

Franklin County Legal Journal

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Commonwealth v. Young

COMMONWEALTH OF PENNSYLVANIA v. HERBERT ALFRED YOUNG, Defendant Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch Criminal Action Nos. 1376–2008 and 1377–2008

Extradition and Detainers; Detainers; Nature and Operation in General; Constitutional and Statutory Provisions.

Extradition and Detainers; Detainers; Time for Trial.

1. To establish a right to relief under the Post-Conviction Relief Act (PCRA), the Defendant must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated errors or defects under the statute. A petitioner must also prove the claims have not been previously litigated or waived, and the failure to litigate the issue during trial or on direct appeal could not have resulted from a rational, strategic, or tactical decision by counsel.
2. Counsel is presumed to render effective assistance, placing the burden upon the PCRA petitioner to demonstrate counsel's performance was deficient, and that the deficiency prejudiced him.
3. The PCRA petitioner must demonstrate: first, that the underlying issue has arguable merit; second, that counsel's actions lacked any objectively reasonable basis; and third, that actual prejudice resulted from counsel's act or omission.
4. The Interstate Agreement on Detainers (IAD) is a pact among forty-eight (48) states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the United States establishing procedures for transfer of inmates in one jurisdiction to the temporary custody of another that has lodged a detainer against the prisoner.
5. The Act requires that when a detainer is lodged, the sending jurisdiction inform the prisoner, so that the prisoner may request the charges be resolved. 42 Pa. C.S.A. §9101 (III).
6. The statute provides that following such a request, the prisoner must be tried within one hundred and eighty (180) days. The one hundred and eighty (180) day time period in Article III (a) of the IAD commences when the prisoner's request for final disposition of the charges against him is actually delivered to the court and prosecuting officer of the jurisdiction lodging the detainer against him.
7. If the Commonwealth cannot bring the Defendant to trial prior to the expiration of the one hundred and eighty (180) day period, it must move for a continuance or face dismissal of the charges.
8. The provisions of the IAD allow the trial court discretion to extend the deadline, or to exclude days from the statutory period, for good cause shown in open court. The IAD also provides that when the prisoner is unable to stand trial, the statute is tolled.
9. Pennsylvania courts have long held the period between an accused's waiver of extradition and his subsequent return to the jurisdiction may be excludable if the Commonwealth demonstrates due diligence in effecting his return.
10. When the Defendant is incarcerated in another jurisdiction, he is "unavailable" for the period during which his presence in the jurisdiction cannot be obtained, despite the Commonwealth's diligence in taking all necessary measures to do so. Additionally, a defendant is unavailable for the period during which a responding jurisdiction delays extradition.
11. The Court must examine the affirmative actions of the Commonwealth, rather than acts it did not undertake.
12. Delay occasioned by a defendant is excludable from the IAD's time period, consistent with the speedy trial provisions of what is now Pennsylvania Rule of Criminal Procedure 600.
13. Initially held in New Jersey, the Defendant was not available to stand trial in Franklin County until his transfer to Pennsylvania. Thereafter, while present in the Commonwealth, the Defendant was unavailable as Dauphin County commenced proceedings against him. Once transported to Franklin County, Defendant requested several continuances, one of which was granted over objection by the Commonwealth. Defendant's initial unavailability, coupled with the periods tolled by reason of his requests, makes his prosecution timely under the IAD.
14. Trial counsel will not be deemed ineffective for failing to raise a meritless claim or pursue an issue without basis.

Appearances:

Franklin County District Attorney's Office

Stephen R. Maitland, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., December 23, 2010

Statement of the Case

On September 16, 2006, the Defendant, Herbert Alfred Young, shot Douglas Thomas between his thumb and index finger, at the Laurel Lodge bar in Chambersburg, Pennsylvania. The shooting came after approximately a week of threats against the victim by the Defendant. Two (2) days earlier, on September 14, 2006, the Defendant

and a companion robbed the Finish Line Shoe Store in the Chambersburg Mall after trying on two pairs of shoes. The robbery was similar to an earlier robbery committed against a Footlocker Shoe Store in Lower Paxton Township, Dauphin County, Pennsylvania, on September 9, 2006.

Franklin and Dauphin County police proceeded to investigate the crimes, searching for the perpetrator. On September 22, 2006, a New Jersey State Police Trooper apprehended the Defendant in a rest area after running the tags of the tan Honda Accord he was driving and finding the tags were officially assigned to a blue Buick. Upon discovery of the pending Pennsylvania charges, including attempted murder, the officer arrested the Defendant, subsequently finding a revolver on the floor of the Accord. During a later interview with New Jersey police officers, the Defendant admitted to committing crimes in several states.

