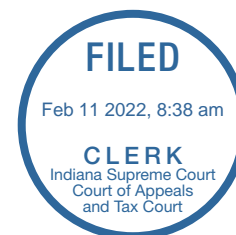


MEMORANDUM DECISION

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

Charles L.D. Perry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 11, 2022

Court of Appeals Case No.
21A-CR-877

Interlocutory Appeal from the
Jennings Circuit Court

The Honorable Murielle S. Bright,
Judge

Trial Court Cause Nos.
40C01-1911-F6-350
40C01-2003-F5-22

Crone, Judge.

Case Summary

- [1] Charles L.D. Perry brings this consolidated interlocutory appeal from the denial of his motions for discharge and a motion to reconsider in two separate criminal causes. We affirm.

Facts and Procedural History

- [2] The convoluted procedural history regarding each cause follows. On September 27, 2018, Perry was arrested for alleged possession of a narcotic drug (heroin) and operating a vehicle while intoxicated. Following a hearing on September 29, the trial court set bail and released Perry on his own recognizance. The State filed formal charges against Perry on November 8, 2019, under cause number 40C01-1911-F6-350 (Cause 350). At an initial hearing held on December 23, 2019, the trial court appointed counsel for Perry and scheduled a jury trial for June 29, 2020. However, after Perry failed to appear for a final attorney's conference on June 5, the trial court canceled the jury trial and issued a warrant for Perry's arrest. Perry was arrested on June 23, and he appeared with counsel for a pretrial conference on July 10. The trial court again released Perry on his own recognizance on July 14 and stated that it would schedule a jury trial date by separate order.
- [3] On October 19, 2020, the State moved to revoke Perry's release, alleging that Perry had been arrested and charged with other crimes, including crimes charged under cause number 40C01-2003-F5-22 (Cause 22). On December 8, 2020, the trial court issued a warrant for Perry's arrest and issued an order

resetting his jury trial to May 17, 2021. Perry was arrested on December 16, and on January 28, 2021, the trial court ordered him to be held without bond in both Cause 350 and Cause 22. The State filed its witness and exhibit list on March 29, 2021, and on April 23, Perry appeared with counsel at a pretrial conference and reported to the trial court that the jury trial would proceed as scheduled. Appellant's App. Vol. 2 at 98.

[4] Regarding Cause 22, on May 21, 2019, Perry was arrested following the execution of a search warrant at his residence. He was later released from the Jennings County Jail. Perry was charged with nine felony counts related to fentanyl and methamphetamine dealing and possession on March 31, 2020. Following an initial hearing held on May 22, the trial court appointed counsel for Perry and scheduled his jury trial for June 29, 2020. Perry failed to appear for a pretrial conference on June 5, his trial date was canceled, and a warrant was issued for his arrest. Perry was arrested on June 23, 2020, and a pretrial conference was held on July 9. After the conference, the trial court released Perry from jail. On October 19, the State moved to revoke Perry's release due to an accumulation of new charges, including charges filed in June and October 2020. On November 19, the trial court issued a warrant for Perry's arrest, and he was arrested on December 16. In the meantime, on December 8, 2020, the trial court issued an order resetting Perry's jury trial to May 17, 2021. On March 29, 2021, the State filed its witness and exhibit list for Perry's trial, and on April 23, Perry appeared with counsel at a pretrial conference and reported

to the trial court that the jury trial would proceed as scheduled. Appellant's App. Vol. 2 at 98.

[5] Three days after the pretrial conference in Cause 350 and Cause 22, on April 26, 2021, Perry filed motions for discharge under Indiana Criminal Rule 4 in both causes. The trial court summarily denied the motions. Perry filed a motion to reconsider, which the trial court denied on April 28. Specifically, the trial court found:

1. Defendant argues his Motion for Discharge cannot be denied summarily as his claims for dismissal under CR4(A) and CR4(B) had not vested by the March 18, 2021 deadline for motions for dismissal. This claim carries no weight as the May 17, 2021 jury trial date was clearly ordered in the [December 8, 2020]¹ Order. Defendant could have filed his CR4 motions at any time after the [December 8, 2020] Order when the jury trial date was given.
2. Additionally, the May 17, 2021 jury trial date was due to court congestion caused by the COVID-19 pandemic emergency which provides an exception to CR4 requirements.
3. Furthermore, the Motion to Discharge and Reconsider are denied as the Indiana Supreme Court suspended jury trials due to the COVID-19 pandemic emergency from April 3, 2020 to August 14, 2020 for a total of 134 days and again from December 14, 2020 to March 1, 2021 for a total of 78 days, for a combined total of 212 days that shall not be included in the calculation of time to bring the Defendant to trial.

¹ The trial court signed and dated the order November 8, 2020, but the court did not enter the order in the chronological case summary until December 8, 2020.

Id. at 104. This interlocutory appeal ensued.²

Discussion and Decision

[6] Perry challenges the trial court’s denial of his motions for discharge pursuant to Criminal Rule 4. In reviewing claims that Criminal Rule 4 has been violated, 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* (2020). “The broad goal of Indiana’s Criminal Rule 4 is to provide functionality to a criminal defendant’s fundamental and constitutionally protected right to a speedy trial.” *Austin v. State*, 997 N.E.2d 1027, 1037 (Ind. 2013) (footnote omitted).³ As our 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.*

² On April 27, 2021, the trial court entered an additional order in F6-360 and a third case involving Perry (40-C01-2010-F6-328) which provided:

On December 8, 2020, these cases were scheduled for jury trial on May 17, 2021, along with approximately twenty-five (25) other cases. The Jennings Circuit Court is a single judge court with no referees or magistrates and on May 17, 2021 the case of State of Indiana vs. Charles L.D. Perry, [Cause F5-22], must be tried first under Indiana Rule of Criminal Procedure 4. Thus, due to extreme court congestion, this case is continued and will be reset by separate order.

Appellant’s App. Vol. 2 at 103. This order is not the subject of this interlocutory appeal.

³ It is well established that Criminal Rule 4 claims are separate and distinct from claims regarding the constitutional right to a speedy trial. *Cundiff v. State*, 967 N.E.2d 1026, 1027 n.2 (Ind. 2012). To the extent that Perry claims that the trial court violated his right to a speedy trial as guaranteed by the United States and Indiana Constitutions, we note that he raises this claim for the first time on appeal. Indeed, Perry concedes as much in his appellant’s brief. *See* Appellant’s Br. at 17 (“Admittedly, Perry’s Motion for Discharge did not expressly invoke his rights under the United State[s] and Indiana Constitution.”). Issues not properly presented to the trial court in ruling on the interlocutory order are unavailable on interlocutory appeal. *Curtis v. State*, 948 N.E.2d 1143, 1147 (Ind. 2011). Accordingly, Perry’s constitutional speedy-trial claims are forfeited. *See id.*

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

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*.

[7] Under this rule, although the State has an affirmative duty to bring the defendant to trial within one year of being charged or arrested, extensions are allowed for various reasons. *Cook v. State*, 810 N.E.2d 1064, 1065 (Ind. 2004). For instance, “[i]f a delay is caused by the defendant’s own motion or action, the one-year time limit is extended accordingly.” *Frisbie v. State*, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997), *trans. denied* (1998). Moreover, a defendant waives his right to a speedy trial if the defendant is aware or should be aware of the fact that the trial court has set a trial date beyond the applicable time limitation, and the defendant does not object to the trial date. *State v. Black*, 947 N.E.2d 503, 507 (Ind. Ct. App. 2011). As our court has previously explained:

[W]hen, prior to the expiration of the period set by [Criminal Rule 4], the court sets a trial date which is beyond that period

and the defendant is or should be aware that the setting is beyond that period, it is his obligation to object at the earliest opportunity so that the court can reset the trial for a date within the proper period. If the defendant sits idly by at a time when the court could yet grant him a trial within the proper period and permits the court, without objection, to set a date beyond that period, he will be deemed to have acquiesced therein.

Delph, 875 N.E.2d at 420. This requirement emphasizes that the purpose of Criminal Rule 4(C) is to create early trials and *not* to discharge defendants. *Brown v. State*, 725 N.E.2d 823, 825 (Ind. 2000) (emphasis added).

Section 1 – The trial court did not err in denying Perry’s motion for discharge in Cause 350 based upon his waiver.

[8] A determination of whether the Criminal Rule 4(C)’s one-year timeframe has been violated requires various considerations. First, we must determine what date marks the beginning and end of the one-year timeframe. The one-year period commences with the date of the defendant’s arrest or the filing of the information, whichever is later. Ind. Criminal Rule 4(C). Here, the charges in Cause 350 were filed after Perry’s arrest on November 8, 2019, and thus, the original one-year deadline would have expired on November 8, 2020. The trial court’s initial setting of Perry’s trial date for June 29, 2020, was well within that one-year deadline.

[9] At Perry’s initial hearing, the trial court ordered him to appear at a final pretrial conference on June 5, 2020. Perry’s failure to appear necessitated the trial court to cancel the original trial date and issue a warrant for his arrest. This delay—

the thirty-five days between June 5 and July 10 when Perry was brought before the trial court—is attributable to Perry. Thus, the 4(C) deadline was extended to December 13, 2020. *See Frisbie*, 687 N.E.2d at 1217 (“If a delay is caused by the defendant’s own motion or action, the one-year time limit is extended accordingly.”). Before the expiration of that time period, on December 8, 2020, the trial court issued an order setting the trial date to May 17, 2021, beyond the date required by Criminal Rule 4(C). Therefore, it was during this brief interval between December 8 and December 13, that Perry was required to object to the May 2021 trial date. Failure to do so resulted in his waiver of his claim for discharge under Criminal Rule 4(C).

[10] We emphasize that Perry not only sat idly by while still within the Criminal Rule 4(C) deadline, but also continued to sit idly by long after. Indeed, more than four months after the one-year period had expired, Perry and his counsel appeared before the trial court for a pretrial conference and advised that they were ready to proceed for the May 17, 2021, trial. Indeed, at no point did Perry’s counsel object to the trial date until he finally filed a motion for discharge. “Failure to voice a prompt objection is deemed a waiver of the issue.” *Todisco v. State*, 965 N.E.2d 753, 755 (Ind. Ct. App. 2012), *trans. denied*. Under the circumstances, the trial court did not clearly err in denying Perry’s motion for discharge in Cause 350.

Section 2 – The trial court did not err in denying Perry’s motion for discharge in Cause 22 based upon his waiver.

[11] We reach a similar but even more compelling result regarding Cause 22. The charges in Cause 22 were filed after Perry’s arrest on March 31, 2020, resulting in an original Criminal Rule 4(C) deadline of April 1, 2021. The trial court’s initial setting of Perry’s trial date for June 29, 2020, was well within that one-year deadline.

[12] As with Cause 350, the trial court ordered Perry to appear at a final pretrial conference on June 5, 2020. Perry failed to appear, which necessitated the trial court to cancel the original trial date and issue a warrant for his arrest. Perry was finally arrested on June 23, 2020, and brought before the court on July 10. This delay—the thirty-five days between June 5 and July 10 when Perry was brought before the trial court—is attributable to Perry. Thus, the 4(C) deadline was extended to May 6, 2021. *See Frisbie*, 687 N.E.2d at 1217. Well before the expiration of that time period, on December 8, 2020, the trial court issued an order setting the trial date for May 17, 2021, beyond the date required by Criminal Rule 4(C). Therefore, it was during this time, the many months that remained between December 2020 and May 2021, that Perry was required to object to the May 17, 2021, trial date. Failure to do so resulted in his waiver of his claim for discharge under Criminal Rule 4(C).

[13] Again, Perry not only sat idly by for months while still within the Criminal Rule 4(C) deadline, but he and his counsel also specifically advised the trial court that they were ready to proceed for the May 17, 2021, trial when they

attended the final pretrial conference in April 2021. At no point did Perry's counsel object to the trial date until he finally filed a motion for discharge. Under the circumstances, the trial court did not clearly err in denying Perry's motion for discharge in Cause 22.⁴ The trial court's orders denying Perry's motions for discharge and motion to reconsider are affirmed.

[14] Affirmed.

Bradford, C.J., and Tavitas, J., concur.

⁴ Waiver notwithstanding, the State points to the Indiana Supreme Court's emergency orders regarding the COVID-19 pandemic, which tolled the time limits for Criminal Rule 4 in Jennings County from March 18, 2020, through August 14, 2020, and again from December 14, 2020, to March 1, 2021. See *In the Matter of the Petition of the Courts of Jennings Cnty. for Admin. Rule 17 Emergency Relief*, No. 20S-CB-186 (Ind. March 19, 2020) (providing that, effective March 18, 2020 through April 15, 2020, the Indiana Supreme Court authorized the tolling of Criminal Rule 4 time limits in the Jennings County courts); *In the Matter of Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 141 N.E.3d 1243 (Ind. April 3, 2020) (extending tolling period through May 4, 2020); *In the Matter of Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 142 N.E.3d 912 (Ind. April 24, 2020) (extending tolling period through May 17, 2020); *In the Matter of Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 144 N.E.3d 198 (Ind. May 13, 2020) (extending tolling period through May 30, 2020); *In the Matter of Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 145 N.E.3d 787 (Ind. May 29, 2020) (extending tolling period through August 14, 2020); *In the Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 155 N.E.3d 1191 (Ind. Dec. 14, 2020) (tolling early trial demands under Criminal Rule 4 from December 14, 2020 through March 1, 2021). After doing numerous calculations regarding the pandemic tolling periods, the State posits that the total of the periods attributable to the Criminal Rule 4(C) deadline is 307 days, meaning that Perry's motions for discharge were two months premature and therefore properly denied by the trial court. For his part, Perry questions the validity of our supreme court's emergency orders and the court's authority to toll Criminal 4(C) deadlines. As did another panel of this Court recently in *Owens v. State*, 168 N.E.3d 1036, 1040 n.5 (Ind. Ct. App. 2021), we find it unnecessary to address this alternative basis for affirming the trial court's interlocutory order.