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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000347-MR

BRICK BRUCE PHILLIPS — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 14-CR-00144-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Brick Bruce Phillips has appealed from the judgment of the Henderson Circuit Court convicting him of first-degree criminal mischief and sentencing him to two years' imprisonment pursuant to his conditional guilty plea. Phillips seeks review of the circuit court's denial of his motion to dismiss the interstate detainer lodged against him. We affirm.

This matter began with the filing of a complaint and arrest warrant against Phillips related to the attempted theft of money from an ATM machine in Ellis Park with Stephen Vile from September 29, 2013, through October 1, 2013. The Henderson County grand jury indicted Phillips on one count of first-degree criminal mischief and/or complicity to first-degree criminal mischief pursuant to Kentucky Revised Statutes (KRS) 512.020 and 502.020. Phillips entered a not guilty plea at his arraignment on June 24, 2014, counsel was appointed to represent him, and the matter was set for a trial review in August. Bond was set at $5,000.00, 10%. A subsequent review was set for late September, and a jury trial was scheduled for October 1, 2014. Phillips failed to appear for the September 29, 2014, review, and the circuit court issued an arrest warrant as a result. It was later determined that Phillips had been incarcerated in Indiana at that time, and an interstate detainer had been lodged against him based upon the circuit court's arrest warrant that had been issued due to his failure to appear.

On October 16, 2015, Phillips filed a *pro se* motion to dismiss the interstate detainer.[1] He received notice from the Indiana Department of Corrections (IDOC) on January 4, 2015, that the circuit court had filed a detainer against him, and on April 7, 2015, he submitted the appropriate Interstate Agreement on Detainers (IAD) forms requesting that the local prosecutor take

[1] Phillips used a preprinted form and filled in the necessary blanks. The motion has an affirmation of service date of October 6, 2015.

further action related to the charges pending against him; in other words, Phillips was requesting a trial within 180 days. He said the Branchville Correctional Facility submitted his demand on April 10, 2015, and that all records related to the filing were in the possession of the IDOC and available upon request. The Branchville Correctional Facility notified him on April 16, 2015, that his demand had been received. Because more than 180 days had passed without further action by the Kentucky court since the receipt of his request, Phillips requested dismissal of his indictment.

On October 23, 2015, Phillips was arrested in Henderson County on the bench warrant issued following his failure to appear in September 2014. He appeared before the circuit court a few days later, and he admitted that he failed to appear and pled guilty to contempt of court. By order entered October 27, 2015, the court sentenced him to thirty days in the Henderson County Detention Center, but conditionally discharged the sentence and ordered him to be released as soon as administratively possible. A review in the criminal mischief case was scheduled for early January 2016.

In early November 2015, Phillips filed a motion seeking a hearing on his motion to dismiss the interstate detainer as it had not yet been ruled on by the court. The court held a brief hearing on November 9, 2015, on the motion to dismiss. The Commonwealth Attorney stated that Phillips' paperwork had never

been received, and the court indicated that it would look through its file and filings made in the clerk's office and rule accordingly. On November 16, 2015, the court entered an order denying Phillips' motion, reasoning as follows:

> While Mr. Phillips' motion to dismiss states that a request for final disposition was made in April of 2015, the Court's records do not reflect receiving any such documentation from the defendant. Further, there is no affidavit, exhibit, or other evidence showing that Mr. Phillips delivered the proper paperwork to the warden and the warden failed to forward it as directed.

Because the IAD had not been complied with in full, the court denied the motion.

Rather than proceed to trial, Phillips moved the court to accept a guilty plea conditioned upon his right to appeal the order denying his motion to dismiss. The Commonwealth's offer reflected that Phillips would plead guilty to first-degree criminal mischief, which carried a penalty of one to five years' imprisonment; that the indictment would be amended to dismiss the complicity charge; and that the recommended sentence was two years. The circuit court accepted Phillips' conditional guilty plea and entered a judgment of conviction and sentence pursuant to his plea on March 17, 2016. This appeal now follows.

The IAD is a federal law created under the Compact Clause, as set forth in Article I, Section 10, Clause 3 of the United States Constitution. The Supreme Court of Kentucky described it as follows:

> The [IAD] is a compact entered into by forty-eight states, the United States and the District of Columbia to

> establish procedures for resolution of one State's outstanding charges against a prisoner of another State. *See New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). 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. *Hill*, *supra*.

Parks v. Commonwealth, 89 S.W.3d 395, 397 (Ky. 2002). In *Ward v. Commonwealth*, 62 S.W.3d 399, 402 (Ky. App. 2001), this Court explained that the IAD is "a statutory scheme which prescribes procedures by which an out-of-state prisoner may demand the speedy disposition of charges pending against him in Kentucky (Article III) and procedures by which a prosecutor can secure the presence of a prisoner detained in another state for disposition of an outstanding charge (Article IV)." The purpose of the IAD is "to eliminate potential abuses of the detainer system[.]" *Id*., *citing Yost v. Smith*, 862 S.W.2d 852, 853 (Ky. 1993) (internal quotation marks omitted).

KRS 440.450 codifies Kentucky's version of the IAD. Article III provides in relevant part as follows:

> (1) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party 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 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 request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, 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.
>
> (2) The written notice and request for final disposition referred to in paragraph (1) hereof shall be given or sent by the prisoner to the warden, secretary of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by certified mail, return receipt requested.

Article V, in turn, provides as follows:

> (3) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

In *Johnson v. Commonwealth*, 450 S.W.3d 696, 700–01 (Ky. 2014), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky.

2015), the Supreme Court addressed the application of Article III of the IAD in some depth:

> The 180–day time period established by the IAD does not commence until a detainee's request for final disposition of the charges against him has actually been delivered to the appropriate court and to the prosecuting officer that lodged the detainer against him. *Fex v. Michigan*, 507 U.S. 43, 52, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993). Article III of the IAD, codified at KRS 440.450(1) requires that in order to invoke the 180–day IAD rule, a detainee inmate, inter alia, "shall have caused to be delivered to the prosecuting officer ... his request for a final disposition to be made of the indictment, information or complaint[.]" Pursuant to KRS 440.450(2), he does this by giving his request for final disposition to the "warden," or other official having custody of him, who must then forward the IAD request as directed by the detainee's paperwork. Because it is the detainee who "shall have caused" the delivery of the IAD forms to the proper prosecuting officer, the statutory text clearly places the responsibility for the accuracy of the notice upon the prisoner. *See Clutter v. Commonwealth*, 322 S.W.3d 59 (Ky. 2010).
>
> In *Clutter*, we emphasized the necessity of strict compliance with the procedures of Article III of the IAD. *Id*. at 63–64, citing *Ellis v. Commonwealth*, 828 S.W.2d 360, 361 (Ky. 1992). We further noted, however, that a limited exception to the requirement of strict compliance applied, "only when strict compliance is thwarted by a public official despite a prisoner's having done everything possible to achieve strict compliance." *Id*. at 64.

In the present case, Phillips contends that he submitted the appropriate IAD forms requesting a trial to prison officials on April 7, 2015, the forms were

submitted to the Commonwealth Attorney on April 10, 2015, and the prison notified him that the forms had been received by the Commonwealth Attorney on April 16, 2015. When he filed his motion to dismiss on October 16, 2015, more than 180 days had elapsed, entitling him to a dismissal of the charges pending against him in Kentucky due to a violation of the IAD. The Commonwealth disputes this assertion for two reasons, and we agree that Phillips is not entitled to relief.

First, Phillips has failed to establish that he ever submitted the necessary IAD forms to request a trial, other than stating so in the motion to dismiss. The circuit court record is devoid of any IAD forms in which Phillips requested a trial prior to the filing of his motion to dismiss. Furthermore, Phillips did not attach any copies of the IAD forms he claims to have filed to his motion to dismiss, despite the statement in paragraph 3 of his motion that the IAD documentation was attached as Exhibit A. It is not enough to state in the motion, "All records pertaining to this filing, including certification of mailing, are in the possession of the IDOC and are available upon request[,]" and then blame the court and the Commonwealth Attorney for not contacting his correctional facility to obtain the documentation. "[P]leadings are not evidence," *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003), and Phillips has the burden of proof on this issue. *See* Kentucky Rules of Civil

Procedure (CR) 43.01(1) ("The party holding the affirmative of an issue must produce the evidence to prove it.").

Second, Phillips' argument that the warden of the sending state acts as an agent of, and therefore binds, the receiving court and prosecutor in interstate detainer situations must also fail. In *Fex v. Michigan*, 507 U.S. at 52, 113 S.Ct. at 1091, the United States Supreme Court held that "the 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." *Fex* is controlling on this issue, *see Bryant v. Commonwealth*, 199 S.W.3d 169, 173 (Ky. 2006), and *Wright v. Commonwealth*, 953 S.W.2d 611, 615 (Ky. App. 1997), and the *Fex* Court rejected the petitioner's policy argument that:

> "[f]airness requires the burden of compliance with the requirements of the IAD to be placed entirely on the law enforcement officials involved, since the prisoner has little ability to enforce compliance," Brief for Petitioner 8, and that any other approach would "frustrate the higher purpose" of the IAD, leaving "neither a legal nor a practical limit on the length of time prison authorities could delay forwarding a [request]," *id.*, at 20. These arguments, however, assume the availability of a reading that would give effect to a request that is never delivered at all. (Otherwise, it remains within the power of the warden to frustrate the IAD by simply not forwarding.) As we have observed, the textual requirement "shall have caused to be delivered" is simply not susceptible of such a reading.

Id., 507 U.S. at 52, 113 S.Ct. at 1091. Because Phillips has not established that the circuit court and the Commonwealth Attorney ever received his IAD request for a trial, the 180-day period never began to run.

Therefore, we hold that the circuit court did not commit any error in denying Phillips' motion to dismiss, and the judgment on appeal is affirmed.

ALL CONCUR.

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