

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT - STATE OF MISSOURI

FILED
AUG 03 2015

STATE OF MISSOURI,)
)
Plaintiff,)
)
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)
BERNARD CHERRY,)
)
Defendant.)

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

Cause Number 1422-CR03983

Division Number 11

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS
FOR VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS**

On Monday, August 3, 2015, the Court heard oral arguments from the attorneys for the State and for Defendant Bernard Cherry on Defendant's Motion to Dismiss with Prejudice for Violations of the Interstate Agreement on Detainers. Defendant argues that the Court should dismiss the State's charge against him on the ground that pursuing the charge at trial would be a violation of the Interstate Agreement on Detainers set out in Section 217.490 of the Revised Statutes of Missouri. The Court rules on Defendant's Motion as follows:

FINDINGS OF FACT

1. On July 16, 2012, the State filed a complaint against Bernard Cherry accusing him of one count of unlawful possession of a weapon, a Class C felony under Missouri law. At the time the State issued this complaint, Bernard Cherry was imprisoned at a Federal Prison in Pennsylvania.

2. On October 20, 2014, the Clerk of the St. Louis City Circuit Court received and filed Bernard Cherry's Motion for Fast and Speedy Trial. The St. Louis City Circuit Attorney's Office received a copy of Bernard Cherry's motion the same day. Bernard Cherry remained in custody at the Federal Prison. Defendant's Motion was postmarked October 16, 2014.

3. Bernard Cherry first appeared before a judge for the St. Louis City Circuit Court on February 27, 2015. The time period from October 16, 2014 to February 27, 2015 is 135 days. The time period from October 20, 2014, to February 27, 2015 is 131 days.

Mr. Cherry appeared at this hearing by closed circuit video. He did not have a lawyer at this time. The Court granted a continuance to March 25, 2015, to allow Mr. Cherry to have an assistant public defender enter his or her appearance as his lawyer. The time from February 27 to March 25, 2015, is 26 days.

4. On March 25, 2015, the Court took up Bernard Cherry's case again. Mr. Cherry appeared at this hearing by closed circuit video. The Court questioned Bernard Cherry about his desire to have a lawyer represent him in this case. The Court also questioned Mr. Cherry about having the time of the continuance not run against the time for his speedy trial if the Court continued the case to allow Bernard Cherry to continue to apply for a public defender. Bernard Cherry answered yes to both questions. The Court continued the case to April 14, 2015. In its written order, the Court stated that it granted the continuance for the reason that the State was waiting for an indictment from the Grand Jury. The time from March 25 to April 14, 2015 is 20 days.

5. On April 14, 2015, the Court took up Bernard Cherry's case again. Bernard Cherry appeared in person. The Court asked Mr. Cherry if he still desired a lawyer to represent him and asked him if he wanted to toll the time of the continuance against the time running on his request for a speedy trial. Mr. Cherry apparently answered yes to both questions. The Court continued the case for these reasons to May 15, 2015. The time from April 14 to May 15, 2015, is 31 days.

6. On May 7, 2015, the State filed an indictment from the Grand Jury charging Bernard Cherry with one count of unlawful possession of a firearm.

7. On May 15, 2015, Judge Michael Noble, presiding in Division 25 of the St. Louis City Circuit Court, called Bernard Cherry's case again. The Court's record does not indicate whether Mr. Cherry appeared in person or by closed circuit video or did not appear. The Court noted that Defendant requested a continuance because he did not have a lawyer. The Court continued the case to June 18, 2015. The time from May 15 to June 18, 2015 is 34 days.

8. On May 20, 2015, Assistant Public Defender Marissa Ulman entered her appearance as attorney for Bernard Cherry.

9. On June 18, 2015, Judge Michael Noble called Bernard Cherry's case again. Bernard Cherry appeared at this hearing by closed circuit video. Mr. Cherry waived a formal reading of the indictment and entered his plea of not guilty. Judge Noble transferred the case to Division 16 and set an initial trial date of August 3, 2015.

10. On July 22, 2015, Judge Michael Mullen, presiding in Division 16, assigned this case to Division 11 for trial beginning August 3, 2015.

The attorneys for the State and for Bernard Cherry first approached the Court about Defendant's Motion to Dismiss with Prejudice for Violations of the Interstate Agreement on Detainers on August 3, 2015. Marissa Ulman filed her Motion to Dismiss with Prejudice for Violation of the Interstate Agreement on Detainers on behalf of Bernard Cherry on August 2, 2015.

