

RENDERED: September 13, 2002; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000356-MR

DONALD IBENTHAL

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE DENNIS A. FRITZ, JUDGE  
ACTION NO. 98-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Donald Ibenthal has appealed from an order entered by the Oldham Circuit Court on January 29, 2001, which denied his motion to set aside his judgment of conviction and sentence and to dismiss the indictment against him. Having concluded that Ibenthal's right to a speedy trial was not violated and that the trial court properly denied the motion, we affirm.

On January 15, 1998, an Oldham County grand jury indicted Ibenthal on 14 counts of promoting a sexual performance

by a minor,<sup>1</sup> two counts of promoting contraband in the second degree,<sup>2</sup> one count of sodomy in the first degree,<sup>3</sup> one count of tampering with physical evidence,<sup>4</sup> and two counts of distribution of matter portraying a sexual performance by a minor.<sup>5</sup> At the time of the alleged offenses, Ibenthal was serving a 35-year sentence at the Luther Luckett Correctional Complex in Oldham County, Kentucky. It was alleged that Ibenthal wrote illicit letters to his former wife, Kathy Ibenthal,<sup>6</sup> from his prison cell, directing her to photograph the genitals of infants and young children and then to secretly send the pictures to him at the correctional complex. In addition to his own viewing of the pornographic photos, Ibenthal distributed them to other prisoners. Some of Ibenthal's letters gave Kathy explicit instructions for improving the photographs, and expressed his intense desires to have sex with the young children pictured. All of the exploited children were either related to Kathy or had been left in her care as a babysitter.

At Ibenthal's arraignment on January 22, 1998, the trial court scheduled a pretrial conference for March 26, 1998,

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<sup>1</sup>Kentucky Revised Statutes (KRS) 531.320.

<sup>2</sup>KRS 520.060.

<sup>3</sup>KRS 510.070.

<sup>4</sup>KRS 524.100.

<sup>5</sup>KRS 531.340.

<sup>6</sup>Kathy Ibenthal was also indicted and convicted of similar charges.

and a trial for July 14, 1998. For several months, Ibenthal's case proceeded normally. On March 12, 1998, Ibenthal filed a request for a bill of particulars. Shortly thereafter, on March 30, 1998, the Commonwealth filed a detainer warrant against Ibenthal, causing him to be held in custody until a trial on the current charges could be held. However, the prolonged illness of the Assistant Commonwealth's Attorney in charge of prosecuting Ibenthal caused Ibenthal's case to be delayed. Based on his counsel's advice, Ibenthal, who was not eligible for probation on the sentences he was already serving until 2010, agreed to the Commonwealth's motion to continue his trial.

On January 29, 1999, Ibenthal's trial counsel sent a letter to the Commonwealth demanding action on his ten-month old request for a bill of particulars. The letter also informed the Commonwealth that since a detainer warrant had been lodged against Ibenthal, he was statutorily entitled to a trial within 180 days.<sup>7</sup> The letter concluded by noting that Ibenthal had agreed not to press his statutory right to a trial within 180 days due to the Assistant Commonwealth's Attorney's illness, but that counsel could no longer in good conscience ask his client to wait. The Commonwealth failed to promptly respond to this letter. On May 12, 1999, Ibenthal filed a pro se motion, pursuant to KRS 500.110, to dismiss the indictment based on the Commonwealth's failure to bring him to trial within 180 days.

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<sup>7</sup>KRS 500.110.

The following day, Ibenthal's trial counsel filed a motion adopting Ibenthal's pro se motion.

Finally, on June 23, 1999, the Commonwealth responded to Ibenthal's request for a bill of particulars. At a status conference held on June 24, 1999, the trial court noted that Ibenthal was not entitled to a dismissal of the indictment under KRS 500.110, since he had failed to deliver proper notice of his demand to be tried as required by the statute. However, the trial court went on to state that it believed the January 29, 1999, letter constituted such notice. Accordingly, the trial court noted that July 29, 1999, would be the 180th day after notice had been delivered to the Commonwealth.

On July 13, 1999, Ibenthal filed a motion to dismiss the indictment for failure to charge an offense. At a pretrial conference held on July 14, 1999, the trial court indicated that Ibenthal's trial could not be held before July 29, 1999, since it first had to rule on Ibenthal's motion and since a capital murder trial had been previously scheduled for July 26, 1999. In an order entered on July 19, 1999, the trial court found that there was "good cause" for delaying Ibenthal's trial past July 29, 1999, and thus the delay was not in violation of KRS 500.110. On September 14, 1999, the trial court entered an order denying Ibenthal's motion to dismiss the indictment pursuant to KRS 500.110. The trial court found that the delays were reasonable and that Ibenthal was not prejudiced by the delays. At a status hearing on April 27, 2000, the trial court stated that the case

would be set for trial on September 26, 2000, and Ibenthal voiced no objection to the September 26, 2000, trial date. The trial court also indicated that it intended to grant in part Ibenthal's motion to dismiss the indictment for failure to charge an offense.

On September 28, 2000, Ibenthal entered into a plea agreement with the Commonwealth. In exchange for an unconditional plea of guilty on five counts of promoting sexual performance by a minor, two counts of distribution of matter portraying the sexual performance of a minor, and two counts of promoting contraband, the Commonwealth recommended a total prison sentence of 15 years, to run consecutively with Ibenthal's current sentence. After informing Ibenthal of his constitutional rights and ensuring that Ibenthal was knowingly, intelligently and voluntarily waiving all of those rights, the trial court accepted his guilty plea and entered a judgment of conviction and sentence consistent with the Commonwealth's recommendations. On October 9, 2000, Ibenthal filed a pro se motion to set aside the judgment of conviction and sentence on the grounds that his right to a speedy trial pursuant to KRS 500.110 had been violated. The Oldham Circuit Court denied that motion on January 29, 2001, and this appeal followed.

The entry of a voluntary guilty plea waives all defenses "other than that the indictment charges no offense."<sup>8</sup>

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<sup>8</sup>Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 55  
(continued...)

"A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea."<sup>9</sup> Nonetheless, we will briefly address Ibenthal's right to a trial within 180 days pursuant to KRS 500.110.

KRS 500.110 provides that if a demand for a speedy trial on an untried indictment is made by a person in custody, the trial court must try that person within 180 days. However, KRS 500.110 also provides 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." The Supreme Court of Kentucky has held that where a defendant has requested the continuance or agreed to the continuance, his right to a speedy trial under KRS 500.110 has not been violated.<sup>10</sup>

In the case sub judice, the trial court granted the original continuance in July 1999 so it could properly consider the motion for dismissal of the indictment filed by Ibenthal's counsel. The motion had been filed less than one month before

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<sup>8</sup>(...continued)  
(1990) (citing Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970) and Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234 (1970)).

<sup>9</sup>Id. (citing White v. Sowders, 644 F.2d 1177 (6th Cir. 1980)).

<sup>10</sup>See Wells v. Commonwealth, Ky., 892 S.W.2d 299, 303 (1995).

his scheduled trial. The second continuance, granted in September 1999, was granted with Ibenthal's consent. Further, it should be noted that after the trial court had the opportunity during the period of continuance to thoroughly review Ibenthal's motion to dismiss, that many of the counts against Ibenthal were dismissed. Therefore, we hold that Ibenthal's right to a speedy trial under KRS 500.110 was not violated, and that the trial court did not err by denying Ibenthal's motion to set aside the judgment of conviction and sentence.

For the foregoing reasons, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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