

No. 30928

In the
Missouri Court of Appeals
Southern District

STATE OF MISSOURI,

Appellant,

v.

DARRELL DELONG,

Respondent.

Appeal from Lawrence County Circuit Court
The Honorable Larry W. Meyer, Judge

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

This case is an appeal from the Lawrence County associate circuit court's order and judgment dismissing, with prejudice, all of the state's charges in Case No. 09LW-CR00950 (leaving the scene of a motor vehicle accident; tampering with a motor vehicle, and resisting arrest); Case No. 09LW-CR00952 (misdemeanor driving while revoked); and Case No. 091LW-CR01053 (first degree burglary, stealing, and receiving stolen property). The charges in all three cases were dismissed with prejudice via a single order and judgment issued by the Associate Circuit Court of Lawrence County, which found that the state had failed to bring the cases to trial within 180 days of respondent's request for disposition of detainer filed on April 23, 2010. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Southern District. Article V, §3, Missouri Constitution (as amended 1982); §477.060, RSMo 2000.

Respondent asserts that this Court does not have jurisdiction because the state failed to identify in its jurisdictional statement in its initial brief the statutory provision that gives the State the right to this appeal, and suggests that this Court should therefore decline to find that it has jurisdiction (App.Br. 4). But this Court's jurisdiction is not contingent upon the state's authority to bring an appeal, and the jurisdictional statement does not require the state to set out the statute that gives the state authority to bring the appeal. Rule 84.04(a) provides that the jurisdictional statement shall set forth sufficient factual data to demonstrate the applicability of the particular provision or provisions of Article V, section 3, of the Constitution whereon jurisdiction is sought to be predicated. Appellant's jurisdictional

statement does so, in that it demonstrates that it is an appeal from a criminal case in the Circuit Court of Lawrence County and the issues do not involve any issues within the original jurisdiction of the Missouri Supreme Court. Respondent confuses the concept of the state's ability to bring an appeal with the court's jurisdiction to hear an appeal. Moreover, respondent makes no argument and does not contend that the state, in fact, did not have a right to appeal in this case.

And in fact, the State does have a right to appeal in this case. Supreme Court Rule 30(a) provides that after the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law. Section 547.200.2 provides that the state, in any criminal prosecution shall be allowed an appeal under the circumstances mentioned in section 547.210 and "in all other criminal cases except in those cases where the possible outcome of such an appeal would result for the defendant." Double jeopardy is obviously not an issue in the present case inasmuch as jeopardy never attached. Moreover, caselaw has established that the state may appeal from a ruling dismissing a case for alleged violation of a defendant's speedy trial rights under detainer law. *See State v. Hellems*, 13 S.W.3d 302 (Mo.App.E.D. 2000).

ARGUMENT

This Court should not decline to address appellant's point because appellant filed the complete record available to it and that record is sufficient for this Court to find that appellant's claim is preserved and for this Court to find that the associate circuit court erred in dismissing respondent's cases because the state had not violated the terms of the Interstate Agreement on Detainers (IAD) by failing to bring respondent's cases to trial within 180 days of respondent's request under the IAD in that respondent was not entitled to the protections of the IAD because no detainer had been filed against respondent at the time he made his purported request under the IAD and thus respondent was not entitled to the IAD's protections.

Respondent asserts that this Court should not consider appellant's claim because appellant failed to provide transcripts of the hearing on respondent's motion to dismiss on September 16, 2010 and the hearing on respondent's motion to reconsider on n October 14, 2010. Respondent contends that without those transcripts, it is unknown whether appellant raised before the trial court the issue that it raises now on appeal, namely, that no detainer had been filed against respondent at the time he made his request under the IAD (Resp.Br. 11).

1. State's claim is preserved.

To begin, appellant has provided the available record in this case. To appellant's knowledge, based on representations by the prosecutor in the above cases, the hearings in question were not conducted on the record, and there are no transcripts available for either hearing.

