STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 287594 Oakland Circuit Court
CARVIN RUDOLPH, Defendant-Appellant.	LC No. 2007-213920-FH

Before: SERVITTO, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a conditional plea of nolo contendere to a charge of breaking and entering a building, MCL 750.110, for which he was sentenced to time served. We affirm.

On May 14, 2005, police were dispatched to MSX International, a business in Auburn Hills, Michigan. Personnel on the scene reported that the offices had been broken into and a theft of items valued at $47,500.00 occurred. The perpetrator of the crime broke out a glass sidelight to gain entry, and bloodstains were found on the carpet and in the offices where the theft had occurred. Blood samples were taken from the scene to allow for DNA testing. In December 2005, the security chief for the business contacted police after he learned that two former employees had been arrested for robbery. A detective contacted defendant, a former employee, while he was jailed for the unrelated robbery charge, but defendant refused to provide a DNA sample for comparison to the blood taken from the scene. The case went cold until defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, for robbing a business in Clawson, Michigan. After his convictions, defendant was required to provide a DNA sample. Through CODIS,[1] the DNA sample taken from the unsolved crime matched the sample taken from defendant. Consequently,

[1] CODIS is a computer software program that gathers local, state, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. The software allows law enforcement agencies to identify suspects by matching DNA profiles from crime scenes with profiles from convicted offenders. See http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/codis/.

defendant was charged with breaking and entering, MCL 750.110, for the theft from his former employer.

On April 5, 2007, defendant waived his right to a preliminary examination, and an arraignment by mail was filed with the circuit court. A pretrial was held on April 19, 2007, and defense counsel indicated that resolution short of trial was possible following discovery regarding the amount of potential restitution. On June 21, 2007, a pretrial was held, but defendant had been returned to the department of corrections, and defense counsel needed to confer with defendant. The trial court scheduled another pretrial for July 5, 2007, scheduled a trial date of August 20, 2007, and indicated that a hold order would be placed on defendant to allow him to remain in the jail.

On July 5, 2007, defense counsel moved to withdraw from the case. He indicated that defendant refused to confer with him following disagreement regarding the viability of a defense. Defendant also indicated his dissatisfaction with counsel and the preservation of attorney-client privilege. The trial court granted defendant's motion to withdraw. The prosecutor indicated that defendant must be tried by September 9, 2007, because he was a state prisoner. The trial court stated that any delay necessary because of the appointment of new counsel would be attributed to the defense. On July 11, 2007, the prosecutor filed a motion to compel DNA sample. Although the CODIS system provided a match, a confirmation sample had to be taken from defendant in accordance with the CODIS database quality control and assurance criteria, but defendant refused to provide a sample. On July 18, 2007, the circuit court granted the motion for a buccal swab DNA sample. During the hearing on the motion to compel, the defense objected to the DNA sample, alleging that the processing would not be completed before the August 20, 2007 trial date. In response, the prosecutor asserted that the 180-day rule addressing state prisoners did not apply because the department of corrections had never sent a notice regarding defendant's incarceration. The trial court maintained the August 20, 2007 trial date, and instructed the parties to file a motion to address the timeliness of the trial. On August 9, 2007, the parties stipulated to adjourn the trial date scheduled for August 20, 2007 to November 1, 2007, with a final pretrial to be held on October 18, 2007. The reasons for the adjournment were not provided, and a hearing was not held on the record.

On October 18, 2007, the pretrial was held. The prosecutor noted that the expert witness who processed the DNA sample was unavailable until January 2008, because of maternity leave, but the results would be available shortly. Defense counsel objected, asserting that defendant was entitled to a speedy trial, and also noted that defendant had filed motions in propria persona. The trial court scheduled October 31, 2007, for an evidentiary hearing. After hearing testimony at the evidentiary hearing, the trial court rejected defendant's challenge to the waiver of his preliminary examination and the arraignment by mail. With regard to the November 1, 2007 trial date, the expert witness remained unavailable until January 2008, and defendant refused to stipulate to the results of the DNA sample. Therefore, the trial court scheduled the trial for January 22, 2008, and advised defendant to file a motion to dismiss for lack of speedy trial for hearing on November 21, 2007.

In the motion filed on November 7, 2007, defendant asserted that the court rules and constitution provided for a speedy trial, and he was not tried in 180 days. The motion also asserted that there was a pre-arrest delay period of two years.[2] At the hearing on the motion, defense counsel expressly stated that he was *not* relying on MCL 780.131. Nonetheless, the trial court ruled that the triggering event for purposes of MCL 780.131 and MCR 6.004 did not occur and further held that defendant was not deprived of a speedy trial. On January 16, 2008, defendant requested an independent test of the DNA evidence. The trial court requested additional information regarding the nature of the challenge to the DNA evidence, the individual necessary to perform the evaluation, and the cost involved. On January 18, 2008, defendant pleaded nolo contendere to the breaking and entering charge, but reserved the right to challenge his right to a speedy trial. He was sentenced to time served for the violation of MCL 750.110, but remains incarcerated because of his prior convictions for armed robbery and felony-firearm. This Court granted defendant's delayed application for leave to appeal.

