

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**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.

Argued January 18, 2023 – Decided February 3, 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.

Lawrence S. Lustberg, argued the cause for appellant
(Gibbons, PC, attorneys; Lawrence S. Lustberg,
Jennifer A. Hradil and Kelsey A. Ball, on the briefs).

Maura M. Sullivan, Assistant Prosecutor, argued the
cause for respondent (Grace C. MacAulay, Camden
County Prosecutor, attorney; Maura M. Sullivan, of
counsel and 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 the Camden County jail for over 180 days, violating the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15, and 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 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 applied to toll 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.

The record before us fails to contain transcripts, findings, or other information as to events after June 15, 2021, when all excludable time pursuant to the omnibus orders ended, through the entry of defendant's guilty plea on March 16, 2022. We therefore remand this matter for findings as to events that

occurred after June 15, 2021, that may have impacted tolling or a continuance and whether defendant suffered prejudice during that period of time.

I.

We glean the following facts from the record before us. Michael Gitelis is a resident of Brooklyn, New York. At the time of the events in late 2017, he was eighteen years old. He suffered from substance abuse, causing his parents to enroll him in a rehabilitation facility located in Gloucester Township, New Jersey. On December 5, 2017, Gitelis abruptly left the facility three days after his arrival. Between December 5, and 7, 2017, Gitelis committed a series of crimes in New Jersey and New York. On or about February 21, 2018, the Camden County grand jury returned an eleven-count indictment, charging defendant with two counts of first-degree robbery, second-degree burglary, fourth-degree criminal mischief, two counts of third-degree possession of a weapon for an unlawful purpose, two counts of fourth-degree unlawful possession of a weapon, first-degree carjacking, second-degree aggravated assault, and third-degree aggravated assault.

On or about February 6, 2018, the Camden County Prosecutor lodged a detainer against defendant based on the Camden County charges. On or about July 23, 2019, defendant pled guilty in New York to first and second-degree

assaults for crimes committed in New York on December 7, 2017. On September 5, 2019, defendant was sentenced on those two counts to concurrent six-year terms of imprisonment in New York.

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 accepted temporary custody of defendant.

On March 27, 2020, the Supreme Court of New Jersey issued its First Omnibus Order, suspending new criminal jury trials until further notice, extending the calculation of the time for the return of an indictment and commencement of trial for an eligible detained defendant, for an additional period from its March 12th Notice to the Bar, through April 26, 2020, due to exceptional circumstances and good cause for delay; specifically, grand jury unavailability and the statewide postponement of jury trials due to the COVID-19 pandemic.

Subsequently, additional Supreme Court omnibus orders were periodically issued. On July 24, 2020, the Supreme Court issued its Seventh Omnibus Order continuing excludable time from July 27, 2020, to September

20, 2020, and authorizing new jury selections and jury trials on or after September 21, 2020, beginning in the Atlantic/Cape May, Bergen, and Cumberland/Gloucester/Salem vicinages, and expanding statewide.

On August 18, 2020, the State filed a Notice of Motion for an Extension of Time pursuant to the IAD. On September 17, 2020, the New Jersey Supreme Court issued its Eighth Omnibus Order, stating that, based on the continued temporary suspension of jury trials and grand jury sessions in many counties, the prior orders regarding excludable time were extended for an additional period starting on September 21, 2020, through October 11, 2020.

On September 18, 2020, the trial court held a hearing on the State's motion for an extension of time under the IAD, ultimately requesting supplemental briefing. On October 1, 2020, defendant filed a Notice of Motion to Dismiss the Indictment with prejudice for a violation of the IAD and because of insufficient and inappropriate evidence presented to the grand jury.

On October 8, 2020, the New Jersey Supreme Court issued its Ninth Omnibus Order, which extended excludable time for the commencement of trial from October 12, 2020, through January 15, 2021, due to exceptional circumstances and on account of good cause for the delay; specifically, the

statewide limited capacity to conduct in person jury trials due to distancing requirements mandated by the COVID-19 pandemic.

On October 9, 2020, the trial court held another hearing on the State's motion for an extension of time under the IAD after the parties provided supplemental briefing. On October 14, 2020, the trial court entered an order ruling the 180-day period to bring defendant to trial pursuant to N.J.S.A. 2A:159A-3(a) was tolled from March 12, 2020, until January 15, 2021. Because of the tolling, the court reasoned it need not decide the motion for a continuance, and the State's motion for a continuance was denied without prejudice. In an accompanying written opinion, the court found, pursuant to the IAD, defendant was entitled to be tried on the indictment within 180 days from February 13, 2020, the date the State received defendant's written notice, or August 12, 2020. It further found, pursuant to N.J.S.A. 2A:159A-6(a), the 180-day period could be tolled for as long as the prisoner was unable to stand trial as determined by a court having jurisdiction. Because of the suspension of jury trials from March 12, 2020, the court ruled defendant was "unable to stand trial," and the 180-day period was tolled as of that date. The court ruled that meant only twenty-eight days had expired as of October 14, 2020. Additionally, the court stated, pursuant to the Supreme Court's Ninth Omnibus Order, the 180-day period would

continue to toll up to January 15, 2021. Because it found the 180-day period tolled, it reasoned it need not rule on the motion and denied the State's motion for a continuance without prejudice.

