

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WALTER MOSS	:	No. 676 EDA 2021

Appeal from the Order Entered March 31, 2021
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0007815-2018

BEFORE: BENDER, P.J.E., BOWES, J., and DUBOW, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED JUNE 28, 2022**

In this case, the Commonwealth appeals from the trial court’s March 31, 2021 order granting Appellee’s, Walter Moss, motion to dismiss all charges against him based on the Commonwealth’s allegedly violating the Interstate Agreement on Detainers (“IAD”), 42 Pa.C.S. § 9101. After careful review, we reverse the court’s order and remand for further proceedings.

The Commonwealth sets forth the following summary of the pertinent facts and procedural history of this case, to which Appellee does not object:

On October 15, 2018, the Commonwealth charged [Appellee] ... with aggravated assault, fleeing, and recklessly endangering another person. These charges were held for court on October 30, 2018. Formal arraignment was scheduled for November 14, 2018, but [Appellee] failed to appear and the court issued a bench warrant. It was subsequently discovered that [Appellee] was in custody in Tennessee.

On August 2, 2019, the Commonwealth’s extradition specialist, Carolann Masturzo, lodged a detainer with the Robertson County Prison in Tennessee, where [Appellee] was being held. Ms. Masturzo subsequently contacted the prison to ensure that it had

received the relevant extradition paperwork, but [Appellee] could not be extradited at that time due to open charges in Tennessee (N.T.[,] 3/31/21[,] at 8; R.R. 56a).

On February 21, 2020, [Appellee] was sentenced in his Tennessee case. Then, on April 14, 2020, [Appellee] sent the Commonwealth a "Form 1," which is a request that the charges against him in Pennsylvania be disposed of. The Commonwealth received [Appellee's] request on May 26, 2020. Ms. Masturzo thereafter sent the requisite "Form 6" to the Pennsylvania Department of Corrections (DOC), who received it on June 23, 2020[,], and forwarded it to the proper Tennessee authorities, consistent with the established procedure. Ms. Masturzo then scheduled a July 8, 2020 transfer date with the Philadelphia Sheriff's office, only to have the Sheriff's Office, not the Commonwealth, cancel it due to COVID-19 concerns. Specifically, "Tennessee was a high spiked area at that time" and[,], therefore[, it was] "one of the states on the list [from which] you would have to automatically quarantine yourself after you came back[.]" (**[I]d.** at 11, 16; R.R. 57a, 58a).

On July 7, 2020, as soon as she knew of the Sheriff's cancellation of extradition, Ms. Masturzo immediately sent out another Form 6, which the DOC received on July 16, 2020. She then scheduled extradition with the Philadelphia Sherriff's office for August 11, 2020. Once again, however, the Sherriff's office cancelled [Appellee's] pickup due to COVID-19 concerns[.] (**[I]d.** at 17-18; R.R. 59a).

At this point, given the apparent futility of attempting to extradite [Appellee] at that time, Ms. Masturzo waited to send out another Form 6 "until the situation was getting very mild with COVID[.]" (**[I]d.** at 18; R.R. 59a). However, for the remainder of 2020, "all the spiked areas were going up and then the courts went under – the City [of Philadelphia] went under lock down again[.]" (**[I]d.** at 19; R.R. 59a). Once the pandemic had again subsided, Ms. Masturzo confirmed that [Appellee] remained in the [prison in] Robertson County, Tennessee[,], ... and made another request for extradition on February 3, 2021, resulting in [Appellee's] transfer to Philadelphia on March 17, 2021[.] (**[I]d.** at 19-20; R.R. 59a).

On March 24, 2021, [Appellee] filed a motion to dismiss the Pennsylvania charges against him pursuant to the IAD. On March 31, 2021, just 14 days after [Appellee] had first become available in Pennsylvania, the [trial court] found that the Commonwealth had failed to request a continuance during the time [Appellee] was

unavailable due to COVID-19, and thus granted [Appellee's] motion to dismiss [the charges].

The Commonwealth appealed the court's dismissal on April 5, 2021.

Commonwealth's Brief at 5-7.

Although the trial court did not order the Commonwealth to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, it filed a Rule 1925(a) opinion on October 26, 2021. Herein, the Commonwealth states one issue for our review: "Did the trial court err in dismissing the charges against [Appellee] where only 14 days of the 180-day time[-]period in which the Commonwealth was required to try [Appellee] had passed?"

Commonwealth's Brief at 4.

