STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 24, 2017
v	No. 336170 Chippewa Circuit Court
KEVIN MICHAEL TUCKER, Defendant-Appellee.	LC No. 16-002070-FC

Before: K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ.

PER CURIAM.

In this criminal proceeding, the prosecution appeals by right the trial court's order granting defendant's motion to dismiss the criminal charges against him because of a violation of the 180-day rule.[1] The prosecution argues that the trial court erred in dismissing the charges because the prosecution was "ready, willing, and able" to proceed to trial on the originally scheduled trial date—which was to occur within the 180-day timeframe—and at all times thereafter, and that the prosecution did not violate the rule simply because the court had not been notified of the 180-day notice sent to the prosecution. Under the circumstances presented, we agree with the prosecution, and thus, we reverse and remand for further proceedings.

This Court reviews a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). A trial court abuses its discretion when its decision falls outside the range of principled outcomes.[2] *Id*. This Court reviews legal issues regarding the 180-day rule de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The 180-day rule derives from MCL 780.131(1), which 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

[1] MCL 780.131 and MCL 780.133; See also MCR 6.004(D).

[2] Both parties misstate the abuse of discretion standard in their briefs on appeal.

> 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 of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail. [Emphasis added.]

MCL 780.133 sets forth as follows the remedy for failure to comply with MCL 780.131:

> In the event that, within the time limitation set forth in [MCL 780.131], *action is not commenced* on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [Emphasis added.]

In *People v Lown*, 488 Mich 242, 246; 794 NW2d 9 (2011), our Supreme Court undertook to reaffirm and "clarify the correct interpretation of the 180-day rule." The relevant issue in *Lown* was whether the plaintiff's motion to dismiss the charge against him based on violation of the 180-day rule was properly denied. As indicated above, MCL 780.131(1) requires that the "inmate shall be brought to trial within 180 days" after the department of corrections (DOC) causes written notice to be delivered to the prosecuting attorney containing the information set forth in the statute. The Supreme Court pointed out, however, that MCL 780.133, which governs the consequences of failing to comply with MCL 780.131(1), requires dismissal if "action is not commenced on the matter" within the 180-day period. *Lown*, 488 Mich at 246.[3] The Court noted that MCL 780.133 uses the broader word "action" and not "trial" when referencing what must be commenced on the matter. *Id*. at 256. "Action," the Court noted, "has complementary and relatively uncontroversial meanings[,]" that, "in the context of court proceedings, [includes] a civil or criminal proceeding." *Id*. (quotation marks and citations omitted). "A proceeding, in turn, generally includes the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment[,]" as well as "an act or step that is part of a larger action." *Id* (quotation marks and citation omitted).

[3] As will become clear elsewhere in this opinion, the prosecution must commence "good-faith" action, not action that "consists merely of preliminary steps that are later followed by inexcusable delay and the lack of genuine intent to proceed to trial." *Lown*, 488 Mich at 266.

In line with this reasoning, the Court affirmed its long-held position "that to commence an action within the 180-day period, a prosecutor need not ensure that the *trial* actually begins, or is completed, within that period. Rather, the prosecutor must have undertaken action—or, put otherwise, begun proceedings—against the defendant on the charges (or the 'matter')." *Id*. at 256-257. More specifically, "it is sufficient that the prosecutor 'proceed promptly' and 'move[] the case to the point of readiness for trial' within the 180-day period." *Id*. at 246, quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). As long as "action was commenced" as described within the 180 calendar days[4] subsequent to receiving the DOC notice, the rule has been satisfied. *Lown*, at 247. An exception may be found where the "prosecutor's initial steps are 'followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly . . . .' " *Id*., quoting *Hendershot*, 357 Mich at 303.[5] In light of these principles, the *Lown* Court held that the 180–day rule was satisfied "because the prosecutor commenced action well within 180 days after receiving notice from the DOC, proceed[ed] promptly and with dispatch thereafter toward readying the case for trial, and [stood] ready for trial within the 180–day period . . . ." *Lown*, 488 Mich at 247. The Court further held that the ensuing delays, attributable in part to adjournments, docket congestion, and the appointment of new attorneys, were not inexcusable under the facts of the case. *Id*.

In the instant case, the 180-day period began on April 17, 2016—the day after the prosecutor received written notice by the DOC—and ended on October 12, 2016. See *Lown*, 488 Mich at 255-256. Defendant appeared for his arraignment and preliminary examination[6] on May 11, 2016, and a pretrial hearing was held on June 21, 2016, at which defendant's trial was set for October 5, 2016. The prosecution filed proposed jury instructions and witness and exhibit lists

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[4] "[T]he 180-day period addressed in MCL 780.131 and MCL 780.133 consists of the consecutive 180 days beginning on the day after the prosecutor receives the required notice from the DOC." *Lown*, 488 Mich at 262; *People v Williams*, 75 Mich 245, 256 n 4; 716 NW2d 208 (2006). "[U]nlike periods of delay considered under [a] speedy trial analysis, [it] is not subject to apportionment." *Lown*, 488 Mich at 262-263.

[5] As the Supreme Court in *Hendershot* explained:

> Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly, the statute opens the door to a finding by the court that good-faith action was not commenced as contemplated by [MCL 780.133], thus requiring dismissal. The statute does not require that the action be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If, as here, apparent goodfaith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. [*Hendershot*, 357 Mich at 303-304.]

[6] Defendant waived both and was bound over on the charged offenses.

on July 6, 2016, and several subpoena returns in early September 2016. Thus, the record amply demonstrates that, after receiving the requisite notice from the DOC, the prosecution "proceed[ed] promptly and move[d] the case to the point of readiness for trial within the 180-day period." *Id*. at 246 (quotation marks, bracket, and citation omitted).[7]

On September 22, 2016, based on docket congestion, the trial court sua sponte adjourned defendant's October 5, 2016 trial date and rescheduled it for December 14, 2016. Neither party objected to the adjournment. After the adjournment, defendant filed additional motions, to which the prosecution responded, and by the end of October, the prosecution again began filing subpoena returns in anticipation of the December 2016 trial. On November 10, 2016, defendant filed a motion to dismiss the charges based on a violation of the 180-day rule.

At the November 22, 2016 hearing on defendant's motion to dismiss, defense counsel asserted that the prosecutor had first apprised her of the DOC notice on November 10, 2016, and that if she had been notified earlier, defendant could have gone to trial on October 5, 2016. The prosecutor argued that he had been prepared to go to trial at any time as evidenced by the fact that he had filed documents for trial on time, had his witnesses subpoenaed, and had not taken any action to delay the trial date. The court stated that the "problem [the court has] with this particular case is this; the Court did not know that there's a 180-day notice given." It indicated that had the court been aware of the 180-day notice, it would not have adjourned defendant's trial date in order to hold two other "retries" for hung jury cases in which the charged defendants were out on bond. Instead, the court stated, it would have held defendant's trial as originally scheduled. The court acknowledged that if the prosecutor had notified the court of the 180-day notification, it "would have said there was a good faith effort on the [part of the] prosecutor—I'm not saying it was intentional. But the lack of notification of the 180-day waiting period is the problem." In view of this, the trial court dismissed the charges against defendant with prejudice.

We conclude that the trial court abused its discretion in dismissing this case. The prosecutor ultimately had the responsibility of moving the case forward toward a trial, *People v Forrest*, 72 Mich App 266, 270; 249 NW2d 384 (1976), and delays by the trial court in setting or rescheduling a trial date due to docket congestion can, in some circumstances, amount to inexcusable delay, see *id*., at 271. However, as indicated above, the record amply demonstrates that the prosecutor proceeded promptly and moved the case to the point of readiness for trial within the 180-day period. The prosecutor stood ready for trial on September 22, 2016, and remained ready for trial at all times thereafter. Moreover, it does not appear from the record that the prosecutor knowingly concealed his receipt of notice under 180-day rule, nor could he. As the prosecution points out and defendant concedes on appeal, MCL 780.132 requires the DOC to notify each prisoner of any request forwarded under the provisions of MCL 780.131. Thus, the prosecution could safely assume that, at a minimum, defendant also knew about the 180-day

[7] We further note that defendant also readied for trial during the 180-day window. He filed his proposed jury instructions, witness and exhibit lists on September 20, 2016, and a motion to suppress out-of-court identifications on September 22, 2016. Defendant filed several motions to which the prosecution responded, and the prosecution complied with all discovery orders.

timeline. Although a prosecution's failure to notify the court that it had received notice pursuant to MCL 780.131, in the presence of other circumstances, might reflect evidence of intent not to bring the case to trial promptly, such circumstances simply are not present in this case. Thus, like the prosecutor in *Lown*, the prosecutor in the instant case satisfied the statutory 180-day rule because he "commenced action well within 180 days after receiving notice from the DOC, proceed[ed] promptly and with dispatch thereafter toward readying the case for trial, and [stood] ready for trial within the 180–day period . . . ." *Lown*, 488 Mich at 247. Furthermore, we do not view the prosecutor's failure to alert the trial court of the 180-day deadline, in a case where the court had scheduled trial to occur within the deadline, as "an evident intent not to bring the case to trial promptly." *Id*. at 246. And because the trial was rescheduled to occur only 64 days after the 180-day period, it did not cause "inexcusable" delay. *Id*.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering
/s/ Michael J. Riordan