MEMORANDUM DECISION

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

Michael Franscoviak,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 16, 2021

Court of Appeals Case No. 21A-CR-437

Appeal from the Pulaski Circuit Court

The Honorable Mary C. Welker, Judge

Trial Court Cause No. 66C01-1606-F4-2

Najam, Judge.

Statement of the Case

[1] Michael Franscoviak appeals the trial court's denial of his motion for discharge under Indiana Criminal Rule 4(C). He presents a single issue for our review, namely, whether the trial court erred when it denied his motion for discharge.

[2] We affirm.

Facts and Procedural History

[3] On June 3, 2016, the State charged Franscoviak with possession of a firearm by a serious violent felon, a Level 4 felony; dealing in marijuana, as a Level 5 felony; possession of marijuana, as a Level 6 felony; maintaining a common nuisance, a Level 6 felony; neglect of a dependent, as a Level 6 felony; and visiting a common nuisance, as a Class A misdemeanor. On August 2, the trial court set a trial for April 11, 2017. On March 16, 2017, the trial court reset the trial for October 18 due to court congestion. On September 7, Franscoviak moved to continue the trial, and the court reset the trial for August 7, 2018.

[4] On August 7, 2018, the trial court started jury selection for Franscoviak's trial, which continued into August 8. Before the jury was empaneled, on August 8, the trial court declared a "mistrial" and "terminate[d]" the trial. Appellant's App. Vol. 2 at 198. The court gave no reason for the mistrial, but it stated that, because "the jury was never impaneled . . . jeopardy did not attach." *Id.* Franscoviak did not object to the mistrial. The prosecutor then asked the court to reschedule the trial and to schedule a plea hearing. Defense counsel indicated that he would try to get Franscoviak accepted into a community

corrections program. The trial court then scheduled a plea hearing for September 18, 2018, and rescheduled the trial for September 3, 2019, without objection.

[5] At Franscoviak's plea hearing on September 18, 2018, defense counsel appeared, but Franscoviak did not appear. The court issued a bench warrant. Franscoviak was finally arrested and jailed in October.

[6] On June 26, 2019, the trial court held a hearing on defense counsel's motion to withdraw, and Franscoviak "addresse[d]" the court. *Id.* at 15. The trial court granted the motion to withdraw and assigned new counsel to represent Franscoviak. The court also confirmed the September 3 trial date, without objection. And on August 15, 2019, Franscoviak moved to continue the September 3, 2019, trial date. The trial court granted that motion and reset the trial for February 25, 2020.

[7] On February 14, 2020, Franscoviak moved to continue the trial again, and the trial court reset the trial for July 27. When Franscoviak did not appear for a pretrial conference in June, the trial court issued another bench warrant for his arrest. Franscoviak was missing until November 4, 2020. On January 6, 2021, Franscoviak filed a pro se motion for discharge under Criminal Rule 4(C). The trial court scheduled a hearing on that motion, which was continued until February 11. In the meantime, on February 4, 2021, Franscoviak, by counsel, filed another motion for discharge under Criminal Rule 4(C). Following that hearing, the trial court denied the motion for discharge. Franscoviak filed a

motion to correct error, which the court denied. This certified interlocutory appeal ensued.

Discussion and Decision

[8] Franscoviak contends that the delay in bringing him to trial violated Indiana Criminal Rule 4(C).[1] "In reviewing Criminal Rule 4 claims, we review questions of law *de novo*, and we review factual findings under the clearly erroneous standard." *State v. Harper*, 135 N.E.3d 962, 972 (Ind. Ct. App. 2019), *trans. denied*.

[9] As the Supreme Court recently reiterated, "'[t]he State bears the burden of bringing the defendant to trial within one year.'" *Battering v. State*, 150 N.E.3d 597, 601 (Ind. 2020) (quoting *State v. Larkin*, 100 N.E.3d 700, 703 (Ind. 2018)). To enforce this burden, Criminal Rule 4(C) provides, in relevant part:

> 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. . .

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[1] In a footnote, Franscoviak "requests that this Court analyze the facts and circumstances of his case considering the right to speedy trial under both the United States and Indiana Constitutions." Appellant's Br. at 25 n.7. But he does not support that request with cogent argument, and it is, therefore, waived.

As the rule suggests, criminal defendants extend the one-year period "'by seeking or acquiescing in delay resulting in a later trial date.'" *Id.* (quoting *Pelley v. State*, 901 N.E.2d 494, 498 (Ind. 2009)).

[10] A defendant may seek and be granted a discharge if he is not brought to trial within the proper time period. *State v. Delph*, 875 N.E.2d 416, 419 (Ind. Ct. App. 2007), *trans. denied*. The purpose of Criminal Rule 4(C), however, is to create early trials and not to discharge defendants. *Id.*

[11] On appeal, Franscoviak contends that the trial court erred when it calculated the time charged against the State for Rule 4(C) purposes. In particular, Franscoviak asserts that the trial court erred when it did not charge the State with 373 days that ensued after the alleged mistrial in August 2018. He maintains that, "[b]ecause there is nothing in the record indicating that the delay is attributable to the actions of Franscoviak, an emergency, or congestion, this time must count towards the Rule." Appellant's Br. at 26. We cannot agree.

[12] The parties agree that the State is charged with 287 days from June 3, 2016, the date the charges were filed, and March 16, 2017. And Franscoviak does not allege that the State is charged with any time between March 16, 2017, and August 8, 2018. The parties' dispute arises as of August 8, 2018, the date of the mistrial. However, the record is clear that, on August 8, 2018, defense counsel did not object to the mistrial and agreed to a new trial date, September 3, 2019,

which was the first time the trial court had set a trial date outside the one-year time limit.

[13] As this court has stated, "'[b]ecause the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant.'" *State v. Black*, 947 N.E.2d 503, 509 n.9 (Ind. Ct. App. 2011) (quoting *Vermont v. Brillon*, 556 U.S. 81, 90-91 (2009) (citation omitted)). Thus, while Franscoviak was not in the courtroom on August 8, 2018, when his counsel agreed to the September 3, 2019, trial date, Franscoviak is charged with acquiescing to the new trial date well outside the one-year time limit.

[14] Further, this court has held that, "a defendant *waives* his right to a speedy trial if he is aware or should be aware of the fact that the trial court has set a trial date beyond the applicable time limitation, and he does not object to the trial date." *Todisco v. State*, 965 N.E.2d 753, 755 (Ind. Ct. App. 2012) (emphasis added), *trans. denied*. "As such, it is the defendant's 'obligation to object at the earliest opportunity so the court can reset the trial for a date within the proper period. Failure to voice a prompt objection is deemed a waiver of the issue.'" *Id.* (quoting *Hood v. State*, 561 N.E.2d 494, 496 (Ind. 1990)).

[15] Here, Franscoviak did not object to the new trial date until he filed his pro se discharge motion in January 2021, more than *two years* after the trial court set the trial outside the one-year time limit. Indeed, in August 2019, Franscoviak

moved to *continue* the September 2019 trial, and the trial court granted that motion. Franscoviak has waived his right to a speedy trial.

[16] In sum, Franscoviak has not met his burden on appeal to show that the trial court erred when it denied his motion for discharge. As a result of Franscoviak's acquiescence to the September 3, 2019, trial date, which the court set on August 8, 2018, the State is not charged with that delay. And because Franscoviak did not object, at his earliest opportunity, to the trial date outside of the one-year limit, he has waived his right to a speedy trial.

[17] Affirmed.

Riley, J., and Brown, J., concur.