Weapons charges were filed against Young, who was subsequently incarcerated at Bayside State Prison in New Jersey. On October 22, 2007, Young received notice of his rights under the Interstate Agreement on Detainers (IAD), pursuant to Form I promulgated under the statute. (Commw. Br. Ex. at 6-7.¹) The form, dated October 2, 2007, was signed by Young October 22, 2007, indicating his intent to pursue his rights under the statute. (See *id.*) As a result, Form II, which provides notice of the inmate's place of imprisonment and requests disposition of any outstanding indictments, was sent to the Dauphin County District Attorney. (See *id.* at 8-9). Form II was accompanied by the requisite Certificate of Inmate Status and Offer to Deliver Temporary Custody, the latter simultaneously providing notice of the pending charges in Franklin County. (See *id.* at 10, 11-12.)

The documents were sent under cover letter, also dated October 22, 2007, the copy of which appended to the Commonwealth's Brief indicating receipt on October 31, 2007. (See *id.* at 5.) The Dauphin County District Attorney, Edward M. Marsico, Jr., Esq., returned Form VII, dated November 6, 2007, to the Administrator of the Bayside State Prison, indicating his intent to accept temporary custody of Young for the purpose of bringing the indictments to trial. (See *id.* at 2-3.) Form VI was also sent to allow for transport of the prisoner. (See *id.* at 4.)

On December 8, 2007, the Defendant arrived in Dauphin County, Pennsylvania. (See *id.* at 1.) By cover letter dated December 12, 2007, the Extradition Coordinator of Dauphin County sent notice to Extradition Coordinator of Franklin County that Young was present in Dauphin. (See *id.*) In response, on December 14, 2007, the Franklin County District Attorney sent Form VIII to the Administrator of Bayside State Prison in New Jersey, indicating his intent to accept temporary custody of the Defendant for the purpose of disposing of the charges. (See Def. Br. Attach. A at 1.) Dauphin County proceeded with its case against the Defendant.²

On March 4, 2008, the Defendant wrote a letter to "Whom it May Concern" in the Franklin County District Attorneys office, recounting the current status of his case in Dauphin County, stating he wished to "get the ball rolling" and requesting "you to come get me and let me stay at Franklin County Jail." (See Commw. Br. Ex. at 23.) The Dauphin County charges were dismissed by Order dated June 24, 2008, by reason of the expiration of the one hundred eighty (180) day period during which the Defendant was required to be tried under the Interstate Agreement. (See *id.* at 2.) Form XI was sent to Franklin County from Dauphin to notify the prosecution that the Defendant could be transported for disposition of the charges in the above captioned cases. (See *id.*) The Defendant was transported to Franklin County Jail July 1, 2008.

The preliminary hearing, initially scheduled for July 8, 2008 in case number 1376 of 2008, and July 15, 2008, in case number 1377, was continued on the request of defense counsel until July 22. (See Commw. Br. Ex. at 24, 30.) The criminal information was filed in the Court of Common Pleas July 29, 2008. Young appeared and waived arraignment July 30, 2008, and was scheduled to appear at the call of the criminal trial list August 18, 2008. At that time, a pre-trial conference was scheduled for August 28, 2008, which was held as planned on that date. At the conference, the Defendant requested continuance to the November trial term, alleging there had been incomplete time for discovery. (See Commw. Br. Ex. at 26.) The Court, noting the Commonwealth's objection, granted the request, requiring the Defendant to next appear at the call of the list October 20, 2008.

The following day, August 29, the Defendant filed an Omnibus Pre-Trial Motion, which included a request for discovery and appointment of an investigator, as well as a Motion to Suppress Statements. (See Omnibus Pre-Trial Mot.) By Order dated September 16, 2008, the Court scheduled hearing upon the motion for November 3, 2008. Following hearing, the Court requested briefs from the parties in support of their respective positions, due November 20, 2008. On that date, via written correspondence, counsel for the Defendant requested an additional five (5) days for submission of the brief. (See Commw. Br. Ex. at 28.) On November 25, an additional ten (10) days

¹ The entirety of the Exhibit attached to the Commonwealth's Brief does not contain page numbers. The first twenty-one (21) pages of the Exhibit are numbered according to the apparent number of sheets contained in the facsimile from which these first pages were copied. For convenience, when citing to the Exhibit, the Court will utilize these page numbers, continuing the sequence on those pages that follow the twenty-first page in numerical order.

² The docket sheet from Dauphin County, at No. 22-CR-1019-2008 reveals the preliminary hearing date as February 26, 2008, with arraignment held May 1, 2008.

was requested by defense counsel. (See *id.* at 29.)

A subsequent application for continuance on behalf of the Defendant was granted by the Court January 5, 2009, as the omnibus pretrial motion remained pending. By Opinion and Order dated February 19, 2009, the Court denied the Motion to Suppress. February 26, 2009, a pre-trial conference was held in case number 1377 of 2008, scheduling trial in April of that year. The same date, an application for continuance was submitted in case number 1376 of 2008, by reason that the other case was to be tried first. (See *id.* at 42.) On March 9, 2009, the Defendant entered a plea of guilty to count one in case number 1377, robbery, with the District Attorney subsequently submitting an application for *nolle prosequi* as to count two, theft. The Defendant also pled guilty to count two in case number 1376, aggravated assault, and the Commonwealth agreed not to prosecute the charges of attempted homicide, aggravated assault, and possession of firearms. Sentencing before this Court occurred on April 15, 2009. Thereafter, following submission by the Commonwealth of a Motion for Restitution in case number 1377, the sentencing Order was amended May 1, 2009, to include payment of sums to Finish Line Shoes.

Mr. Young filed a pro se Petition for Post Conviction Collateral Relief September 28, 2009. Following a review of the case files and in light of the procedural posture of the case and the issues raised, this Court appointed counsel by Order dated October 2, 2009, giving leave to file an amendment to the petition within sixty (60) days. A request for continuance was submitted November 24, 2009, granted by the Court November 25 for forty five (45) days to perfect the amended petition. The defense filed a motion on December 18, 2009 requesting discovery or inspection of the Commonwealth's files, which this Court granted by Order dated January 6, 2010. Additional continuances were requested January 11, 2010, and February 5, 2010, the Court granting thirty (30) additional days in each instance to either perfect or withdraw the Defendant's petition. The Amended Petition for Post Conviction Collateral Relief was filed March 5, 2010.

By Order dated March 18, 2010, the Court directed the Commonwealth answer the Defendant's petition, such response being filed thereafter on April 22, 2010. By the same Order directing a response, the Court set hearing upon the petition for June 3, 2010. On the request of the defense, the hearing was rescheduled for July 20, 2010, thereafter rescheduled again for August 30, 2010. As the hearing date approached, the defense submitted first a Request for Hearing by Video Tele-Conference, followed by a Request for Transport to procure Young's appearance at hearing. By Order dated August 26, 2010, in light of the lack of facilities in the New Jersey State Prison where the Defendant is housed to allow for hearing by video-conference, and the infeasibility of transport prior to the set hearing, by agreement of the Commonwealth and the defense the Court directed the Defendant participate in hearing via telephone.

The hearing was held as scheduled August 30, 2010. In light of the issues raised in the Defendant's petition, and the assertions of the parties, the Court directed the Commonwealth submit a brief examining the timeliness of Young's prosecution under the IAD. Deadline for any supplemental brief on behalf of the Defendant was set for September 13, 2010, the Commonwealth's response due September 27, 2010. The Commonwealth's brief was timely submitted, the defense electing to rest upon the brief initially submitted with the amended petition. Having held hearing upon the Petition, conducted a review of the applicable law and the case files, and having read the submissions of the parties, the Court now rules upon the Amended Petition for Post Conviction Collateral Relief via this Opinion and Order of Court.

Issue Raised

The Defendant raises a single issue for the Court's determination. Young argues trial counsel Karl Rominger, Esquire, rendered him ineffective assistance, and requests his sentence be vacated and the charges against him be withdrawn. According to the Defendant, Rominger was aware of the applicability of the Interstate Agreement on Detainers to his case, and failed to assert a defense of untimely prosecution on his behalf. Young argues the IAD demanded dismissal of the charges levied against him in Franklin County, as the Commonwealth failed to dispose of his case within the one hundred eighty (180) day period mandated under the Act. Because Rominger knew the defense applied, but failed to raise the issue, Young asserts he was rendered ineffective assistance which now demands the Court vacate his guilty plea.

