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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2618-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL GITELIS, a/k/a MICHAEL SMITH, MICHAEL JACKSON, JAMES MADDEN, and JOHN DOE,

Defendant-Appellant.

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Argued January 18, 2023 – Remanded February 3, 2023
Resubmitted March 8, 2023 – Decided July 28, 2023

Before Judges Susswein, Berdote Byrne, and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 21-02-0272.

Gibbons, PC, attorneys for appellant (Lawrence S. Lustberg, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Maura M. Sullivan, Assistant Prosecutor, on the brief).

PER CURIAM

In this matter, we are asked to consider whether the rights of defendant were violated when he was detained in Camden County jail for over 180 days in alleged contravention of the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15, subjecting the indictment to dismissal with prejudice. Specifically, defendant argues: 1) the trial court erred in finding the Supreme Court omnibus orders regarding excludable time apply to the IAD because the IAD is not specifically mentioned in the omnibus orders and the Supreme Court cannot alter federal law; 2) the State's failure to read the governing statutes for each charged offense correctly in each of three separate indictments violated defendant's constitutional right to a fair grand jury process and created unjust delays; and 3) even assuming the Supreme Court's omnibus orders tolled the IAD, defendant was held in excess of 180 days after the tolling period prescribed by the omnibus orders ended, in violation of the IAD, requiring dismissal of the indictment.

Because we find the trial court tolled the 180-day period pursuant to the relevant IAD provision in compliance with applicable Supreme Court omnibus orders, and the period after the omnibus orders was tolled due to defendant's own actions, we conclude defendant's constitutional rights were not violated.

We also conclude defendant failed to demonstrate the State erred in proceedings before the grand jury and the trial court did not abuse its discretion in denying defendant's motion to dismiss the indictment. We affirm.

Because we recounted the facts of this matter in our interim opinion,[1] we do not fully recite them here, except as necessary to illuminate our conclusions. In February 2018, the Camden County Prosecutor lodged a detainer against defendant based on New Jersey criminal charges. At the time, defendant was detained in New York awaiting trial for separate New York-based offenses. The governor's office in New York declined to bestow temporary custody of defendant to New Jersey until the New York proceedings concluded. In July 2019, defendant pleaded guilty to first and second-degree assault crimes in New York. Defendant was sentenced for the New York convictions in September 2019.

On February 6, 2020, defendant executed an Agreement on Detainer Form, requesting disposition pursuant to the IAD. On February 13, 2020, the Camden County Prosecutor’s Office received defendant’s request for disposition. On February 18, 2020, the Camden County Prosecutor’s Office

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[1] See State v. Gitelis, No. A-2618-21 (App. Div. Feb. 3, 2023) (slip op. at 3-11).

accepted temporary custody of defendant. Trial was tentatively scheduled to begin on March 23, 2020.

On March 27, 2020, the Supreme Court of New Jersey issued the first of a series of fourteen omnibus orders applying to all criminal cases. "For purposes of the 180-day clock, the omnibus orders cumulatively excluded the time to commence trial for a total of 461 days – from March 12, 2020 through June 15, 2021." State v. Mackroy Davis, 251 N.J. 217, 228-29 (2022). The Court did so in response to an unprecedented global COVID-19 pandemic beginning in March 2020 where "the court system, like the rest of society, could not safely bring large groups of people together for court proceedings in close quarters." Id. at 221.

During oral argument on this appeal, we became concerned about the lack of any detail in the record for the time between June 15, 2021, when all excludable time pursuant to the omnibus orders would have ended, and March 16, 2022, when defendant pleaded guilty to one count of first-degree robbery in exchange for the State's recommendation of an incarceration term of ten years.[2]

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[2] On April 14, 2022, in accordance with his plea agreement, defendant was sentenced on his first-degree robbery conviction to ten years imprisonment, subject to NERA, to run concurrent with his New York sentence. Defendant received a total of 1,588 days of jail credit.

We remanded the matter for further factual development as to events occurring after June 15, 2021, that may have impacted tolling or a continuance and for findings as to whether defendant suffered prejudice during that period of time. The trial judge and parties promptly complied with our instruction, developing a more robust record and submitting supplemental briefs, permitting us a meaningful review.

