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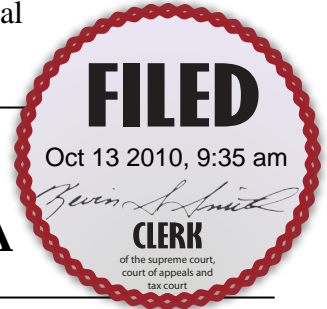
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**IN THE
COURT OF APPEALS OF INDIANA**



LARRY E. HYATT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 48A04-0912-CR-735
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0707-FB-180

October 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Larry Hyatt appeals his convictions for four counts of dealing in cocaine as class B felonies¹ and one count of maintaining a common nuisance as a class D felony.² Hyatt raises one issue, which we revise and restate as whether the trial court erred by denying Hyatt's motion for discharge under Ind. Criminal Rule 4(C). We affirm.

The relevant facts follow. On July 18, 2007, the State charged Hyatt with four counts of dealing in cocaine as class B felonies and one count of maintaining a common nuisance as a class D felony. On September 12, 2007, the court scheduled a jury trial for February 19, 2008. On February 11, 2008, the court appointed an attorney to represent Hyatt. On February 25, 2008, Hyatt filed a motion to continue. The court granted Hyatt's motion and rescheduled the jury trial for June 10, 2008.

An entry in the chronological case summary ("CCS") dated June 18, 2008, states: "Cause having been scheduled 6/10/08 was not had due to Court congestion, to-wit: State vs Edward Weaver, 48D03-0704-FC-099" Appellant's Appendix at 3. The court rescheduled the jury trial for November 18, 2008. On October 13, 2008, the court rescheduled the jury trial for November 12, 2008. A CCS entry dated November 19, 2008, states: "Cause having been scheduled 11/12/08 was not had due to Court congestion, to-wit: State vs Sean Sayers, 48D03-0612-FD-535" Id. The court rescheduled the jury trial for February 17, 2009.

¹ Ind. Code § 35-48-4-1 (Supp. 2006).

² Ind. Code § 35-48-4-13 (2004).

On December 11, 2008, Hyatt filed a *pro se* motion for discharge pursuant to Ind. Criminal Rule 4(C). At Hyatt's request, a dispositional hearing was scheduled for March 2, 2009, and was later rescheduled for March 9, 2009. Due to a transport order not having been issued, the dispositional hearing was rescheduled for March 30, 2009.

At the hearing on March 30, 2009, Hyatt did not plead guilty. Rather, the parties addressed Hyatt's motion for discharge. Hyatt's counsel moved for discharge under Ind. Criminal Rule 4(C) and challenged the court's prior findings of congestion. Hyatt introduced the CCS for Sayers's case and Weaver's case, and the State introduced subpoenas ordering witnesses to appear for the Sayers trial on November 12, 2008. At the hearing, the court denied Hyatt's motion for discharge, but allowed Hyatt to pursue an interlocutory appeal by certifying the cause for an interlocutory appeal. Upon Hyatt's request, the court appointed an attorney to perform the interlocutory appeal. On April 2, 2009, Hyatt requested new appellate counsel, which the court granted. On April 8, 2009, Hyatt filed a *pro se* motion for appointment of counsel, and a CCS entry dated April 8, 2009 indicates that the trial court had already replaced the attorney it had initially appointed with successor appellate counsel. On April 30, 2009, Hyatt filed a Belated Motion to Certify Order for Interlocutory Appeal, and the trial court granted Hyatt's motion. On May 18, 2009, this court denied Hyatt's motion to accept jurisdiction of the interlocutory appeal.

On June 9, 2009, the court scheduled a jury trial for September 29, 2009. On July 7, 2009, while Hyatt was represented by counsel, the court received from Hyatt a Pro Se

Petitioner's Entry of Appearance which stated that "[t]his *pro se* appearance is for the limited purpose of filing a Motion for Fast and Speedy Trial." Id. at 91. Hyatt also included a Motion for Fast and Speedy Trial in which he moved for "a Fast and Speedy Trial upon all pending charges before the Court, pursuant to Indiana Criminal Rule 4(B)(1)," and in which Hyatt objected "to any trial date set beyond the seventy (70) days limitation of Indiana Criminal Rule 4(B)(1)." Id. at 92. A CCS entry for July 7, 2009, states: "Defendant's *pro se* Motion for Fast and Speedy Trial received, but not filed for failure to comply with TR 11. (copy of motion provided to public defender – Bryan Williams)." Id. at 6. On August 10, 2009, the court received a letter from Hyatt which referenced Ind. Criminal Rule 4(B) and stated that the September 29, 2009 trial date was "set outside the 70 days and I'm writing this letter to object to this setting." Id. at 96. A CCS entry dated the same day indicated that Hyatt's motion for Fast and Speedy Trial was received but not filed pursuant to Ind. Trial Rule 11. On September 25, 2009, the court received a Motion to Dismiss from Hyatt in which Hyatt alleged that he was entitled to discharge under Ind. Criminal Rule 4(B). A CCS entry for the same day indicated that Hyatt's *pro se* Motion to Dismiss was received but not filed for failure to comply with Ind. Trial Rule 11.

On September 28, 2009, the court held a hearing, and Hyatt's attorney indicated that Hyatt was "requesting that we go ahead and start his jury trial" tomorrow. Transcript at 21. The prosecutor stated that "the officers that are involved are out of town so we would ask that we select a jury tomorrow and start evidence the next Tuesday." Id. at 21-

22. Hyatt's attorney objected to the trial setting, and the court overruled the objection. On September 29, 2009, *voir dire* commenced and the jury was selected and sworn. On October 5, 2009, the court rescheduled the jury trial to October 8, 2009, due to the unavailability of the judge. On October 6, 2009, the court rescheduled the jury trial to October 13, 2009, due to "scheduling problems." Appellant's Appendix at 7. A two-day jury trial began on October 13, 2009. Before opening statements, Hyatt's attorney objected to the trial date based upon Ind. Criminal Rule 4, and the court denied Hyatt's motion for discharge.

The jury found Hyatt guilty as charged. The trial court sentenced Hyatt to twenty years for each count of dealing in cocaine as a class B felony and three years for maintaining a common nuisance as a class D felony. The court ordered that all sentences run concurrent with each other for an aggregate sentence of twenty years.

The sole issue is whether the trial court erred by denying Hyatt's motion for discharge 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 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.” Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004). 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). “[W]hen a defendant takes action which delays the proceeding, that time is chargeable to the defendant and extends the one-year time limit, regardless of whether a trial date has been set at the time or not.” Cook, 810 N.E.2d at 1066-1067. The objective of the rule is to move cases along and to provide the defendant with a timely trial, not to create a mechanism to avoid trial. Brown v. State, 725 N.E.2d 823, 825 (Ind. 2000).

“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. “Although a defendant is not obliged under this rule to push the matter to trial, a defendant whose trial is set outside the one-year period must object to the setting at the earliest opportunity or the right to discharge under the rule is waived.” Brown, 725 N.E.2d at 825. See also Rhoton v. State, 575 N.E.2d 1006, 1010 (Ind. Ct. App. 1991)

("[A] defendant has a duty to alert the court when a trial date has been scheduled beyond the one year proscribed limit.") (citing Huffman v. State, 502 N.E.2d 906 (Ind. 1987), reh'g denied), trans. denied.

When a defendant asks for a continuance, the time between the motion for a continuance and the new trial date is chargeable to the defendant. Vermillion, 719 N.E.2d at 1204. 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.

Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. Clark v. State, 659 N.E.2d 548, 552 (Ind. 1995). However, a defendant may challenge that finding by filing a Motion for Discharge and demonstrating that, at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate. Id. Such proof would be *prima facie* adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. Id. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court's finding was clearly erroneous. Id.

Hyatt was charged on July 18, 2007. Thus, the State was required to bring Hyatt to trial by July 18, 2008, unless the one-year period was extended by delays not chargeable to the State. On February 25, 2008, Hyatt filed a motion to continue. The trial court granted Hyatt's motion and rescheduled the jury trial for June 10, 2008. This extended the one-year period by 106 days to November 1, 2008. (Cumulative extension (hereinafter, "C.E.") 106 days).³

A trial was not held on June 10, 2008, and an entry in the chronological case summary ("CCS") dated June 18, 2008, states:

Cause having been scheduled 6/10/08 was not had due to Court congestion, to-wit: State vs Edward Weaver, 48D03-0704-FC-099, the Court now resets this matter for trial by jury on 11/18/08 at 1:00 p.m. 3RD choice this being earliest date available due to Court congestion. Final Pre-trial Conference set for 11/10/08 at 1:30 p.m.

Appellant's Appendix at 3. The court rescheduled the jury trial for November 18, 2008, and later rescheduled the trial for November 12, 2008. The CCS for Weaver's case, which was admitted as an exhibit at the hearing on Hyatt's motion for discharge on March 30, 2009, reveals a CCS entry dated June 9, 2008, which indicated that Weaver requested to hire new counsel and Weaver's jury trial which had been set for June 10, 2008, was rescheduled for August 26, 2008.

Hyatt argues that "[n]either his nor anyone else's trial was held on June 10, 200[8], thus there was in fact no congestion which would have prevented the commencement of [Hyatt's] trial as scheduled." Appellant's Brief at 7. The State argues

³ This represents the delay between February 25, 2008, and June 10, 2008.

that “[f]or [Hyatt] to argue that his trial could have been held on June 10th with less than a day to prepare notification to the jury and for trial preparation is unrealistic at best and certainly is not showing of factual or legal error.” Appellee’s Brief at 8. The State also argues that “there is nothing in the record that indicates Defendant voiced any objection to the continuance of his trial due to court congestion, therefore he cannot object now.” Id. at 9.

We have concluded that Hyatt’s motion for a continuance resulted in an extension of the one-year period by 106 days to November 1, 2008. Even assuming that the trial court’s finding of congestion in its CCS entry dated June 18, 2008 was erroneous, the CCS entry scheduled Hyatt’s trial for November 18, 2008, which was set outside the extended one-year period within which Hyatt should have been tried, and Hyatt did not object at the earliest opportunity.⁴ We conclude that Hyatt is deemed to have acquiesced in the delay because he did not object at the earliest opportunity when the court set the trial outside of the one-year period. See Everroad v. State, 590 N.E.2d 567, 569 (Ind. 1992) (holding that the defendants failed to make a timely objection when they did not object to the setting of the trial date until over a month after the trial had been set beyond the one-year limit), reh’g denied; Blair v. State, 877 N.E.2d 1225, 1232 (Ind. Ct. App. 2007) (holding that the defendant waived his rights under Ind. Criminal Rule 4(C) where he waited almost two months before objecting to the trial court’s scheduling of trial),

⁴ Even if we considered Hyatt’s *pro se* motion for discharge received by the court on December 11, 2008, to be a proper objection, Hyatt did not object until almost six months after the court rescheduled the jury trial.

trans. denied; Townsend v. State, 673 N.E.2d 503, 506 (Ind. Ct. App. 1996) (“However, even if this court accepts Townsend’s contention [that his motion to dismiss constituted an implied objection on speedy trial grounds], his motion to dismiss was filed almost two months after the trial court set the trial date. Townsend failed to object at the earliest opportunity.”). This extended the one-year period by 147 days (C.E. 253 days).⁵ See Vermillion, 719 N.E.2d at 1204-1205 (holding that defendant waived the right to object to a seven-day delay when the trial was rescheduled without objection from the defendant from June 10th to June 17th).

A trial was not held on November 12, 2008, and in a CCS entry dated November 19, 2008, the court stated:

Cause having been scheduled 11/12/08 was not had due to Court congestion, to-wit: State vs Sean Sayers, 48D03-0612-FD-535, the Court now resets this matter for trial by jury on 2/17/09 at 1:00 p.m. 2ND choice this being earliest date available due to Court congestion. Final Pre-trial Conference set for 2/9/09 at 1:30 p.m.

Appellant’s Appendix at 3. Hyatt argues that on “November 12, 2008, Sean Sayers appeared for a dispositional hearing and entered into a plea agreement,” and that “although a panel of prospective jurors was present, no jury trials were held on that date.” Appellant’s Brief at 7 (citations omitted). Hyatt also argues that “there would appear to have been no reasonable bar to proceeding with jury selection on [Hyatt’s] case, even if the presentation of evidence might be delayed for a few days.” Id. The State argues that Hyatt’s argument “that the State could have proceeded to jury selection in his case on that

⁵ This represents the delay between June 18, 2008, and November 12, 2008.

same date after Sayers[’s] guilty plea hearing is again illogical and does not overcome the presumption by showing that the court’s finding of congestion was factually or legally incorrect.” Appellee’s Brief at 8-9.