Preliminarily, our Supreme Court has explained that "[t]he IAD is an agreement between forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States, that establishes procedures for the transfer of prisoners incarcerated in one jurisdiction to the temporary custody of another jurisdiction which has lodged a detainer against a prisoner." **Commonwealth v. Davis**, 786 A.2d 173, 175 (Pa. 2001) (citation omitted). Moreover,

"[t]he policy of the [IAD] is to encourage the expeditious and orderly disposition of charges and its purpose is to promote and foster prisoner treatment and rehabilitation programs by eliminating uncertainties which accompany the filing of detainees. **Commonwealth v. Fisher**, ... 301 A.2d 605, 607 ([Pa.] 1973)." **Commonwealth v. Wilson**, ... 454, 331 A.2d 792, 794 ([Pa. Super.] 1974) (footnote omitted); **see also Commonwealth v. Merlo**, ... 364 A.2d 391, 394 ([Pa. Super.] 1976). Because the legislation is remedial in character, it

is to be liberally construed in favor of the prisoner so as to effectuate its purpose. ... **Merlo, supra**[,] ... at 394.

Commonwealth v. Thornhill, 601 A.2d 842, 845-46 (Pa. Super. 1992)
(cleaned up).

Pertinent to the present case, Article III of the IAD states the following:

(a) 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 brought to trial within 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 or reasonable continuance.** The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

42 Pa.C.S. § 9101, Article III(a) (emphasis added).

Also at issue in this case is the following language of Article VI(a) of the IAD: "In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods **shall be tolled whenever and for as long as the prisoner is unable to stand trial**, as determined by the court having jurisdiction of the

matter.” 42 Pa.C.S. § 9101, Article VI(a) (emphasis added). We have explained that,

[w]here a defendant is unavailable for trial and the District Attorney exercises due diligence in seeking custody of the defendant, the time where the defendant is unavailable is to be excluded in an IAD calculation. In determining whether the prosecution has exercised due diligence, this Court has previously stated:

Due diligence is a “fluid concept” which must be determined on a “case by case” basis. ***But it is well settled that a defendant incarcerated in another jurisdiction will be deemed unavailable for the period of time during which his presence, despite the Commonwealth’s duly diligent efforts, cannot otherwise be obtained.*** What is more, in addition to any other circumstances precluding the availability of the defendant ... the defendant should be deemed unavailable for the period of time during which ... a responding jurisdiction delayed ... extradition. When it has been determined that the Commonwealth adhered to procedures requested by the sending jurisdiction and has properly relied on that jurisdiction’s assertions, the Commonwealth will have exercised due diligence. Furthermore, insofar as the Commonwealth believed it pursued the prisoner’s return to the fullest extent within its control, any “period of inactivity” is excluded from the running of the statute of limitations. What is important is what the Commonwealth did do; not what it did not do.

Commonwealth v. Woods, ... 663 A.2d 803, 807 ([Pa. Super.] 1995).

Commonwealth v. Horne, 89 A.3d 277, 281-82 (Pa. Super. 2014) (some citations and quotation marks omitted; emphasis added).

Here, the parties agree that the Commonwealth received notice of Appellee’s request for the disposition of his pending charges in Pennsylvania on May 26, 2020. **See** Commonwealth’s Brief at 6; Appellee’s Brief at 5. The

trial court, however, concluded that the Commonwealth received Appellee's notice on June 11, 2020. **See** Trial Court Opinion (TCO), 10/26/21, at 5. For purposes of our assessment, we will use the earlier date of May 26, 2020, as doing so favors Appellee. **See Commonwealth v. Mayle**, 780 A.2d 677, 682 (Pa. Super. 2001) ("Because the [IAD] is remedial in character, it is to be liberally construed in favor of the prisoner so as to effectuate its purpose.").

In granting Appellee's motion to dismiss the charges pending against him, the trial court concluded that the Commonwealth "was required to bring this case to trial within one hundred and eighty days as per Article III of the IAD but chose not to do so." TCO at 4. The court noted that Article III(a) requires the Commonwealth to request a continuance "once it becomes clear that a defendant cannot be tried within the time constraints required under the IAD and ... when the Commonwealth fails to file a continuance, dismissal of the charges is mandated." **Id.** at 5 (quoting **Commonwealth v. Thurston**, 834 A.2d 595, 599 (Pa. Super. 2004)). The court found that this case "is analogous to **Mayle** and **Thurston**[,]'" explaining:

In **Mayle**, the defendant filed a request for the disposition of his charges, pursuant to Article III of the IAD, with the Court of Common Pleas. **Mayle**, 780 A.2d at 678. Upon notice of the request, the [180]-day time frame began to run. Due to valid reasons, the Commonwealth knew the defendant's trial could not be held within the [180]-day period, but it did not request a ... continuance. **Id.** at 679. The [Superior] Court agreed that under the circumstances of the case, delaying the [defendant's] trial beyond the run date was "not unreasonable." **Id.** However, the [C]ourt did find the Commonwealth's failure to petition the [trial] court for a continuance based on the circumstances of the unavoidable delay [w]as "unreasonable." **Id.** Furthermore, the

[C]ourt stated that the Commonwealth's failure to follow the basic procedure set forth in the IAD was "inexcusable" because to do so would not have been a burdensome task. *Id.* Therefore, the court concluded that "the Commonwealth's failure to bring [the defendant] to trial within the time periods set forth by Article III and Article IV of the [IAD] warrant[ed] dismissal of the [defendant's] charges." *Id.* at 684.

