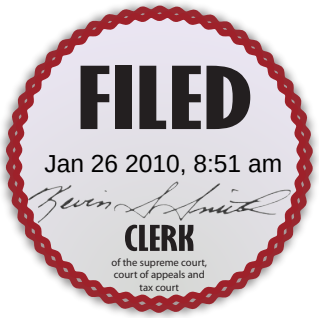

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IN THE
COURT OF APPEALS OF INDIANA

SHAUN L. STEELE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0908-CR-469
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0903-CM-169

January 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Shaun Steele ("Steele") was convicted in Elkhart Superior Court of Class A misdemeanor check deception. He appeals his conviction raising four issues, but we address only the following three:

I. Whether Steele's right to a speedy trial was violated;

II. Whether the trial court abused its discretion when it denied Steele's demand for a jury trial; and

III. Whether sufficient evidence supports his Class A misdemeanor check deception conviction.

Concluding that Steele timely filed his demand for a jury trial, we reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

On August 18, 2007, Steele presented check number 1004 in the amount of $57.74 to a cashier at a Menards store in Elkhart, Indiana. Steele's name and address were listed on the check. The cashier verified Steele's phone number and noted his date of birth on the check. The check was not honored by the financial institution upon which it was drawn. A certified letter was sent to Steele to notify him that his check had been dishonored. Steele never paid the debt owed to Menards.

Steele was charged with Class A misdemeanor check deception on December 7, 2007. When Steele failed to appear for a hearing on January 18, 2008, the Elkhart City Court issued a warrant for Steele's arrest. The warrant was served on February 19, 2009. Steele's omnibus date was set for February 23, 2009. Steele filed a motion for speedy trial on March 19, 2009, and the Elkhart City Court scheduled Steele's trial to begin on

April 21, 2009. However, the cause was transferred to Elkhart Superior Court after Steele requested a jury trial.

On March 30, 2009, the trial court determined that Steele's request for a jury trial was not timely filed, and his request was denied. Steele's motions for dismissal pursuant to Criminal Rule 4(B) were also denied. Steele's bench trial was held on June 25, 2009, and Steele proceeded pro se. Steele attempted to raise an alibi defense at trial. The trial court noted that Steele's evidence did not support his defense, and found him guilty as charged. Steele was ordered to serve a one-year sentence consecutive to a sentence Steele was serving on another cause. Steele now appeals pro se. Additional facts will be provided as necessary.

I. Speedy Trial

We review de novo a trial court's denial of a motion to discharge a defendant. Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), trans. denied. "The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. This fundamental principle of constitutional law has long been zealously guarded by our courts." State v. Huber, 843 N.E.2d 571, 573 (Ind. Ct. App. 2006), trans. denied (citations omitted). "To this end, the provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right." Id. Criminal Rule 4(B) provides in pertinent part:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try

> him during such seventy (70) calendar days because of the congestion of the court calendar. . . . .

Steele argues that he was incarcerated when he moved for a speedy trial, and therefore, he should have been tried within seventy calendar days of his motion. The State acknowledges that Steele was incarcerated, but argues that Rule 4(B) does not apply because Steele was incarcerated for an unrelated matter. However, "incarceration due to the pending charge at issue need not be the only reason the defendant is in jail at the time the speedy trial is requested under Rule 4(B)." Poore v. State, 685 N.E.2d 36, 40 (Ind. 1997).

In Brown v. State, 825 N.E.2d 978, 981 (Ind. Ct. App. 2005), trans. denied, the defendant was detained on an unrelated charge or conviction in the Marshall County Jail and requested a speedy trial for charges pending in Fulton County. When Brown made his speedy trial request, an arrest warrant had been issued, but he had not yet been arrested for the pending charges.

On appeal, Brown argued that the trial court erred when it denied his Criminal Rule 4(B) motion for discharge. Our court noted that in Poore, our supreme court approved of a line of cases indicating that Rule 4(B) is available to a defendant incarcerated on another charge and within the exclusive custody of the State of Indiana. Id. at 981-82 (citing Poore, 685 N.E.2d at 40).[1] We therefore concluded because Brown was in the exclusive custody of the State, he was "entitled to invoke his right to a speedy

[1] However, recently in Monk v. State, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009), our court, citing the same language from Poore, concluded that "incarceration on a present offense must be a reason that the defendant is in jail." Therefore, although the defendant was incarcerated on other charges, because he had been released on his own recognizance in the instant cause, we concluded that the trial court did not err when it denied the defendant's Rule 4(B) motion for discharge. Id.

trial under Rule 4(B) with regard to the pending charges[.]" Id. "Because he was not brought to trial within seventy days of his request for a speedy trial, and the delay is not attributable to Brown or to a congested court calendar, Rule 4(B) requires that Brown be discharged." Id. at 983.

In this case, Steele filed his motion for speedy trial in the Elkhart City Court on March 19, 2009. However, his case was transferred to Elkhart Superior Court because he later filed a request for a jury trial. On April 22, 2009, the Elkhart Superior Court held a pretrial hearing, at which the court set a trial date for June 25, 2009. Steele objected and argued that date was over seventy days after he filed his motion for a speedy trial. The court then made a detailed finding of court congestion and stated that June 25, 2009 "is the very earliest possible date that I have." Tr. p. 7. Therefore, although Criminal Rule 4(B) may have applied to Steele due to his incarceration, we cannot conclude that the trial court erred in setting a trial date over seventy-days after Steele filed his speedy trial motion because the delay is attributable to the court's congested calendar.

II. Jury Trial

Next, Steele contends that the trial court improperly denied his request for a jury trial. Article 1, Section 13 of the Indiana Constitution provides: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury." "This provision guarantees the right to a jury trial without distinction between felonies and misdemeanors." Stevens v. State, 689 N.E.2d 487, 489 (Ind. Ct. App. 1997).

