

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANASTASIA ALLEN,

Defendant-Appellant.

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UNPUBLISHED

December 19, 1997

No. 197128

Genesee Circuit Court

LC No. 90-043815 FC

Before: MacKenzie, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

By leave granted, defendant contends that the circuit court erred in denying her motion to dismiss based on the 180-day statute, MCL 780.131 *et seq.*; MSA 28.969(1) *et seq.* This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Charged with substantially more serious offenses, defendant was convicted in a 1991 jury trial of the lesser included offenses of breaking and entering an occupied dwelling with intent to commit felonious assault, MCL 750.110; MSA 28.305, and of felonious assault, MCL 750.82; MSA 28.277. She then pleaded guilty to being a third offender, MCL 769.11; MSA 28.1083, and received enhanced sentences accordingly. On prior appeal as of right, Docket No. 148019 (unpublished opinion per curiam of the Court, issued 10/24/94), her conviction of felonious assault was affirmed, but the breaking and entering conviction was reversed and remanded for new trial, based on an error in the drafting of the information.

The Supreme Court denied defendant's application for leave to appeal, and the prosecutor's motion for miscellaneous relief, on December 27, 1995. The record was returned to the circuit court by the Supreme Court on January 24, 1996. It is this date that would commence the running of the 180-day statutory time frame. *People v Hill*, 144 Mich App 735; 376 NW2d 396 (1985). Contrary to the prosecutor's argument, upon reversal, the breaking and entering charge became "untried" as to defendant, and as defendant was then incarcerated with the prosecutor's knowledge, express or implied, the 180-day statute applies. *People v Hill*, 402 Mich 272, 280-281; 262 NW2d 641 (1978).

The 180 days would have expired on July 22, 1996. Defendant, however, twice moved to dismiss, citing the 180-day statute, on April 6, 1996 (which motion was denied on April 22, 1996) and again on July 10, 1996 (which motion was heard on July 29, 1996, and denied on August 16, 1996.) It is the latter order of the circuit court from which leave to appeal has been granted in this case.

As the foregoing makes apparent, at the time of neither motion had the 180 days expired. Furthermore, the time needed to adjudicate such motions is not counted against the 180 days allowed. *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959). The total of 51 days needed to adjudicate those motions would have extended the 180 days to September 11, 1996.

However, at a proceeding before the circuit court on August 26, 1996, the circuit court was informed, albeit incorrectly, that defendant's filing of an application for leave to appeal on August 19, 1996, had divested the circuit court of jurisdiction. Unless and until leave to appeal was granted, however, the circuit court had full jurisdiction to issue any appropriate order in the case. MCR 7.208(A). At that point, the prosecutor noted on the record that the State was prepared to either try the case or schedule a preliminary examination, which defendant had demanded. Because doing as little as commencing the preliminary examination within the 180 days would satisfy the statutory requirement, absent a 180-day gap in the steady progress of the case toward trial, *People v Stephens*, 103 Mich App 640; 303 NW2d 51 (1981), it was defendant's filing of motions to dismiss and pursuit of interlocutory appeal that prevented the case from proceeding to trial, and accordingly, there has been no violation by the State of the 180-day statute. In any event, this Court's jurisdiction is limited to a review of the order from which leave to appeal was granted, and inasmuch as the 180 days had clearly not expired either at the time defendant filed the second motion to dismiss or the date the motion was adjudicated, the decision of the circuit court must be affirmed.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Harold Hood

/s/ Joel P. Hoekstra