RENDERED: June 25, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002495-MR

JAMES W. BURKHART — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLEN RAY BERTRAM, JUDGE
ACTION NO. 01-CR-00162

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from the Marion Circuit Court's judgment and sentence on appellant James Burkhart's conditional guilty plea to escape in the second-degree. Appellant contends that the trial court erred in not granting his motion to dismiss for failure to conduct a trial within 180 days pursuant to KRS 500.110. For the reasons stated hereafter, we affirm.

On November 24, 2001, appellant escaped from the Marion Adjustment Center, where he was serving a fifty-two year

sentence for prior felony convictions. Appellant was indicted on December 17 for escape in the second-degree and for being a persistent felony offender in the first-degree. Subsequently, the Northpoint Training Center sent a letter to the Marion Circuit Court acknowledging that Northpoint was lodging the circuit court's detainer against appellant. On February 22, 2002, appellant filed a *pro se* motion requesting a final disposition of the criminal charges pending against him within 180 days, pursuant to KRS 500.110 (motion for a speedy trial).

At appellant's June 3 arraignment, the trial court appointed Glenda Edwards of the Department of Public Advocacy as appellant's counsel. Appellant pled not guilty to the charges against him, and the trial judge asked Edwards when the case should be set for trial. Edwards was unaware of appellant's *pro se* motion for a speedy trial but replied that the trial should be set within 180 days (the judge had told her that there was a six-month window in which to hold appellant's trial, though he had not told her why). The trial judge asked Edwards if November 14 was an acceptable date, and Edwards indicated that it was. The judge then asked Edwards whether she would prefer an August 15 trial date. Edwards replied that she had quite a few cases set for trial in August and that the November 14 date was satisfactory. The trial court set that trial date (a date outside of the speedy trial time limit), as well as dates for

the pretrial conference and review. Appellant was present at all times during this exchange between the trial judge and his counsel. The court's June 3 docket sheet indicated that appellant "waived [his] 180 day limit."

At the October 7 pretrial conference, Edwards indicated that she had become aware of appellant's *pro se* motion for a speedy trial during an August 23 telephone conversation with appellant, over two months after his arraignment. Edwards requested that the trial court review the June 3 arraignment videotape to see if appellant had waived his right to a speedy trial (as the court's docket sheet indicated that he had). At the November 4 pretrial review, Edwards moved the court to dismiss the charges against appellant because he had not been given a speedy trial upon request. The trial judge stated that he had reviewed the June 3 arraignment tape and denied appellant's motion, because the constitution did not set a specific number of days in its guarantee to a speedy trial. Edwards indicated that appellant's motion was statutorily based, not constitutionally based, and that a Kentucky statute required a trial to be conducted within 180 days if a detainer had been lodged against a defendant and the defendant properly requested a speedy trial. The judge again denied the motion, based on his review of the June 3 arraignment tape. Appellant subsequently entered a conditional guilty plea to escape in the second-degree

on the grounds that he could appeal the trial court's denial of his motion to dismiss for failure to hold a speedy trial. This appeal followed.

KRS 500.110 provides 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; 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.

It is uncontested that appellant effected KRS 500.110's protection, because a detainer was lodged against him, he informed the proper individuals where he was incarcerated, and he requested that the pending charges against him be determined within 180 days. Therefore, if appellant's right to a speedy trial was not waived, the Commonwealth had until August 21, 2002 (180 days from the date appellant's request for a

speedy trial was received) to produce a final disposition of the charges against appellant.

Kentucky has adopted the Interstate Agreement on Detainers (IAD) at KRS 440.450-440.990. "As a congressionally sanctioned interstate compact within the Compact Clause of the U.S. Constitution, the IAD is a federal law subject to federal construction." *Parks v. Commonwealth*, 89 S.W.3d 395, 397 (2002) (citing *New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 662, 145 L.Ed.2d 560 (2000)). "The IAD applies to interstate detainers, *i.e.*, detainers lodged by one state against prisoners incarcerated in another state, whereas KRS 500.110, applies to intrastate detainers, *i.e.* detainers lodged by Kentucky courts against in-state prisoners." *Rosen v. Watson*, Ky., 103 S.W.3d 25, 28 (2003). "KRS 500.110 was adopted after the IAD and [uses] the same language. In addition, the reasons supporting the IAD seem to apply with equal force to the intrastate statute." *Dunaway v. Commonwealth*, Ky., 60 S.W.3d 563, 567 (2001). Thus, when construing KRS 500.110, cases interpreting the IAD are insightful. *Id.* at 567.