Upon remand, the trial judge made findings regarding events transpiring between the expiration of excludable time pursuant to the omnibus orders and defendant's guilty plea. The trial court found on June 14, 2021, the parties appeared for a final case disposition conference. At the conference, the prosecution offered a plea deal of ten years subject to NERA as well as the possibility of negotiating jail credits. The defense expressed openness to the terms of the plea, subject to additional details being resolved and requested a new return date to meet with the prosecution. The record demonstrates from June 14, 2021, until March 16, 2022, multiple case disposition conferences between the parties were either scheduled or occurred. Any and all requests for adjournments of scheduled case disposition conferences were made by the defense. Prior to the final conference which resulted in the March 16, 2022 guilty plea, the State caused no delays.

The IAD "is a congressionally sanctioned interstate compact" among and between the federal government, forty-eight states, the District of Columbia, Puerto Rico, and the United States Virgin Islands. Carchman v. Nash, 473 U.S. 716, 719 (1985); State v. Amer, ___ N.J. ___, ___ (2023) (slip. op. at 14-15). "The purpose of [the IAD 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." N.J.S.A. 2A:159A-1; State v. Perry, 430 N.J. Super. 419, 424-25 (App. Div. 2013).

The central policy goal is accomplished by Article III of the IAD, codified at N.J.S.A. 2A:159A-3, which "gives a prisoner incarcerated in one State the right to demand the speedy disposition of 'any untried indictment, information or complaint' that is the basis of a detainer lodged against him by another State." Carchman, 473 U.S. at 718-19. Article III requires a prisoner:

> 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.
>
> [N.J.S.A. 2A:159A-3(a).]

Thus, the prosecution must bring the defendant to trial within 180 days after the prosecutor receives the written IAD request. However, the court

exercising jurisdiction over the matter "may grant any necessary or reasonable continuance" for "good cause shown" pursuant to Article VI of the IAD. See Amer, slip. op. at 18. Moreover, a defendant who requests or consents to adjournment of a trial date later than the date on which the 180-day time period expires may be held to have waived his right to a speedy trial pursuant to the IAD. Amer, slip. op. at 17 (citing New York v. Hill, 528 U.S. 110, 112-18 (2000)); see also State v. Buhl, 269 N.J. Super. 344, 357 (App. Div. 1994).

Notwithstanding the Supreme Court's omnibus orders, the referenced 180-day period, beginning on February 13, 2020, would have expired on August 11, 2020. Gitelis was not brought to trial by that date, and the State did not seek a continuance or seek to toll the statute prior to that date. Gitelis was arraigned in Camden County on August 17, 2020.

On August 18, 2020, the State moved, pursuant to N.J.S.A. 2A:159A-3(a), for a continuance "for good cause shown," and made an oral application to toll the proceedings due to the Supreme Court’s omnibus orders issued in response to the COVID-19 pandemic. On October 14, 2021, the trial court entered an order finding the 180-day period from March 12, 2020, through January 15, 2022, was tolled by the omnibus orders and it did not need to decide the motion for a continuance, denying the State's motion for a continuance without

prejudice. The trial court acknowledged twenty-eight days had already elapsed between February 13, 2020 (when the State received notice of the detainer), and March 12, 2020 (when all jury trials in the state were suspended).

Gitelis argues the Supreme Court's omnibus orders did not toll the 180-day period because they did not specifically reference the IAD or provide for excludable time due to a defendant's inability to stand trial. Moreover, he argues the Supreme Court does not have authority to alter federal law, which does not provide a pandemic exception, claiming the narrow tolling provision applies only where a defendant is physically or mentally unable to stand trial, not where the state's judicial system is unable to hear the case. In all, defendant contends he should have been brought to trial by August 11, 2020, and the State's failure to move for a continuance until August 18 violates the IAD, requiring dismissal.

Initially, we note defendant's argument the trial court's failure to bring him to trial by August 11, 2020, requires automatic dismissal with prejudice fails. Notwithstanding any omnibus orders that may have tolled any portion of the 180-day period, although defendant was not brought to trial within 180 days of the prosecution receiving notice of his detainer on February 13, 2020, the prosecutor is permitted to move for a continuance "at any time prior to the actual entry of an order dismissing the indictment." State v. Miller, 299 N.J. Super.

387, 397 (App. Div. 1997) (quoting State v. Lippolis, 207 N.J. Super. 137, 147 (App. Div. 1969) (Kolovsky, J.A.D., dissenting), rev'd on dissent, 55 N.J. 354 (1970); see also State v. Pero, 370 N.J. Super. 203, 211 n.7 (App. Div. 2004). The State's failure to seek a continuance until August 18 is of no moment as an order dismissing the indictment had not been entered prior to that date.