The statement of the issue, as raised on appeal, asserts that the Michigan Department of Corrections failed to send the appropriate notice of defendant's incarceration; the failure to send the notice constitutes a denial of due process, and the denial of due process warrants dismissal. We disagree. Constitutional claims and statutory construction issues present questions of law reviewed de novo. *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007). MCL 780.131 provides in relevant part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. . . .

MCL 780.131 does not contain a remedy for the department's failure to deliver notice to the prosecuting attorney. Rather, MCL 780.133 provides:

> In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Thus, the statutory remedy is the loss of jurisdiction over the charges if "action" is not commenced on the matter within the 180-day period.

[2] We note that the motion was not contained in the lower court record. However, a copy of the motion is attached to the brief on appeal.

In *People v Hendershot*, 357 Mich 300, 301-302; 98 NW2d 568 (1959), the Supreme Court addressed the fact that MCL 780.131 provided that an inmate "shall be brought to trial within 180 days" although MCL 780.133 provided for a loss of jurisdiction and dismissal of charges if "action" was not commenced within 180 days. The Supreme Court examined the statutes as a whole and determined that the legislative intent was to require that steps be taken to promptly resolve the criminal charges:

> The language of [MCL 780.131] is not that the inmate shall be "tried" or that his "trial shall commence" within 180 days, but, instead, that he "shall be brought to trial" within that time. The legislative intent and meaning in its use of the term "brought to trial" is to be gathered from the entire act. [MCL 780.133's] provision for action to be commenced on the matter within the mentioned time throws strong light on the question. Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly, the statute opens the door to a finding by the court that good-faith action was not commenced as contemplated by [MCL 780.133], thus requiring dismissal. The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If, as here, apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. When the people have moved the case to the point of readiness for trial and stand ready for trial within the 180-day period, defendant's delaying motions, carrying the matter beyond that period before the trial can occur, may not be said to have brought the statute into operation, barring trial thereafter. [*Id*. at 303-304.]

In *People v Davis*, 283 Mich App 737, 740; 769 NW2d 278 (2009), the prosecutor received noticed from the department of corrections that defendant was incarcerated on May 10, 2007. The defendant was arraigned on October 17, 2007, his preliminary examination when he was bound over for trial was held on November 1, 2007, his final pretrial conference was scheduled for December 18, 2007, and his trial was scheduled for January 14, 2008. On December 13, 2007, the defendant moved to dismiss for lack of a speedy trial. The trial court granted the motion, concluding that the statute specifically required that an inmate be brought to trial within 180 days. This Court noted that MCL 780.131 and MCL 780.133 were reconciled in *Hendershot*, 357 Mich at 304. Relying on *Hendershot*, this Court concluded that the prosecution had commenced the action within 180 days of receiving notice of defendant's incarceration from the department of corrections. Specifically, the arraignment in October 2007, and the preliminary examination in November 2007, demonstrated the good faith attempt to bring defendant to trial in a timely manner. *Davis*, 283 Mich App at 743-744.

In the present case, the department of corrections did not send notice to the prosecutor regarding defendant's incarceration. Rather, it appears that the match from the CODIS system alerted police and the prosecution to the fact that defendant, an incarcerated individual, matched the perpetrator of the MSX theft, resulting in the pursuit of criminal charges. The prosecutor engaged in good faith efforts to try the case within 180 days. The preliminary examination was

waived on April 5, 2007, and a pretrial was held in circuit court on April 19, 2007. The initial pretrial noted the need for additional discovery. At the next pretrial, a trial date of August 20, 2007 was scheduled. However, in accordance with the CODIS system's requirement of quality assurance, a second DNA sample was necessary, but defendant refused to voluntarily provide a sample. Consequently, the prosecutor had to file a motion, and the trial court granted the motion to compel the DNA sample. However, the case did not languish on the court's docket. Rather, defendant's request for new counsel was addressed and granted, and defendant's challenge to the waiver of the preliminary examination and the arraignment by mail was the subject of an evidentiary hearing. The prosecutor wanted to proceed to trial, but delay occurred when the evidence processor was unavailable due to a maternity leave. Upon inquiry by the trial court, defendant refused to stipulate to the results of the DNA sample. Consequently, a trial date was scheduled when the witness returned from leave. Pursuant to *Hendershot*, 357 Mich at 303-304, and *Davis*, 283 Mich App at 743-744, defendant was not entitled to dismissal of the action.[3]

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

[3] Defendant asserted that this was an issue of first impression and presented this Court with analogous authority addressing due process and the Interstate Agreement on Detainers, MCL 780.601. In light of the *Davis* decision, 283 Mich App at 743-744, defendant's position is without merit. Defendant does not challenge the other aspects of the trial court's ruling, and therefore, we do not address it.