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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001356-MR

LEROME BRANTLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
INDICTMENT NO. 05-CR-002740

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Lerome Brantley, having entered a conditional plea of guilty, appeals from a denial of his motion to dismiss his indictment for lack of jurisdiction under the Interstate Agreement on Detainers. For the reasons set forth herein, we vacate and remand.

[1]Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In August 2004, the Kentucky State Police Forensics Laboratory (KSP Lab) informed the Louisville Metro Police that DNA from a July 2000 reported rape and robbery in Jefferson County had been matched to a DNA record from the National DNA Index System. According to the KSP Lab, the DNA profile matched Lerome Brantley, who was then a prisoner at the Fountain Correctional Facility in Atmore, Alabama. On November 1, 2004, a bench warrant for Brantley was issued by the Juvenile Session of Jefferson District Court.

In December 2004, a blood sample was obtained from Brantley, based upon a search warrant executed at the Alabama correctional facility where he was being held. In February 2005, that sample was reported by the KSP Lab as a match to the DNA from the July 2000 case.

On May 5, 2005, the Jefferson County Commonwealth's Attorney filed a detainer with the Alabama Department of Corrections. On June 15, 2005, Brantley made his request under the Interstate Agreement on Detainers (IAD) for a final disposition of all outstanding charges. Alabama Corrections officials on that same day promptly notified the Jefferson County Commonwealth's Attorney, the Jefferson Circuit Court, and the Kentucky IAD Administrator of Brantley's request and of Alabama's offer to deliver temporary custody of Brantley under the IAD. The demand was received by the circuit court clerk on June 24, 2005, and the Commonwealth Attorney's statement of willingness to accept temporary custody of Brantley was dated July 5, 2005.

Brantley was brought to Kentucky to face the July 2004 charges. On July 28, 2005, the Juvenile Session of Jefferson District Court held a transfer hearing and found probable cause that Brantley was seventeen at the time of the July 2000 offenses, that a handgun was used in the offenses, and that Brantley committed the offense. The juvenile court transferred the case to circuit court, noting a grand jury date of August 22, 2005.

The indictment was received in open court on Wednesday, September 14, 2005. On that same day, at the Louisville Metro Department of Corrections, Brantley was arrested on the bench warrant that had been issued when the indictment was returned. Brantley was arraigned the day after the return of the indictment and entered a plea of not guilty. On that day, stand-in counsel admitted Brantley's identity, waived the formalities of arraignment, entered a plea of not guilty, and reserved the right to file necessary motions. The court then told Brantley that his case had been scheduled for a pretrial conference on October 5, 2005, and for trial on March 1, 2006. The court also determined that Brantley qualified for a public defender.

At the October 5 pretrial conference, Brantley's attorney, Sheila Seadler, was in attendance, but the prosecutor, J. Scott Davis, did not show up, no discovery was tendered to the defense, and neither the lead investigator, Ed Price, nor any prosecuting witness appeared. Another prosecutor, Mr. Bonar, appeared for the Commonwealth, explaining that Davis was in trial and was under the impression that Brantley was still incarcerated out of state and therefore would not be at the pretrial conference. The court

then scheduled another pretrial conference for November 8, 2005, and ordered the Commonwealth to turn over discovery and tender a settlement offer to the defense no later than October 21, 2005.

On November 8, the assigned prosecutor, Davis, did appear, but neither the lead investigator nor any prosecuting witness was present. Moreover, no settlement offer had been tendered, and eighty-five pages of discovery documents had not been delivered to defense counsel until 3:46 p.m. the night before. Because defense counsel had not had an opportunity to review the discovery with Brantley in order to participate in a meaningful pretrial conference, she asked that another pretrial be scheduled. The court scheduled another pretrial hearing for December 7, 2005, ordering the prosecutor to have the lead detective at that hearing. When asked if the March 1, 2006, trial date was still good for them, both the prosecutor and defense counsel responded that it was.

At the December 7th pretrial conference, Davis again failed to appear, and the prosecutor who did appear, Mr. Baker, explained that Davis had left the office at 11:30 a.m. for a 1:30 p.m. appointment in eastern Jefferson County but had not returned. Defense counsel advised the court that it appeared that Brantley had been brought to Kentucky under the IAD, and that the time period for trial was 180 days. Counsel stated that she had not agreed to the March 1, 2006, trial date and that Brantley wanted to be tried within the time limits of the IAD. The court found that defense counsel had raised the IAD issue within the applicable time period, the Commonwealth was on notice, but

the court would keep the March 1, 2006, trial date subject to advancing the trial if necessary.

