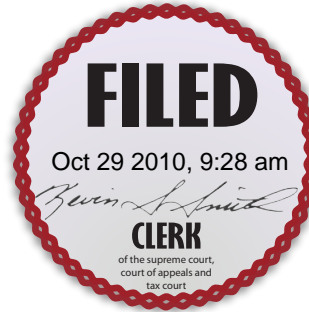


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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REBECCA REED-HARRISON, )

Appellant-Defendant, )

vs. )

No. 49A04-0912-CR-740

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Barbara Collins, Judge  
Cause No. 49F08-0903-CM-30466

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**October 29, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Rebecca Reed-Harrison appeals the trial court's denial of her motion to dismiss a criminal charge against her. Reed-Harrison presents a single issue for review: whether the denial of her motion to dismiss violated her due process rights because, due to her incompetence to stand trial, she had already been confined longer than the maximum sentence the trial court could have imposed following a conviction. We conclude that the trial court did not abuse its discretion. However, in light of new information in the record and in the interest of judicial economy, we affirm but remand with instructions.

## **FACTS AND PROCEDURAL HISTORY**

On March 4, 2009, Reed-Harrison traveled from her home in Philadelphia to Indianapolis. On March 7, an Indianapolis Metropolitan Police Officer who was working as off-duty security in a bus station in Indianapolis approached Reed-Harrison and asked to see her ticket. Reed-Harrison had been sitting in the bus terminal for two days. When she responded that she did not have a ticket, the officer informed her that she had to either buy a ticket or leave the station. When she refused to do either, she was arrested. The State charged her with Criminal Trespass, as a Class A misdemeanor.

On April 14, the trial court appointed Dr. Stephanie Callaway, a clinical psychologist, and Dr. George Parker, a psychiatrist, to evaluate Reed-Harrison's competency. Dr. Parker performed the evaluation on May 5, and Dr. Callaway did so on May 7. Based on their evaluations, both professionals concluded that Reed-Harrison was not competent to stand trial. As a result, on May 20 the trial court ordered Reed-Harrison committed to the State Division of Mental Health and Addiction ("DMHA") for

competency restoration services. Following acknowledgement by the Family and Social Services Administration (“FSSA”) of the State’s confinement authority, on June 30 the trial court issued an order to transport Reed-Harrison to Larue D. Carter Memorial Hospital (“Larue Carter”) in Indianapolis.

On September 8, Reed-Harrison filed a motion to dismiss. In her motion she alleged that the charges should be dismissed because she had already served, with credit time earned, more than the maximum possible sentence that the trial court could impose if she were convicted of the charged offense. On September 24, the State filed a response to the motion, opposing dismissal on two grounds: (1) that mental health professionals had determined that Reed-Harrison might yet be restored to competency and therefore case law did not require dismissal, and (2) that the State had compelling interests sufficient to overcome Reed-Harrison’s liberty interest. On November 20, the trial court denied Reed-Harrison’s motion. And on December 9, that court certified the order for interlocutory appeal.<sup>1</sup>

### **DISCUSSION AND DECISION**

Reed-Harrison contends that the trial court abused its discretion when it denied her motion to dismiss. Specifically, she argues that the charge against her should have been dismissed because she has served more time in pre-trial custody than the trial court could have imposed at sentencing. In support, Reed-Harrison cites State v. Davis, 898 N.E.2d 281 (Ind. 2008). The State counters that Davis does not apply on the present facts and, therefore, dismissal was not required. We conclude that Reed-Harrison had not satisfied

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<sup>1</sup> Briefing in this case was consolidated with Cause No. 49A02-1001-CR-89.

the test announced in Davis at the time the trial court entered its order and, therefore, that the trial court did not abuse its discretion when it denied her motion to dismiss.

In Davis, our supreme court considered whether it was “a violation of fundamental fairness to hold criminal charges over the head of an incompetent defendant who will never be able to stand trial.” Id. at 283. The court observed that the defendant had a substantial liberty interest in being free from involuntary commitment. The court further observed:

Justification for the commitment of an incompetent accused is found in the State’s interest in the restoration of the accused to competency because of the right of the public and the defendant to the prompt disposition of criminal charges pending against him, Strunk v. United States, 412 U.S. 434, 439 n.2 (1973), and the protection of the accused against being required to answer to charges that she lacks the capacity to understand or to assist her attorney in defending against. Drope[ v. Missouri], 420 U.S. 162, 171 (1975)].

Id. at 289.

Significantly, the accused in Davis had been found unlikely ever to regain competency to stand trial, and the court had determined that Davis could not be restored to competency. The court held that under those circumstances the State would have to show “some legitimate interest in determining the guilt or innocence of [the] accused even though the accused, in effect, had already been punished.” Id. But the State had offered no legitimate interest in determining the guilt or innocence of the accused that outweighed the accused’s substantial liberty interest. Therefore, the court held:

Because Davis’ pretrial confinement has extended beyond the maximum period of any sentence the trial court can impose, and because the State has advanced no argument that its interests outweigh Davis’ substantial liberty interest, we conclude it is a violation of basic notions of fundamental fairness as embodied in the Due Process Clause of the Fourteenth

Amendment to hold criminal charges over the head of Davis, an incompetent defendant, when it is apparent she will never be able to stand trial.

