

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

POSEIA MCCUNE,

Defendant-Appellee.

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UNPUBLISHED

July 28, 2000

No. 220594

Wayne Circuit Court

LC No. 97-008799

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order granting defendant's motion to dismiss with prejudice for violation of the 180-day rule, MCL 780.131; MSA 28.969(1); MCR 6.004(D). We reverse and remand.

On October 30, 1997, defendant was bound over for trial on charges of carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), stemming from an incident that occurred earlier that month. Defendant did not appear for arraignment on November 14, 1997, and the trial court issued a bench warrant for his arrest. Defendant next appeared before the trial court in April 1999.

In the interim, defendant was convicted of other charges in two other counties. On September 29, 1998, he was sentenced to four to twenty-five years' imprisonment for two Macomb County convictions, and, on November 9, 1998, he was sentenced to four to twenty-five years' imprisonment for two Oakland County convictions. By letter dated December 2, 1998, the Michigan Department of Corrections ("MDOC") notified the Wayne Circuit Court that defendant was an inmate within the MDOC. The letter noted that defendant's presentence investigation report indicated that he may have pending charges in Wayne County, and asked that the Wayne Circuit Court notify the MDOC concerning disposition of any such charges. Defendant was finally brought before the trial court in this matter in April 1999, at which time counsel was appointed.

Following a hearing on May 24, 1999, the trial court granted defendant's motion to dismiss with prejudice for violation of the 180-day rule. On appeal, the prosecution argues that the trial court erred

by failing to make a determination whether the prosecutor had actual knowledge of defendant's inmate status pursuant to MCR 6.004(D)(1)(a), such that dismissal was the appropriate remedy, or whether the delay was attributable to lack of notice from the MDOC pursuant to MCR 6.004(D)(1)(b), such that sentence credit was defendant's only available remedy.

The statutory version of the 180-day rule, codified at MCL 780.131(1); MSA 28.969(1)(1), provides:

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 . . . written notice of the place of imprisonment of the inmate and a request for final disposition . . . by certified mail.

Our Supreme Court adopted MCR 6.004(D), which "codifie[s] a construction of the 180-day rule statute that no longer makes prosecutors responsible for negligence by the MDOC in the dissemination of the information that invokes the 180-day rule." *People v Taylor*, 199 Mich App 549, 553; 502 NW2d 348 (1993). MCR 6.004(D)(1) provides:

*The 180-Day Rule.* Except for crimes exempted by MCL 780.131(2); MSA 28.969(1)(2), the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:

(a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or

(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.

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(2) *Remedy.* In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

The purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences can run concurrently. *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999); *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). “The 180-day rule does not require trial to be commenced within 180 days, but obligates the prosecution to take good-faith action during the 180-day period and thereafter to proceed to ready the case against the prison inmate for trial.” *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). The burden is on the prosecution to show that there has been no violation of the 180-day rule. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 195; 579 NW2d 82, modified in part and remanded 458 Mich 862 (1998); *People v Wolak*, 153 Mich App 60, 64; 395 NW2d 240 (1986).

From review of the record in the present case, it is unclear whether the trial court undertook the appropriate analysis to determine if a violation of the 180-day rule occurred.<sup>1</sup> The trial court received no evidence and made no findings of fact with regard to when the prosecutor had actual knowledge of defendant’s incarceration. MCR 6.004 clearly delineates that dismissal is the appropriate remedy when the prosecution fails to make a good faith effort to try the defendant within the 180-day period when “the prosecutor knows that the person charged with the offense is incarcerated in state prison.” MCR 6.004(D)(1)(a) & (2). “[A] prosecutor must now have actual, not imputed, knowledge of the incarceration in order for the 180-day period to be triggered.” *Taylor, supra* at 552. Because there was no evidentiary hearing or findings of fact from which we can determine whether the trial court clearly erred or improperly applied the relevant court rule, the record is insufficient for us to review. Thus, we remand to the trial court for an evidentiary hearing to determine when the prosecution had actual notice of defendant’s incarceration in a state prison and to conduct the appropriate MCR 6.004(D) analysis. See MCR 7.216(A)(5).

Reversed and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Helene N. White

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<sup>1</sup> It appears from the record that the trial court determined that the 180-day rule was violated because the prosecution failed to take meaningful action to bring this case to trial, using the September 1998 sentencing date to calculate the operative 180-day period. Because the key date for calculating a 180-day violation is not the date of sentencing, but rather, the date the prosecution is notified of the defendant’s incarceration by the MDOC, or has independent actual knowledge of a defendant’s incarceration, we find a determination on that basis to be erroneous, assuming this is what happened. Nevertheless, it is unclear from the record exactly why the trial court chose to calculate from the September of 1998 sentencing date. Until such time as the record is clarified regarding when the prosecution received notice of defendant’s incarceration on other charges, no proper determination of a 180-day rule violation can be made.