CONCLUSIONS OF LAW

1. Section 217.490 of the Revised Statutes of Missouri sets out the requirements for a defendant in Missouri to file a motion for disposition of detainers. Article III, Section 1 of

Section 217.490 RSMo provides that, whenever a person imprisoned in one state shall have a detainer against him or her from another state, he or she shall be tried within 180 days after that prisoner "shall have caused to be delivered" to the appropriate court and prosecutor in the detainer state a request for final disposition of all such detainees. Article III, Section 1 also provides that the court which receives a motion for disposition of detainees may, for good cause shown with the prisoner and his or her attorney present in open court, "may grant any necessary or reasonable continuance." Article IV, Section 3 of Section 217.490 RSMo provides that trial shall begin within 120 days of the arrival of the prisoner at the detainer court, but "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." And, Article VI, Section 1 of Section 217.490 RSMo provides that, in determining the length of time periods provided for in Sections III and IV, those time periods will 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."

2. The State has directed the Court to consider the ruling of the St. Louis City Circuit Court in State v. Antwane Nathan Johnson concerning the calculation of time in a case involving Section 217.490 RSMo. The decision of the St. Louis City Circuit Court in Cause Number 1322-CR00246 (State v. Antwane Nathan Johnson) is based on a fact pattern that differs in significant ways from the fact pattern in Bernard Cherry's case. At the same time, the cases cited by the Court in its August 28, 2014 ruling in State v. Antwane Nathan Johnson consistently show that, as a practical matter, the appellate courts have given trial judges considerable leeway in applying the rules of Section 217.490 RSMo to the fact patterns of

specific cases and show that trial judges are given broad discretion in construing facts so as to preserve the State's right to try the defendant.

3. As one example, Bernard Cherry argues that the court should begin counting the 180-day time limit applicable to his motion for disposition of detainers as of the date his motion was postmarked. But, the appellate courts in Missouri have ruled that the 180-day time period does not start to run until both the trial court and the prosecutor have received the written request for disposition of detainers. See State v. Woods, 259 S.W.3d 552, 556 (Mo.App.S.D. 2008). This approach makes sense given that Section 217.490 RSMo requires that both the court and the prosecutor must receive the motion before the 180 days can begin to run.

4. As another example, Bernard Cherry argues that the court should count against the State any time that elapses from the filing of his motion for disposition of detainers to the time that the State filed its indictment because, until the indictment is filed, the State is not ready to proceed to trial. However, Section 217.490 RSMo does not explicitly mention this factor. Instead, the statute says that the trial court should toll the time running against the State "for as long as the prisoner is unable to stand trial." Article VI, Section 1.

Applying this rule to Bernard Cherry's case, the Court notes that the trial court specifically provided in its orders dated February 27, 2015, March 25, 2015 (in the hearing but not in the written court memo), April 14, 2015 and May 15, 2015, that it was continuing the case for the reason that Bernard Cherry had requested a lawyer but had not yet obtained a public defender. The reasonable implication of this finding is that Bernard Cherry was not yet ready to stand trial.

5. Applying these guidelines to the facts of Bernard Cherry's case, the Court concludes that 130 days are charged to the State from October 20, 2014, when the Circuit Attorney's

Office and the trial court received Mr. Cherry's motion for disposition of detainers, through February 27, 2015, when Mr. Cherry first appeared in Court. The Court then charges the next 82 days, from February 28 through May 20, 2015 to Bernard Cherry because he did not have a lawyer, he was not ready for trial and he consented to the tolling of this time against the 180 days running on his motion for disposition of detainers.

6. As of May 20, 2015, the State had 50 days remaining in which to begin trial.

The time from May 20 through June 18, 2015, is charged to Bernard Cherry because Judge Michael Noble had already granted this continuance to give Mr. Cherry further time to obtain a public defender.

The time from June 19 to August 3, 2015, is 46 days, which is within the 50 days that the State had remaining to try Bernard Cherry on the charge of unlawful possession of a firearm.

7. Given the Court's calculation of the time charged against the State, the Court concludes that the State is still within its time limit of 180 days to try Bernard Cherry in Cause Number 1222-CR03983.

8. Bernard Cherry argues that the State should be charged with the time that passed from the time of his first hearing on February 27, 2015, until the State filed its indictment on May 7, 2015. But, the Court notes that Bernard Cherry did not have a lawyer during any of this time and so it is "reasonable" for the Court to charge the time to Mr. Cherry.

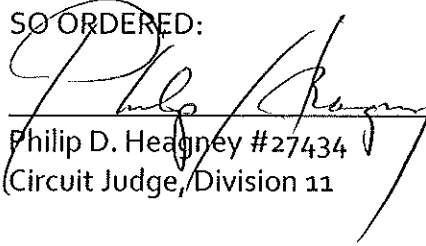
ORDERS

Based on its Findings of Fact and Conclusions of Law set out above, the Court rules as follows:

1. The Court denies Defendant Bernard Cherry's Motion to Dismiss with Prejudice for Violation of the Interstate Agreement on Detainers.

2. The Court authorizes the State and Defendant Bernard Cherry to proceed with trial in this case beginning August 4, 2015.

SO ORDERED:



Philip D. Heagney #27434
Circuit Judge, Division 11

August 3, 2015

Cc: Bayonle Osundare, Assistant Circuit Attorney
Marissa Ulman, APD, Attorney for Defendant