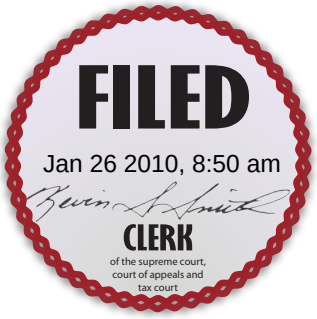

ATTORNEY FOR APPELLANT:

THOMAS M. THOMPSON
Thompson Law Office
Connersville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEVEN E. DURHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A01-0905-CR-234
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0704-FB-63

January 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Steven Durham appeals his convictions for possession of anhydrous ammonia as a class D felony,[1] possession or sale of precursors as a class D felony,[2] and criminal recklessness as a class B misdemeanor.[3] Durham raises two issues, which we revise and restate as:

I. Whether the trial court erred by denying Durham's motion for discharge under Ind. Criminal Rule 4(C); and

II. Whether the evidence is sufficient to sustain Durham's convictions.

We affirm.

The facts most favorable to the convictions follow. In April 2007, Angie Gabbard resided in Connersville, Indiana. Durham placed a "small travel trailer" or "camper" on Gabbard's property and stayed in the trailer most of the time. Transcript at 11-12. Gabbard, a methamphetamine user, purchased lithium batteries, pseudoephedrine, lantern fuel, coffee filters, and mason jars for Durham so that he could produce methamphetamine. Gabbard allowed Durham to keep the trailer on her property because he exchanged methamphetamine as a form of payment for rent.

On April 8, 2007, there was an explosion and the trailer "went up in flames." Id. at 81. Durham ran across Gabbard's yard. The police received a call regarding the fire and explosion. Connersville Police Officer Dax Gunder arrived at the scene and saw a

[1] Ind. Code § 35-48-4-14.5 (Supp. 2006).

[2] Id.

[3] Ind. Code § 35-42-2-2 (Supp. 2006).

house on fire and a trailer that "was fully engulfed." Id. at 10-11. The fire appeared to be spreading from the trailer. Officer Gunder encountered Gabbard and Amy Schafer, Gabbard's sister, at the house. Gabbard told Officer Gunder that others had left.

The odors that were given off by the burning trailer were "rancid." Id. at 15. A fireman removed a plastic trash bag from underneath the trailer using a pipe pole, and the bag contained coffee filters, paper towels, napkins, bottles, tubing, a can of Coleman fuel, and waste products, which are all items involved in the production of methamphetamine. The police discovered a plastic bottle under the trailer that contained hydrochloric acid, a waste product of pills commonly referred to as "pill dough" on the ground in the area around the trailer, isopropyl alcohol, and an "HCL generator" that contained acid and salt. Id. at 34, 113. The police also discovered two twenty-pound propane style tanks within the trailer that contained anhydrous ammonia, which is commonly used in the manufacture of methamphetamine. Lastly, the police discovered a reaction vessel in a shed on the property. The vessel contained an ice thermic reaction with unspent lithium floating on top of the reaction, which is "a high hazard for explosive properties" and indicative of an active methamphetamine lab. Id. at 127. An undercover narcotics investigator for the Indiana State Police determined that methamphetamine was being produced.

On April 26, 2007, the State charged Durham with: Count I, dealing in methamphetamine as a class B felony; Count II, possession of methamphetamine as a class D felony; Count III, possession of anhydrous ammonia as a class D felony; Count

IV, possession of two or more precursors with the intent to manufacture methamphetamine as a class D felony; Count V, possession or sale of precursors as a class D felony; Count VI, maintaining a common nuisance as a class D felony; Count VII, dumping a controlled substance as a class D felony; and Count VIII, criminal recklessness as a class B misdemeanor. On April 27, 2007, an arrest warrant was issued for Durham. Durham fled the state and was not arrested until February 27, 2008.

The trial date was set for May 5, 2008. The chronological case summary ("CCS") does not contain an entry for May 5, 2008, but an entry dated May 20, 2008, states "ORDER SETTING TRIAL: Trial continued to July 28, 2008. [Durham] and counsel failed to appear ready for trail [sic] on May 5, 2008." Appellant's Appendix at 3. A CCS entry for August 13, 2008, indicated that Durham and his counsel "failed to appear ready for trial" on July 28, 2008, and rescheduled the trial for November 3, 2008. Id. A CCS entry for November 18, 2008, stated that Durham and his counsel "failed to appear ready for trial" on November 3, 2008, and rescheduled the trial for January 5, 2009. Id.