But the mere fact that the hearings in question were not transcribed does not render appellant's claim unreviewable, as respondent suggests (Resp.Br. 11). Respondent argues that it is impossible to tell whether the state raised the claim of error it raises on appeal before the trial court. But the state had no burden to demonstrate to the trial court that respondent was not entitled to the protections of the IAD. Rather, it was respondent's burden below to prove that he had complied with the requirements of the IAD. Respondent, as the movant, had the initial burden of presenting evidence to show a violation of the IAD. *State v. Lybarger*, 165 S.W.3d 180, 185 (Mo.App.W.D. 2005); *State ex rel. Hammett v. McKenzie*, 596 S.W.2d 53, 59 (Mo.App.E.D. 1980).¹ The state had no burden to raise a claim orally or via a written pleading before the motion court demonstrating that the movant had not complied with the terms of the IAD. (Indeed, the state could remain wholly silent on the issue, and the motion court could decide to overrule or grant the movant's motion based solely on the movant's evidence or lack thereof.) The court's ruling, which is of course the error from which the state appeals, did not occur until the court in fact issued its ruling. Thus, the error that appellant raises on appeal, that the motion court was clearly erroneous in finding that respondent's request was triggered on April 23, 2010, when no detainer had yet been filed (App.Br. 8, 12), did not occur until the motion court issued its order on October 21, 2010, and made the erroneous finding that the April 23, 2010 request triggered the time

¹ Only where the defendant has proven compliance with the IAD does the burden shift to the state to prove that the 180 day period has been met or should have been tolled. *Hammett, supra*, at 59-60.

limits under the IAD (LF 142-144). The state's claim of error should be deemed preserved because the state raised the claim of error in the proper manner once the error occurred.

The cases appellant cites are inapposite because they deal with appeals from motions to suppress where the *state*, not the defendant, had the burden of proof before the trial court to prove by a preponderance of the evidence that the motion to suppress should be overruled. §542.296.6, RSMo. (“The burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.”). Thus, for example, in *State v. Trenter*, 85 S.W.3d 662 (Mo.App.W.D. 2002), cited by respondent, the state failed to preserve its claim that the defendant's motion to suppress was insufficiently pled. The sufficiency of the motion was a threshold matter that should have been raised before the trial court before the defendant's motion was even considered. In *State v. Williams*, 334 S.W.3d 177 (Mo.App.W.D. 2011), the state tried to raise on appeal a justification to uphold a search that it did not raise before the trial court. But since the state had the burden of proof before the trial court on the motions to suppress, it needed to present its evidence and arguments there, not later on appeal.

The present case is also unlike a defendant's criminal appeal where the erroneous rulings occurred in the course of the trial and those erroneous rulings call into question the validity of the final judgment. In such situations, the erroneous rulings must be brought to the trial court's attention at the time they are made in order to give the trial court a chance to correct them and to thus preserve them. But in the present case, the erroneous ruling was the trial court's order and findings issued on October 21. And the state had no burden

whatsoever prior to that to demonstrate that respondent had not complied with the IAD; it was respondent's burden to prove that he did. The state was not required to plead a claim or raise an error, and thus the state did not fail to preserve its claim.

2. State's appeal is not based on a ruling based on matters outside the record.

Appellant also argues that because the hearings were not recorded, it is unknown whether any evidence was presented on this issue (App.Br. 11). Appellant asserts that the State may not appeal the dismissal of an indictment or information based on matters *dehors* (outside, beyond, unconnected with) the record (Resp.Br. 12). But the record on appeal as provided in this case clearly demonstrates that the trial court's ruling was not based on matters outside the record. The trial court's own findings in its order and judgment demonstrate that it found that respondent's request for disposition of detainers was filed on April 23, 2010, and that the prosecutor filed a detainer on April 26, 2010, *after* respondent's request was filed (LF 48). These findings are supported by the evidence in the legal file (LF 33-34, 35), and these documents form the basis of the trial court's erroneous ruling. There is no basis in the court's order and judgment to believe that the court relied on any matters outside of the record to reach its erroneous ruling, and the state is not appealing the dismissal of an indictment or information based on matters outside the record, as respondent contends (Resp.Br. 12).

3. State's claim, even if unpreserved, constituted plain error.

Even if appellant's claim were deemed unpreserved, this does not mandate that this Court must dismiss appellant's appeal. Appellant requests in such an event that this Court review appellant's claim for plain error. *See, e.g., Schaal v. State*, 179 S.W.3d 907, 910, n.3 (Mo.App.S.D. 2005) (reviewing state's claims on appeal for plain error despite fact that the points relied on did not preserve claims).