Regarding defendant's then-pending motion to dismiss for failure to properly instruct the grand jury, in a letter dated October 30, 2020, the State informed the court and defense counsel it realized the carjacking statute had not been read to the grand jury. The State informed the court of its intention to supersede the indictment to correct the alleged defect with respect to the carjacking count.

On November 13, 2020, the trial court held a hearing on defendant's motion to dismiss. The State reiterated its intention to present the case again to the grand jury to ensure the carjacking statute was read and stated it would be doing so the following week.

On November 16, 2020, the New Jersey Supreme Court issued a Notice to the Bar, suspending new in-person jury trials because of the second wave of the COVID-19 pandemic, and extending excludable time for the commencement of trial from January 15, 2021, through March 1, 2021, due to exceptional circumstances and on account of good cause for the delay.

On November 17, 2020, the Camden County grand jury returned a superseding indictment, charging defendant with the same exact charges as the original indictment, and the trial court dismissed the original indictment.

On December 3, 2020, the trial court denied defendant's motion to dismiss the indictment without prejudice, ruling defendant's arguments regarding defects in the first indictment were rendered moot by virtue of the superseding indictment. As to defendant's argument that the indictment should be dismissed due to violations of the IAD, the court ruled that argument lacked merit because it had ordered the 180-day period tolled from March 12, 2020, to January 15, 2021, due to defendant's inability to stand trial.

By letter dated January 11, 2021, defense counsel learned the transcript unit was unable to complete his request for the October 13, 2020 grand jury orientation transcript and the November 17, 2020 grand jury transcript because typing could be heard "but the voices [were] too low." On January 27, 2021, defendant filed another Notice of Motion to Dismiss the Indictment with prejudice, requesting defendant's return to the sending state of New York.

On February 10, 2021, a second superseding indictment was filed, charging defendant with the same exact counts as the original and superseding

indictments. On February 22, 2021, the trial court dismissed the superseding indictment.

On February 17, 2021, the Supreme Court issued its Tenth Omnibus Order extending excludable time for the commencement of jury trials from March 1, 2021, through March 31, 2021, due to exceptional circumstances and on account of good cause for the delay.

On March 1, 2021, the trial court held a hearing on defendant's motion to dismiss the superseding indictment or, alternatively, to return defendant to New York. On March 2, 2021, the trial court denied defendant's motion to dismiss the indictment, finding defendant's argument regarding the failure to record the presentment of the superseding indictment moot by virtue of the second superseding indictment. It further rejected defendant's argument that he should be returned to New York because the original indictment, on which the IAD request was requested, no longer existed. The court also found defendant's contention the court lacked jurisdiction was not supported by the IAD provisions.

On March 17, 2021, defendant filed a motion for leave to appeal the March 2, 2021 order. On March 22, 2021, defendant was scheduled for arraignment on the second superseding indictment. The trial court incorporated by reference

the plea entered to the original indictment and entered a not guilty plea to the second superseding indictment.

On March 23, 2021, the New Jersey Supreme Court issued its Eleventh Omnibus Order, which, in part, extended excludable time for the commencement of trial from April 1, 2021, through May 17, 2021, due to exceptional circumstances and on account of good cause.

On March 31, 2021, defendant filed a motion to dismiss the indictment, arguing dismissal was appropriate due to defects of fact and law in the State's presentation of the charges to the grand jury. On April 8, 2021, we denied defendant's motion for leave to appeal.

On April 9, 2021, the New Jersey Supreme Court again extended excludable time for the commencement of jury trials from May 18, 2021, through June 15, 2021, due to exceptional circumstances and on account of good cause for the delay.

On April 30, 2021, the trial court held a hearing on defendant's motion to dismiss the indictment and an initial case disposition conference.

On May 11, 2021, the New Jersey Supreme Court provided that extensions of post-indictment excludable time would conclude, as set forth in its April 9, 2021 order, on June 15, 2021.

On May 12, 2021, the trial court denied defendant's motion to dismiss the second superseding indictment.

On March 16, 2022, defendant pled guilty to one count of first-degree robbery in exchange for the State's recommendation of a term of ten years, subject to the No Early Release Act (NERA). Defendant would receive negotiated jail credit for all his time served, starting December 8, 2017. Defendant reserved the right to appeal the denial of any and all motions in this case.

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

On April 28, 2022, defendant filed a notice of appeal. On May 16, 2022, we granted defendant's motion to accelerate this appeal.

II.

Forty-eight states and the federal government have adopted the IAD, which governs the transfer of sentenced defendants from one jurisdiction to another. New York v. Hill, 528 U.S. 110, 111 (2000); State v. Baker, 198 N.J. 189, 192 n.1 (2009). The IAD "creates uniform procedures for lodging and

executing a detainer, i.e., a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime." Alabama v. Bozeman, 533 U.S. 146, 148 (2001). In particular, the IAD "provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State." Ibid.