On February 16, 2006, Seadler filed a motion to dismiss the indictment for failure to comply with the IAD. On that same day, the Commonwealth sought a continuance because Detective Price was in Atlanta attending polygraph training until the end of March. The trial judge advised the parties that he needed time to research the law, so the case was passed until March 6th. On that day, however, the trial judge again passed the case to March 10th in order to complete his research.

On March 10th, the court denied the motion to dismiss and announced that it would issue a written order with a new trial date. Brantley's counsel said she objected to a trial date outside the 180 days. The record indicates, however, that the court found that Brantley had waived the terms of the IAD from September 15th to March 1st. Therefore, the court asked what month would be good for the parties for trial, and Brantley's counsel again reiterated that she wanted immediate trial. The prosecutor requested August. In its order, the court reassigned the jury trial for August 15, 2006, finding that the Commonwealth's motion for continuance "based upon its investigative officer . . . being in training in Atlanta for a period of three months, constituted a necessary or reasonable continuance for good cause."

Thereafter, Brantley entered pleas of guilty to the rape and robbery offenses in exchange for the Commonwealth's recommendation of ten years on each offense to run concurrently with each other and concurrently with the Alabama sentence. The plea was

conditional, reserving the IAD issue for appeal. Judgment was entered, and this appeal followed.

Brantley's sole argument is that the indictment should have been dismissed because he was not brought to trial within the 180-day period required by Article III of the Interstate Agreement on Detainers. We review the trial court's findings of fact under the abuse of discretion standard but review its application of law to those facts *de novo*. *See Commonwealth v. Deloney*, 20 S.W.3d 471, 474 (Ky. 2000).

Article III of the IAD, or KRS 440.450, provides 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 bases of which 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'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.

It is undisputed that Brantley's case falls under this section of the IAD. However, in *New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 662, 145 L.Ed.2d 560 (2000), the Supreme Court held that the right to be tried within the 180 day time limit contained in Article III of the IAD may be waived when a defendant or his counsel agrees to a trial date outside the time limit. In this case, Brantley waived his rights under the IAD because he was aware of the March 1, 2006, jury trial date when he was

arraigned on September 15, 2005, and no written motion to dismiss was filed for an additional five months, until the time under the statute had passed. Therefore, we agree with the trial court's analysis on this issue.

After careful review, however, we find the court erred in granting the continuance of the trial from March to August 15, 2006. In *Zedner v. United States*, 126 S.Ct. 1976, 1987, 164 L.Ed.2d 749 (2006), the Supreme Court, interpreting the Federal Speedy Trial Act of 1974, found that an explicit waiver of the Act by the defendant "for all time" was ineffective. In light of that holding and the similarity between the two Acts, we find that although Brantley waived his right to trial within 180 days when he agreed to the trial date of March, 1, 2006, it would be counter to *Zedner* to find that the waiver continued "for all time." As a matter of fact, it is clear that Brantley's counsel asserted his right to speedy trial several times at both of the hearings in March. Therefore, under the IAD, the trial court must find that the continuance requested by the Commonwealth was based on good cause and was both necessary and reasonable.

The trial court found that there was good cause for a continuance based on the Commonwealth's "lead investigator, Detective Ed Price, being in training in Atlanta for a period of three months." The record reflects that this fact is incorrect. Ed Price would have returned from training at the end of March and would have been available for trial the beginning of April. *See* Record, Tape, 3/10/06, 9:42:40). Moreover, although the trial court found good cause for the continuance, it failed to find good cause as to the five and one-half month length of the continuance. Therefore, in light of the Kentucky

Supreme Court holding in *Roberson v. Commonwealth*, 913 S.W.2d 310, 314 (Ky. 1994), in which the Court held that a trial court must address whether there is good cause and whether it is necessary or reasonable for the length of continuance granted when a Defendant's rights under the IAD have not been waived, we vacate and remand this case to the trial court to determine whether continuing the case for five and one-half months following Brantley's assertion of his right under the IAD was for good cause and was necessary or reasonable.

ALL CONCUR.

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