"[T]he most basic rights of criminal defendants are. . . subject to waiver." *Hill*, 528 U.S. at 114, 120 S.Ct. at 663 (citing *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991)). And in some circumstances, a defendant may "waive his right to object to a given delay

under the IAD." *Hill*, 528 U.S. at 114, 120 S.Ct. at 663. Additionally, a defendant may personally waive his right to a speedy trial or "waiver may be affected by action of counsel." *Hill*, 528 U.S. at 114, 120 S.Ct. at 664. Counsel may especially waive a defendant's right to a speedy trial when the waiver occurs due to a scheduling matter, because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Id.* at 115, 120 S.Ct. at 664. In the matter before us, both appellant and counsel waived appellant's right to a speedy trial.

Appellant argues that the trial court erred in holding that he waived his right to a speedy trial, because one must act affirmatively in order to waive this right. We disagree. In *Hill*, the Court held that defense counsel waived the defendant's right to a speedy trial under the IAD, even though neither the defendant nor defense counsel made an affirmative act. *Hill*, 528 U.S. 110 120 S.Ct. 659; *accord Parks*, 89 S.W.3d 395. In fact, the Court found there to be no differences between waivers a defendant proposed and waivers to which a defendant agreed. *Id.* at 118, 120 S.Ct. at 666. In *Hill*, the prosecutor suggested May 1 as the trial date (a date outside of the IAD time limit). The trial judge asked defense counsel if that date was acceptable, and defense counsel responded, "That will be fine, Your Honor." *Id.* at 113, 120 S.Ct. at 663. *Hill* is

indistinguishable from the matter now before us, and the trial court was correct in finding that Edwards waived appellant's right to a speedy trial when she agreed to a trial date outside of the 180-day period.

Next, appellant argues that Edwards could not have waived his right to a speedy trial, because Edwards did not know about appellant's *pro se* motion at the time she agreed to the trial date outside of the speedy trial time limits. We disagree. "IAD rights are not constitutionally based; waiver of them must be voluntary, but need not be knowing and intelligent." *People v. Moody*, 676 P.2d 691, 695 (Colo. 1984) (citing *United States v. Black*, 609 F.2d 1330 (9th Cir. 1979)). Edwards did not have to know she was waiving appellant's right to a speedy trial; she merely had to voluntarily waive this right. Edwards voluntarily consented to the trial date outside of the speedy trial time limits and waived any objection thereto. Edwards' consent to the trial date outside of the speedy trial time limits and waiver of defendant's right to a speedy trial are binding on appellant.

Additionally, appellant personally waived his right to a speedy trial, because he was present at the June 3 arraignment yet said nothing when the trial date was set outside of the speedy trial time limit. Though appellant argues his silence cannot be considered a personal waiver that is simply not the

case. In *Ward v. Commonwealth*, Ky. App., 62 S.W.3d 399, 404 (2001), the court held:

> Ward waived his right to complain of the [IAD] violation by acquiescing to be tried outside the required time period and by failing to raise the issue of alleged noncompliance with the IAD on the numerous occasions when he was before the trial court prior to the expiration of the 120 days.

Appellant was present at the June 3 arraignment, when the trial date was set, and was certainly aware at that time of his *pro se* motion for a speedy trial. Even though appellant was not before the trial court "numerous times" before the 180-day period expired, he did have ample time between the time the trial date was set and the time the 180-day period expired in which to request an earlier trial date. Pursuant to *Hill*, 528 U.S. 110, 120 S.Ct. 659 and *Ward*, 62 S.W.3d 399, appellant's silence was enough to waive his right to a speedy trial. *See Parks*, 89 S.W.3d 395 (defendant's right to a speedy trial under the IAD was waived when defense counsel made no response to the trial judge's proposed trial date outside of the IAD time limits).

Because both appellant and Edwards waived appellant's right to a speedy trial, the court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Palombi
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Ian G. Sonego
Assistant Attorney General
Office of the Attorney General
Frankfort, Kentucky