IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0520-MR and 2005-SC-0585-MR

DATE 3-16-06 [handwritten initials]

MARK ALLEN KREMER — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
V. — NO. 03-CR-00253

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant entered conditional pleas of guilty to four (4) counts of robbery in the second degree, two (2) counts of robbery in the first degree, and being a first-degree persistent felony offender. For these crimes, Appellant was sentenced to a total of thirty-five (35) years imprisonment. Pursuant to his conditional pleas, Appellant appealed to this Court on the issues preserved within his pleas. RCr 8.09; Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The facts, as they pertain to this appeal, are as follows: a warrant for Appellant's arrest for the above crimes was issued on January 7, 2003, and Appellant was arrested the next day. At the time of his arrest, Appellant was on parole. Sometime between January 8, 2003, and March 24, 2003, Appellant's parole was revoked and Appellant

was incarcerated pursuant to the terms of a previous, unrelated judgment. On March 24, 2003, Appellant filed a *pro se* motion from prison which stated, among other things, the following:

> 7. The defendant gives notice at this time to the court, and the [C]ommonwealth's attorney, that he is invoking his [sic] all of the rights pursuant to Kentucky Revised Statute five-hundred one-ten [500.110], as well as any other Kentucky Statutes that may apply to him in order to guarantee him and insure him unhindered justice in this case.

On April 4, 2003, Appellant appeared before the trial court with an attorney. His attorney noted that Appellant had filed a *pro se* motion. The trial court informed Appellant that since he was currently being represented by counsel, he needed to file all pleadings and motions through his attorney.

On April 25, 2003, Appellant appeared before the trial court again and informed the trial court, via counsel, that he had decided against proceeding *pro se* and wished to retain his appointed counsel. At this point, Appellant engaged his appointed counsel in discussion regarding the *pro se* motion filed by Appellant on March 24, 2003. Appellant's attorney told Appellant that it would be best for the two of them to discuss the *pro se* motion later and that if Appellant still wished to proceed with that motion, counsel would file it on his behalf. Appellant, through his attorney, then requested that a trial date be set. The trial court asked the parties whether September 23-24, 2003, would suffice. Appellant's counsel responded that those dates were acceptable.

On September 22, 2003, Appellant delivered to the trial court and counsel a *pro se* motion to dismiss,[1] citing KRS § 500.110 as grounds for the dismissal. In certain cases, KRS § 500.110 mandates that incarcerated persons must be tried within 180 days of noticing their incarceration to the appropriate authorities. In this case, Appellant

[1] The motion was filed two days later on September 24, 2003.

claimed that the 180 days expired on September 20, 2003,[2] and that since he was not tried by this date, the charges against him must be dismissed. A hearing was held that same day addressing the *pro se* motion. Both the trial court and the prosecutor questioned whether a detainer had ever been filed in the case. Upon agreement by the parties, the trial court continued the trial (which was scheduled to start the next day) so that both sides could adequately address the arguments in Appellant's *pro se* motion to dismiss.

After considering briefs and arguments from both parties, the trial court denied Appellant's *pro se* motion to dismiss on November 7, 2003, determining that Appellant failed to meet the statutory requirements entitling him to relief pursuant to KRS § 500.110. The trial court also determined that even if Appellant had satisfied the statutory requirements of KRS § 500.110, he waived any right to claim the benefit of that statute since he accepted, without objection, the trial court's offer to begin trial on September 23, 2003.

On December 12, 2003, Appellant filed an original action for Writ of Prohibition in the Kentucky Court of Appeals. Appellant's writ was denied by a vote of two to one (2-1).[3] Mark Allen Kremer v. Thomas L. Clark, Judge, No. 2003-CA-2708-OA (entered April 1, 2004). The Court of Appeals did not reach the merits of the writ, determining that an adequate remedy by appeal was available to Appellant. See St. Luke Hospitals, Inc. v. Kopowski, 160 S.W.3d 771, 774 (Ky. 2005) (merits of a writ need not be addressed where adequate remedy by appeal is available to petitioning party). Thereafter, Appellant entered conditional guilty pleas to the charges set forth above. Appellant now appeals to this Court (1) the trial court's order denying his motion to

[2] September 20, 2003, was a Saturday.
[3] Judge Taylor dissented from this order.

dismiss pursuant to KRS § 500.110 and (2) the Court of Appeal's order denying his petition for Writ of Prohibition. We address Appellant's appeals in turn:

I. Trial Court's order denying Appellant's Motion to Dismiss

Appellant argues that the trial court erred when it denied his *pro se* motion to dismiss. Primarily, he contends that he did meet the statutory requirements entitling him to relief pursuant to KRS § 500.110. Further, he claims that at no time did he waive his right to be tried within the statutory time limit. We disagree, and because we find that Appellant did knowingly and voluntarily waive any perceived right to be tried by September 20, 2003, we need not address the issue of whether Appellant met the statutory requirements entitling him to relief pursuant to KRS § 500.110.