Discussion

1. Post Conviction Relief Act Generally and Ineffective Assistance of Counsel

To establish a right to relief under the Post-Conviction Relief Act (PCRA), the Defendant must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated errors

or defects under the statute. See 42 Pa. C.S.A. §9543(a)(2) (2010). A petitioner must also prove the claims have not been previously litigated or waived, and the failure to litigate the issue during trial or on direct appeal could not have resulted from a rational, strategic, or tactical decision by counsel. See *id.* at §9543(a)(3), (4). Claims of ineffective assistance by trial counsel should be raised on collateral review, and are no longer waived by reason of the failure to assert such right to relief at the first opportunity on direct appeal. See Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002).

Counsel is presumed to render effective assistance. See Commonwealth v. Colavita, 993 A.2d 874, 886 (Pa. 2010). Thus, the burden is upon the PCRA petitioner to demonstrate counsel's performance was deficient, and that the deficiency prejudiced him. See *id.* In Pennsylvania, the test for ineffective assistance explicated by the United States Supreme Court has been refined into a three-part inquiry. See *id.* at 886-87 (citing Strickland v. Washington, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)). The petitioner must demonstrate: first, that the underlying issue has arguable merit; second, that counsel's actions lacked any objectively reasonable basis; and third, that actual prejudice resulted from counsel's act or omission. See Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987). Failure to demonstrate any prong of the test defeats a claim of ineffectiveness. See Commonwealth v. Basemore, 744 A.2d 717, 738 n. 23 (Pa. 2000). Prejudice is demonstrated where "but for counsel's error or omission, the result of the proceeding would have been different." Colavita, 993 A.2d at 887.

2. Interstate Agreement on Detainers

The Interstate Agreement on Detainers is a pact among forty eight (48) states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the United States establishing procedures for transfer of inmates in one jurisdiction to the temporary custody of another which has lodged a detainer against the prisoner. See Commonwealth v. Montione, 720 A.2d 738, 740 (Pa. 1998). A detainer is a means to inform the custodial jurisdiction charges remain pending in another jurisdiction, to request the prisoner be held for the requesting state, or to ask for notice to the requesting state of the inmate's imminent release. See *id.* The legislation is remedial, intended to curb the abuses previously associated with the lodging of detainers, which had a variety of prejudicial effects on the rights of those prisoners subject to such requests.³ See *id.*

The Act requires that when a detainer is lodged, the sending jurisdiction⁴ inform the prisoner, so that the prisoner may request the charges be resolved. 42 Pa. C.S.A. §9101 (III). The statute provides that following such a request, the prisoner must be tried within one hundred and eighty (180) days.⁵ The one hundred and eighty (180) day time period in Article III (a) of the IAD commences when the prisoner's request for final disposition of the charges against him is actually delivered to the court and prosecuting officer of the jurisdiction lodging the detainer against him.⁶ See Fex v. Michigan, 507 U.S. 43, 52, 113 S. Ct. 1085, 1091, 122 L. Ed.2d 406 (1993). The United States Supreme Court has determined the word "shall" in the statute is absolute, so that no harmless error analysis may be applied if the Commonwealth fails to comply with the strict language of the law. See Alabama v. Bozeman, 533 U.S. 146, 156, 121 S. Ct. 2079, 2086, 150 L. Ed. 2d 188 (2001). If the Commonwealth cannot bring the Defendant to trial prior to the expiration of the one hundred and eighty (180) day period, it must move for a continuance or face dismissal of the charges. See Commonwealth v. Thornhill, 601 A.2d 842, 845 (Pa. Super. Ct. 1992). Indeed, "it is not the defendant's duty to insure that he is being brought to trial within the specified time; that responsibility rests with the Commonwealth." See *id.*

Two provisions may operate to extend the one hundred eighty (180) day period under the IAD. First, the provisions of the IAD allow the trial court discretion to extend the deadline or to exclude days from the period for good cause shown in open court. See Commonwealth v. Williams, 896 A.2d 523, 536 (Pa. 2006); 42 Pa. C.S.A. §9101 (IV).⁷ Good cause to extend the deadline may result from acts of the Defendant which delay the onset of trial. See

³ For instance, detainers were seen as thwarting efforts at rehabilitation due to the anxiety created in an inmate facing pending charges in another jurisdiction; prisoners subject to detainer were seen as higher risks for flight, making them ineligible for work assignments or parole; the informality of detainer proceedings allowed them to be filed in bad faith; and a sentencing court in one jurisdiction was likely more reluctant to impose a substantial sentence, as the prisoner was facing additional time upon their release. See Montione, 720 A.2d at 740 n. 1.

⁴ The jurisdiction where the prisoner is incarcerated. See 42 Pa. C.S. §9101 (II)

⁵ "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 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, he shall 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 . . . The request of the prisoner shall 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 of the prisoner, and any decisions of the state parole agency relating to the prisoner." 42 Pa. C.S.A. §9101 (III) (a). In calculating the one hundred and eighty (180) day period, the first day is excluded, and the final day included unless such last day falls of Saturday, Sunday, or a legal holiday, which is then omitted from the calculation. See 1 Pa. C.S.A. §1908 (2010).

⁶ The jurisdiction lodging the detainer, where the prisoner will be tried on the pending charges that form the basis of the detainer, is dubbed the receiving jurisdiction under the statute. See 42 Pa. C.S. §9101 (II).

⁷ The statute states: "Provided, that 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." 42 Pa. C.S.A. §9101(III) (a).

Commonwealth v. Washington, 411 A.2d 490, 491 (Pa. 1979). In Montione, the Supreme Court held that in filing an omnibus pretrial motion, and a motion to dismiss, the Defendant “implicitly consented to allow the court the requisite amount of time in order to dispose of them.” Commonwealth v. Montione, 720 A.2d 738, 741 (Pa. 1998).

Second, when the prisoner is unable to stand trial as determined by the court having jurisdiction over the matter, the statute is also tolled. See 42 Pa. C.S.A. §9101 (VI) (a).⁸ In Thurston, the Court determined that the time period during which a defendant was in Virginia facing pending charges in that state was excludable from the IAD calculation as the absence from Pennsylvania made him “unavailable to stand trial.” Commonwealth v. Thurston, 834 A.2d 595, 598 (Pa. Super. Ct. 2003).

Though dismissal is appropriate where the Commonwealth fails to commence trial within the period provided for under the statute, if the prosecution is able to demonstrate due diligence in bringing the defendant to trial, this period may be extended. See Williams, 896 A.2d at 536. Indeed, Pennsylvania courts have long held the period between an accused’s waiver of extradition and his subsequent return to the jurisdiction may be excludable if such a demonstration of diligence is made in effecting such return. See Commonwealth v. Woods, 663 A.2d 803, 807 (Pa. Super. Ct. 1995) (citing Commonwealth v. Martin, 452 A.2d 238, 241 (Pa. Super. Ct. 1982)). Due diligence is determined on a case by case basis. See id.

When the Defendant is incarcerated in another jurisdiction, he is “unavailable” for the period during which his presence in the jurisdiction cannot be obtained, despite the Commonwealth’s diligence in taking all necessary measures to do so. See Commonwealth v. Lloyd, 535 A.2d 1152, 1160 (Pa. Super. Ct. 1988). Additionally, a defendant is unavailable for the period during which a responding jurisdiction delays extradition. See id. If the Commonwealth has followed the procedures requested by the sending jurisdiction, relying on that jurisdiction’s assertions, it has exercised due diligence. See Woods, 663 A.2d at 807. Where the prosecution believes it has pursued the prisoner’s return “to the fullest extent within its control, any ‘period of inactivity’ is excluded.” Id. The Court must examine the affirmative actions of the Commonwealth, rather than acts it did not undertake. See id.

3. Issues Raised Under the IAD Lack Arguable Merit

The Court need only examine the first prong of Pierce test in disposing of the instant Petition for Post Conviction Relief, as the issues raised under the IAD lack arguable merit. No violation of the Act occurred, any delay in bringing the Defendant to trial attributable to requests for continuance by his counsel, and the Commonwealth acting with due diligence in obtaining his presence in the Franklin County. As the issue lacks merit, no ineffective assistance has been proven.

Both the Commonwealth and the Defendant agree the applicable time period herein is the one hundred and eighty (180) day period triggered on a request by the prisoner for disposition of charges pending in another jurisdiction. See 42 Pa. C.S.A. § 9101(III) (a). (Def. Br. at 9; Commw. Br. at 3.) However, there is some dispute as to what date should begin the one hundred eighty (180) day period. The Defendant asserts the period should begin on October 2, 2007, the date he made his request for disposition. (Def. Br. at 9.) However, the determination by the Supreme Court of the United States in Fex is in clear opposition to this assertion. Considering a similar argument from the defendant in that case, the Supreme Court determined the period begins on receipt by the prosecutor of the request for disposition, rather than on the date such request is made. Fex v. Michigan, 507 U.S. 43, 52, 113 S. Ct. 1085, 1091, 122 L. Ed.2d 406 (1993). Defendant alternatively asserts that the period should begin on December 14, 2007, the date on the Form VII completed by the Franklin County prosecutor. (Def. Br. at 9.)

The Commonwealth allows that October 31, 2007, may be the date upon which the statutory period begins, as that is the date the Dauphin County district attorney received the request for disposition forwarded from New Jersey. (Commw. Br. at 3.) Alternatively, the Commonwealth asserts the period should begin on March 4, 2008, when a handwritten letter was received from the Defendant in the Franklin County District Attorney’s Office. (See id. at 3.) However, informal requests for disposition such as this one, without the certificate of the official having custody of the prisoner containing the requisite information required by statute, have been held insufficient to begin the statutory period. See, e.g., Commonwealth v. Miller, 3 Pa. D. & C. 5th 449, 461 (Monroe Co. January 7, 2008).

Whether the Court begins the period on October 31, 2007, or on December 12, 2007, a date neither party asserted but the Court finds a plausible date to trigger the one hundred eighty (180) day period, the result is the same. No violation of the IAD occurred. As to the calculation from October 31, 2007, the numerous continuances submitted by defense counsel, and the unavailability of the Defendant to stand trial in Franklin County, result in the

⁸ This portion of the statute provides: “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.” 42 Pa. C.S.A. §9101(VI) (a).

tolling of the statutory period such that trial was timely commenced. If calculated from triggering on December 12, 2007, the period is nonetheless tolled from that date until June 24, 2008, when the Dauphin County charges were resolved and the Defendant was available for transport to Franklin County.

The Dauphin County Prosecutor received Form II from the New Jersey institution holding the Defendant on October 31, 2007. This receipt could be deemed to trigger the one hundred eighty (180) day period. Alternatively, the period may have been triggered on December 12, 2007, when the Franklin County District Attorney's Office received notice from its counterpart in Dauphin County that the Defendant was present there, awaiting trial. (See Commw. Br. Ex. at 22.) The statutory period commences when notice is received of the prisoner's request for disposition. See 42 Pa. C.S.A. §9101(III) (a). The Court believes the informal letter submitted by the Defendant to Franklin County on March 4, 2008, lacked the requisite formality to begin the running of the one hundred eighty (180) day period. See Commonwealth v. Miller, 3 Pa. D. & C. 5th 449, 461 (Monroe Co. January 7, 2008) (citing Fex v. Michigan, 507 U.S. 43, 52, 113 S. Ct. 1085, 1091, 122 L. Ed.2d 406 (1993)). Indeed, such request did contain written notice of the place of imprisonment and a request for final disposition, but lacked a certificate of the official having custody of him. See 42 Pa. C.S.A. §9101 (III) (a).

Such certificate should state the term of commitment under which a prisoner is being held, the time remaining to be served, the amount of good time earned, time for parole eligibility, and decisions of the state parole agency relating to the prisoner. See id. Containing none of this information, the informal correspondence does not begin the statutory period. Conversely, the letter from the District Attorney of Dauphin County, received on or about December 12, 2007, contains reference to the proper forms and formalities required by the IAD. Consistent with its provisions, it is this notification which the Court considers more likely triggered the running of the period mandated by statute.

If the period was triggered on October 31, 2007, it was nonetheless tolled pending availability of the Defendant to stand trial in Pennsylvania. Young was held in New Jersey until he was transported to Dauphin County on December 8, 2007. While a defendant is incarcerated in another jurisdiction, he is unavailable for the period during which his presence cannot be obtained despite the diligent efforts of the Commonwealth. See Commonwealth v. Woods, 663 A.2d 803, 807 (Pa. Super. Ct. 1995). Thus, while the Commonwealth arranged to transport Young to Pennsylvania, completing the process required under the statute to obtain his presence, the statutory period was tolled. Considering the circumstances of the case, due diligence was exercised by the Commonwealth in following the procedures mandated by law to obtain the presence of the Defendant. See Commonwealth v. Martin, 452 A.2d 238, 241 (Pa. Super. Ct. 1982). Thus, this thirty eight (38) days is excluded from calculations under the IAD, such that the one hundred eighty (180) days under the IAD was tolled from October 31, 2007 until December 8, 2007.

At this time, though present in Pennsylvania, the Defendant was clearly not available for trial in Franklin County as Dauphin County commenced proceedings against him. The same principle requiring the statutory period be tolled while Young was incarcerated in New Jersey similarly mandates the exclusion of the time between December 8, 2007 (or December 12, 2007) and June 24, 2008. Though present in the same state, another jurisdiction had the custody of the Defendant and sought to bring him to justice upon crimes committed there. The statute is tolled "whenever and for as long as the prisoner is unable to stand trial, as determined by the court." 42 Pa. C.S. §9101 (IV), (VI).