Our Supreme Court recently held, in accord with two other jurisdictions, the term "brought to trial" for purposes of the IAD means when jury selection begins because jury selection is not simply a pretrial proceeding "but a critical stage of the trial itself." Amer, slip. op. at 30. However, as our Supreme Court noted in Mackroy-Davis, the constraints imposed by social distancing resulted in unavoidable trial delays because "relatively few courtrooms today [could] accommodate all the essential parties to a criminal trial with appropriate social distancing." Mackroy-Davis, 251 N.J. at 221. The critical trial stage of jury selection was unavoidably delayed.

Defendant attempts to distinguish Mackroy-Davis from the present facts, arguing the omnibus orders did not apply to toll the IAD, because the Supreme Court explicitly referenced only the excludable time provisions of the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, not the IAD. Looking to the plain language of the IAD, irrespective of any omnibus orders, the statute

grants the trial court broad authority to toll the 180-day period. Article VI of the IAD, codified at N.J.S.A. 2A:159A-6(a), states:

> 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.
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> [(emphasis added).]

The IAD "is a federal law subject to federal construction," Carchman, 473 U.S. at 719, and the interpretation of its terms "presents a question of federal law," Pero, 370 N.J. Super. at 214 (quoting Cuyler v. Adams, 449 U.S. 433, 442 (1981)). Accordingly, our interpretation of the IAD is guided by the United States Supreme Court and federal courts. Ibid.; see also Amer, slip. op. at 18.

Article VI(a), addressing whether defendant is "unable to stand trial" is determinative of this point on appeal. Some federal circuit courts of appeals have interpreted "unable to stand trial" in the narrowest context, referring solely to defendant's physical ability or mental capacity. See Birdwell v. Skeen, 983 F.2d 1332, 1340-41 (5th Cir. 1993); Stroble v. Anderson, 587 F.2d 830, 838 (6th Cir. 1978). However, other circuit courts have adopted more expansive readings. Notably, the Seventh and Eight Circuits have broadly interpreted "unable to stand trial" to mean a prisoner is "legally or administratively"

unavailable. See United States v. Roy, 830 F.2d 628, 635 (7th Cir. 1987); Young v. Mabry, 596 F.2d 339, 343 (8th Cir. 1979). Still, other federal courts have held logical or logistical impossibilities may render a defendant unable to stand trial. See United States v. Mason, 372 F. Supp. 651 653 (N.D. Ohio 1973) (interpreting tolling to apply when defendant was standing trial in another jurisdiction because it was "the only logical result, since if a person is standing trial in one state he cannot be expected to be standing trial in another state simultaneously").

New Jersey courts have also adopted this latter interpretation and hold defendant is unable to stand trial where trial is a physical impossibility. See State v. Miller, 299 N.J. Super. 387, 395-96 (App. Div. 1997) ("Defendant could not be tried on two separate and unrelated indictments simultaneously."); State v. Binn, 196 N.J. Super. 102, 108 (Law Div. 1984) (recognizing some charges "cannot humanly be tried within 180 days"), aff'd as modified, 208 N.J. Super. 443 (App. Div. 1986).

Most recently, other states have had occasion to interpret the IAD's "unable to stand trial" provision in the context of the unprecedented global COVID-19 pandemic, and, looking to federal law on the matter, have concluded the pandemic-related closing of court facilities rendered defendants unable to

stand trial within the meaning of the statute. Those sister jurisdictions have noted the inability to stand trial was not attributable to any fault of defendants but rather because of the impossibility or impracticability of convening a trial. See, e.g., Ex parte Brown, ___ So. 3d ___, ___ (Ala. 2022) ("[D]ue to circumstances not attributable to prosecutorial delay or negligence – there were no jury trials being held in any Alabama state court at the time."), cert. denied, 143 S. Ct. 596 (2023); State v. Reeves, 2022 ME 10, ¶¶ 25-29, 268 A.3d 281, 289 (Me. 2022).

