v. Commonwealth, Ky., 828 S.W.2d 360 (1992). Ellis does not address the point at issue here. In Ellis the issues concerned violations of Article III of the IAD whereas here the issues concern Article IV. Nor is Ellis applicable by analogy. In Ellis appellant filed a motion for a speedy trial directly with the receiving state that made references to neither the IAD nor the 180-day rule. While the opinion does briefly discuss the analogous Article III certificate requirement, at issue in Ellis was whether the appellant had properly invoked the IAD in his motion. The discussion concerning the failure to comply with the certificate requirement is for the purpose of noting one possible consequence of circumventing the sending state by dealing directly with the receiving state. At issue here is the sending state's alleged failure to provide a certificate after a request by the receiving state for temporary custody. The issues in the two cases are unrelated. It was clearly erroneous for the trial court to rely on Ellis in support of its denial of appellant's motion.

The alleged procedural flaw identified by the trial court and relied on by the Commonwealth is not fatal to the 120-day rule. KRS 440.450 Art. IV(4) provides:

In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but 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 proceedings against appellant in Kentucky were made possible by KRS 440.450 Art. IV. As maintained by the Commonwealth, appellant's request for disposition under Article III was fatally flawed by his failure to properly deliver certain documents to the appropriate court. In view of this, Article IV alone is the provision under which custody of appellant was properly obtained. KRS 440.450 Art. IV(3) provides that trial shall be commenced within 120 days. The only deviation from this mandate is "for good cause." The 120-day rule is not, by the terms of the article, defeated by the failure of the sending state to file a response under KRS 440.450 Art. IV(2). The trial court clearly erred in holding that Missouri's failure to provide a certificate was fatal to appellant's claim.

If the IAD is violated, the trial court is compelled to dismiss the charges with prejudice. KRS 440.450 Art. V(3); Lovitt v. Commonwealth, Ky., 592 S.W.2d 133 (1979); Roberson v. Commonwealth, Ky., 913 S.W.2d 313 (1994). It is apparent that

the 120-day rule of Article IV of the IAD was not complied with in this case. However, trial counsel failed to raise this as an issue in the course of her representation of appellant. It is ineffective assistance of counsel to fail, without a reasonable basis, to present a defense that would compel a dismissal of the charges. Ivey v. Commonwealth, Ky. App., 655 S.W.2d 506, 512 (1983). Failure to raise an issue that would result in the dismissal of a charge with prejudice clearly violates both prongs of Strickland. In view of this, appellant has established his claim of ineffective assistance of counsel.

Because there could not be a reasonable basis for counsel's failure to properly raise the IAD defense, the order of the McCracken Circuit Court entered December 10, 1996, is reversed with directions for the trial court to enter an order vacating the judgment entered November 13, 1991, and to dismiss, with prejudice, the charges contained in indictment number 91-CR-076.

ALL CONCUR.

BRIEF FOR APPELLANT:

William H. Eddy
Eddyville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Suzanne Baker Hite
Assistant Attorney General
Frankfort, Kentucky