"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). There is a "strong public policy against neglecting indefinitely the disposition of indictments against persons incarcerated out-of-state." State v. Lippolis, 107 N.J. Super. 137, 142 (App. Div. 1969), rev'd on dissent, 55 N.J. 354 (1970).

A prisoner has a right pursuant to the IAD to initiate the disposition of an outstanding out-of-state detainer. See N.J.S.A. 2A:159A-3. "Article III of the [IAD] 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 v. Nash, 473 U.S. 716, 718-19 (1985). As the IAD provides:

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: 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.

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

The 180-day period to bring the prisoner to trial commences when "the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer." Fex v. Michigan, 507 U.S. 43, 52 (1993); State v. Pero, 370 N.J. Super. 203, 215 (App. Div. 2004). The prosecution must bring the defendant to trial within 180 days after the prosecutor receives the written IAD request. "Failure to abide by the [180-day] time limit set forth in Article III requires dismissal of the indictment as set forth in Article V[.]" Pero, 370 N.J. Super. at 207.

Although the remedy is prescribed and unforgiving, the timeframe does allow some flexibility. The prosecution has two methods by which it may properly extend the 180 days. The prosecution may request a continuance from the 180-day requirement for good cause shown in open court, as long as a defendant is afforded an opportunity to object or consent. N.J.S.A. 2A:159A-3(a). Where a prosecutor has not sought such a continuance before the expiration of the 180-day period, the indictment is subject to dismissal with prejudice. N.J.S.A. 2A:159A-5(c). A continuance for good cause shown may be granted "at any time prior to an actual entry of an order dismissing the indictment pursuant to Article V." Lippolis, 107 N.J. Super. at 147 (Kolovsky, J.A.D., dissenting); State v. Amer, 471 N.J. Super. 331, 351-52 (App. Div. 2022); State v. Miller, 299 N.J. Super. 387, 397 (App. Div. 1997).

In addition to a continuance, tolling is available to extend the 180-day period in the IAD, and it is appropriate where a court having jurisdiction of the matter determines that the prisoner is unable to stand trial. N.J.S.A. 2A:159A-6(a).

The referenced 180-day period, beginning on February 13, 2020, expired on August 11, 2020, Gitelis was not brought to trial by that date, and the State did not seek to toll the statute or a continuance prior to that date. Gitelis was

arraigned in Camden County on August 17, 2020. On August 18, 2020, seven days after the IAD's 180-day limit had expired, the Prosecutor moved pursuant to N.J.S.A. 2A:159A-3(a) for the first time 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.

Even if we were to accept the State's argument that the Supreme Court's omnibus orders created blanket tolling until June 15, 2021,¹ we are without information sufficient to determine whether defendant's statutory rights were violated when he was in custody pursuant to the IAD from June 15, 2021 (the last day any omnibus order could be presumed to have tolled the statute), through the March 16, 2022, plea disposition date. This was a period of 274 days which, when added to the 28 original days in custody, totals 302 days.

The State argues, for the first time in a certification filed in opposition to a motion for bail pending this appeal – a motion filed after we heard oral argument on this appeal – that a series of hearings were held when the omnibus orders expired, the first occurring June 14, 2021, wherein defense counsel

¹ The Supreme Court's opinion in State v. Mackroy-Davis, 251 N.J. 217 (2022), was not decided until June 27, 2022, and thus not available to the trial court in making this determination at that time.

requested additional time to discuss the plea offer with his client. It further certifies it informed the trial court it was ready for trial on September 20, 2021 (a period of 125 days after any omnibus order would have served to toll the IAD).

This information was not supplied to us as part of the record on appeal, although defendant specifically raised the issue of the delay after the omnibus orders expired in his moving brief, the transcripts of these proceedings were not made part of any appendix on appeal, there was no motion made to supplement the record on appeal, and there is no indication, either in the record before us on appeal or the certification filed in opposition to the motion for bail pending appeal, that a trial date was set within 180 days of the last possible tolling date from June 15, 2021, or November 15, 2021. This information was also not supplied to us at oral argument. Notably, defendant has not had an opportunity to respond to this late information.

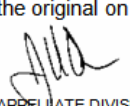
We therefore remand this matter, on an accelerated basis, to the trial court for factual findings and conclusions of law as to any further tolling or continuance that may have occurred after June 15, 2021, through March 16, 2022, and whether defendant suffered prejudice by any delay during this timeframe. Specifically, we seek findings as to any tolling or continuance

motion made by the State or sua sponte order entered by the trial court after June 15, 2021, and the effect any requests for adjournments made by defendant after June 15, 2021, had on tolling the IAD timeframe.

The trial court must expedite this matter and submit its findings no later than twenty-one days after the date of this order, whether in writing or on the record pursuant to R. 1:7-4(a). No extensions of this timeframe shall be granted without leave of this court.

Remanded for specific findings. We retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION