**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 18, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP2116-CR** **Cir. Ct. No. 2014CF149**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES CHARLESTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] James Charleston appeals from a judgment of conviction for theft as party to a crime. He challenges his conviction on the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

ground that his trial was untimely under WIS. STAT. § 976.05, the Interstate Agreement on Detainers Act (IAD). Charleston argues that he strictly and substantially complied with the IAD requirements but officials in the State of Illinois failed to promptly inform the State of Wisconsin of Charleston's request for final disposition. The circuit court concluded that dismissal of the Wisconsin charges was not required under § 976.05, and we affirm.

## BACKGROUND

*WIS. STAT. § 976.05*

¶2 Wisconsin and Illinois have both adopted the IAD, which "is a congressionally sanctioned interstate compact that establishes procedures for the transfer of a prisoner in one jurisdiction to the temporary custody of another." ***State v. Grzelak***, 215 Wis. 2d 577, 580, 573 N.W.2d 538 (Ct. App. 1997). The purpose of the IAD is to "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, informations or complaints" by establishing interstate "cooperative procedures." WIS. STAT. § 976.05(1).

¶3 Article III of WIS. STAT. § 976.05 provides the prisoner-initiated procedure under which a prisoner may be transferred to the custody of a receiving state.[2] Section 976.05(3)(a) is applicable to an individual subject to an "untried indictment, information or complaint" in a state (receiving state) who is at the

[2] "Receiving state" is defined as "the state in which trial is to be had on an indictment, information or complaint." WIS. STAT. § 976.05(2)(a). "Sending state" is the "state in which a prisoner is incarcerated at the time that the prisoner initiates a request for final disposition." Sec. 976.05(2)(b).

same time detained in another state (sending state). The statute provides that after the detainee "has 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 or her imprisonment and his or her request for a final disposition to be made of the indictment, information or complaint," the detainee must "be brought to trial within 180 days." ***Id.*** This speedy trial request must

> 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 or date of release to extended supervision of the prisoner and any decisions of the department relating to the prisoner.

***Id.***

¶4 The prisoner must give or send the request "to the department, or warden, or other official having custody of the prisoner, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested." WIS. STAT. § 976.05(3)(b). If these statutory procedures are followed and the receiving state does not try the defendant within 180 days after receipt of the request, the charges shall be dismissed with prejudice. Sec. 976.05(3)(d), (5)(c).

*Facts*

¶5 On February 6, 2014, Charleston was charged in Kenosha County Circuit Court with one count of misdemeanor theft and one count of felony unauthorized use of an individual's personal identifying information or documents. Following his failure to appear at a scheduled court appearance, the court issued a bench warrant for his arrest. After learning that Charleston was in custody in Illinois, the Kenosha County Sheriff's Department requested that a

detainer be placed on the defendant and pursued a governor's warrant for Charleston's extradition.

¶6 On August 20, 2015, the State received a letter and other documents from the warden at Graham Correctional Center in Illinois. Included with the documents was a "Request Demand For Final Disposition of Interstate Detainer" under WIS. STAT. § 976.05(3) signed by Charleston and dated August 12, 2015, along with other documents required under the IAD. The parties do not dispute that the August 2015 request was the first the State of Wisconsin received from Charleston. After an exchange of the requisite paperwork, the Kenosha County Sheriff's Department picked Charleston up in Illinois and brought him to Wisconsin on October 5, 2015.

¶7 On October 6, 2015, a return on warrant hearing was held, and the court set a $1000 cash bond. The next day, Charleston posted bond and was released from custody. On December 8, 2015, at a pretrial hearing, counsel brought to the attention of the court an alleged "Request Demand For Final Disposition of Interstate Detainer" signed by Charleston and dated November 14, 2014.[3] The November 2014 request was never sent by the warden of the Illinois prison to the appropriate Wisconsin authorities, and counsel

[3] The November 2014 request differs from the August 2015 request as it lists a different Illinois warden, a different housing unit, and a different notary public. The record also indicates that on August 12, 2015, Charleston wrote a letter to the circuit court in Kenosha, requesting a copy of the complaint and the court record. The letter does not mention the November 2014 request. Charleston claims in his brief-in-chief that the November 2014 request "appeared as attachments" to the August 20, 2015 letter from the Illinois warden. We were unable to find support for Charleston's assertion as our independent review of the record indicates that the November 2014 request was provided by Charleston's counsel in an affidavit, but not with the letter from the Illinois warden provided in the record. As it does not impact the basis of our decision, we do not address this further.

explained that he planned to bring a motion to dismiss for failure to comply with the requirements of the IAD. On March 24, 2016, the court denied Charleston's motion to dismiss, and the case was resolved on April 28, 2016, by plea agreement.[4] Charleston appeals.

## DISCUSSION

¶8 On appeal, Charleston argues that he followed all the required procedures for a prisoner's request for a final disposition embodied in WIS. STAT. § 976.05(3)(b), but "because Illinois and Wisconsin officials did not meet their obligations to trigger the 180-day disposition requirement," the Wisconsin charges should have been dismissed. The question on appeal requires us to interpret the provisions of § 976.05. Statutory interpretation is a question of law that we review de novo. ***State v. Whittemore***, 166 Wis. 2d 127, 131-32, 479 N.W.2d 566 (Ct. App. 1991). Our analysis of the case suggests that there are two requests for final disposition at issue: the November 2014 request and the August 2015 request. We address the effect of each on Charleston's rights under § 976.05 below.

*November 2014 Request*

¶9 Charleston alleges that he followed all the proper procedures to submit his November 2014 request for final disposition. For the purposes of this decision, we accept Charleston's claim. The question remains whether Charleston's submission activated the provisions of WIS. STAT. § 976.05(3)(a) and (d) such that Charleston's right to a speedy trial within 180 days was violated.

[4] Charleston pled guilty to count one of misdemeanor theft as a party to a crime.

This court has already had occasion to consider at what point the clock starts running on the 180-day statutory time period. In ***Whittemore***, 166 Wis. 2d at 132, the defendant argued that the 180 days begins running on the date the prisoner delivers the request for a final disposition to the sending state, while the State argued that the period begins when the receiving state receives the request. We concluded that the 180-day provision commenced on the date that the receiving state receives the prisoner's request for final disposition, reasoning that the phrase "caused to be delivered" means "has delivered." ***Id.*** at 133. ***Whittemore***'s holding is not limited to its facts, as Charleston suggests, as the court's conclusion was based solely on its reading of the statutory language: receipt of the request by the receiving state—here, Wisconsin—begins the 180-day time period.

¶10 The United States Supreme Court agreed in ***Fex v. Michigan***, 507 U.S. 43, 47 (1993), where the Court similarly considered the meaning of the phrase "caused to be delivered." The Court concluded that "the 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." ***Fex***, 507 U.S. at 52. The Court acknowledged that under its interpretation "it is possible that a warden, through negligence or even malice, can delay forwarding of the request and thus postpone the starting of the 180-day clock," but the Court reasoned that while that result would be unfortunate, it is "no worse than what regularly occurred before the IAD was adopted, and … cannot be entirely avoided by embracing" the view that the measuring event is receipt of the request by the warden. ***Id.*** at 50. The Supreme Court felt it was "more reasonable" to read the statute to protect against the receiving state's prosecutors losing their case before they had even been informed of the trial request. ***Id.*** at 51.

¶11 In this case, we are bound by this court's interpretation of Wisconsin's enactment of the IAD in ***Whittemore*** and the Supreme Court's holding in ***Fex***, which begins the tolling of the 180 days upon receipt by the appropriate officials in Wisconsin, which is consistent with the plain language of the statute. As Wisconsin officials never received the November 2014 request, the clock did not begin running on the 180 days and, thus, dismissal of Wisconsin's complaint against Charleston was neither appropriate nor required under WIS. STAT. § 976.05(3)(d).

¶12 Charleston argues that we should apply the so-called "substantial compliance" exception to the requirements of WIS. STAT. § 976.05 in this case as his November 2014 request was in the proper form and was served as required under Illinois law. *See* ***State v. Blackburn***, 214 Wis. 2d 372, 381-82, 571 N.W.2d 695 (Ct. App. 1997). In ***Blackburn***, this court suggested that the substantial compliance doctrine applies "only where the defendant's failure to meet the technical requirements of the IAD was due to 'intentional or negligent sabotage by government officials.'" ***Id.*** (citation omitted). We disagree that the substantial compliance doctrine is applicable to the present case as Charleston does not allege that government officials sabotaged Charleston's *own* ability to meet the technical requirements. The foreign jurisdiction cases relied on by the court in ***Blackburn*** revealed that the doctrine "applied only where the prisoner's failure to meet the technical requirements of the IAD was due to inadequate guidance from prison officials" as to the procedures and requirements of the statute. ***Id.*** at 381. As

Charleston alleges that the Illinois government officials themselves did not follow the statutory requirements under § 976.05(3)(b), Charleston's argument fails.[5]

¶13 This court has also more recently addressed the issue of an IAD error by the sending state. In ***State v. Townsend***, 2006 WI App 177, 295 Wis. 2d 844, 722 N.W.2d 753, the defendant argued that Illinois violated the IAD because it did not inform him of the charges filed against him, who lodged the detainer, or of the procedures for requesting a final disposition in Wisconsin. ***Id.***, ¶5. The court explained that the real issue in the case was: "given the IAD violation by the State of Illinois, was dismissal of the Wisconsin charge against Townsend the proper remedy?" ***Id.***, ¶13. In concluding that dismissal of the Wisconsin charge against Townsend was not warranted, this court explained that the IAD lists three circumstances where dismissal is appropriate under the statute, *see* WIS. STAT. § 976.05(3)(d), (4)(e), and (5)(c), none of which were applicable to the dispute. ***Townsend***, 295 Wis. 2d 844, ¶12. This court explained its reasoning as follows:

