UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:01CR00058
	)	
v.	)	**OPINION AND ORDER**
	)	
CHRIS BARRY KETRON,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for the United States; Nancy C. Dickenson, Lebanon, Virginia, for the Defendant.

The defendant has filed a motion to dismiss contending that the delay in bringing him to trial has violated the Speedy Trial Act and the Constitution. For the reasons stated below, the motion will be denied.

I

An indictment from this court was returned against the defendant on August 9, 2001, charging him with drug offenses. At that time, the defendant was serving a state sentence at the Washington County Jail in Abingdon, Virginia. On April 24, 2002, the defendant was transported to Wisconsin to serve a state sentence there. Subsequent to this transfer, on May 1, 2002, the United States obtained a writ of

habeas corpus ad testificandum for the defendant to testify in this court in a different case and he was transported in federal custody to this district to testify pursuant to the writ. A probation officer of this court interviewed the defendant in late August of 2002 while he was in federal custody. The defendant was then returned to Wisconsin to serve the remainder of his state prison term and in November of 2002, the defendant returned to Virginia to serve the remainder of his state prison term here. On April 15, 2003, after completing his Virginia sentence, the defendant was brought before a magistrate judge of this court for an initial appearance pursuant to the August, 9, 2001, federal indictment. The defendant has now moved to dismiss the indictment, asserting violations of both the Speedy Trial Act and the right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution.

II

The Speedy Trial Act, 18 U.S.C.A. §§ 3161-3174 (West 2000 & Supp. 2003), requires that a defendant be brought to trial within seventy days of either the return of the indictment or the defendant's first appearance before a judicial officer, "whichever date last occurs." 18 U.S.C.A. § 3161(c)(1). The defendant first asserts that his interview with a federal probation officer in August of 2002 was his first appearance before a "judicial officer" and that because seventy days have passed

since that appearance, the indictment should be dismissed. However, a probation officer is not a "judicial officer." *See* 18 U.S.C.A. § 3172(1) (providing that a "judge" or "judicial officer" as used in the Speedy Trial Act means any United States magistrate judge or United States district judge); *United States v. Johnson,* 48 F.3d 806, 808-09 (4th Cir. 1995) (holding that the law does not assign probation officers any judicial functions and such functions cannot be delegated to them). The defendant's "first appearance" instead occurred on April 15, 2003, when he appeared before a magistrate judge. As the defendant's trial has been set for June 19, 2003, a date which is within seventy days of this initial appearance, I do not find a violation of the Speedy Trial Act on this ground.

The defendant next asserts a violation of the provision of the Speedy Trial Act that requires the attorney for the government, when she knows that a person charged with an offense is incarcerated, to either obtain the defendant or file a detainer with the person having custody of the defendant. *See* 18 U.S.C.A. § 3161(j)(1). The Act also requires the person having custody of the defendant to advise him of his right to demand a trial. *See id.* Absent such a demand for trial, the government is under no obligation to prosecute a defendant while he is being held by another sovereign. The defendant did not demand a trial at any time, but he contends that he did not demand a trial because he had no knowledge of the federal indictment.

When a detainer is filed by the government, normally there is attached a Speedy Trial Act notification form, thus giving the defendant notice of his right to demand a trial. *See United States v. King*, 909 F. Supp. 369, 374 (E.D. Va. 1995). The defendant here has presented no evidence that the government failed to file a detainer or failed to attach a notification form. The defendant asserts only that he did not know of the indictment. While the Speedy Trial Act is silent as to who bears the burden of proof for a violation of § 3161(j), the Act places the burden on the defendant when a motion to dismiss is made on other grounds. *See* 18 U.S.C.A. § 3162(a)(2). I do not find that the defendant has presented sufficient evidence to show a violation of § 3161(j). Further, even if a violation of § 3161(j) had been established, dismissal of the indictment is not an available remedy. *See King*, 909 F. Supp. at 376 (holding that discipline of the government attorney is the only remedy available for a violation of § 3161(j)). Accordingly, the defendant's Motion to Dismiss on this ground is denied.

Finally, the defendant contends that his delayed trial violates his Sixth Amendment right to a speedy trial. In determining if such a violation exists, I must examine four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the extent of any

prejudice to the defendant. *See Barker v. Wingo,* 407 U.S. 514, 530 (1972); *United States v. Thomas*, 55 F.3d 144, 148 (4th Cir. 1995).

"[T]he lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States,* 505 U.S. 647, 652 n.1 (1992) (citation omitted). Here, the defendant's initial appearance before the magistrate was approximately one year and seven months from the date of the indictment. This factor thus weighs in favor of the defendant.

There is no direct evidence before the court as to the reason for the government's delay in bringing the defendant to trial. However, the defendant's initial appearance in this case occurred immediately after the defendant completed his Wisconsin and Virginia prison sentences. "The need to allow [the defendant] to be prosecuted by the State without interference by the federal government" has been found to be a valid reason for delay. *See Thomas*, 55 F.3d at 150. "To do otherwise would be to mire the state and federal systems in innumerable opposing writs, to increase inmate transportation back and forth between the state and federal systems with consequent additional safety risks and administrative costs, and generally to throw parallel federal and state prosecutions into confusion and disarray." *Id.* at 150-51. Accordingly, this factor weighs in favor of the government.

As noted above, at no time did the defendant request a speedy trial in this case. While this factor is not dispositive, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker,* 407 U.S. at 532.

Finally, I do not find that the delay has unfairly prejudiced the defendant. The defendant asserts that the delay is prejudicial because he was not able to observe the proceedings against his alleged accomplices. However, the records of those proceedings are available to the defendant. This reason, standing alone, is insufficient to establish prejudicial delay. *See id.* at 534 (holding that prejudice minimal where, despite five-year delay in trial, no witnesses died, became unavailable, or suffered from memory lapse). While the Supreme Court has held that in certain circumstances actual prejudice need not be shown, those facts do not apply here. *See Doggett,* 505 U.S. at 657 (holding that no actual prejudice need be shown if the government is sufficiently culpable).

Accordingly, the only factor weighing in favor of the defendant is the delay of nineteen months and this factor alone is insufficient to rise to the level of a Sixth Amendment violation.[1] *See Barker,* 407 U.S. at 534 (holding that where defendant

[1] The Interstate Agreement on Detainers Act, 18 U.S.C.A. app. 2 (West 2000), ("IAD") also applies in this case. It requires the state or federal government to bring a prisoner to trial on a detainer within 180 days after a prisoner gives notice to the receiving state that he wants a trial. *See id.* at § 2, art. III (a). There is no violation of this provision as the defendant did not demand a trial at any time. The IAD further provides that "[i]n

was not seriously prejudiced by delay of more than five years, defendant's Sixth Amendment right to a speedy trial not violated).

III

For the foregoing reasons, it is **ORDERED** that the defendant's Motion to Dismiss [Doc. 15] is **DENIED**.

ENTER: June 4, 2003

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United States District Judge

respect of any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state . . . ." *Id.* at § 2, art. IV (c). While the defendant did return to federal custody, or the "receiving state," post-indictment, he returned pursuant to a writ of habeas corpus ad testificandum, and not to stand trial on his indictment. Under the plain language of the IAD, returning to the "receiving state" to testify in a separate case does not invoke its protections.