Additionally, in *Thurston*, the court dismissed the defendant's charges due to the Commonwealth's failure to bring the defendant to trial within [180] days. *Thurston*, 834 A.2d at 597. In *Thurston*, the defendant filed a request for final disposition of the [charges] in Pennsylvania and Virginia under the IAD. *Id.* The defendant's trial date was 192 days after the date triggering the [180]-day time frame. *Id.* at 599. The [C]ourt stated [that] the IAD statute "expressly allows for excludable time when the defendant is unavailable." *Id.* Therefore, when it was "clear the defendant was unavailable," the Commonwealth could have easily obtained a continuance under the express statutory language," but failed to do so. *Id.* at 600. Due to the defendant's trial not being held within the [180] days, the [C]ourt dismissed the defendant's charges. *Id.*

Here, like in *Mayle* and *Thurston*, the [Commonwealth] failed to request a continuance when it was clear that [Appellee] could not be extradited to Pennsylvania. Prior to receiving the first pickup date on July 8, 2020, the Commonwealth was denied a transportation request because of the high rate of COVID-19 in Tennessee. Instead of notifying the court and requesting a continuance, the [Commonwealth] did nothing. Once the July 8, 2020[] pickup date was canceled[] due to COVID-19 restrictions in Philadelphia, the [Commonwealth] could have requested a continuance but decided not to do so. Instead, the [Commonwealth] decided to wait "at least six weeks" before filing another transportation request with the Philadelphia Sheriff's Office. After the second filing, it was confirmed that ... Appellee would be picked up on August 11, 2020. However, the August 11th pickup date was canceled due to COVID-19 restrictions in Philadelphia. Following this cancelation, instead of requesting a continuance, the [Commonwealth] decided to "just [wait] [until] the situation was getting very mild with COVID."

In the instant matter, the [Commonwealth] had a valid reason to request a continuance, especially when it became clear that ... Appellee could not be extradited to Philadelphia[,] but [it] failed

to do so. At the filing of ... Appellee's motion to dismiss, 285 days had passed, which is well beyond the [180]-day time[]frame. Due to the expiration of the [180]-day time frame and the Commonwealth's failure to request a continuance, the dismissal of ... Appellee's charges was proper.

TCO at 6-8.

The Commonwealth disagrees with the trial court's rationale and reading of **Mayle** and **Thurston**. It argues:

The trial court here failed to recognize th[e] distinction between time that is automatically tolled due to defendant's initial unavailability – which was the situation here – and that which may be excluded once the 180-day timeline has already begun and there is good cause to request a continuance, such as a crowded court docket. Specifically, the court relied upon **Mayle**, where the defendant was in Pennsylvania and available, but a subsequent court scheduling issue caused the Commonwealth to miss the 180-day deadline after it had begun. The **Mayle** Court specifically distinguished that situation from ... **Woods**, where the defendant's presence in Pennsylvania could not be secured and, even though the Commonwealth never requested a continuance during that time, this Court held "that the 180-day requirement of Article III is tolled during the period in which, despite the Commonwealth's best efforts, the defendant cannot be brought to Pennsylvania." **Mayle**, 780 A.2d at 683 (citing **Woods**, 663 A.2d at 808). **Mayle** reasoned that **Woods** did not disturb other authority from this Court and the Supreme Court requiring the Commonwealth to request a continuance only once the defendant becomes available, but where court delay threatens its ability to meet the statutory time limit. **Mayle**, 780 A.2d at 683 (citing **Commonwealth v. Fisher**, 301 A.2d 605 (Pa. 1973); **Commonwealth v. Thornhill**, 601 A.2d 842 (Pa. Super. 1992); and **Commonwealth v. Gance**, 466 A.2d 1039 (Pa. Super. 1983)).

Similarly, in ... **Thurston, supra**, this Court held that the time the defendant was on trial in Virginia, and thus unavailable for trial in Pennsylvania, was automatically excluded despite the lack of a Commonwealth continuance. **See [Thurston,]** 834 A.2d at 599 ("Clearly, the time [the a]ppellant was in custody in Virginia is

excluded from the 180 days because he was not able to stand trial in Pennsylvania while he was on trial in Virginia. Thus, July 9, 2001, to October 16, 2001, should be excluded from the calculation.”). This Court ultimately dismissed the charges because, *once that time was excluded*, there were still 192 days that had passed between when defendant requested disposition of the Pennsylvania charges against him and his scheduled trial, and the Commonwealth never requested a continuance. ***Id.*** The trial court here was therefore incorrect that ***Thurston*** required the Commonwealth to move for a continuance in order to exclude the time when defendant was unavailable; ***Thurston*** holds the opposite.

Commonwealth’s Brief at 12-15 (citations to the record omitted, emphasis in original).

After carefully reviewing ***Mayle*** and ***Thurston***, we agree with the Commonwealth’s interpretation of those decisions. As the Commonwealth points out, in ***Thurston***, we automatically omitted the time that Thurston was in custody in Virginia from the 180 days the Commonwealth had to bring him to trial under the IAD, even though the Commonwealth had not requested a continuance during that time. ***See Thurston***, 834 A.2d at 599. Moreover, in ***Mayle***, we held that the Commonwealth was required to request a continuance to avoid violating the IAD because, ***although Mayle was present in Pennsylvania and available for trial***, other court and/or Commonwealth-related delays pushed his trial date outside the 180-day window.

As the Commonwealth observes, we explicitly distinguished the facts of ***Mayle*** from those in ***Woods***, which are similar to the present circumstances. There, federal authorities had custody of Woods and made him unavailable for

extradition to Pennsylvania, despite the Commonwealth's attempts to retrieve him. **See Woods**, 663 A.2d at 805. We held that, although the 180-day time-period began to run when the Commonwealth received Woods' request for final disposition, the time during which he was in federal custody and could not be extradited "may be properly tolled against the [180-]day statute of limitations" because the Commonwealth "was diligent in tracking and requesting the return of [Woods] at every appropriate juncture while [he] was within federal jurisdiction." **Id.** at 807, 808. At no point did we indicate that the Commonwealth had requested — or was required to request — a continuance for this time to be tolled. Instead, we found that the time Woods was in federal custody outside of Pennsylvania was **automatically** excluded from the 180-calculation because the Commonwealth had proven, "by a preponderance of the evidence[,] that it exercised due diligence in seeking the return of [Woods]" to no avail, thus, rendering him "unavailable" under Article VI of the IAD. **Id.** at 808.

Here, as in **Woods**, the Commonwealth demonstrated that it exercised due diligence in attempting to secure Appellee's extradition to Pennsylvania. According to Ms. Masturzo's testimony, she filed the paperwork to initiate Appellee's extradition less than one month after receiving the notice that he was requesting disposition of his Pennsylvania charges. Appellee's transfer to Pennsylvania was scheduled, but then canceled due to the COVID-19 pandemic. Ms. Masturzo immediately filed another request for Appellee's extradition, which was again scheduled but canceled because of COVID-19

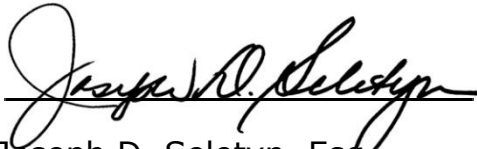
concerns. Ms. Masturzo then decided to wait until COVID-19 cases subsided before filing a third request for Appellee's extradition. She testified that over the next six months, COVID-19 cases spiked and the City of Philadelphia went into lock down. As soon as the pandemic subsided in February of 2021, she sought Appellee's extradition and he was finally transferred in March of 2021.

We conclude that this evidence was sufficient to prove, by a preponderance of the evidence, that the Commonwealth was diligent in attempting to secure Appellee's return to Pennsylvania during the unprecedented and unpredictable pandemic. Focusing on what the Commonwealth did, rather than what it did not do, **see Woods, supra**, it is clear that the Commonwealth made two unsuccessful attempts to extradite Appellee, and then monitored the surge of COVID-19 cases until they subsided before making a third request, which led to Appellee's extradition to Pennsylvania. Because the Commonwealth's diligent efforts were unable to secure Appellee's extradition to Pennsylvania because of the pandemic, Appellee was "unable to stand trial" during that time, and it must be automatically tolled from the 180-days in which the Commonwealth was required to bring him to trial. 42 Pa.C.S. § 9101(VI)(a). The trial court erred by concluding that the Commonwealth had to request a continuance under the rationale of **Mayle** and **Thurston**, as Appellee was not in Pennsylvania, and the delay in bringing him here was due to the pandemic. Therefore, we agree with the Commonwealth that the time from its receipt of Appellee's request for disposition (May 26, 2020) until he was extradited to Pennsylvania (March

17, 2021) must be automatically tolled from the 180-day statute of limitation. Because only seven days had passed from March 17, 2021, to Appellee's filing of his motion to dismiss the charges on March 24, 2021, the court erred by granting that motion. Accordingly, we reverse the court's order and remand for further proceedings.

Order reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/28/2022