

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-000535-MR

DATE 3-13-08 ELLAGRAWH.D.C.

SCOTT HAYNES

APPELLANT

V.

ON APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
NO. 03-CR-000070

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Ballard Circuit Court where Appellant, Scott Haynes, was convicted of two counts of first-degree wanton endangerment, two counts of kidnapping, robbery, and burglary. Appellant was sentenced to 70 years imprisonment.

Appellant raises three claims of error: (1) that his indictment should have been dismissed due to the court's failure to bring him to trial within 180 days; (2) that his lack of presence at a hearing violated his due process rights; and (3) that the Commonwealth improperly introduced KRE 404(b) evidence.

I. Background

On September 23, 2003, Appellant was indicted in Ballard County. Appellant's jury trial was held on May 2, 2006 and he was convicted of all charges. A recitation of

the material facts in this case is unnecessary. Only one of Appellant's three issues on appeal concerns substantive, rather than procedural, matters and that issue was unpreserved.

II. Analysis

A. Interstate Agreement on Detainers

Appellant argues that the indictment against him should have been dismissed by the trial court because he was not brought to trial within the time limits set forth in the Interstate Agreement on Detainers (IAD) as set forth in KRS 440.450.

Article III of the IAD states in pertinent part:

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 tried 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 and reasonable continuance.

Appellant was indicted on September 23, 2003 in Ballard County. He was incarcerated in Minnesota on September 13, 2005, when the Ballard County Commonwealth Attorney lodged a detainer against him. Appellant signed Form II, the request for disposition of charges, and sent it to the Ballard County Sheriff's Office where the return receipt was signed on September 30, 2005, by the Deputy Ballard County Judge Executive. The County Judge Executive is not an employee of or associated with the office of the Ballard County Commonwealth Attorney's office. The

Ballard County Commonwealth Attorney at that time, Hon. Timothy Langford, stated to the trial court that no one from his office had ever received Appellant's request for disposition under the IAD.

In October 2005, the Ballard County Commonwealth Attorney learned that Appellant was in custody in McCracken County, Kentucky, under a detainer that had been lodged with the Minnesota prison authorities on unrelated charges. The Ballard County Commonwealth Attorney then contacted the Kentucky IAD administrator to determine the procedure for "borrowing" Appellant from McCracken County in order to dispose of the Ballard County charges. The Ballard County Commonwealth Attorney then sent an IAD form IV to the Minnesota institution where Appellant was housed prior to being released to McCracken County on its detainer which permitted Ballard County to have temporary custody of Appellant. Form IV was properly executed and delivered to Minnesota authorities on February 24, 2006.

The record clearly indicates that Appellant failed to submit documents to the proper parties that would have triggered the IAD. For the 180 day time limit to begin, a request for disposition must have been made; in this case, to the Ballard County Commonwealth Attorney's office and the Ballard County Circuit Court. Ward v. Commonwealth, 62 S.W.3d 399, 403 (Ky.App. 2001) (180 day period to dispose of charges not triggered until request for final disposition is delivered to the court and prosecutor). Appellant submitted documents to neither party and instead sent them to the sheriff's office.

Appellant cites Schofs v. Warden, FCI, Lexington, 509 F.Supp. 78, 80-81 (E.D.Ky. 1981) for the argument that he substantially complied with IAD requirements. However, the Appellant in Schofs had mailed letters to the proper parties discussing the

IAD, but had merely failed to provide the correct forms. The proper parties were put on notice and the court found that sufficient. In this case, the proper parties did not receive notice. To hold the Commonwealth to the 180 day time limit when they had no notice would be unfair and prejudicial to their case. The trial court properly denied Appellant's motion to dismiss.

B. Appellant's Absence at Hearing

At Appellant's arraignment on March 6, 2006, the Commonwealth requested a continuance to pursue charges under the IAD. Appellant was not present at the hearing. Appellant objected to this, stating that factual matters were at issue, but the court denied his objection, believing that he did not need to be present because the hearing involved legal arguments. There was no error in the court's ruling.