The Sayers CCS reveals an entry dated October 13, 2008, which states that the jury trial was scheduled for November 12, 2008. The next CCS entry is dated November 12, 2008, and states that a dispositional hearing was held and that the parties recited a plea agreement, which the trial court accepted. Given that a jury trial was scheduled and a dispositional hearing occurred on November 12, 2008, we cannot say that the trial court’s finding of congestion in Hyatt’s case was factually or legally inaccurate. See James v. State, 716 N.E.2d 935, 939 (Ind. 1999) (holding that the defendant was not entitled to discharge under Ind. Criminal Rule 4(B) when the trial court explained that other cases were not tried due to last minute guilty pleas and defendant made no argument refuting the trial court’s findings). This extended the one-year period by ninety days (C.E. 343 days).⁶

On February 11, 2009, days before the scheduled jury trial date of February 17, 2009, Hyatt requested a dispositional hearing. The court granted Hyatt’s request and scheduled a hearing for March 2, 2009. Upon Hyatt’s request, the hearing was later rescheduled for March 9, 2009. This extended the one-year period by twenty days (C.E. 363 days).⁷ See Burdine v. State, 515 N.E.2d 1085, 1091 (Ind. 1987) (holding that the

⁶ This represents the delay between November 19, 2008, and February 17, 2009.

⁷ This represents the delay between February 17, 2009, and March 9, 2009. We use February 17,

delays resulting from the defendant's changes of pleas were chargeable to him for purposes of the rule where a trial date was vacated because defendant pled guilty under an agreement with the State), reh'g denied, superseded on other grounds, Ind. Evidence Rule 401 (1994); Isaacs, 673 N.E.2d at 762 (holding that the one-year period is extended by any delay due to a delay caused by the defendant's act).

At the hearing on March 30, 2009, Hyatt's attorney moved for discharge under Ind. Criminal Rule 4(C). The delays discussed above extended the one-year limit by 363 days to July 16, 2009. Thus, Hyatt's motion for discharge on March 30, 2009, was premature and his right under Ind. Criminal Rule 4(C) to be brought to trial within one year of being charged had not been violated. Thus, the trial court properly denied Hyatt's motion for discharge under Ind. Criminal Rule 4(C) at the hearing. See Cook, 810 N.E.2d at 1068 (holding that defendant's right under Ind. Criminal Rule 4(C) was not violated).

After this court denied Hyatt's motion to accept jurisdiction of the interlocutory appeal, on June 9, 2009, the court scheduled a jury trial for September 29, 2009. We acknowledge that Hyatt sent multiple letters to the trial court objecting to the scheduling of the trial date of September 29, 2009. However, we observe that Hyatt does not challenge the trial court's failure to file these letters as Hyatt was represented by an attorney at the time, the letters referenced only Ind. Criminal Rule 4(B) and not Ind.

2009, as the beginning point for this calculation because the previous calculation included the days between November 19, 2008, and February 17, 2009. See Henderson v. State, 647 N.E.2d 7, 13 (Ind. Ct. App. 1995) (holding that this court does not charge defendant twice for those days of delay that overlap), reh'g denied, trans. denied.

Criminal Rule 4(C), and the first letter was not received by the trial court until almost a month after it had rescheduled the trial. Under the circumstances, we conclude that Hyatt is deemed to have acquiesced in the delay because he did not object at the earliest opportunity when the court set the trial outside of the one-year period. See Townsend, 673 N.E.2d at 506; Everroad, 590 N.E.2d at 569; Blair, 877 N.E.2d at 1232. This extended the one-year period by 112 days (C.E. 475 days).⁸ See Vermillion, 719 N.E.2d at 1204-1205.

The delays discussed above extended the one-year limit by 475 days to November 5, 2009. We conclude that Hyatt's motion for discharge on October 13, 2009, was premature and his right under Ind. Criminal Rule 4(C) to be brought to trial within one year of being charged had not been violated. Thus, the trial court properly denied Hyatt's motion for discharge under Ind. Criminal Rule 4(C). See Cook, 810 N.E.2d at 1068 (holding that defendant's right under Ind. Criminal Rule 4(C) was not violated).

For the foregoing reasons, we affirm Hyatt's convictions for four counts of dealing in cocaine as class B felonies and one count of maintaining a common nuisance as a class D felony.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

⁸ This represents the delay between June 9, 2009, and September 29, 2009.