The letter from Dauphin County to the Franklin County prosecutor's office states Young is present in Dauphin, and recites the IAD requests and forms previously submitted in order to obtain his presence there. (See Commw. Br. Ex. at 1.) In bold type, it states that on "completion of the trial process" in Dauphin County, the extradition and IAD coordinator would forward "the disposition of charges" form under the IAD. (Id.) The form provides that for Dauphin to release Young to Franklin, Form VIII would be required, and that under the IAD, disposition of all Pennsylvania charges would need to be accomplished during his stay in this state. (See id.) The Franklin District Attorney duly submitted Form VIII to the New Jersey prison administrator, indicating his intent to take custody of the Defendant following the disposition of the Dauphin County charges. (See id. at 22.) As promised, once the Dauphin charges were dismissed, the prosecution completed Form IX, a facsimile copy of which appears appended to the Defendant's Amended Petition for Post Conviction Relief. (See Def. Br. Attach. A at 2.) The top of the photocopied form reflects the original facsimile was sent June 25, 2008. (See id.)

Thus, the Defendant was "unable to stand trial" under the IAD from December 8, 2007 (or December 12, 2007, if the statutory period was triggered on that date), until June 24, 2008, when the Dauphin County charges were dismissed. See 42 Pa. C.S.A. §9101 (VI) (a). Incarcerated in Dauphin County Jail, which is indeed, as the Commonwealth points out, another jurisdiction, Young was unavailable because his presence in Franklin County could not be obtained. See Commonwealth v. Lloyd, 535 A.2d 1152, 1160 (Pa. Super. Ct. 1988). Further, this period could

be characterized as one during which “a responding jurisdiction delayed . . . extradition” as the Franklin prosecutor adhered to the procedures requested by Dauphin, and relied upon Dauphin’s assertions Young would later be given into their custody. See Commonwealth v. DeMarco, 481 A.2d 632, 637 (Pa. Super. Ct. 1984). The Court is clear Franklin County believed it pursued Young’s return to the fullest extent within its control, meriting exclusion of such period of inactivity. See Commonwealth v. Woods, 663 A.2d 803, 807 (Pa. Super. Ct. 1995). This period cannot run against the Commonwealth.

Triggered either on October 31 or December 12, 2007, the one hundred eighty (180) day period was tolled from such date until June 24, 2008. Following his transport to Franklin County, the Defendant requested several continuances. In Commonwealth v. Montione, the Supreme Court concluded that delay occasioned by a defendant is excludable from the IAD’s time period, consistent with the speedy trial provisions of what is now Rule 600. See Commonwealth v. Montione, 720 A.2d 738, 741 (Pa. 1998). Thus, there is no violation of the IAD where the Defendant consents to a continuance of trial, or files motions which require disposition prior to its inception. See Commonwealth v. Washington, 411 A.2d 490, 491 (Pa. 1979). Further, inquiry into the reasonableness of the time taken by the trial court to dispose of pre-trial motions is “inappropriate,” “imprudent and impractical” on review. Montione, 720 A.2d at 741. The IAD is simply tolled for the period required to dispose of pre-trial motions, and for periods of continuance allowed at the request of the Defendant.

In case number 1376 of 2008, Young requested continuance of the preliminary hearing, from July 8, 2008 until July 22, 2008, a period of fourteen (14) days. August 28, 2008, Defendant requested continuance to the Call of the List on October 20, 2008. (See Commw. Br. Ex. at 26.) This continuance was granted over the objection of the Commonwealth, who at the time of this pre-trial conference was ready to proceed to trial. (See id.) These fifty-three (53) days are clearly a continuance allowed at defense request, therefore excluded from the period for prosecution under the IAD. Further excluded are the periods from November 20, 2008 until November 25, 2008, and from that date until December 5, 2008. This fifteen (15) day period is excluded by reason of defense counsel’s request for additional time to submit a brief in support of the omnibus motion filed previously on the Defendant’s behalf.

