

RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002349-MR

MCCLELLAN GAINES

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
INDICTMENT NO. 04-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

HENRY, JUDGE: While McClellan Gaines was incarcerated on felony charges he learned that a Jessamine County warrant had been issued for him as a result of a criminal complaint charging him with five counts of Criminal Possession of a Forged Instrument Second Degree¹.

It is not possible to determine from the record exactly how or when Gaines learned about the Jessamine County charges. The arrest warrant was issued for him on July 15, 2003. The record does not contain a copy of the District Court

¹ Proscribed by Kentucky Revised Statutes (KRS) 516.060.

warrant returned and marked as "served" upon Gaines. A transport order issued for Gaines by the Jessamine District Court on December 17, 2003 does not specify the charges upon which it was issued. This transport order was not served upon Gaines. It was sent to the Fayette County Detention Center and returned by the Jessamine County Sheriff with a note indicating that Gaines was not found there. The record contains two documents² signed by Gaines requesting final disposition of Criminal Possession of a Forged Instrument charges against him, the first dated December 8, 2002, and the second dated December 10, 2003. Both list Gaines' address as "Roederer Correctional Complex, P.O. Box 69, LaGrange, KY 40031", and both are notarized by the same notary, Mark Hughes. The existence of two requests almost exactly one year apart is not explained in the record or mentioned by counsel in the briefs. Due to the similarity of the dates it is possible that the first contained a typographical error as to the year, but it could also be that Gaines had similar charges pending against him in more than one jurisdiction, or that he had heard rumors that charges were pending against him long before they were actually filed. Both documents requesting final disposition of the forgery charges give as their basis KRS 500.110, which states:

² The first of these documents, dated December 8, 2002, is clearly ineffectual because it does not specify the court in which the charges are pending, does not make any reference to service upon the prosecuting attorney and does not specify to whom it was sent.

**Trial of prisoner on untried indictment within 180 days
after prisoner's request for final disposition:**

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.

The District Court warrant was apparently never served on Gaines. On July 9, 2004, an indictment was returned against Gaines in the Jessamine Circuit Court for the same charges named in the District Court warrant. The warrant issued on the indictment was served upon Gaines and he was arraigned in the Jessamine Circuit Court on August 13, 2004. At his arraignment Gaines orally moved for dismissal "under 500.110 and Spivey v. Jackson³." The motion was denied at Gaines' next appearance, and a trial date was set for October 12, 2004. Instead, on October

³ 602 S.W.2d 158 (Ky. 1980).

22, 2004 Gaines withdrew his not guilty plea and entered a conditional plea of guilty under the provisions of RCr⁴ 8.09 and pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), reserving the issue of whether the Circuit Court erred by refusing to dismiss the charges for failure of the Commonwealth to dispose of his case within 180 days as required by KRS 500.110. In exchange for Gaines' plea the Commonwealth recommended a sentence of one year on each of the five counts, to be served concurrently for a total of one year.

On appeal, Gaines argues that the Circuit Court erred when it overruled his motion to dismiss without holding an evidentiary hearing, or making some other inquiry to determine whether the court had lost jurisdiction of the case, citing RCr 8.18. However, the record is devoid of any request or motion by Gaines or by his counsel to hold an evidentiary hearing. We are cited to no authority, and we have found none, holding that upon filing of a motion for disposition of a case pursuant to KRS 500.110 it is incumbent upon the court either to set an evidentiary hearing or to conduct any other kind of inquiry, in the absence of a motion for such hearing. If the movant desires an evidentiary hearing on the motion he must request it. See

⁴ Kentucky Rules of Criminal Procedure.

Cane v. Commonwealth, 556 S.W.2d 902, 907 (Ky.App. 1977), cert. den., 437 U.S. 906, 98 S.Ct. 3094, 57 L.Ed.2d 1136 (1978).

Moreover, Gaines failed to establish the threshold requirement for obtaining relief under KRS 500.110, by showing conclusively that a detainer had been lodged against him for the forged-instrument charges. Huddleston v. Jennings, 723 S.W.2d 381, 383 (Ky.App. 1986). In order to obtain relief under KRS 500.110, a defendant must carry the burden of showing both that a detainer has been lodged and that the prosecutor has been served with the request for final disposition of the charges. Donahoo v. Dortsch, 128 S.W.3d 491, 494, 495 (Ky. 2004). As Gaines did neither, his motion could not have been granted even if he had requested a hearing.

The order of the Jessamine Circuit Court overruling the motion to dismiss is affirmed.

ALL CONCUR.

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