

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-001270-MR

HUBERT SMITH

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 05-CI-00564

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Hubert Smith appeals from an order of the Franklin Circuit Court which denied his petition for declaratory relief.

Smith seeks relief because of a purported violation of the Interstate Agreement on Detainers (IAD), *see* Kentucky Revised Statutes (KRS) 440.450, that occurred in 1985. In 1984, Smith was a federal prisoner in Terre Haute, Indiana. On May 10, 1984, the Commonwealth Attorney for Laurel County, Kentucky, filed a

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

detainer warrant pursuant to the IAD requesting temporary custody of Smith in order to bring him to London, Kentucky, to face charges of capital murder, first-degree rape and first-degree PFO.

Under the terms of the IAD, if a prosecutor files such a detainer, “trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state[.]” KRS 440.450, Article IV. If the court fails to bring the prisoner to trial within that period, it loses jurisdiction of the case and must dismiss it with prejudice. *Spivey v. Jackson*, 602 S.W.2d 158 (Ky. 1980); *Wright v. Commonwealth*, 953 S.W.2d 611 (Ky.App. 1997). Smith was transported from Indiana to the Laurel County jail on November 3, 1984, to await trial. The court set a trial date of December 3, 1984. The trial was delayed, however, due to inclement weather and to two motions for continuances made by Smith’s attorney.

Finally, on March 27, 1985, the trial court entered a “Waiver of rights and agreement for return of prisoner,” which stated that on February 25, 1985, Smith and his counsel had “agreed in open court to waive all rights the defendant might have regarding a transfer back to the custody of the U.S. Department of Justice, and a subsequent return to the Commonwealth of Kentucky.” The agreement further specified that Smith would be returned to the custody of the U.S. Department of Justice and would remain in its custody until July 3, 1985, at which time he would “once more be surrendered to the Sheriff of Laurel County” for trial in Laurel Circuit Court. Although a signature line for

Smith appeared on the agreement, it appears that it was signed only by the judge, by Smith's counsel, and by the Commonwealth Attorney.

Smith was accordingly sent back to Indiana and then returned to Kentucky in July, where he was tried and found guilty of murder and first-degree rape. He was sentenced to life and twenty years respectively on the charges. He filed his petition for declaration of rights on April 20, 2005, arguing that his waiver of rights under the IAD was invalid. The Franklin Circuit Court denied his petition and this appeal followed.

Smith argues that the Laurel Circuit Court was without jurisdiction to put him on trial and convict him because his signature does not appear on the "Waiver and agreement" document. He contends that he did not waive his statutory right to be tried within 120 days under Article IV of the IAD, and that consequently his conviction must be dismissed.

The Commonwealth has drawn our attention to the fact that this issue has been raised by Smith on numerous previous occasions before various courts,<sup>2</sup> and argues that the action is therefore barred by the operation of *res judicata*, and by the law of the

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<sup>2</sup> According to the Commonwealth's brief, these include a petition for a writ of prohibition before the Franklin Circuit Court; a motion pursuant to RCr 11.42 in Laurel Circuit Court (the denial of which was affirmed by this Court on May 1, 1991, in an opinion which observed that "there is nothing in the record to indicate that the appellant did not agree to be transferred"); a writ of habeas corpus in the U.S. District Court for the Eastern District of Kentucky, 91-164, the denial of which was affirmed by the U.S. Court of Appeals for the Sixth Circuit in 92-5355; a petition for a writ of habeas corpus in the Oldham Circuit Court in 01-109; a petition to file a second or successive writ of habeas corpus in the Sixth Circuit Court of Appeals in 05-5308; and a writ of prohibition in the Laurel Circuit Court which was denied on November 3, 2003.

case. Smith has responded that these legal doctrines should not bar an action when a palpable error has been committed.

Even if we accept for the sake of argument that Smith did not expressly assent to waive his right to be tried within the statutory period by signing the “Waiver and agreement,” the validity of the waiver is not affected because his counsel was empowered to act on his behalf. The United States Supreme Court has held that a defendant’s counsel may waive the limitations period under the IAD on the defendant’s behalf. Therefore, even if there was a failure to obtain Smith's express assent, it could not constitute palpable error.

In *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000), the defendant was an Ohio prisoner who was sent pursuant to the IAD to face charges in New York. His counsel in New York agreed to set a trial date that was beyond the limitations period set by the statute. Hill thereafter argued that the charges against him should be dismissed because his counsel did not have the right to waive his rights to a speedy trial under the IAD. The Supreme Court disagreed, holding that his defense counsel’s agreement to a trial date outside the IAD period barred the defendant from seeking dismissal on the ground that the trial did not occur within that period. The Court reached this conclusion by considering the nature of the right at stake.

For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to

manage the conduct of the trial. . . . As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice which can be charged upon the attorney. . . . Scheduling matters are plainly among those for which agreement by counsel generally controls.

*Hill*, 528 U.S. at 114-15, 120 S.Ct. at 664 (internal citations omitted).

The Court also relied on the express terms of the IAD itself, which states in both Sections III(1) and IV(3) 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.”

In our view, the holding in *Hill* is directly applicable to Smith’s case, because it also did “not involve a purported prospective waiver of **all** protection of the IAD’s time limits or of the IAD **generally**, but merely agreement to a specified delay in trial.” *Hill*, 528 U.S. at 114-15, 120 S.Ct. at 664 (emphasis supplied). Smith and his attorney agreed to what was basically a postponement of the trial date. Smith’s reliance on another Supreme Court case, *Alabama v. Bozeman*, 533 U.S. 146, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001), in which the dismissal of charges against a defendant was upheld because the state had failed to comply strictly with the terms of the IAD, is misplaced. In *Bozeman*, no waiver was signed by the defendant or by his attorney. Indeed, the *Bozeman* Court also stated, citing its decision in *Hill*, that “our decision does not bar a receiving State from returning a prisoner when it would be mutually advantageous and the prisoner accordingly waives his rights under Article IV(e).” *Bozeman*, 533 U.S. at 156-157, 121 S.Ct. at 2086.

The order of the Franklin Circuit Court denying Smith's petition for declaratory relief is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hubert Smith, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

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