Defendant argues the Supreme Court had no authority to toll the IAD. The plain language of the IAD Article VI(a) confers authority and discretion to the trial court "having jurisdiction over the matter" to toll the 180 days "whenever" it finds defendant is unable to stand trial. Here, the trial court tolled the 180-day period from March 12, 2020 "up to" January 15, 2022. In doing so, the trial court was acting under the instruction of the Supreme Court's omnibus orders, which closed the courts to in-person jury trials, but nevertheless continued to operate remotely, and have jurisdiction and express statutory authority to toll the IAD pursuant to N.J.S.A. 2A:159A-6. Given the continued limited capacity

requirements of the courts at the time — pursuant to the then-ninth omnibus order — jury selection was an administrative impossibility.[3]

In tolling the time period, the trial court was acting under the express instruction of the Supreme Court omnibus orders. Though the omnibus orders themselves did not specifically address the IAD, and referenced only the CJRA, trial courts which tolled the statutes pursuant to either or both were doing so during this time because it was not possible to convene a jury while adhering to the required social distancing guidelines. See Mackroy-Davis, 251 N.J. at 221; see also State v. Amer, 471 N.J. Super. 331, 351 (App. Div. 2022) ("[W]henever possible, the interpretation of the [IAD] and the [Speedy Trial Act (STA)], 18 U.S.C.S. §§ 3161-74 should not be discordant.") (second and third alterations in original) (quoting United States v. Peterson, 945 F.3d 144, 151 (4th Cir. 2019), cert. denied, 141 U.S. 132 (2020))).

Although Mackroy-Davis involved the CJRA, those reasons were identical to the reasons the trial court here tolled the IAD. Ibid. We interpret the "unable to stand trial" provision of the IAD more broadly than defendant urges, as it is not limited merely to defendant's physical ability to stand trial.

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[3] See Sup. Ct. of N.J., Notice to the Bar: COVID-19 – Ninth Omnibus Order on Court Operations and Legal Practice (Oct. 8, 2020).

We conclude defendant was unable to stand trial during the tolled period of time because the courts were unable to convene juries during the pandemic that met the requirements of social distancing imposed by law. Although the inability was attributable to the exigent administrative circumstances of the pandemic and not the fault of defendant, the conclusion that defendant was unable to stand trial is the same and constitutes sound reasoning.

The trial court entered one tolling order in this case and acknowledged a period of twenty-eight days had already elapsed between February 13, 2020, when the Camden County Prosecutor received the detainer, and March 12, 2020, when in-person criminal jury trials were suspended. Thus, the 29th day for purposes of the IAD excludable time calculation was January 15, 2021, and the 180-day period began to run again that day. Including January 15, 2021, an additional 151 days elapsed between then and June 14, 2021, when the defense requested a new return date for a case disposition conference to further discuss and finalize guilty plea terms. Altogether, as of June 14, 2021, defendant was in New Jersey custody for 179 days, still short of the 180 allowable days to be brought to trial. On day 179, defendant began a series of adjournment and rescheduling requests to finalize the terms of a guilty plea. Those requests were granted by the trial court until his guilty plea was entered on March 16, 2022.

The record demonstrates all additional time between June 14, 2022, and March 16, 2022, was due to defendant's adjournment requests to finalize a guilty plea. Because defendant's requests had the effect of delaying his own trial, these efforts were analogous to adjourning the trial date beyond the 180-day period. See Amer, slip. op. at 17-18; see also Buhl, 269 N.J. Super. at 357 (holding a defendant who requests an adjournment of his trial until after the expiration of N.J.S.A. 2A:159A-3(a)'s 180-day period "waived his right to have the trial commence within 180 days of his request for final disposition of the pending charges"). Thus, while the 180-day period was tolled until June 14, 2022 — day 179 — defendant effectively waived his right to be brought to trial by requesting multiple adjournments thereafter.

Defendant also challenges the manner in which the State presented superseding indictments to the grand jury. Defendant argues the trial court erred in denying his motion to dismiss the third indictment because fundamental flaws in the grand jury process violated his right to a fair grand jury presentment. More specifically, defendant argues the prosecutor failed to re-read charges when presenting an additional carjacking charge to the jury seven weeks after the first two charges were presented. In defendant's view, the prosecutor was required to refresh the jurors' memory by re-reading the law to them on each

offense when it presented the additional carjacking offense. The seven-week time gap between orientation and presentment, in defendant's view, was also too great for the jurors to be able to recall the elements of each offense. Finally, defendant contends the trial court erred in not dismissing the indictment because the State was required to seek approval from the Camden County Assignment Judge before it could present a third indictment to the grand jury.

The prosecution argues the trial court did not abuse its discretion by denying defendant's motion to dismiss the indictment, contending the trial court properly ruled the standard charges were given as to each offense at the time of the grand jury orientation, and nothing in the record indicated the prosecutor's "instructions were blatantly wrong, misleading, or an incorrect statement of law." Finally, the State argued it did not need to seek judicial approval in order to advance the third indictment because judicial approval is only necessary in situations where the grand jury declines to indict.

Grand juries operate "as both a sword and shield." State v. Shaw, 241 N.J. 223, 235 (2020). A grand jury works to determine whether there is probable cause to believe a crime has been committed and protect the citizenry from unjust criminal prosecutions. Ibid.; United States v. Sells Eng'g, Inc., 463 U.S.

418, 423 (1983).[4] State and county prosecutors are responsible for presenting cases to the grand jury and seeking an indictment. Shaw, 241 N.J. at 238. "Grand juries, in turn, investigate allegations and decide whether the State has presented sufficient evidence to establish probable cause that a crime has been committed and that the accused committed it." Ibid. The decisions of grand juries enjoy a "presumption of validity," and prosecutors have "broad discretion in presenting a matter to the grand jury." State v. Smith, 269 N.J. Super. 86, 92 (App. Div. 1993). "In a nutshell, a court examining a grand jury record should determine whether, 'viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it.'" State v. Feliciano, 224 N.J. 351, 380-81 (2016) (quoting State v. Morrison, 188 N.J. 2, 13 (2006)).

In grand jury proceedings, a prosecutor must instruct the grand jury on the elements of each specific offense and dismissal of an indictment is proper where the instructions are "blatantly wrong." State v. Eldakroury, 439 N.J. Super. 304,

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[4] See N.J. Const. art. 1, ¶ 8 ("No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.").

309 (App. Div. 2015); State v. Triestman, 416 N.J. Super. 195, 205 (App. Div. 2010). Further, an indictment must be dismissed if the instructions "were misleading or an incorrect statement of law." Triestman, 416 N.J. Super. at 205. These thresholds are high, and an indictment will be dismissed only "on the clearest and plainest grounds, where it is manifestly deficient or palpably defective," as "a prosecutor's decision on how to instruct a grand jury will constitute grounds for challenging an indictment only in exceptional cases." Id. at 202.

A review of the record indicates the trial court did not abuse its discretion in denying defendant's motion to dismiss the indictment. The prosecutor initially read the instructions and statements of law for all the charges in the indictment except for the carjacking statute, which itself was read to the grand jurors on the day it heard the superseding indictment. There is nothing in the record to indicate any of the instructions given or statements of law read were blatantly wrong, misleading, or incorrect. See Eldakroury, 439 N.J. Super. at 309; Triestman, 416 N.J. Super. at 205.

Further, defendant's reliance on the State's failure to rehash each statement of law at the presentment hearing fails. Unlike in Triestman, where the jurors needed to consider and evaluate more complicated sex offenses and eleven

weeks passed between orientation and presentment, here, as noted by the trial court, the charged offenses were relatively straightforward, and less time passed between orientation and presentment. It was reasonable for the trial court to find the jurors would have been able to recall the elements of the offenses considered, and there was no error present which would render the indictment "manifestly deficient or palpably defective." Hogan, 144 N.J. at 229.

Finally, defendant's reliance on Shaw is misplaced. Defendant submits because the State brought and dismissed two prior grand jury indictments, it needed to obtain approval from the Assignment Judge before it could bring the third. Defendant's interpretation of Shaw exceeds the scope of its holding. In Shaw the Court considered "whether there should be any limits on the number of times a prosecutor can submit a case to a grand jury to seek an indictment after a prior grand jury declined to indict." Shaw, 241 N.J. at 229. The Court concluded "if grand juries decline to indict on two prior occasions, the State must obtain advance approval from the Assignment Judge before it can submit the same case to a third grand jury." Id. at 230.

Here, the grand jury returned all three indictments. Unlike Shaw, the first two indictments were not dismissed, and the State presented two superseding indictments. First, the State brought a superseding indictment because the

carjacking statute was not read at orientation and the prosecutor could not confidently establish it had been read at any point. Second, the State superseded the second indictment because the grand jury proceedings were recorded but were too faint to be heard. At no point did the grand jury dismiss the indictments. Thus, unlike Shaw, the State did not need to seek the approval of the Assignment Judge prior to bringing the third indictment, and the trial court did not err in this regard. Ibid.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION