RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001791-MR

BILLY CARL UTLEY — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 02-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a conditional guilty plea convicting appellant of five counts of second-degree sodomy and five counts of second-degree rape. Appellant's sole argument on appeal is that all counts of the indictment should have been dismissed because a detainer was lodged against him and he was not tried within 180 days as required by KRS 500.110. We adjudge that the two counts of rape upon which the detainer was based should have been dismissed

because he was not tried within the time limitation in KRS 500.110. Accordingly, we reverse two of the second-degree rape convictions. As to the remainder of the convictions, we affirm.

In February of 2000, S.T., who was eleven years old at the time, told her mother that she had been sexually abused by her father, Billy Utley, since she was five or six years old. At the time she told her mother of the abuse, Utley was serving a prison sentence at the Western Kentucky Correctional Complex ("WKCC"). S.T.'s mother subsequently reported the allegations to the police. In August of 2000, Detective Babbs of the Kentucky State Police received information from S.T.'s mother that Utley was about to be released from prison. Upon receiving this information, Detective Babbs obtained an arrest warrant for Utley on August 15, 2000, signed by a trial commissioner, alleging two counts of rape in the first degree based on S.T.'s allegations. Two days later, Babbs obtained a second arrest warrant against Utley alleging two counts of sodomy in the first degree based on his molestation of S.T. At this time, nothing had been filed in the Union District Court Clerk's office and no indictment had been obtained against Utley regarding S.T.'s allegations.

On August 16, 2000, Detective Babbs contacted WKCC. According to Babbs, he explained that he had an arrest warrant for Utley, but that Utley had not yet been arrested on the

warrant. He stated that he merely requested that he be notified when Utley would be released so he could pick him up upon his release.

According to officials at WKCC, Babbs was told that if he wanted a detainer lodged against Utley, he would have to send the facility a copy of the arrest warrant. It is undisputed that on August 16, 2000, Babbs faxed WKCC a copy of the arrest warrant on the two counts of first-degree rape. On August 18, 2000, a detainer was lodged against Utley based on that arrest warrant.

On August 19, 2000, Ms. Ellen Cockerman, Records Supervisor at WKCC, assembled a package of materials she was required to give an inmate when a detainer had been lodged against him. The package of materials contained an acknowledgment form signed by Utley, the arrest warrant, Utley's resident record card, a copy of the detainer, and a copy of the letter the Records Department sent to Security at WKCC. It is undisputed that Utley received this package of materials on August 19, 2000.

Detective Babbs testified that he intended to serve the warrant on Utley when he was released from prison. He stated that he had no idea that WKCC would serve the warrant on

Utley when he faxed it to the facility.[1] Babbs further stated that he had never had a prison facility serve a warrant for him.

After receiving notice that a detainer had been lodged against him, Utley filed a request for a final disposition with the Union County District Court,[2] the County Attorney for Union County, and the Union County District Judge. The District Court and the County Attorney received the request for final disposition on August 25, 2000 and August 26, 2000, respectively. Utley thereafter filed a motion for speedy disposition pursuant to KRS 500.110 on October 5, 2000, with the Union District Court and the Union County Attorney.[3] This motion was returned to Utley with notation stating, "No number of record in Union Circuit Court." On December 8, 2000, Utley received a letter from the Union District Judge Rene Williams acknowledging the receipt of various pleadings relating to the arrest warrant filed as a detainer against Utley. The letter confirmed that there was no active case pending against Utley in the Union District Court because the arrest warrant had never been officially served upon him.

Upon receiving a copy of the December 8 letter, Cockerman wrote Judge Williams a letter on December 21, 2000, reiterating that a detainer had been lodged against Utley based

[1] A warrant, served or unserved, would amount to a detainer.
[2] Once the warrant was served, a case file should have been opened by the Union District/Circuit Clerk's office.
[3] Id.

on an arrest warrant and that WKCC had given the Union District Court notice of this fact by letter dated August 18, 2000. On January 4, 2001, Judge Williams responded to Cockerman that a case had never been opened for the charges described in the arrest warrant because there was no record of a return on the alleged warrant. Judge Williams advised that upon receipt of a copy of the arrest warrant verifying service upon Utley, a case would then be opened against Utley.

At some point, Utley contacted Lynn Aldridge, a paralegal/investigator with the Department of Public Advocacy, who wrote three letters on his behalf, dated April 23, 2001, May 29, 2001, and July 11, 2001, to Brucie Moore, the Union County Attorney. Moore testified that she first received something from the Department of Corrections regarding Utley's desire for a speedy trial in August of 2000. When she received notice of the potential case against Utley, she testified that she called the Union District Court Clerk's Office and was informed that there was no pending case, file or charge against Utley. After determining that Detective Babbs was the investigating officer in the matter, Moore contacted him. Babbs told Moore that he had not filed any warrants and was waiting for Utley to be released from prison before he pursued the case. According to Moore, Babbs stated that he did not seek a detainer on Utley. Based on this conversation, Moore agreed to sign a

release of the detainer lodged against Utley. On July 17, 2001, Moore signed the release of detainer. Moore testified that she was unaware that Babbs had sent the arrest warrant to WKCC until the preliminary hearing in this case in February 2002.

On August 18, 2000, the day the detainer was lodged against Utley, Utley had a hearing before the Kentucky Parole Board. Because the detainer had been lodged against him, the Parole Board gave Utley an eighteen-month deferment, and one of the conditions for future consideration of parole was to have the detainer removed. Utley also testified that after the detainer was lodged against him, he was moved from the minimum security portion of WKCC to the medium security area.

On February 26, 2002, when Utley was released on parole from WKCC, Detective Babbs served him with a warrant for his arrest on the sodomy and rape charges. Utley was thereafter indicted by the Union County Grand Jury on March 5, 2002, on five counts of first-degree rape and five counts of first-degree sodomy based on the molestation of S.T. occurring on January 1, 1995, and December 31, 1999. On April 16, 2002, Utley filed a motion to dismiss the indictment for failure to timely prosecute under KRS 500.110. After an evidentiary hearing, the court denied the motion.

On May 7, 2003, Utley entered a conditional plea of guilty to five counts of second-degree rape and five counts of

second-degree sodomy pursuant to a plea agreement with the Commonwealth. Utley was sentenced to eight years on each count of rape and sodomy, to run concurrently for a total of eight years' imprisonment. This appeal by Utley followed.

Utley's sole argument on appeal is that all charges in the indictment should have been dismissed because he was not tried within the 180-day limitation period set out in KRS 500.110. KRS 500.110 provides:

> 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 the Commonwealth's position that KRS 500.110 does not apply in this case because: the arrest warrant faxed to WKCC was not the functional equivalent of a detainer; Detective Babbs did not intend for a detainer to be lodged

against Utley; and the detainer was mistakenly lodged by WKCC. In our view, it is immaterial whether Detective Babbs intended for a detainer to be lodged when he faxed the warrant to WKCC. There is no such "intent" requirement in KRS 500.110. The question is whether a detainer was lodged against Utley. In Donahoo v. Dortch, Ky., 128 S.W.3d 491, 493 (2004), our Supreme Court adopted the Kentucky Department of Corrections definition of "detainer":

> 'Detainer' means a written notification filed by a criminal justice or law enforcement agency with the institution where an inmate is serving a sentence, advising that the inmate is wanted in connection with a criminal offense, and requesting the institution to hold the inmate or to notify the agency when the inmate is about to be released. The detainer may have documents attached in support, such as indictment or other charging instruments, a court bench warrant, a parole violation warrant, or an escape warrant.

Id. (emphasis added) (quoting Kentucky Corrections, Policies and Procedures, Policy Number 18.17 (eff. February 17, 1995)).

In the present case, there is no question that a detainer was lodged against Utley as a result of the arrest warrant procured by Detective Babbs. The record before us contains a form entitled "Acknowledgement/Release" executed by WKCC for the Union District Court which states, "We are lodging your Arrest Warrant detainer/hold against the above captioned." The form lists the case number as 16-00-278 (the same case

number listed on the arrest warrant) and states that the charges are "Rape I-2 cts." Detective Babbs admitted that he contacted WKCC about Utley and faxed the facility the arrest warrant so that he could be notified when he was to be released.

"[T]he General Assembly enacted KRS 500.110 for the ameliorative purpose of lessening the detrimental effect that detainers have on the prison population by requiring a court, upon request by a prisoner, to resolve untried indictments within 180 days so that the detainer may be lifted if the prisoner is found innocent of the charges." Rosen v. Watson, Ky., 103 S.W.3d 25, 29 (2003). In Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 567 (2001), the Court recognized the specific problems an inmate can face as a result of a detainer being filed:

> (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee [sic] status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which

> carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Id. (quoting Carchman v. Nash, 473 U.S. 716, 730, 105 S. Ct. 3401, 3409, 87 L. Ed. 2d 516, 527 (1985)). In fact, Utley testified to the consequences he suffered as a result of the detainer being lodged against him in this case – being moved from minimum to medium security at WKCC and his parole being deferred. Hence, as a detainee, Utley encountered some of the very problems that KRS 500.110 was promulgated to protect against.