Plain error review is discretionary and involves a two-step analysis. *State v. Jefferson*, 341 S.W.3d 690, 698 (Mo.App.S.D. 2011). First, this Court considers the facts and circumstances to facially determine if there was plain error—meaning “evident, obvious and clear” error. *Id.* Only if this Court identifies plain error does it proceed to the second step of determining whether manifest injustice, or a miscarriage of justice resulted. *Id.* Appellant has the burden to establish the trial court committed plain error, and that there has been a manifest injustice or a miscarriage of justice. A manifest injustice or miscarriage of justice is error that is outcome determinative. *State v. Stidum*, 276 S.W.3d 910, 914 (Mo.App.S.D. 2009).

In the present case, the associate circuit court committed plain error in dismissing the state's cases with prejudice based on an alleged violation of the IAD. The court's own findings demonstrate plain error, in that the court found that respondent's request for disposition of detainer was filed on April 23, 2010 but the detainer itself was not filed until after that date, on April 26, 2010. Yet the court found that the 180-day period under the IAD was triggered as of the date respondent filed his request for disposition of detainer, notwithstanding the clear language of the IAD which states “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 the 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,*” the prisoner shall be brought to trial within 180 days of his valid invocation of his rights under the IAD.” §217.490, Article III, Section 1 (emphasis added). The court’s ruling below is plainly erroneous as there is no legal basis to support a finding that the 180-day term of the IAD started running on April 23, 2010, when respondent filed his request without a detainer having been filed.

Appellant’s case is similar to the situation presented in *State v. Sharp*, 341 S.W.3d 834 (Mo.App.W.D. 2011), which was handed down after appellant filed its initial brief in this matter. Sharp claimed that the trial court erred in denying his motion to dismiss under the Uniform Mandatory Disposition of Detainers Law (UMDDL).² *Id.* at 837. Like the IAD, the UMDDL allows an inmate to request a final disposition of any untried charges when a detainer has been lodged against him. Section 217.450.1, RSMo 2000. Sharp contended that he substantially complied with the UMDDL when he filed his *pro se* motion for speedy trial on November 17, 2008. *Id.* The State argued, however, on appeal that the

² The IAD and the UMDDL are in *pari materia*, both provide for a defendant to be brought to trial within a prescribed 180–day limit, they are construed in harmony with each other, and the principles of one may be applied to the other. *State v. Overton*, 261 S.W.3d 654, 662 (Mo.App.S.D. 2008).

motion was ineffective because there was no detainer lodged against him at that time. *Id.* The State relied on *Burnes v. State*, 92 S.W.3d 342 (Mo.App.S.D. 2003). *Sharp, supra*, at 838. The Court of Appeals, Western District, agreed with the reasoning in *Burnes*. The Court found that a fundamental procedural requirement is that the defendant must send a written request for disposition of untried charges on the basis of which a detainer has been lodged against him. *Id.* In the *Sharp* case, the record indicated that there was no detainer lodged against Sharp at the time he filed his speedy trial request. *Id.* Although the record reflected that a detainer was subsequently filed on December 24, 2008, there was nothing to indicate that Sharp had renewed his request for speedy trial *after* the detainer was filed. *Id.* The Court found the language of the UMDDL “clear and unambiguous.” *Id.* “Absent the court’s finding that a detainer was *already* filed, or the functional equivalent, a defendant’s premature request for disposition of charges does not trigger the 180-day time limit.” *Id.*

Similarly in the present case, respondent’s request for disposition was insufficient as there was no detainer in existence at the time he filed his request. The language of the IAD, which is substantially similar to the language of the UMDDL, clearly and unambiguously requires that a detainer be in place in order for the prisoner to invoke the IAD. The associate circuit court plainly erred in determining that the 180-day time limit of the IAD had run and dismissing the state’s charges as a result.

Respondent, in his brief, asserts that that *Commonwealth v. Petrozziello*, 491 N.E.2d 627 (Mass.App. 1986) supports his position (Resp.Br. 17). He observes that the court in *Petrozziello* found that the applicable date for measuring the time period was based on when all four requirements under the IAD had been satisfied. *Id.* at 632. But in *Petrozziello*, a

detainer was lodged *before* the defendant filed his request. The defendant argued that once the four requirements which trigger the relevant time periods in the IAD were fulfilled, no matter what order, the time should be measured from the time the first requirement was met, in that case, when the detainer was filed. *Id.* at 78-79. The Court rejected this argument, noting the following:

If carried to its logical extreme . . . such an approach would likely cause considerable confusion. For example, immediately upon pretrial detention, prisoners could file requests under the Agreement for final disposition of all charges pending in other jurisdictions, even though they had not yet been convicted of the offenses for which they were held, had their places of confinement finally determined, or had detainers lodged against them. Prosecuting officers would, in turn, be pressed to file detainers prematurely in order to avoid the loss of their rights to prosecute. Not surprisingly, there is little authority to support the argument favoring this methodology.

Id. at 79. The *Petroziello* decision does not stand for the proposition that once the requirements have been met, the 180-day period is retroactive to when the first criteria under the IAD was met.

Respondent also notes, however, that the *Petroziello* decision decided that the 180-day time period should start running once all of the criteria had been met, regardless of the order in which they occurred. But even if this determination is adopted by this Court, it does not save the associate circuit court's ruling. Assuming, for the sake of argument, that all criteria under the IAD were satisfactorily met as of the filing of the detainer on April 26,

2010, and the 180-day period under the IAD began running on that date, the 180 days would have run on October 23, 2010. But the trial court dismissed the state's charges on October 21, 2010, two days before the 180-day time period potentially would have run. There was simply no legal basis for the court to have dismissed the state's cases on October 21, 2010.

Nor is there any basis in Missouri law to find that a defendant may prematurely file a request for disposition of detainers. Missouri courts have consistently held that a request for disposition of detainers is *not* valid if a detainer does not exist at the time the request is made and a premature request is not valid. See *State v. Hicks*, 719 S.W.2d 86 (Mo.App.S.D. 1986) (“Since no detainer had been lodged against Hicks with respect to the Webster County robbery charge *at the time* Hicks claims he made a request for final disposition [September 19, 1977] his request . . . was ineffective with respect to the robbery charge and the Agreement on Detainers was not triggered with respect to the latter.” (emphasis added)). *Burnes v. State, supra*, expressly rejected the defendant's claim that his premature request for disposition became automatically effective once Greene County filed its complaint against him, and instead found that the plain language of the UMDDL asserted that a defendant could not request disposition of a detainer that did not exist. The Court in *Sharp* clearly noted that the defendant had not reasserted his request for a speedy trial *after* the detainer was filed, thereby demonstrating that a request for disposition of a detainer may *not* be prematurely filed and then later come into effect after the detainer is filed.

Finally, the associate circuit court's plain error resulted in a manifest injustice and miscarriage of justice. Because of the court's plain error, seven charges against respondent in three separate cases were dismissed with prejudice. Respondent was charged with serious

offenses: leaving the scene of a motor vehicle accident; tampering in the first degree for operating a pickup without the owner's consent; resisting an arrest for fleeing officers in such a manner that created a risk of serious physical injury or death to other persons by colliding with a Lawrence County patrol car; driving while revoked; first degree burglary for knowingly entering a building to commit stealing and being armed with a deadly weapon; stealing a .22 caliber gun and a 12 gauge shot gun; and receiving stolen property worth at least \$500 (LF 6, 66, 107). Because of the court's plainly erroneous ruling, respondent will never be made to answer for his numerous serious violations of the law which the state has probable cause to believe he committed. The court's ruling was outcome-determinative as to these seven charges, and a manifest injustice and miscarriage of justice has been perpetrated upon the citizens of Lawrence County and the citizens of the State of Missouri in that respondent cannot be held responsible for his crimes.

In short, whether reviewed as preserved error or plain error, the associate circuit court clearly erred in dismissing the Lawrence County charges for alleged violation of the IAD.

CONCLUSION

In view of the foregoing, appellant submits that the dismissal of respondent's charges in Case Nos. 09LW-CR00950, 09LW-CR00952, and 09LW-CR01053 be reversed and the causes reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of August, 2011, to:

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