COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1839-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANNY C. EESLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ashland and Bayfield Counties: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Danny Eesley appeals a judgment convicting him of armed burglary, contrary to § 943.10(1)(a) and (2)(a), STATS., arson to a building, contrary to § 943.02(1)(a), STATS., and burglary while arming himself with a dangerous weapon, contrary to § 943.10(2)(b). On appeal, he contends that the State violated the Interstate Agreement on Detainers, § 976.05, STATS., by

failing to commence trial within 120 days from the time he appeared pursuant to a writ of habeas corpus ad prosequendum and by returning him to federal custody before trial. We conclude that a writ of habeas corpus ad prosequendum is not a detainer within the meaning of the Agreement and, therefore, does not trigger its application. Accordingly, we affirm.

Eesley was convicted in the United States Federal Court for the Western District of Wisconsin and sentenced to a term of 105 months. He was incarcerated at the Federal Correctional Institute in Sandstone, Minnesota. While in federal custody, he was charged with twelve separate state offenses, nine pending in Ashland County and three in Bayfield County. The Ashland County district attorney, through a special prosecutor, prosecuted all twelve offenses by the parties' stipulation.

The special prosecutor petitioned for a writ of habeas corpus ad prosequendum. The petition stated Eesley was scheduled to appear on January 26, 1996, for initial appearances on felony charges as shown in an attached criminal complaint. It further provided that Eesley would be returned to FCI Sandstone on January 27, 1996. The court executed the writ, ordering the United States Bureau of Prisons to deliver Eesley on January 25, 1996, so that he could make his appearance, and providing that he would be returned immediately unless otherwise ordered by the court. On January 26, FCI Sandstone delivered Eesley to the Ashland County sheriff. Eesley made his initial appearance on eleven of the twelve state charges, and was then returned to FCI Sandstone.

Subsequently, the court issued two additional writs of habeas corpus ad prosequendum ordering Eesley to be returned for his preliminary hearing on May 10, 1996, and arraignment on June 5. On July 10, Eesley filed a motion to

dismiss the charges for violations of § 976.05, STATS., in Ashland County Circuit Court. The court denied Eesley's motion. Thereafter, reserving the right to appeal the issue of the § 976.05 violation, Eesley entered into a plea agreement resolving all the charges.

Wisconsin adopted the Agreement in 1977, codified as § 976.05, STATS. It is a compact among the party states and federal government, providing one state the ability to obtain temporary custody of a prisoner held in another state in order to bring the prisoner to trial on a criminal charge. It further provides a prisoner with the right to demand speedy resolution of pending charges filed against him as a detainer by another state. For purposes of the Agreement, a federal jurisdiction of the United States is considered a "state." Section 976.05(2)(c), STATS. As a congressionally sanctioned interstate compact, it is a federal law subject to federal construction. ***Cuyler v. Adams***, 449 U.S. 433, 438-42 (1981).

The Agreement was enacted in response to the legislative finding that "charges outstanding against a prisoner, detainers based upon untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Section 976.05(1), STATS. Accordingly, its policy is "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." ***Id***.

The Agreement provides two procedures to achieve this purpose. Article III establishes a mechanism by which a prisoner incarcerated in a party state may demand resolution of any "untried indictment, information or complaint

on the basis of which a detainer has been lodged against the prisoner ...." Section 976.05(3)(a), STATS. When the prisoner follows the established procedure, he or she shall be brought to trial within 180 days after such notice. ***Id***. If trial is not commenced within this time and a continuance is not obtained for "good cause," the trial court must dismiss the indictment, information or complaint with prejudice. Section 976.05(3)(a) and (5)(c), STATS.

Article IV outlines the procedure by which a prosecutor may obtain temporary custody of a prisoner in order to resolve pending criminal proceedings. First, the state must lodge a detainer against a prisoner. Section 976.05(4)(a), STATS. Then the prosecutor must present a "written request for temporary custody" to appropriate authorities in the state where the prisoner is incarcerated (the sending state). The trial must commence within 120 days after the prisoner's arrival in the receiving state unless the court grants a continuance for "good cause." Section 976.05(4)(c), STATS. Again, if the trial is not initiated within this period the trial court shall enter an order dismissing the charges with prejudice. Section 976.05(4)(e), STATS.

Finally, once a prisoner is removed from the sending state, the statute sets forth a "no return" provision. If trial is not had on the indictment, information or complaint prior to the prisoner being returned to the original place of imprisonment, the same shall be dismissed with prejudice. Section 976.05(3)(d) and (4)(e), STATS.

The first issue we must address is whether a writ of habeas corpus ad prosequendum constitutes a detainer for purposes of the Agreement, thus triggering its application. The Agreement does not define detainer. The congressional record states that "[a] detainer is a notification filed with the

institution in which a prisoner is serving a sentence, advising that he is wanted to face pending charges in another jurisdiction." U.S. Code Cong. & Admin. News 4865 (1970), quoted in ***United States v. Mauro***, 436 U.S. 340, 359 (1978). The closest controlling authority on the issue is the ***Mauro*** case, which we turn to in detail.

Mauro involved two consolidated cases. The first involved defendants who were serving state sentences when federally indicted in the Eastern District of New York. ***Id***. at 344. The district court issued writs of habeas corpus ad prosequendum directing the prison authorities to produce the defendants. ***Id***. After trial dates were established, the defendants were returned to their respective state prisons. ***Id***. They moved to dismiss their indictments on the grounds that the United States had violated art. IV(e) of the Agreement by returning them to state custody before trial. ***Id***. at 345. The district court dismissed the indictments, and the court of appeals affirmed, holding that a writ of habeas corpus ad prosequendum is a detainer activating the Agreement's protections. ***Id***.

In the second case, the defendant was arrested on federal charges in Illinois. ***Id***. He was delivered to Illinois authorities for extradition to Massachusetts on unrelated state charges. ***Id***. at 345-46. After he was transferred to Massachusetts, federal officials lodged a detainer against him with state prison authorities. ***Id***. at 346. Following his conviction on state charges, the defendant was indicted on the federal charges in the Southern District of New York, and Massachusetts produced him for arraignment before that court pursuant to a writ of habeas corpus ad prosequendum. ***Id***. He then returned to a Massachusetts prison to await the federal trial, which was postponed several times. ***Id***.

After the government moved to postpone the trial a third time, the prisoner moved to dismiss the indictment on the ground that he was denied his right to a speedy trial, which he had demanded, and that the detainer was causing him to be denied certain privileges at the state prison. ***Id***. at 347. The court denied his motion, and the government subsequently secured his presence for trial by means of a writ of habeas corpus ad prosequendum. ***Id***. On appeal, the defendant argued, inter alia, that the government violated the Agreement by failing to try him within 120 days of his arrival in the state and because he was returned to state prison before trial. ***Id***. at 348. The court of appeals agreed that the indictment should be dismissed because of time limit violations, holding that a writ of habeas corpus ad prosequendum constituted a "written request for temporary custody" and that it was sufficient to trigger the Agreement's protections. ***Id***.

The Supreme Court reversed, holding that a writ of habeas corpus ad prosequendum is not a detainer within the meaning of the Agreement.[1] ***Id***. at 361. In reaching this conclusion, the Court drew an important distinction between a detainer and a writ of habeas corpus ad prosequendum. It first indicated that a writ is issued by a federal district court, while a detainer may be lodged against a prisoner on the initiative of a prosecutor or law enforcement officer. ***Id***. at 358. It noted that the writ required the immediate presence of the prisoner, while a detainer merely put prison officials on notice that a prisoner is wanted in another jurisdiction for trial upon release. ***Id***. To obtain custody of the prisoner against

[1] It further held that a writ of habeas corpus ad prosequendum may be considered a "written request for temporary custody" within the meaning of the Agreement *after* a detainer has been filed against a prisoner. *See* ***United States v. Mauro***, 436 U.S. 340, 361-67 (1978).

whom a detainer is lodged, the jurisdiction that filed the detainer must take further action. ***Id.***

Further addressing the distinction between writs and detainers, the Court noted that the latter could remain lodged against prisoners for lengthy periods of time including, quite often, the duration of a prisoner's sentence. ***Id***. at 358-59. It further stated:

> Because a detainer remains lodged against a prisoner without any action being taken on it, he is denied certain privileges within the prison, and rehabilitation efforts may be frustrated. For these reasons the stated purpose of the Agreement is "to encourage the *expeditious* and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, information, or complaints."

Id. at 360 (quoting art. I) (emphasis added). Citing the critical difference between a detainer and a writ of habeas corpus ad prosequendum, the Court stated: "Because writs of habeas corpus *ad prosequendum* issued by a federal court pursuant to the express authority of a federal statute are *immediately executed*, enactment of the Agreement was not necessary to achieve their expeditious disposition." ***Id***. (emphasis added). Because these writs are immediately executed, "the problems that the Agreement seeks to eliminate do not arise …."[2] ***Id***. at 361.

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[2] The Court concluded that the anti-shuttling provisions of the Agreement were not implicated by the use of the writ as opposed to the detainer process. While the Court appears to agree that use of a writ of habeas corpus ad prosequendum could lead to problems with shuttling a prisoner between institutions, it concluded that:

> [T]he real concern of the provision was that, if the prisoner were returned to the sending State prior to the disposition of the charges in the receiving State, the detainer previously lodged against him would remain in effect with all its attendant problems. These problems, of course, would not arise if a

(continued)

To determine whether the writ in question constitutes a detainer under the Agreement, we must apply the law to undisputed facts. The standard of review is therefore de novo. *See* ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). Applying the Supreme Court's analysis to the instant case, we first note that, just as in ***Mauro***, the state writ purports to be a judge's directive to transport and produce an inmate rather than a prosecutor's written notice of the intent to pursue charges pending in another jurisdiction. ***Mauro*** involved the issuance of a writ by a federal court to a state prison authority. This case concerns a state court writ commanding action by a federal prison authority.[3] In terms of the Supreme Court's discussion comparing writs and detainers, the distinction between the enforceability of federal and state writs appears immaterial. As with the federal writ, the state writ does not precipitate the difficulties that arise from lodged detainers. From this we conclude that the ***Mauro*** reasoning applies to the present case. We conclude that a writ of habeas corpus ad prosequendum does not constitute a detainer under the Agreement and, therefore, does not trigger its application.

The primary difference between a writ issued by a federal court to state prison authorities and a state court writ directed to federal officials is that the former is compulsory while the latter is discretionary; the state court does not have the authority to compel federal officials to deliver a federal prisoner. This is, however, a distinction without a difference. A writ issued by a federal court to

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> detainer had never been lodged and a writ alone had been used to remove a prisoner ….

Mauro, 436 U.S. at 361 n.26.

[3] This is not the same as "a notification filed with the institution … advising that he is wanted to face pending charges …." U.S. Code Cong. & Admin. News 4865 (1970).

state authorities is executed immediately, leading the ***Mauro*** Court to conclude that the difficulties associated with prolonged detainers do not arise. ***Id***. at 1847. A state-issued writ, while not compulsory, will either be executed immediately as a matter of comity by federal officials,[4] or it will expire. In either case, again, the difficulties associated with detainers are not implicated.[5] If the writ is complied with, the prisoner will be brought before the court and may demand a speedy trial. Thus, while a writ of habeas corpus ad prosequendum puts prison officials on alert that a prisoner is wanted to face additional charges, it in no way "detains" the prisoner. Rather, it is either immediately executed or it expires in due course. In the latter situation, it is no longer operative upon a prisoner's custody, unlike a detainer that, prior to the Agreement, hung over the prisoner's head for perhaps the entire length of his or her sentence.

In conclusion, we hold that a writ of habeas corpus ad prosequendum does not constitute a detainer for purposes of the Interstate Agreement on Detainers, § 976.05, STATS. Therefore, the Agreement's time limit and "no return" provisions are not applicable.

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[4] Federal officials may release a federal prisoner to a state writ of habeas corpus on principles of comity. *See* ***Puerto Rico v. Perez Casillas***, 624 F. Supp. 822, 827 (D. P.R. 1985).

[5] This conclusion is subject to the Supreme Court's reasoning in ***Mauro*** that the Agreement's anti-shuttling provisions are not implicated by a writ of habeas corpus ad prosequendum. *See* note 2.

By the Court.—Judgment affirmed.

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