Utley next argues that the requirement of an "untried indictment, information or complaint" in KRS 500.110 was satisfied in this case. The arrest warrant in this case, which was sworn to by Detective Babbs and signed by Trial Commissioner Simpson, stated that Utley was being charged with two counts of first-degree rape (KRS 510.040) and contained a "Criminal Complaint" section which provided the following detailed information about the offenses:

> The affiant, DET. BRIAN BABBS says that on or about June 28, 1999, in Union County, Kentucky, the above-named defendant unlawfully ENGAGED IN SEXUAL INTERCOURSE WITH ANOTHER PERSON WHO WAS INCAPABLE OF CONSENT BECAUSE SHE WAS LESS THAN TWELVE

> YEARS OLD. THE VICTIM STATED TO AFFIANT THAT DEFENDANT HAD BEEN HAVING SEXUAL INTERCOURSE (DESCRIBED BY HER AS HIM PUTTING HIS PRIVATE PART INTO HER PRIVATE PART) FOR THE LAST FIVE OR SIX YEARS. SHE DESCRIBED HIM DOING THIS AND THEN STOPPING AND PEEING INTO A CUP OR ON AN ARTICLE OF CLOTHING. HE THEN PLACED THE CLOTHING INTO THE BOTTOM OF THE CLOTHES BASKET OR HE THEN WASHED OUT THE CUP. THE VICTIM SAID THE DEFENDANT WOULD BE BREATHING HEAVY AND SWEATING DURING THE INCIDENTS. AN EXAMINATION OF THE VICTIM BY MISSY OWENS, AN OB/GYN NURSE PRACTITIONER, REVEALED THAT THE VICTIMS HYMEN WAS NOT INTACT.

Although at the time the detainer was lodged, there had not yet been charges filed in the Union District Court nor an indictment obtained against Utley relative to S.T.'s allegations, we adjudge that a criminal complaint was contained within the August 2000 arrest warrant on the two counts of first-degree rape.

Since this was the complaint on which the detainer was based, we agree with Utley that KRS 500.110 was applicable in this case, and the 180-day limitation period began to run at the time he filed his motion for final disposition of the case with the Union County District Court and the Union County Attorney on August 26, 2000.

Utley was indicted by the Union County Grand Jury on March 5, 2002, on five counts of first-degree rape and five counts of first-degree sodomy based on the allegations of S.T. Utley next argues that because he was not tried on those charges

within the 180-day limitation period in KRS 500.110, all of the charges in that indictment should have been dismissed. The Commonwealth counters that even if KRS 500.110 did apply in this case, only those charges that were the basis of the detainer should have been dismissed.

In Huddleston v. Jennings, Ky. App., 723 S.W.2d 381, 383 (1986), this Court stated:

> The "triggering mechanism" which brings . . . [KRS 500.110] into play is the lodging of a detainer against a prisoner. The purpose of the statute is not to ensure the speedy disposition of every charge, or even of those charges which potentially could form the basis for a detainer being lodged. Its purpose is to provide for speedy disposition only of such charges as have actually resulted in a detainer being lodged.

Only two of the first-degree rape charges served as the basis for the detainer in this case. As is apparent from the fact that a no true bill was not returned by the grand jury on any of the charges, two of the second-degree rape charges to which Utley ultimately pled guilty had to be the basis of the August 15, 2000, arrest warrant and detainer in this case. Accordingly, the convictions on these two charges of rape are hereby reversed because Utley was not tried on those two charges within the time limitation in KRS 500.110.

We reject the Commonwealth's argument that the protections provided by KRS 500.110 no longer applied to Utley once the detainer was released by Moore on July 17, 2001. See

Dunaway v. Commonwealth, 60 S.W.3d at 567-68. In the present case, Utley did not serve out his prison term on the prior sentence until well after the expiration of the 180-day period, and the detainer was not released until after the expiration of the 180-day limitation period which, as noted earlier, began running on August 26, 2000.

We also reject the Commonwealth's argument that the trial court had the discretion to grant any reasonable or necessary continuances under KRS 500.110. From our review of the record, we do not see that the Commonwealth ever sought such a continuance of the time limitation in KRS 500.110.

For the reasons stated above, that portion of the Union County judgment convicting appellant of two counts of second-degree rape is reversed and the matter remanded for any further necessary proceedings. The remainder of the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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