In order to qualify for relief pursuant to KRS § 500.110, certain statutory requirements must be satisfied. See KRS § 500.110; Rushin v. Commonwealth, 931 S.W.2d 456, 459-60 (Ky. App. 1996) (must present evidence that a detainer has been lodged against the prisoner in order to acquire rights pursuant to KRS § 500.110). Once those statutory requirements are met, KRS § 500.110 directs that an indictment against an incarcerated person shall be tried within 180 days unless good cause can be shown as to why a reasonable delay in the action was necessary. Spivey v. Jackson, 602 S.W.2d 158, 159 (Ky. 1980).

It is well-established that most statutory and constitutional rights are not absolute, and thus, they are subject to waiver by criminal defendants. See New York v. Hill, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) ("the most basic rights of a criminal defendant are subject to waiver") (citations and quotations omitted); Commonwealth v. Townsend, 87 S.W.3d 12, 15 (Ky. 2002); Johnson v. Commonwealth, 90 S.W.3d 39, 44-45 (Ky. 2002); Humphrey v. Commonwealth, 153 S.W.3d 854, 857

(Ky. App. 2004). In this instance, the ruling in New York v. Hill, supra, is directly on point and particularly persuasive. Interpreting a nearly identical provision of the Interstate Agreement on Detainers (IAD), the United States Supreme Court permitted criminal defendants or their attorneys to waive the right to be tried within the statutory time periods contained therein. Id. at 114-115, 120 S.Ct. at 664-65. The waiver in that case was deemed sufficient where the attorney agreed (without the presence of the defendant) to accept a trial date beyond the 180 day period specified in the IAD. Id. at 113, 120 S.Ct. at 663.

The reasoning in New York v. Hill, supra, is also applicable in this case. First, we find nothing in KRS § 500.110 which is inconsistent with recognizing the general rule that criminal defendants may knowingly and voluntarily waive statutory rights. Id. at 116, 120 S.Ct. at 664-65 (noting that "waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured"); Cf. Wells v. Commonwealth, 892 S.W.2d 299, 303 (Ky. 1995) (no violation of right to speedy trial pursuant to KRS § 500.110 where defendant asked for and received a continuance beyond the 180 day time limitation). Thus, we hold that a valid waiver by a criminal defendant is sufficient to constitute good cause under KRS § 500.110 for extending the period of time in which an incarcerated person shall be tried. See Spivey, supra, at 159. Second, the circumstances indicating a knowing and voluntarily waiver of the right to be tried within the statutory time period in this case are even more compelling than they were in New York v. Hill, supra.

If we accept Appellant's argument that his March 24, 2003, *pro se* motion was competent to affirmatively invoke his right to be tried within 180 days pursuant to KRS § 500.110, then we must also assume that Appellant was aware that the time period

under this statute lapsed on September 20, 2003. However, despite this knowledge, Appellant nonetheless stood next to his attorney in open court on April 23, 2003, (one month later) and requested a trial date. When the trial court offered to start trial on September 23, 2003, Appellant said nothing. He also said nothing when his attorney accepted, on his behalf, the trial court's offer to begin trial on that day. Moreover, Appellant thought not to say anything for five additional months, until the time had conveniently lapsed under the statute. We find such circumstances to be an affirmative and valid waiver by Appellant of any right to be tried by September 20, 2003.

Our decision renders the remainder of Appellant's arguments in this appeal moot, and thus, we do not address them.

II. Court of Appeal's order denying Appellant's Petition for Writ of Prohibition

Appellant also appeals the Court of Appeal's order (1) denying his Writ of Prohibition; and (2) refusing to address the merits of the petition. We agree with Appellant and Judge Taylor that the Court of Appeals erred when it found that Appellant had an adequate remedy by appeal. See Spivey v. Jackson, 602 S.W.2d 158 (Ky. 1980) (writ of prohibition is appropriate when lower court is found to have violated provisions of KRS § 500.110). However, as the writ was nonetheless properly denied, the error is deemed harmless.

For the reasons set forth above, the judgment of the Fayette Circuit Court is affirmed.

Graves, Johnstone, Roach, Scott, and Wintersheimer J.J. concur. Cooper, J., concurs in result only. Lambert, C.J., dissents without opinion.

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