On December 9, 2008, Durham filed a motion for release for delay in trial.[4] Durham requested release under "trial rule 4-A" and argued that he "has been incarcerated for over 180 days with no delays on his own behalf, therefore he ask [sic] the court to grant his release on recognances [sic] so that he can adequately prepare for

[4] It appears that Durham filed this motion *pro se*. Although the motion states, "Comes now the defendant, Steven E. Durham, with his attorney, Stephen S. Gotllieb," the motion is handwritten and states that a copy was sent to "Attorney – Stephen S. Gottlieb." Appellant's Appendix at 140.

trial." Appellant's Appendix at 140. On December 12, 2008, the trial court denied Durham's motion because it was not filed by Durham's attorney.

On December 30, 2008, the State filed a motion to reschedule the trial, which the trial court granted. The trial court reset the trial for March 16, 2009. On January 5, 2009, Durham filed a Notice of Objection to Continuance and a Motion for Discharge from Custody. Durham argued that "CR 4(A) calls for release from custody in the case of a defendant who has been held in custody for more than six (6) months without trial, except where he has moved for continuance or delays were attributable to him." Id. at 134. The trial court denied Durham's motion for discharge because "the only continuance from January 5, 2009 is charged to the State" and "all other charges are to [Durham]." Id. at 131.

On March 4, 2009, Durham filed a motion for discharge under Ind. Criminal Rule 4(C). On March 5, 2009, after a hearing on Durham's motion for discharge, the trial court denied Durham's motion.

On March 16, 2009, the State filed an amended information charging Durham with: Count I, dealing in methamphetamine as a class B felony; Count II, possession of methamphetamine as a class D felony; Count III, possession of anhydrous ammonia as a class D felony; Count IV, possession or sale of precursors as a class D felony; Count V, maintaining a common nuisance as a class D felony; Count VI, dumping a controlled substance as a class D felony; and Count VII, criminal recklessness as a class B misdemeanor.

On March 16, 2009, a jury trial was conducted. The jury convicted Durham of: Count III, possession of anhydrous ammonia as a class D felony; Count IV, possession or sale of precursors as a class D felony; and Count VII, criminal recklessness as a class B misdemeanor.[5] On April 14, 2009, the trial court sentenced Durham to three years each for Count III, possession of anhydrous ammonia as a class D felony, and Count IV, unlawful possession or sale of precursors as a class D felony. The trial court sentenced Durham to 180 days for Count VII, criminal recklessness as a class B misdemeanor. The trial court ordered that the sentences be served consecutively.

I.

The first issue is whether the trial court erred by denying Durham's motion for discharge under Ind. Criminal Rule 4(C).[6] Durham argues that he should be discharged because the State failed to bring him to trial within the one-year period under Ind. Criminal Rule 4(C). Ind. Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that

[5] The jury found Durham not guilty of: Count I, dealing in methamphetamine as a class B felony, and Count V, maintaining a common nuisance. The jury was unable to reach a verdict as to Counts II and VI, which were later dismissed.

[6] Durham does not appeal the trial court's denial of his motion for release for delay in trial filed on December 9, 2008, or Motion for Discharge from Custody pursuant to Ind. Criminal Rule 4(A) filed on January 5, 2009.

> a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested but allows for extensions of that time for various reasons. Ritchison v. State, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The one-year period is extended by any delay due to: (1) a defendant's motion for a continuance; (2) a delay caused by the defendant's act; or (3) congestion of the court calendar. Isaacs v. State, 673 N.E.2d 757, 762 (Ind. 1996). "A defendant extends the one-year period by seeking or acquiescing in delay resulting in a later trial date." Pelley v. State, 901 N.E.2d 494, 498 (Ind. 2009), reh'g denied. "The defendant's failure to object timely will be deemed acquiescence in the setting of that date." Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999), reh'g denied. When a motion for discharge for an Ind. Criminal Rule 4 violation is made prematurely, it is properly denied. Stephenson v. State, 742 N.E.2d 463, 487, n.21 (Ind. 2001), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002). The determination of whether a particular delay in bringing a defendant to trial violates the speedy trial guarantee depends on the specific circumstances of the case. Payton v. State, 905 N.E.2d 508, 511 (Ind. Ct. App. 2009), trans. denied.

Durham appears to argue that the record is silent concerning any delays and that no delays were caused by him. Durham also argues that he could not have appeared for

trial without the aid of the court and that "[t]herefore, the docket entries that indicate [Durham] failed to appear ready for trial are simply an attempt by the trial court to attribute the delay to [Durham] rather than the State." Appellant's Brief at 13.