So too, when the Defendant requested continuance on January 5, 2009, which was unopposed by the Commonwealth, the period was tolled as provided in the Court’s Order until March 9, 2009. The reason given for the sixty three (63) day continuance was that the Omnibus Pre-trial Motion remained pending.⁹ (See Commw. Br. Ex. at 25.) As the Court has previously stated, the period required to dispose of pre-trial motions is tolled under the IAD. An additional continuance was requested by the Defendant February 26, 2009, the period between such date and May 11, 2009, excluded by Order of Court for calculating the period for commencement of trial under Pennsylvania Rule of Criminal Procedure 600. (See Commw. Br. Ex. at 42.) The reason given was again that the omnibus motion remained pending, and that case number 1377 would commence trial first. (See id.) Discounting eleven (11) overlapping days covered by such continuance and that requested January 5, 2009, this period represents another sixty-three (63) days which cannot be counted against the Commonwealth in construing the requirements of the IAD.¹⁰

From June 24, 2008, when the Defendant became available for trial, and the tolling of the period for timely prosecution ceased, until the guilty plea was taken on March 9, 2009, a total of two hundred fifty eight (258) days passed. Of this time, in case number 1376, a total of one hundred and thirteen (113) days may permissibly be counted against the Commonwealth in construing the IAD’s time period for trial, one hundred and forty five (145) days of delay being attributable to continuances and motions filed by the defense.¹¹

A similar result occurs in calculating the time period in case number 1377 of 2008. The preliminary hearing was continued from July 15 to July 22, 2007, a total of seven (7) days. Thereafter, the August 28, 2008 continuance tolled the period another fifty-three (53) days. The fifteen (15) days from November 20, 2008 until December 5, 2008 are again excluded. The continuance requested January 5, 2009, again tolling the period sixty-three (63) days to March 9, 2009, when the Defendant entered his plea. Thus, a total of one hundred twenty (120) days may be counted against the Commonwealth, one hundred and thirty eight (138) days being attributable to continuances requested on behalf of the Defendant.¹² Thus, in neither case was the period of time from Mr. Young’s availability to his guilty plea

⁹ Indeed, the time period from December 5, 2008, until January 5, 2009, could also be considered tolled, as the Omnibus Motion remained pending. By filing motions which required disposition, the Defendant implicitly consented to the consequent delay such disposition required in bringing him to trial. See Commonwealth v. Washington, 411 A.2d 490, 491 (Pa. 1979).

¹⁰ This continuance does not figure into the calculations of the Court, as the prior continuance tolled the period from January 5, 2009 until March 9, 2009, the date of the Defendant’s plea of guilty. Halting our calculations on that date, with the overlapping period accounted for, the Court need not add this continuance period into our numerical calculations. As it was requested, but unneeded due to a final disposition, the Court notes such period would have been excluded if the case had continued to trial.

¹¹ If the period from December 5, 2008 until January 5, 2009, is also considered tolled, then eighty-two (82) days may permissibly be counted against the Commonwealth, a total of one hundred and seventy six (176) days of delay being attributable to the defense.

¹² If the forty six (46) days from December 5, 2008 until January 5, 2009 is also tolled, then eighty-nine (89) days may be counted toward the one hundred eighty (180) day period, one hundred sixty nine (169) being omitted due to tolling.

greater than one hundred eighty (180) days. Rather, in each matter, the period was far less, making the disposition timely under the IAD.

In light of the foregoing discussion, it is clear the Defendant cannot carry his burden to prove by the preponderance of the evidence that the underlying issue raised to demonstrate ineffective assistance possesses arguable merit. As the Court's calculations confirm, the Interstate Agreement on Detainers was not violated, any delay in bringing the Defendant to trial the result of his unavailability and continuances ordered upon his request. Because the issue of untimely prosecution lacked merit, counsel cannot be found ineffective by reason of the failure to pursue it. No unprofessional omission by trial counsel occurred in failing to submit a motion to dismiss the charges, as the time limits imposed by the IAD were not violated.

Conclusion

Because the Court has determined Young cannot satisfy the first prong of the test for ineffective assistance set forth in Pierce, there is no need to discuss the final two. Trial counsel will not be deemed ineffective for failing to raise a meritless claim or pursue an issue without basis. See Commonwealth v. Marinelli, 810 A.2d 1257, 1267 (Pa. 2002); Commonwealth v. Ellis, 700 A.2d 948, 959 (Pa. Super. 1997). Because there was no basis to move for dismissal on the grounds the IAD had been violated, counsel cannot be found ineffective for failing to do so. The attached Order of Court dismisses the Defendant's petition for collateral relief.

ORDER OF COURT

December 23, 2010, upon review of Defendant's Petition for Post Conviction Relief and the applicable law, the record and the evidence presented in the hearing in this matter and the written submissions of the parties, it is hereby ordered that Defendant's Petition under the Post-Conviction Relief Act is dismissed.