> Any IAD violation was the fault of Illinois, not Wisconsin. In light of this, we believe the extreme remedy of dismissing the *Wisconsin* charge against Townsend, which is not specifically mandated by the IAD, is not appropriate. We understand the appellant's frustration with the Illinois prison system's ineptness that led to a clear violation of the IAD, but the State of Wisconsin did not violate the IAD, and Townsend clearly knew of the Wisconsin charge and chose not to waive extradition and seek a quick resolution. Under these circumstances, it would be contrary to public policy to permit Townsend to escape prosecution on the crime he committed in Wisconsin.

[5] Further, Charleston fails to demonstrate any evidence of "intentional or negligent sabotage" by Illinois. His bare assertion that the November 2014 request never made it to officials in Wisconsin is not sufficient proof of sabotage as there could have been any number of reasons for the delay. *See* ***State v. Thomas***, 2013 WI App 78, ¶¶23-24, 348 Wis. 2d 699, 834 N.W.2d 425.

***Id.***, ¶17.

¶14 Like in ***Townsend***, the State of Illinois in this case committed a clear error by not following the proper procedures under WIS. STAT. § 976.05(3)(b) after receiving Charleston's November 2014 request. It is equally clear, however, that Wisconsin did not violate Charleston's rights under the IAD as the November 2014 request was never received by Wisconsin officials and, therefore, the 180-day time period did not commence and was not violated. Since the 180-day requirement was not violated, dismissal of the proceedings with prejudice, pursuant to § 976.05(3)(d), is not the proper remedy. The claim that Wisconsin should suffer for the error of Illinois officials was rejected both by the Supreme Court in ***Fex***, 507 U.S. at 50-51, and by this court in ***Townsend***, 295 Wis. 2d 844, ¶17.

*August 2015 Request*

¶15 The parties do not dispute that Charleston's August 12, 2015 final disposition request complied with the requirements of WIS. STAT. § 976.05(3) and was then executed properly in accordance with the provisions of the IAD. The State received Charleston's request on August 20, 2015, and 180 days from that date was February 16, 2016. Charleston's plea and sentencing hearing was not held until April 28, 2016. We conclude that Charleston waived his speedy trial request as he consented to an extension of the 180-day time period.

¶16 A defendant's rights under the IAD are statutory and may be waived. ***State v. Brown***, 118 Wis. 2d 377, 386, 348 N.W.2d 593 (Ct. App. 1984). Waiver under the IAD may be accomplished either by "express personal waiver on the record" or by "conduct." ***State v. Miller***, 2003 WI App 74, ¶9, 261 Wis. 2d 866, 661 N.W.2d 466 (citation omitted). In ***Miller***, the defendant fired his lawyer six

days before trial, and this court determined that "[t]he law is that a defendant 'cannot be heard to complain about delay caused by his own conduct,' and that such conduct 'need not be called delaying tactics to be identified as time consuming impediments to an early trial.'" ***Id.***, ¶14 (quoting ***Norwood v. State***, 74 Wis. 2d 343, 357, 246 N.W.2d 801 (1976)). Where the defendant "asked for, and accepted, treatment inconsistent with his rights under the IAD, the defendant cannot then assert those rights in an effort to win dismissal of charges." ***Miller***, 261 Wis. 2d 866, ¶14.

¶17 In this case, Charleston's request for several adjournments caused him to voluntarily waive the 180-day time limit. At a November 20, 2015 district attorney pretrial hearing, Charleston's counsel indicated that he would need more time to look into the issue of the November 2014 request.[6] On December 8, 2015, Charleston's counsel informed the court that he planned to bring a motion to dismiss for failure to comply with the requirements of the IAD, but he had not drafted it yet. After a continuance sought by Charleston due to medical reasons, the next status hearing was held on February 9, 2016, where Charleston's counsel indicated that he had "drafted a motion" to dismiss, but had not filed it, and requested a date for the motion hearing. After the court denied the motion to dismiss at the hearing on March 24, 2016, Charleston's counsel requested more time to review the case for possible appeal. At that time, the court raised the issue of having gone beyond the time limit established under the IAD due to "legal issues that need to be litigated on [Charleston's] behalf."[7] After questioning

[6] The transcript of the November 20, 2015 hearing was not provided in the record.

[7] WISCONSIN STAT. § 976.05(3)(a) provides that the court "may grant any necessary or reasonable continuance" "for good cause shown in open court."

Charleston as to whether he consented to the delay, the court found that he stipulated to going beyond the 180 days. We conclude that Charleston waived his right to a speedy trial under the IAD based on Charleston's own conduct and consent.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.