However, pursuant to Criminal Rule 22, misdemeanor charges are tried to the bench unless the defendant demands a jury trial in a timely fashion. Id. Specifically, the rule provides:

> *A defendant charged with a misdemeanor may demand trial by jury by filing a written demand therefor not later than ten (10) days before his first scheduled trial date.* The failure of a defendant to demand a trial by jury as required by this rule shall constitute a waiver by him of trial by jury unless the defendant has not had at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury.
>
> The trial court shall not grant a demand for a trial by jury filed after the time fixed has elapsed except upon the written agreement of the state and defendant, which agreement shall be filed with the court and made a part of the record. If such agreement is filed, then the trial court may, in its discretion, grant a trial by jury.

Ind. Crim. R. 22 (emphasis added).

The State argues that Steele did not file a timely demand for a jury trial because he failed to file his demand ten days before his first scheduled trial date. Specifically, the State argues that Steele was required to file his demand for a jury trial ten days prior to February 23, 2009, which was the omnibus date. Pursuant to Indiana Code section 35-36-8-1(c), "[t]he omnibus date for persons charged only with one (1) or more misdemeanors: . . . (3) is the trial date."

However, that section also provides that the omnibus date "must be no earlier than thirty (30) days (unless the defendant and prosecuting attorney agree to an earlier date), and no later than sixty-five (65) days, *after the initial hearing*[.]" I.C. 35-36-8-1(c) (emphasis added). In this case, the charges were filed against Steele on December 7,

2007, and Steele failed to appear for a hearing scheduled for January 18, 2008. Therefore, a warrant was issued for his arrest.

The arrest warrant was served on February 19, 2009, and on either that date or February 20, 2009,[2] the Elkhart City Court held a hearing and set the omnibus date for February 23, 2009. Pursuant to section 35-36-8-1(c), the Elkhart City Court was required to set the omnibus date (i.e. trial date) no earlier than thirty days after the date of the initial hearing. The court did not do so. Because only four days elapsed between Steele's initial hearing and the omnibus date, it was impossible for Steele to demand a jury trial ten days before his omnibus date.

On March 21, 2009, the Elkhart City Court set a trial date of April 21, 2009. An entry on the chronological case summary dated March 26, 2009, states: "Court now notes [Steele] asked for jury trial and now transfers same to the superior court." Appellant's App. p. 4. Because Steele could not have filed his demand for a jury trial at least ten days before the omnibus date, and Steele did file his jury trial demand more than ten days prior to his April 21, 2009 scheduled trial date, we conclude that Steele was entitled to a jury trial on the charge of Class A misdemeanor check deception. We therefore reverse and remand with instructions to hold a jury trial on the check deception charge.

[2] From the Chronological Case Summary, we are unable to determine whether the initial hearing was held on February 19 or 20, 2009. In his brief, Steele claims that he appeared before the Elkhart City Court on February 19, 2009. Appellant's Br. at 6.

III. Sufficient Evidence

Because we are remanding this case to the trial court for a jury trial,[3] we must also address Steele's final argument concerning the sufficiency of the evidence. Steele argues that the evidence is insufficient to support his conviction because "nothing in the trial presented to show beyond a reasonable doubt that the defendant was the actual person who issued/delivered the check in question." Appellant's Br. at 12.

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To convict Steele of Class A misdemeanor check deception, the State was required to prove that Steele knowingly or intentionally delivered a check for the payment of money knowing that the check would not be paid or honored by the credit institution upon presentment in the usual course of business. Ind. Code § 35-43-5-5 (2004). The State bears the burden to prove that Steele was the maker, issuer, or deliverer of the check. Henderson v. State, 647 N.E.2d 7, 15 (Ind. Ct. App. 1995). Further,

> The following two (2) items constitute prima facie evidence of the identity of the maker of a check, draft, or order if at the time of its acceptance they

[3] To decide whether retrial is permissible, our court considers all of the evidence admitted by the trial court, and if that evidence would have been sufficient to sustain the judgment, retrial does not offend double jeopardy principles. McMurrar v. State, 905 N.E.2d 527, 529 (Ind. Ct. App. 2009) (citing Alexander v. State, 819 N.E.2d 533, 539 (Ind. Ct. App. 2004)).

> are obtained and recorded, either on the check, draft, or order itself or on file, by the payee:
>
> (1) Name and residence, business, or mailing address of the maker.
>
> (2) Motor vehicle operator's license number, Social Security number, home telephone number, or place of employment of the maker.

I.C. § 35-43-5-5(d).

At trial, a Menards employee, whose duties included processing bad checks, testified that check number 1004 from Shaun Steele's account at G.W. Jones Exchange Bank was tendered to Menards on August 18, 2007. The check was returned to Menards for "non-sufficient funds." Appellant's App. p. 1; Tr. pp. 11-13, 26. Shaun Steele's name, phone number, address, date of birth, and driver's license number were listed on the check. The court also admitted Steele's Michigan driver's license record into evidence, which verified Steele's residence and date of birth. Appellant's App. p. 2; Tr. pp. 18, 26. Because sufficient evidence exists to retry Steele on this offense, such a retrial does not offend double jeopardy principles.

Conclusion

The trial court did not err when it set a trial date over seventy-days after Steele filed his Criminal Rule 4(B) motion because the delay is attributable to the court's congested calendar. However, we conclude that Steele timely filed his demand for a jury trial, and therefore, we reverse and remand this case to the trial court to hold a jury trial on the Class A misdemeanor check deception charge.

Reversed and remanded for proceedings consistent with this opinion.

BARNES, J., and BROWN, J., concur.