Initially, we will address Durham's argument to the extent that he suggests that the CCS is inaccurate. In Gibson v. State, 910 N.E.2d 263, 267 (Ind. Ct. App. 2009), the defendant contended that the CCS showing that he was granted continuances was not an accurate record of what occurred. The court held:

> In the analogous situation in which a defendant challenges a trial court's finding of court congestion as a reason for trying him outside the one-year period of Rule 4(C), we have held that although a trial court's finding of court congestion is presumed to be valid, a defendant may overcome this presumption by demonstrating that the finding of congestion was factually or legally inaccurate.

Id. (citing Alter v. State, 860 N.E.2d 874, 877 (Ind. Ct. App. 2007)).

Here, at the hearing on Durham's motion for discharge under Ind. Criminal Rule 4(C), the trial court asked Durham's attorney, "[I]s there anything you'd like to say in addition to your motion?" Transcript at 4. Durham's attorney stated, "No sir I think the Motion speaks for itself and sites [sic] the appropriate law. We just ask the Court to examine that and rule accordingly." Id. Durham's motion stated in part:

> 2. Trial by jury was assigned on May 5, 2008, but not until May 21, 2008 did the Court conclude that [Durham] and his counsel had failed to appear ready for trial on that date.
>
> 3. Similarly, the Court then reassigned the trial date to July 28, 2008, and in an August 13, 2008 CCS entry noted that the defendant and his counsel failed to appear ready for trial on the July date. The trial was reassigned on November 3, 2008.

4. In a November 18, 2008 [sic] the Court noted that [Durham] and his counsel failed to appear ready for trial on November 3, 2008 and reset the matter for trial on January 5, 2009.

5. On December 22, 2008 the Court issued a jury summons for the January 5 trial date.

6. On December 30, 2008 the State filed a Motion to Reschedule Trial, and the Court reset the trial for March 16, 2009. [Durham]'s counsel has filed an objection to that continuance.

7. At all times from February 27, 2008 to the present, [Durham] has been in custody in the above cause and subject to be brought to trial either on the State's or the Court's own motion, and subject to be physically transported to Court for that purpose.

8. In advance of none of the scheduled trial dates did the State request the calling of a jury, nor did the Court do so on its own motion.

9. Neither [Durham] nor his counsel has moved for any continuances in this case.

Appellant's Appendix at 126. Based merely upon the allegations in Durham's motion, we cannot say that Durham overcame the presumption that the trial court's entries were valid by demonstrating that the entries were factually or legally inaccurate. Cf. Gibson, 910 N.E.2d at 267-268 (holding that the defendant's testimony and the trial court's statements illustrated that the CCS entries were factually inaccurate).

We also observe that Durham acquiesced in each of the delays caused by his failure to appear ready. Durham did not timely object to the trial court's CCS entries that indicated that he failed to appear ready and in which the court rescheduled the trial date.

Rather, Durham did not raise any argument regarding the delays until his January 5, 2009 motion for discharge.

Having concluded that Durham has failed to overcome the presumption that the trial court's CCS entries were valid and that Durham acquiesced in the delays, we turn to the calculation of the delays attributed to Durham. Durham was arrested on February 27, 2008. Thus, the State was required to bring Durham to trial by February 27, 2009, unless the one-year period was extended by delays not chargeable to the State. The trial date was set for May 5, 2008. While the CCS does not contain an entry for May 5, 2008, an entry dated May 20, 2008, states "ORDER SETTING TRIAL: Trial continued to July 28, 2008. [Durham] and counsel failed to appear ready for trail [sic] on May 5, 2008." Appellant's Appendix at 3. While Durham suggests that the record is silent concerning the reason for the delay, the CCS indicates that Durham and his counsel "failed to appear ready" for trial.[7] This continued the one-year period by sixty-eight days.[8] (Cumulative extension (hereinafter, "C.E.") 68 days).

[7] In support of his argument, Durham cites Schwartz v. State, 708 N.E.2d 34 (Ind. Ct. App. 1999). In Schwartz, the court held that "[w]here the record is silent concerning the reason for a delay, the delay is not attributable to the defendant." 708 N.E.2d at 37. The court also held that "assuming a pretrial conference was held, and further assuming [the defendant] did not appear, we fail to see why a trial date could not have been set in his absence." Id. Here, unlike in Schwartz, the record is not silent concerning the reason for the delay. Rather, the CCS states that Durham and his counsel "failed to appear ready" for trial. Also, unlike in Schwartz, the record does not reveal that Durham and his counsel failed to appear but that they "failed to appear ready" for trial. Thus, we do not find Schwartz instructive.