This court has held that hearings regarding whether a defendant is being held pursuant to the IAD are not "critical stages of the trial" at which the defendant must be present: "A defendant is not required to be present during the argument of legal issues between court and counsel." Tamme v. Commonwealth, 973 S.W.2d 13, 38 (Ky. 1998), Thomas v. Commonwealth, 437 S.W.2d 512, 515 (Ky. 1968); Harris v. Commonwealth, 285 S.W.2d 489, 491 (Ky. 1955), quoted in, St. Clair v. Commonwealth, 140 S.W.3d 510, 557 (Ky. 2004).

The only issue at the IAD hearing was whether Appellant had complied with the legal requirements to trigger the IAD time provision. These are legal issues and Appellant's presence was not necessary. Any explanation Appellant may have given for sending the request to the improper party was irrelevant with regard to his compliance with the IAD requirements.

C. KRE 404(b) Evidence

Appellant filed a motion on May 2, 2006, seeking to exclude bad acts, convictions, and alleged crimes committed before and after Appellant's arrest. The motion was discussed in chambers the morning of trial where Appellant's counsel informed the court that she had not received the required written notice articulated in KRE 404(c) for the admission of KRE 404(b) evidence.

Appellant first argued that, due to the lack of notice, she had been unable to mount a proper defense. However, she later admitted that she had received oral notice from the Commonwealth a couple of weeks prior to trial and that she had received all discovery she would have received had she been given written notice. Appellant's counsel maintained however that KRE 404(c) required written notice. The court stated that pretrial notice by phone was reasonable and overruled the motion with regard to the notice requirement.

The ruling by the trial court was proper in this instance. Where no written notice has been given, but "the accused has received 'actual notice' of the intention to introduce KRE 404(b) evidence and the accused has suffered no prejudice, the notice requirement in KRE 404(c) is satisfied." Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005). Whether reasonable pre-trial notice has been given is decided on a case-by-case basis in light of the intent of the notice requirement in KRE 404(c), i.e., "to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with reliability and prejudice problems at trial." Id. quoting Bowling v. Commonwealth, 942 S.W. 2d 293, 300 (Ky. 1997) (quoting Robert G. Lawson, Kentucky Evidence Law Handbook sec. 2.25 (3rd Ed. 1993)).

Appellant's counsel received actual notice two weeks prior to trial and admitted

that she had received all pertinent discovery from the Commonwealth. Appellant had two weeks to mount defenses to this evidence, giving the Appellant opportunity to challenge its admissibility. That opportunity is the very thing the notice requirement seeks to address. Appellant suffered no prejudice as a result of not receiving written notice and there was no error by the trial court in overruling the motion.

The alleged error regarding the KRE 404(b) evidence was unpreserved. A ruling on record regarding a motion in limine will suffice to preserve error, KRE 103(d); Lanham v. Commonwealth, 171 S.W. 3d 14, 22 (Ky. 2005). Although the 404(b) evidence was discussed at the pretrial conference, the only ruling made concerned the KRE 404(c) notice requirement. No ruling was made on the KRE 404(b) evidence and Appellant made no contemporaneous objection at trial.

Because this alleged error was not preserved for appellate review, the Court will reverse because of it only if it constitutes palpable error under RCr 10.26. A palpable error is one that “affects the substantial rights of a party” and will result in “manifest injustice” if not considered by the court. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003) (citing RCr 10.26). Recently this Court clarified that the key emphasis in defining such a palpable error under RCr 10.26 is the concept of “manifest injustice.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). “[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” Id. Having reviewed Appellant’s arguments, the Court concludes that there was no manifest injustice. Therefore, any error cannot be considered palpable and is not grounds for reversal.

III. Conclusion

For the reasons set forth herein, the judgment and sentence of the Ballard Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Samuel N. Potter
Department of Public Advocacy
100 Fair Oaks Lane
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Jason Bradley Moore
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capitol Center Drive
Frankfort, Kentucky 40601-8204