

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

State of Delaware,	:	Cr.A. No. 07-05-0077 & 0078
	:	Case No. 0704033609
vs.	:	
	:	
Damon W. Bethel	:	
	:	
Defendant.	:	

Upon State's Motion to Vacate Rule 48(b) Dismissal

Date of Hearing: October 9, 2007

Date Decided: October 9, 2007

State's Motion to Vacate Rule 48(b) Dismissal is denied.

Daniel Stevenson, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.

John R. Garey, Esquire, 48 The Green, Dover, Delaware 19901, attorney for Defendant.

Trader, J.

In the case before the Court, the State's motion to vacate the Court's order of dismissal under Rule 48(b) is denied because any delay in the trial of this case is attributable to the State and the defendant would be prejudiced by the reinstatement of the charges.

The relevant facts are as follows: on the 21st day of April, 2007, the defendant, Damon W. Bethel, was charged with the offense of coercion in violation of 11 *Del.C.* §791(7) and official misconduct in violation of 11 *Del.C.* §1211(1). The defendant was arraigned before this Court on June 8, 2007, and, after a case review, the case was scheduled for trial on August 7, 2007. At the request of the State because of the unavailability of a witness, the case was continued to August 21, 2007. On August 21, 2007, the case was continued at request of the defense until September 18, 2007. On the scheduled trial date, the victim failed to appear for trial and the case was dismissed pursuant to Criminal Rule 48(b) of this Court. Eventually, the victim did appear at 11:35 A.M., after the Court had concluded its calendar.

Thereafter, the State filed its motion to vacate the Court's order of dismissal under Rule 48(b). The victim testified at a hearing on October 9, 2007, that he told the prosecutor that there was a possibility that he would not be able to attend the trial because of a mathematics test scheduled for the same time. The victim received his notice to appear for trial on or about September 10, 2007, and the notice commanded the victim to appear for trial by 8:30 A.M., but he did not arrive at the courthouse until 11:35 A.M. The victim had returned home after the mathematics test and his aunt told him that the vice principal called and told him that he was supposed to be in Court. But for this call, he might not have appeared in Court at 11:35 A.M.

Criminal Rule 48(b) provides that if there is unnecessary delay in bringing the defendant to trial, the Court may dismiss the information. This rule, as well as a similar rule in the Superior Court, is derived from the Federal Rules of Criminal Procedure. The rules are a “codification of the inherent power of a court to dismiss for want of prosecution.” *State v. Harris*, 616 A.2d 288, 291 (Del. 1992). The court’s power under this rule is discretionary and is not governed by established concepts of the Speedy Trial Clause of the Sixth Amendment. *State v. Richards*, 1998 WL 732960, at *3 (Del. Super. Ct. 1998)(citing *State v. Fischer*, 285 A.2d 417, 418 (Del. 1971)).

In *Harris*, the Delaware Supreme Court held,

[F]or a criminal indictment to be dismissed under Rule 48(b) for ‘unnecessary delay,’ the delay, unless extraordinary, i.e., of constitutional dimensions, must as a general rule, first be attributable to the prosecution and second, such delay must be established to have had ‘a prejudicial effect upon defendant’ beyond that normally associated with a criminal justice system necessarily strained by a burgeoning case load.

Harris, 616 A.2d at 291 (citing *State v. McElroy*, 561 A.2d 154, 155-56 (Del. 1989)).

The first criteria for dismissal under Rule 48(b) is that the unnecessary delay must be attributable to the State as prosecutor. “If the delay was caused by the prosecution, then the Court should consider whether the prosecution had a valid reason for the delay. As such, the Court will ‘consider the extent to which the State is at fault in causing the delay and the amount of control the State has over the event causing the delay.’” *State v. Perkins*, 2005 WL 3194460, at *3 (Del. Super. Ct. 2005)(citing *State v. Willis*, 2001 WL 789667, at *2 (Del. Super. Ct. 2001))(footnote omitted). “The failure to produce witnesses necessary for the proceedings, for example, is normally a delay attributable to

the State, as prosecutor.” *Harris*, 616 A.2d at 291 (citing *State v. Glaindez*, 346 A.2d 156, 157 (Del. 1975)).

In the present case, the failure of the victim to timely show up for the trial constitutes a delay attributable to the State. The State knew that the victim was a student and presumably should have made the appropriate arrangement to ensure that its witness would be present. There were no exigent or emergency circumstances that would provide the Court with a reasonable or just cause to enable it to reconsider having the trial.

The second criteria established by the Delaware Supreme Court, as a condition precedent to a dismissal for unnecessary delay, requires a finding that “the delay has been found to work some definable or measurable prejudice to the defendant.” *Harris*, 616 A.2d at 291 (citing *McElroy*, 561 A.2d at 157). “However, prejudice in the traditional sense, such as by death or disappearance of a witness, loss of evidence, or other impairment of the opportunity to prepare for trial, is not required.” *Kozak*, 1999 WL 1846459, at *2 (citing *State v. Budd Metal Co.*, 447 A.2d 1186, 1188-89 (Del. 1982); *Fischer*, 285 A.2d at 419). “Prejudice may be any factor which causes or threatens legal harm or detriment to the defendant.” *Kozak*, 1999 WL 1846459, at *2. “Scheduled trial dates do have some legal value to the parties involved, and when a trial date is disturbed because one side is not prepared, there is at least some minimal legal prejudice to the other side.” *Id.* The period during which the defendant was released on bail is a “lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail.” *Richards*, 1998 WL 732960, at *4; *State v. McDonald*, 456 U.S. 1, 8 (1982). Additionally, the defendant had reason to believe that the matter had ended.

The reinstatement of the previously dismissed charge certainly causes or threatens legal detriment to the defendant. Under the above circumstances, the showing of prejudice to the defendant has been established and any delay is attributable to the State. Therefore, the State's motion to vacate the Rule 48(b) dismissal is denied.

IT IS SO ORDERED.

Merrill C. Trader
Judge