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DISTRICT II

January 6, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1953-CR	State of Wisconsin v. Harry J. Demos (L.C.# 2016CF1280)
2019AP1954-CR	State of Wisconsin v. Harry J. Demos (L.C. #2017CF1017)
2019AP1955-CR	State of Wisconsin v. Harry J. Demos (L.C. #2017CF1018)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated appeals, the State appeals from orders dismissing with prejudice three criminal cases against Harry J. Demos on the grounds that the State violated the speedy trial provisions of the Interstate Agreement on Detainers (IAD) by failing to try Demos within

180 days of his request for prompt disposition. *See* WIS. STAT. § 976.05(3)(a) (2017-18).¹ It is undisputed that the 180-day time limit of the IAD applied to Demos and that he was not brought to trial within 180 days after Demos requested final disposition of the Wisconsin charges against him. *See id.* At issue is whether Demos “implicitly waive[d] his prompt disposition request under the [IAD] by agreeing to a trial date outside of the 180-day deadline for trial.” The trial court found that Demos did not waive his request for prompt disposition. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The parties agree that defendants who seek prompt disposition under the IAD can, by their conduct, waive their right to trial within 180 days. *See State v. Aukes*, 192 Wis. 2d 338, 345, 531 N.W.2d 382 (Ct. App. 1995) (“We hold that waiver under the IAD can be by conduct and does not require an express personal waiver on the record.”). Such conduct can include failing to object to a trial date scheduled outside the time limit. *See id.*

To determine whether Demos, through his conduct, waived his right to a prompt disposition within 180 days, the trial court heard testimony from Demos and the two attorneys who represented him.² The trial court also reviewed the IAD paperwork that Demos filed in May 2017 with the warden of the prison in Michigan where he was being held. It was undisputed that the Michigan authorities sent the IAD paperwork to Kenosha County in a single

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² This hearing occurred in a postconviction setting after Demos pled guilty and pursued the IAD timing issue in postconviction proceedings. On appeal, the State does not argue that Demos should have been barred from raising the IAD timing issue after pleading guilty. Accordingly, we do not discuss the plea hearing or provide a full procedural history of the three criminal cases.

envelope and included letters to both the clerk of circuit court and the “Kenosha County Prosecutor.” The trial court observed: “It was received by the clerk of circuit court [and] ... because it was addressed to Kenosha County [P]rosecutor, the clerk just sent the envelope to the district attorney’s office because it was addressed to them and received then by the district attorney.” Nothing was entered in the court files for Demos’s criminal cases.

The State subsequently completed IAD paperwork to have Demos transferred to Kenosha County. The trial court signed that paperwork on June 6, 2017. On July 18, 2017, Demos appeared in Kenosha County without an attorney. The court commissioner asked Demos how he was transported to Wisconsin and why it took so long. In the course of answering the court commissioner’s questions, Demos said: “So from then I filed a 180 day speedy trial with this Court. So then it took them another month” to transport him to Wisconsin. The fact that Demos had been brought to Wisconsin pursuant to the IAD and had requested a prompt disposition within 180 days was not mentioned in subsequent court hearings.

On November 3, 2017, the attorney representing Demos on one of his cases received a letter from Demos that discussed several issues, including Demos’s “speedy trial” demand.

Demos wrote:

With the next court date of November 9, 201[7], the court has 10 days to meet the speedy trial I filed in Michigan and receipt received on May 23rd, 201[7] for all untried indictments. It is certain there will not be a disposition in any untried indictments. I request a motion be filed to dismiss all charges in this matter.^[3]

³ Demos’s letter erroneously referred to the year 2016 instead of 2017. The trial court recognized that this was a scrivener’s error and found that Demos’s letter, which was sent in late October 2017, was referring to events in 2017.

Both of Demos's attorneys testified that they recalled approaching a court clerk at the conclusion of a court hearing to ask "if there was anything in the record relating to" an IAD detainer. One attorney testified that the clerk looked at the electronic court file and said, "[N]o, there is no evidence of this." Demos testified that his attorneys' exchange with the clerk occurred on November 9, 2017, which was the hearing where the parties set the trial for January 16, 2018—a date outside the 180-day time limit.

The trial court found, based on the testimony and Demos's letter, that Demos's attorneys spoke to the court clerk on November 9, 2017. It is undisputed that there was no on-the-record discussion about the prompt disposition request at that hearing, and the 2018 trial date was set without objection.

The trial court found that Demos "told his attorneys the 180 days [is] running." The trial court continued:

The question then is ... did the defendant have to jump up ... when that trial date is being set [and say, "I told my attorneys, Judge. They won't listen to me. Trust me, I got a detainer out there somewhere

I'll let you brief it but essentially ... the defendant's telling his attorney that the 180 days is running. And he wrote to them basically shortly before the [November 9, 2017] arraignment about that issue, and the attorneys then [based] on what their client said checked with the court because the court should have a record. And there wasn't anything forwarded to the court from the DA's office. And obviously it was mailed wrong, not by the defendant but by the State of Michigan....

I don't believe I can hold the defendant [responsible] for not jumping up and down that the attorney didn't say hey, Judge, you have to try it.

The trial court also said that if it had been informed about the prompt disposition request, “theoretically I could have gave him a trial date in a week.” The trial court concluded that “under those facts it would appear to me that the charges would have to be dismissed.” The trial court gave the State an opportunity to find additional case law to support its position. After the State was unable to provide additional cases, the trial court entered an order vacating the convictions and dismissing the charges against Demos, with prejudice.

On appeal, the State argues that Demos “waived his prompt disposition request by accepting a later trial date.” The State contends that Demos “had all the information about his request and withheld it until it was clear that the State and [the trial] court could not bring him to trial within 180 days. He then agreed to a trial date outside of the 180-day window.” We are not persuaded.

The trial court made several findings that contradict the State’s argument, and those facts are not clearly erroneous. *See State v. Kucharski*, 2015 WI 64, ¶27, 363 Wis. 2d 658, 866 N.W.2d 697 (“[F]actual findings are upheld unless they are clearly erroneous.”). The trial court found that Demos told his trial counsel before the November 9, 2017 hearing about his prompt disposition request under the IAD. The trial court further found that Demos’s attorneys asked the court clerk to check whether an IAD request had been filed; she indicated there was nothing in the court record. The trial court also found that it “theoretically” could have offered Demos a trial date within a week if it had been told about the request at the November 9, 2017 hearing.

We agree with the trial court that Demos did not waive his prompt disposition request by failing to personally address the trial court at the November 9, 2017 hearing. The cases the State cites are all distinguishable from the unique facts in this case. We recognize the State’s

frustration that no one brought the IAD issue to the trial court's attention before the 180 days had passed, but the State—which filled out the IAD paperwork and arranged for Demos to be transported to Wisconsin months earlier—also could have raised the issue. Like the trial court, we are not convinced that Demos waived his speedy disposition request by his conduct at the November 9, 2017 hearing. Therefore, we summarily affirm the trial court's orders dismissing the three criminal cases with prejudice.

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals