STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-0811-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. AUKES,

Defendant-Appellant.

Appeal From The Judgment Entered In The Circuit Court For Walworth County, The Honorable James L. Carlson, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

AUKES DID NOT WAIVE HIS RIGHT TO BE TRIED WITHIN 120 DAYS OF HIS RETURN UNDER TITLE IV OF THE INTERSTATE AGREEMENT ON DETAINERS.

The state claims that Aukes waived reliance upon the 120-day period under Article IV merely because his counsel did not correct the state's erroneous view of the applicable time periods and, after his trial was delayed pending the state's interlocutory appeal, he asked leave to await decision on that appeal in a Colorado prison rather than in the Walworth County Jail. State's Brief at 7-15. While the state is correct that

a defendant may waive his rights under the IAD, Aukes plainly did not do so here. Moreover, even if Aukes could be found to have waived reliance upon the 120-day rule of Article IV, which is all the state asserts, he still is entitled to dismissal under the 180-day rule of Article III. The state's waiver argument goes only to the applicable IAD speedy-trial period and not to the includability of any periods of delay.

First, however, the state's failure to raise its waiver/judicial estoppel argument in the trial court when it had the chance waived it. *State v. Brown*, 96 Wis.2d 258, 291 N.W.2d 538, 541 (1980); *State v. Cetnarowski*, 166 Wis.2d 700, 480 N.W.2d 790, 792 (Ct. App. 1992).

On its "merits," the state's waiver argument likewise fails. The state's pre-8/16/92 argument relies entirely upon a misstatement or misreading of the record. Nowhere did Aukes' trial counsel "agree" that the 180-day provisions of Article controlled this case. Rather, he merely noted the prosecutor's position on that matter.

After the prosecutor stated that the cases "ha[d] to be tried before September 3 under the interstate detainer act," the trial court misconstrued that as a speedy trial demand (R69:33). Aukes' trial counsel merely corrected the court concerning the prosecutor's assertions:

> MR. RAYMOND: There's been no speedy trial demand made, however, what Ms. Bachmen has indicated is that the uniform extradition enactment provides time limits within which the case has to be tried, and those time limits fall -- I

think she said September 4.

(R69:33-34). This statement at most acknowledged the state's calculation of IAD time; counsel neither agreed it was correct or controlling nor waived the right to argue that a different time period was controlling.

Of course, even a statement of agreement would not constitute the type of affirmative request inconsistent with one's IAD rights necessary for a finding of waiver. *Compare State v. Brown*, 118 Wis.2d 377, 348 N.W.2d 593, 598 (Ct. App. 1984) (waiver because defendant affirmatively requested continuance and did not object when that continuance placed trial beyond IAD time limits). Aukes requested nothing; he simply did not point out the state's error. This is not waiver. *See, e.g., People v. Allen*, 744 P.2d 73 (Colo. 1987); Aukes' Brief at 20-21 & cases cited.

Nor can such inaction form the basis for judicial estoppel. *Cf. Coconate v. Schwanz*, 165 Wis.2d 226, 477 N.W.2d 74, 75 (Ct. App. 1991) (failure to disclose note in prior action did not constitute the taking of a position on the legal validity of that note for judicial estoppel purposes). Judicial estoppel does not commit a party to a particular position until that party at least specifically asks the court to act in reliance upon that position. *See State v. Fleming*, 181 Wis.2d 546, 510 N.W.2d 837, 841 (Ct. App. 1993) (no judicial estoppel barring state from requesting lesser-included offense instruction; state's prior contrary state-

ments did not commit it to any particular course of conduct). Aukes did not do so here.

The state's post-8/16/92 waiver argument is frivolous. *See* State's Brief at 11-13. Aukes' request to be returned to Colorado pending the state's interlocutory appeal neither implicitly nor explicitly waived his IAD speedy-trial rights.

When Aukes asked to be returned to Colorado on August 24, 1992, the trial court already had ordered a continuance, over his objection, for the duration of that appeal. Aukes' petition dealt solely with the question of where he would be incarcerated pending that preexisting delay, not when he would be tried (*see* R39). Aukes merely attempted to make the best of a bad situation after his objections to the continuance already had been denied. That petition would not have delayed his trial a single day even if it had not been denied.

Aukes' limited offer to waive his "antishuttling" rights under the IAD should the petition be granted (R39:1), *see* Wis. Stat. §976.05(3)(d) & (4)(e),[1] also cannot be transformed into a waiver of his separate IAD speedy-trial rights, especially since the transfer to Colorado which served

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[1] Absent a waiver, the IAD requires dismissal with prejudice of any charges not resolved prior to the detainee's return to his or her original place of incarceration. Wis. Stat. §976.05(3)(d) & (4)(e). These provisions are intended to avoid the "shuttling" of inmates back and forth in such a manner as would undermine the purposes of the IAD.

as a precondition to the waiver was denied at the state's insistence (R40; R41).

II.

THE TRIAL COURT ERRED IN APPLYING THE 180-DAY PERIOD UNDER ARTICLE III OF THE IAD.

Although the facts are undisputed and demonstrate that the state first invoked Article IV of the IAD, Aukes' Brief at 13-16, the state somehow claims that Aukes must be relegated to the provisions of Article III. State's Brief at 16-22. The state is wrong.

The issue of which article applies under the IAD turns not on who took the first "formal" step toward invoking that statute, but rather on who in fact succeeded in invoking it. Here, the state first invoked the procedures under Article IV on March 5, 1992, when its written request was "present[ed] ... to the appropriate authorities of the state in which the prisoner [was] incarcerated." Wis. Stat. §976.05(4)(a). *See* Aukes' Brief at 14-15 & cases cited. It is that act which first imposed obligations upon both Aukes and the State of Wisconsin under the IAD.[2] Prior to that time, neither was required to do anything.

The state is correct that Aukes asked the Colorado

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[2] Contrary to the state's curious suggestion, State's Brief at 21-22, it is the invocation of the IAD itself which controls here, not the time when the specific speedy trial periods begin to run. *See* Aukes' Brief at 14-16.

authorities sometime between February 26 & 28, 1992, to put together the documentation which would be necessary to invoke Article III. Although that request placed an obligation upon the Colorado authorities to act promptly, Wis. Stat. §976.05(3)(b), it imposed no obligation upon Wisconsin and did not itself invoke Article III. *State v. Whittemore*, 166 Wis.2d 127, 479 N.W.2d 566, 569-70 (Ct. App. 1991), *rev. denied*, 482 N.W.2d 107 (1992).

Yet, even if the state were correct that we look only to whomever takes the first "statutorily-specified step," and thus ignore when the requirements for invoking the IAD are in fact completed, the state still loses. A prerequisite for invoking Article IV is approval and transmission of the state's request by the court having jurisdiction over the untried charges, here the Circuit Court for Walworth County. Wis. Stat. §976.05(4)(a). The state requested such approval by letter dated February 17, 1992, and Judge Carlson granted it on February 19, 1992 (*see* R38 (Attachments 2 & 3)), at least a week before Aukes took any action whatsoever.

The state's suggestion that Colorado's failure to take Aukes before a judge somehow turns this into an Article III proceeding, State's Brief at 20-21, is just silly. Aukes waived any right to such a hearing. Aukes' Brief at 15 n.9. Moreover, failure to hold a hearing simply reflects Ms. Howard's erroneous legal conclusion that Article III applied and has no legal bearing here. Colorado's erroneous denial of

certain rights due Mr. Aukes certainly does not justify this Court's denying him other rights under the IAD. *Cf. Stroble v. Anderson*, 587 F.2d 830, 838 (6th Cir. 1978) ("Art. VI was written as a protective measure for a transferred prisoner. It cannot appropriately be turned from a shield for the defendant into a sword for the prosecutor"), *cert. denied*, 440 U.S. 940 (1979).

III.

REGARDLESS WHAT TIME PERIOD APPLIES, THE TRIAL COURT ERRED IN DENYING AUKES' MOTION TO DISMISS.

The state concedes that, if Article IV's 120-day speedy trial period applies here, Aukes is entitled to dismissal with prejudice. State's Brief at 22-23. Aukes also is entitled to dismissal even if Article III applies because more than 180 days of delay are chargeable to the state. Indeed, the state either expressly or implicitly concedes that over 200 days of delay are chargeable against it.

The state first concedes, as it must, *see* Aukes' Brief at 18-21, that the 121-day period measured from April 18, 1992 through August 17, 1992 is includable, State's Brief at 22-23, and presumably concedes the additional 43 days between March 6, 1992 and April 18 for the same reasons.[3] The

[3] The 180-day period under Article III began March 6, 1992, when the state received Aukes' request for disposition. *Whittemore*, 479 N.W.2d at 569-70. Wisconsin received Aukes on April 18, 1992 (R71:8).

state also fails even to discuss Aukes' argument for inclusion of the additional 42 days caused by the state's wholly unnecessary and unreasonable delay in initiating the interlocutory appeal. Aukes' Brief at 25-27; *see Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (that which is not controverted is deemed conceded). The unchallenged period of delay thus totals 204 days.

Because the state concedes sufficient includable delay to mandate dismissal, its objections to inclusion of particular additional time periods are irrelevant. They are also wrong.

Post-Appeal Delay.--The August 18, 1992 continuance pending the state's interlocutory appeal by its express terms ended on October 7, 1993, when the trial court received "notice of the Appeal's [sic] Court that that matter ha[d] been decided" (R71:45).[4] The trial court did not then or ever grant an additional continuance under the IAD.

Even if that continuance could be misconstrued as extending until decision on the suppression motion, the trial court orally vacated its prior order and denied suppression on October 8, 1993 (R73:29-30). Contrary to the state's curious suggestion, State's Brief at 24, no written document was necessary to make that oral order effective. *State ex rel.*

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[4] The circuit court received the remittitur on October 7, 1993 (R46).

Hildebrand v. Kegu, 59 Wis.2d 215, 207 N.W.2d 658, 659 (1973). Reducing an order to writing is simply a ministerial task necessary to invoke appellate jurisdiction. *Id.*

The state's assertion that Aukes on October 8, 1993, "request[ed]" or "selected" the November 29, 1993 trial date, State's Brief at 24-25, distorts the record. Aukes continued his insistence, as he had throughout these proceedings, on resolving the matter as quickly as possible (R73:31-33). Yet, Aukes' trial counsel had met with the court clerk and found that the earliest date the trial court had available was November 29 (R73:33). Under these circumstances, counsel's relaying that information to the trial court cannot reasonably be construed as an affirmative request for a trial date inconsistent with the assertion of Aukes' IAD rights. *See* Aukes' Brief at 20-22 & cases cited.

The state's one-sentence assertion that the trial court on November 29, 1993, properly reformulated its August 18, 1992 continuance to exclude all time prior to trial, State's Brief at 25, is supported by neither authority nor logic and thus should be ignored. *See, e.g., W.H. Pugh Coal Co. v. State*, 157 Wis.2d 620, 460 N.W.2d 787, 792 (Ct. App. 1990) (Court need not address undeveloped argument), *rev. denied*, 464 N.W.2d 423 (1990); *State v. Shaffer*, 96 Wis.2d 531, 292 N.W.2d 370, 378 (Ct. App. 1980) (Court will not consider arguments unsupported by references to legal authority).

The original continuance by its terms expired upon return of the case from the appellate courts. No continuance for the additional period was granted "for good cause" under the IAD on October 8, 1993, and the trial court was powerless to grant one retroactively. *See* Aukes' Brief at 18-20 & cases cited. As noted in Aukes' Brief at 22 n.11, mere court congestion, the only reason suggested by the record for the delay, does not provide "good cause" unless the court first makes an attempt to transfer the trial to a different judge. *E.g., Haigler v. United States*, 531 A.2d 1236, 1244 (D.C. App. 1987); *State v. Taylor*, 555 N.E.2d 649, 652-53 (Ohio App. 1988). The trial court made no such effort here.

Delay During Interlocutory Appeal.--The state may be correct that Aukes' trial counsel also was negligent in not finding the order authorizing the court commissioner to issue search warrants. *See* State's Brief at 26-27. The fact remains, however, that the burden of compliance with the IAD is upon the state. *See* Aukes' Brief at 20-21. The costs of inattentiveness thus fall upon the state, not the defendant, *see State v. Arwood*, 612 P.2d 763, 765 (Or. App. 1980); *People v. Office*, 337 N.W.2d 592, 595 (Mich. App. 1983), even when both may be deemed equally at fault, *cf. Dennett v. State*, 311 A.2d 437, 442 (Md. App. 1973) (state's unpreparedness not "good cause" for IAD continuance although defense unpreparedness is "good cause").

The state's assertion that the suppressed evidence

was somehow necessary to its case is belied by both the facts, *see* Aukes' Brief at 24-25, and need not be discussed further. Also, as previously noted, the state did not even attempt to justify its outrageous, 42-day delay in filing a simple notice of appeal and thus should be deemed to have conceded inclusion of that time period. *Charolais Breeding Ranches, supra.*

CONCLUSION

For these reasons, as well as for those set forth in his opening brief, Aukes' conviction should be reversed and the charges against him dismissed. If the charges are not dismissed, the Third Amended Judgment must be reversed to the extent of striking the required payment of crime lab fees.

Dated at Milwaukee, Wisconsin, September 12, 1994.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a mono-spaced font. The length of this brief is 11 pages.

Robert R. Henak

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