Id. at 290.

Following Davis, this court considered whether an arrestee's due process rights had been violated where he had not yet been confined beyond the maximum possible sentence for the offense charged but the court had not yet determined whether there was a reasonable likelihood that his competency could be restored. In Habibzadah v. State, 904 N.E.2d 367 (2009), trans. denied, the defendant had been charged with attempted murder, which carries a maximum sentence of fifty years. At the time he filed his motion to dismiss the charge, he had been committed for treatment for more than two years. We held that, "[b]ecause it is possible that Habibzadah may be restored to competency and because he has not been confined for longer than the potential maximum sentence he faces, the trial court did not abuse its discretion in denying his motion to dismiss." Id. at 369 (citing Davis, 898 N.E.2d at 285).

Under Davis and Habibzadah, a refusal to dismiss charges against an accused may violate her due process rights only if (1) the accused has been committed for treatment longer than the maximum possible sentence that could be imposed upon conviction, and (2) the court has not yet determined that the accused has no reasonable likelihood of being restored to competency. Davis, 898 N.E.2d at 285, 290; Habibzadah, 904 N.E.2d at 369. If both of these conditions have been met, then we must balance the substantial liberty interest of the accused against any "legitimate interest [of the State] in

determining the guilt or innocence of [the] accused even though the accused, in effect had already been punished.” Davis, 898 N.E.2d at 289.

For example, a conviction would be required to enhance a sentence for a felony committed as a member of a criminal gang, to prohibit possession of a firearm, to require registration as a sex offender, or to prove status as a habitual offender, a habitual substance offender, or a habitual traffic offender.

Id. (citations omitted).

Here, the State does not challenge Reed-Harrison’s allegation that she has been detained in pretrial commitment for a period exceeding the maximum potential sentence that could be imposed. When she filed her motion to dismiss, Reed-Harrison had served 186 actual days, or 372 days counting credit time under Indiana Code Section 35-50-6-3(a). Under Davis, we include credit time when calculating the period or pretrial commitment for purposes of the present analysis. See 898 N.E.2d at 289. In such a case, the next step is to determine whether keeping the State’s charges alive violates due process rights where the accused has been committed for treatment longer than her maximum possible sentence but the court has not yet determined that there is no reasonable likelihood that she will be restored to competency.

But Reed-Harrison’s circumstances have changed. At the time the trial court denied the motion to dismiss the charges, there remained the possibility that she could be restored to competency, even though she could not have been be sentenced to an additional term if convicted. As such, Reed-Harrison did not satisfy the test in Davis and Habibzadah to show a due process violation. However, the record before us includes additional information, acknowledged by the State in its brief, that alters the outcome in

this case. Specifically, on January 29, 2010, Dr. Alan D. Schmetzer, an attending psychiatrist at Larue Carter, informed the court in a letter that “the likelihood of restoring [Reed-Harrison] to competency with further treatment is nil.” Confidential Appendix at 24. And the Superintendent Designee of Larue Carter informed the court that the hospital had instituted commitment proceedings under Indiana Code chapter 12-26-7. Reed-Harrison now satisfies both requirements in Davis.<sup>2</sup>

Our review of the trial court’s judgment is normally limited to determining whether there is a clear abuse of discretion demonstrated by the record. Thus, on appeal we usually consider only the pleadings and evidence that were before the trial court when it entered judgment. See Hickman v. Hickman, 805 N.E.2d 808, 814 (Ind. Ct. App. 2004) (“abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it”). But in the present case, the record includes information, dutifully disclosed by the State, that materially alters the outcome of this case in the event Reed-Harrison were to renew her motion to dismiss. Simply put, because Reed-Harrison now satisfies both requirements in Davis, the charges against her should be dismissed. See Davis, 898 N.E.2d at 290. In the interest of judicial economy

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<sup>2</sup> We observe that the legislative scheme in Indiana Code chapter 35-36-3 does not provide for situations such as the present case, where the treating facility determines that the accused is not likely to be restored to competency in the foreseeable future on or after the ninety-day period set out in Section 35-36-3-3. For example, if this were an initial determination regarding competency, Indiana Code Section 35-36-3-1 provides that the trial court would need the opinions of two appointed mental health professionals, neither of whom is employed by a state institution. Because this case does not involve an initial determination of competency, that statute does not apply. Similarly, Indiana Code Section 35-36-3-3 provides that commitment proceedings must be instituted if the superintendent of the state institution providing treatment determines, within ninety days of admission, that there is not a substantial probability that the accused would attain the ability to understand the proceedings and assist in the preparation of her defense in the foreseeable future. Thus, that statute also does not apply.

and pursuant to our authority under Appellate Rule 66, we remand this case to the trial court with instructions to grant Reed-Harrison's motion to dismiss.

Affirmed but remanded with instructions.

BAKER, C.J., and MATHIAS, J., concur.