Durham also cites Haston v. State, 695 N.E.2d 1042 (Ind. Ct. App. 1998). To the extent that Durham relies upon Haston to suggest that not all of the time from the delays should be attributed to him, Durham does not develop a cogent argument. Consequently, this issue is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391,

There is no entry in the CCS for July 28, 2008, but an entry for August 13, 2008, states: "TRIAL RESET: [Durham] and counsel failed to appear ready for trial on July 28, 2008. Trial is reset for November 3, 2008 at 9:00 A.M." Appellant's Appendix at 3. This extended the deadline by ninety-eight days.[9] (C.E. 166 days).

Similarly, there is no entry in the C.C.S. for November 3, 2008, but an entry on November 18, 2008, states: "TRIAL RESET: [Durham] and counsel failed to appear ready for trial on November 3, 2008. Trial is reset for January 5, 2009 at 9:00 A.M." Appellant's Appendix at 3. This extended the deadline by sixty-three days.[10] (C.E. 229 days).

The above delays extended the one-year limit by 229 days to October 14, 2010. We conclude that Durham's motion for discharge on March 4, 2009, was premature and his right under Ind. Criminal Rule 4(C) to be brought to trial within one year of being charged has not been violated. Thus, the trial court properly denied Durham's motion for discharge under Ind. Criminal Rule 4(C). See, e.g., Cook v. State, 810 N.E.2d 1064, 1068 (Ind. 2004) (holding that defendant's right under Ind. Criminal Rule 4(C) was not violated).

II.

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398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

[8] This represents the delay between May 5, 2008, and July 28, 2008.

[9] This represents the delay between July 28, 2008, and November 3, 2008.

[10] This represents the delay between November 3, 2008, and January 5, 2009.

The next issue is whether the evidence is sufficient to sustain Durham's convictions for possession of anhydrous ammonia as a class D felony, possession or sale of precursors as a class D felony, and criminal recklessness as a class B misdemeanor. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of possession of anhydrous ammonia as a class D felony is governed by Ind. Code § 35-48-4-14.5(c), which provides that "[a] person who possesses anhydrous ammonia or ammonia solution (as defined in IC 22-11-20-1) with the intent to manufacture methamphetamine or amphetamine, schedule II controlled substances under IC 35-48-2-6, commits a Class D felony." The offense of possession or sale of precursors as a class D felony is governed by Ind. Code § 35-48-4-14.5(e), which provides that "[a] person who possesses two (2) or more chemical reagents or precursors with the intent to manufacture a controlled substance commits a Class D felony." The offense of criminal recklessness as a class B misdemeanor is governed by Ind. Code § 35-42-2-2, which provides that "[a] person who recklessly, knowingly, or intentionally performs . . . an act that creates a substantial risk of bodily injury to another person . . . commits criminal recklessness" as a class B misdemeanor.

Durham does not challenge a specific conviction or element of his convictions. Rather, Durham argues:

> The Defendant did not reside at the residence where the alleged meth lab was found. He was not found at the scene when the police arrived. Angie Gabbard did live there. She admitted that she was a methamphetamine user. She admitted that she purchased some of the precursors used to manufacture methamphetamine. However, she and her sister, who lived where the alleged meth lab was found, also testified that the Defendant was involved in making methamphetamine. That is the State's entire case against the Defendant. The evidence against the Defendant was insufficient to convict him of these crimes.

Appellant's Brief at 18. Thus, Durham appears to argue that the evidence is insufficient because he did not reside at the residence, he was not found at the scene when the police arrived, and the State's case is supported merely by the testimony of Gabbard and Schafer. To the extent that Durham suggests that the evidence is insufficient on these grounds, we conclude that Durham's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817.

Based upon our review of the record and the facts most favorable to the conviction, we conclude that the facts that Durham did not reside at the residence and was not found at the scene when the police arrived do not affect the conclusion that evidence of probative value exists from which the jury could have found Durham guilty of possession of anhydrous ammonia as a class D felony, possession or sale of precursors as a class D felony, and criminal recklessness as a class B misdemeanor. See Richardson v. State, 856 N.E.2d 1222, 1228-1229 (Ind. Ct. App. 2006) (holding that the evidence

was sufficient to support the jury's conclusion that the defendant was guilty of possession of precursors), trans. denied.

For the foregoing reasons, we affirm Durham's convictions and sentences for possession of anhydrous ammonia as a class D felony, possession or sale of precursors as a class D felony, and criminal recklessness as a class B misdemeanor.

Affirmed.

MATHIAS, J., and BARNES, J., concur.