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IN THE COURT OF APPEALS OF INDIANA

Markus W. Miller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 5, 2022

Court of Appeals Case No. 21A-CR-1269

Appeal from the Pulaski Circuit Court

The Honorable Jeanene E. Calabrese, Special Judge

Trial Court Cause No. 66C01-1906-F4-12

Shepard, Senior Judge.

Statement of the Case

[1] This appeal examines the calculation of time after a speedy trial request is made. The defendant's actions and the substantial tolling of time due to the

COVID-19 pandemic delayed the trial date to nearly two years after the request was initially made.

[2] Markus W. Miller appeals after being convicted by a jury of one count each of Level 4 felony unlawful possession of a firearm as a serious violent felon,[1] Level 6 felony resisting law enforcement,[2] Level 6 felony unlawful possession of a syringe,[3] and Level 6 felony possession of methamphetamine.[4]

[3] Miller challenges the trial court's findings and rulings related to his Criminal Rule 4(B) motions for discharge, and raises an ineffective assistance of trial counsel claim as respects counsel's enforcement of Miller's speedy trial request. Finding that the court's speedy trial calculation is correct and that counsel was not ineffective in his representation of Miller, we affirm.

Facts and Procedural History

[4] The events leading to Miller's charges stem from his encounter with law enforcement officers attempting to arrest him on a warrant on the evening of June 13, 2019. Miller fled from officers and ran into the woods. After Miller's gun malfunctioned while attempting to fire it at the officers, he threw it to the

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[1] Ind. Code § 35-47-4-5(c) (2018).

[2] Ind. Code § 35-44.1-3-1(b) (2016).

[3] Ind. Code § 16-42-19-18 (2015).

[4] Ind. Code § 35-48-4-6.1(a) (2014).

ground and surrendered. A search of the bag Miller was carrying produced syringes and other drug paraphernalia.

[5] The sequence of events regarding Miller's challenge to the court's findings and rulings on his speedy trial requests and his corresponding pro se motions for discharge, is quite lengthy and contains many moving parts. The following is a basic framework of the course of events as described by Miller, which will be fleshed out more fully in our discussion of Miller's arguments.

[6] On June 14, 2019, the State filed the present charges against him, and on June 25th Miller orally moved for a fast and speedy trial. It was granted by Pulaski Circuit Court Judge Mary Welker. Therefore, under Rule 4(B) the State was required to bring Miller to trial on or before September 3, 2019. On July 16, 2019, Miller's case was reassigned to Starke Circuit Court Judge Jeanene Calabrese as special judge. On July 22, 2019, the Starke County Clerk's Office received Judge Calabrese's appointment. Next, on September 9, 2019, Judge Calabrese entered a recusal order, and the case was reassigned to Starke Circuit Court Judge Kim Hall the next day. The Starke County Clerk's Office received the case file on September 16, 2019. On October 3, Miller filed for a change of judge. On October 15, 2019, Judge Calabrese was reassigned to the case, and on October 31, the court held a hearing with the parties to schedule trial dates.

[7] In his December 10, 2020 motion for discharge Miller claimed that, based on his calculations, as of October 31, 2019, and assuming a proper calculation of time charged to him, the State was forty-four days past Miller's speedy trial date

of September 3, 2019. Miller filed a memorandum in support of his motion along with a letter from his prior counsel, and a copy of the CCS.

[8] Then, on January 5, 2021, Miller filed a letter with the court in which he outlined the errors he believed were committed by Judge Calabrese, including declining to take his case for forty-nine days in contravention of Miller's interpretation of Criminal Rule 13(C). He also claimed that the recusals by Judge Welker and Judge Calabrese were wrongfully attributed to him in the speedy trial calculation. He maintained that the State was well beyond the window of time in which to hold his speedy trial.

[9] On January 15, 2021, the court held a status hearing addressing the pro se motions for discharge at which Miller presented his arguments once more. The court stated that the pro se filings would be noted and filed but left it to Miller's counsel to decide whether to file a motion for discharge with the court. After the hearing, the court's order asked why Miller was filing pro se motions with the court when he was represented by counsel. The court observed that Miller's claims were the same as before, that the court had listened to and reviewed audio recordings of Miller's previous hearing leading to the earlier denial, and that the latest filing presented no new argument. Miller now says that the court did not issue a formal ruling on his pro se motion for discharge.

[10] On March 4, 2021, the court reset Miller's trial for April 9 and 12, 2021 and the jury trial was held on those dates. Miller was found guilty as charged and he was later sentenced to thirty-four and one-half years. This appeal ensued.

Discussion and Decision

I. Criminal Rule 4(B)[5]

[11] Miller asks us to examine the court's allocation of the delays in setting his trial and its calculation under Criminal Rule 4(B).[6] "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). "It places an affirmative duty on the State to bring the defendant to trial, but at the same time is not intended to be a mechanism for providing defendants a technical means to escape prosecution." *Id.*

[12] If the defendant moves for a speedy trial, the State must bring him to trial within 70 days unless "a continuance within said period is had on [the defendant's] motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar delays because of the congestion of the court calendar." Ind. Crim. Rule 4(B)(1). A defendant cannot cause delay and then demand a speedy trial. *Jackson v. State*, 663 N.E.2d 766 (Ind. 1996).

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[5] To further assist in understanding the timeline of events, we incorporate Attachment 1, which appears at the end of this decision.

[6] Miller did not raise any specific claims under the federal or state constitutions to the trial court or here on appeal. Consequently, those arguments are waived for review. *See Curtis v. State*, 948 N.E.2d 1143 (Ind. 2011) (failure to raise at trial); *Keller v. State*, 987 N.E.2d 1099 (Ind. Ct. App. 2013) (failure to argue cogently on appeal).

[13] A trial court's decision denying discharge under Criminal Rule 4 is reviewed for clear error, after according the trial court's factual findings reasonable deference. *Austin*, 997 N.E.2d 1027. "We neither reweigh the evidence nor determine the credibility of witnesses." *State v. Oney*, 993 N.E.2d 157, 161 (Ind. 2013). "We consider only the probative evidence and reasonable inferences supporting the judgment and reverse only on a showing of clear error." *Id.* "Clear error is that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* (internal citations and quotations omitted). A question of law is reviewed de novo. *Austin*, 997 N.E.2d 1027.

[14] By the time charges in this case were filed, Miller had two other pending criminal cases. All three cases were originally filed in Pulaski Circuit, Judge Mary Welker's court. Miller's initial hearing in the present matter occurred on June 25, 2019, at which he requested a "fast and speedy trial." Tr. Vol. II, p. 12. Judge Welker granted the request, set Miller's trial for August 6-8, 2019, and appointed counsel. Next, on July 12, 2019, at a case management conference, Miller's appointed counsel alerted Judge Welker to the fact that she had previously represented Miller on criminal matters in 1997, 2000, and 2001. Judge Welker confirmed this information and stated for the record that she was recusing herself, "especially since Mr. Miller has brought it up as an issue." *Id.* at 36. The court said that the trial would not be held on the scheduled date and concluded, "that Cr-4 will be charged to him and the speedy trial will not then start to count until there's a new judge that's accepted and he'll have–it'll start to count at that time again." *Id.* Miller's counsel did not object, instead saying,

"I believe it's a prudent decision." *Id.* at 37. Judge Welker's recusal in this case and the other two cases was filed on July 15, 2019.

[15] Miller maintains that the delay produced by Judge Welker's recusal and events thereafter should not be charged against him. He says that because he was not present at the case management hearing he could not agree to his counsel's decision to raise the issue of Judge Welker's prior representation of him before she took the bench. However, our Supreme Court has held that once counsel is appointed, the defendant speaks to the court through his or her attorney. *See Underwood v. State*, 722 N.E.2d 828 (Ind. 2000). To do otherwise and require the court to respond to both the defendant and his counsel, would create a hybrid representation to which a defendant is not entitled. *Id.* Miller's counsel raised the issue on Miller's behalf and received the requested relief. Consequently, this argument is unavailing on appeal.

[16] Further, we agree with the State that, even if Judge Welker had sua sponte recused herself, the time to find a special judge would not have counted toward Miller's Criminal Rule 4(B) period because the delay is "akin to court congestion." *See State v. Larkin*, 100 N.E.3d 700, 706 (Ind. 2018) (delay in finding special judge attributable to defendant). Therefore, for purposes of our calculation, seventeen days would be charged against the Rule, (June 26, 2019 through July 12, 2019) leaving fifty-three days in which to bring Miller to trial under the Rule.

[17] On July 16, 2019, pursuant to Trial Rule 79(D) and Pulaski County Local Rule LR66-CR-2.2-02, the Pulaski County Clerk reassigned Miller's three cases to special judges from Starke County. Cause numbers 66C01-1509-F1-1 (F1-1) and 66C01-1906-F4-12 (F4-12), the current matter, were assigned to Starke Circuit Court Judge Jeanene Calabrese as special judge. However, on that same date, the Pulaski County Clerk reassigned Cause number 66C01-1702-F6-33 (F6-33) to Starke Circuit Court Judge Kim Hall as special judge. Judge Hall filed his acceptance and oath in F6-33 on August 27, 2019. Next, in orders signed that same date but appearing on the CCS on September 9, 2019, Judge Calabrese filed an order of recusal in which she disqualified herself from service finding it best, "[i]n the interest of judicial economy, and time management," that the present case "should be assigned to Starke Circuit Court Judge Kim Hall, to coincide with the other case [of Miller's] that he presides over as special judge." Appellant's App. Conf. Vol. II, p. 130.

[18] As of September 10, 2019, the Pulaski Clerk had assigned all three of Miller's cases to Judge Hall, who filed his acceptance and oath in both cases on September 20, 2019. On October 3, 2019, Miller moved for change of judge in all three cases alleging that Judge Hall had exhibited prejudice against him in the past. Judge Hall granted the motion on October 15th and stated the following in his order regarding all three of Miller's cases:

> The parties agree on a new Special Judge: Starke Circuit Court Magistrate Jeanene Calabrese, who consents to serve as Special Judge in these three (3) causes.
>
> . . . .

All delay is chargeable to [Miller].

Id. at 146. There was no objection to the court's order, including the language attributing the delay to Miller, and Judge Calabrese accepted her appointment in all three cases on October 21, 2019.

[19] Miller contends that Judge Calabrese was required to accept jurisdiction of the case on July 16th under the language of Rule 13(C) and (E), and that from that time forward, all delay should count against Criminal Rule 4. We pause now to address this contention and the interaction of the rules involved and cases Miller cites.

[20] The court's order reflects that Judge Calabrese was selected as special judge pursuant to local rules and Trial Rule 79(D). *See* Appellant's App. Conf. Vol. II, pp. 18, 116. Rule 79(D) allows for the appointment of a special judge under section H, which provides for the selection of a special judge under local rules. The local rule involved, Pulaski County Local Rule LR66-CR-2.2-02, provides in pertinent part that upon the recusal of the judge in the Pulaski Circuit Court, "the case shall be assigned to the judge of the Pulaski Superior Court." If the judge of the Pulaski Superior Court cannot serve, then the case "shall be reassigned to the judge or the magistrate of the Starke Circuit Court." *Id.*

[21] Meanwhile, Judge Hall had already accepted jurisdiction over F6-33. Criminal Rule 13(C) provides that "[a] person appointed to serve as special judge under this subsection must accept jurisdiction in the case unless the appointed special judge is disqualified pursuant to the Code of Judicial Conduct, ineligible for

service under this Rule, or excused from service by the Indiana Supreme Court." Additionally, Rule 13(E) provides that "[a] judge assigned under the provision of this rule shall accept jurisdiction unless disqualified under the *Code of Judicial Conduct* or excused from service by the Indiana Supreme Court." However, Rule 13(C) also states, as respects the selection of special judges under local rules adopted by counties, "[t]he local rule shall take into account the effective use of all judicial resources within an administrative district."

[22] In an apparent effort at judicial economy and efficient management, Judge Calabrese recused so that all three cases would be before the same special judge, Judge Hall. We can imagine the advantages to the defendant in terms of negotiating plea agreements and preparing for trial if the matters are brought together before one special judge. Those opportunities bore fruit for Miller in that he was found not guilty in one case and reached a plea agreement in another.

[23] Our Supreme Court has held that even when "the method of selection of a special judge [is] irregular, the appellant waive[s] the irregularity by accepting the appointment and submitting to the jurisdiction of the special judge, with full knowledge of the irregularity." *See Powell v. State*, 440 N.E.2d 1114, 1117 (Ind. 1982). Judge Calabrese's recusals were acts of judicial management that were unobjectionable even if they were not every day events. Further, Miller's challenge on appeal is to the allocation of time under Criminal Rule 4, not to Judge Calabrese's qualification as special judge.

[24] Miller, nonetheless, cites *State v. Jackson*, 857 N.E.2d 378 (Ind. Ct. App. 2006) in support of his position that the Rule 4 time should have recommenced upon Judge Calabrese's initial appointment in this case. However, that would be so only if he had filed a motion for a change of venue from the county. The *Jackson* Court cited our Supreme Court's opinion in *State v. Grow*, 255 Ind. 183, 186, 263 N.E.2d 277, 278-79 (1977) to explain the difference between the two.

> Where a change of venue from the county has been granted, we have held the time begins to run anew when the court to which the venue is changed receives the transcript and original papers and assumes jurisdiction. *State v. Mabrey* (1927), 199 Ind. 276, 157 N.E. 97. It follows that the time begins to run anew where a change of venue is taken from a judge *when the new judge qualifies and assumes jurisdiction.*

Jackson, 857 N.E.2d at 380-81.

[25] The *Jackson* Court held that "Criminal Rule 13, which governs change of venue from judge, contemplates that a successor judge may recuse or be disqualified or excused from service, necessitating the assignment or appointment of yet another judge." *Id.* at 381. Here, we find that the delays in settling on a special judge for all of Miller's cases was brought about by his actions in prompting Judge Welker's recusal in the first instance, including Judge Calabrese's recusal in the interest of judicial economy, and time management. *See Larkin*, 100 N.E.3d 700. So, for purposes of our calculation, the fourteen days which elapsed between when Judge Hall assumed jurisdiction (September 20, 2019) and when Miller moved for a change of judge (October 3, 2019), and nothing

more, would count under the Rule, leaving thirty-nine days in which to try Miller.[7]

[26] Next, on October 31st, Miller appeared with new counsel. The parties had agreed to Judge Calabrese's service as special judge and she had assumed jurisdiction on October 21st. At that hearing, Miller's trial in this cause was scheduled for February 10-14, 2020, as were F1-1 and F6-33, due to congestion in the court's calendar. *See* Appellant's App. Vol. 2, p. 8. The parties agreed that the cases would be set for trial in chronological order with the oldest case, F1-1, as the first setting, F6-33, as the second setting, and the present case as the third setting. Miller's counsel acknowledged that if one of the two older cases

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[7] To reiterate, Miller moved for a change of judge because the judge had a demonstrable conflict, the judge promptly recused, and then Miller's case bounced among judges for nearly two months before one assumed jurisdiction. (That Miller then moved for another change of judge is a separate issue.) It is worth noting that in a similar situation, this court has held that delay resulting from a defendant moving for a special prosecutor because the regular prosecutor had a conflict is chargeable to the State because "a defendant should not be forced to choose between a speedy trial and a fair trial as a result of the prosecutor's failure to identify and cure his conflicts." *Harrington v. State*, 588 N.E.2d 509, 511 (Ind. Ct. App. 1992) (relying on *Biggs v. State*, 546 N.E.2d 1271, 1275 (Ind. Ct. App. 1989), which held that a defendant cannot be charged with delay caused by a motion for continuance made because the State failed to comply with discovery), disapproved on other grounds, *Cook v. State*, 810 N.E.2d 1064, 1067 (Ind. 2004). "The determination of whether a particular delay in bringing a defendant to trial violates the speedy trial guarantee largely depends on the specific circumstances of the case." *Wheeler v. State*, 662 N.E.2d 192, 193 (Ind. Ct. App. 1996). There is no suggestion that Miller moved for a change of judge to strategically run out the time. *See Larkin*, 100 N.E.3d at 705 (noting the problem with applying Harrington in that case was it "would allow for a defendant to file for change of judge preventing the case from moving forward but allowing the 4(C) period to run"). And although Judge Calabrese was assigned F4-12 on July 16, 2019, she did not act on that assignment until over a month later, when she signed a recusal order that was not filed and entered on the CCS for nearly two weeks. Nonetheless, we acknowledge that Larkin says a delay occasioned by a defendant's filing of a motion for change of judge is chargeable to him – such as is the case here – and that "it is not clear why such delay is not akin to court congestion." *Id.* at 705-06. We simply observe that not every non-continuance delay should be considered "akin to court congestion" without a consideration of the specific facts and circumstances or Rule 4(B) will cease to have meaning. *Cf. Austin v. State*, 997 N.E.2d 1027, 1043-44 (Ind. 2013) ("[W]e caution that 'court congestion' is not a blank check for poor judicial administration. . . . The protections afforded a defendant under Criminal Rule 4 are not to be trampled upon and trial courts must remain vigilant in its enforcement.")

went to trial, the jury trial in the present case would be continued to a later date. For purposes, of our calculation, upon that scheduling agreement, eleven days (October 21st to October 31st) would count under the Rule, leaving twenty-eight days in which to bring Miller to trial.

[27] Counsel agreed to the trial setting and informed the court that he would be "scheduling and taking depositions within the next couple of months" and further stated that "the Defendant will not be filing any Motions for Discharge Under Criminal Rule 4." *Id.* at 165. The trial in F1-1 was held on February 10-12, 2020 at the conclusion of which Miller was found not guilty.

[28] In a pre-trial conference held after the F1-1 trial, the court found that "due to congestion of the court's calendar, the jury trial scheduled for February 10-12, 2020 [in F4-12] is hereby reset for a Jury Trial on August 3-6, 2020 . . . as a primary setting." *Id.* at 169. On February 14, 2020, the court's order, without objection, scheduled F6-33 and F4-12 (the current matter) for trial on August 3, 2020.

[29] Next, due to the challenges brought on by the COVID-19 pandemic, the Supreme Court issued an order on May 29, 2020, tolling all early trial demands until August 14, 2020. *See In re Admin. R. 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, 145 N.E.3d 787 (Ind. 2020). For purposes of our calculation, there remained twenty-eight days in which to bring Miller to trial after the tolling period expired.

[30] On June 8, 2020, during the tolling period, the court continued Miller's trial in the present matter until February 8, 2021 "due to COVID-19" and congestion of the court's calendar. *See* Appellant's App. Conf. Vol. II, p. 180. Miller appeared for a pre-trial conference on June 26, 2020 and agreed to the new trial settings in this case and in F6-33. There remained twenty-eight days left in which to bring Miller to trial under the Rule.

[31] Next, on July 24, 2020, Miller's counsel filed a motion to dismiss in the present case, citing Criminal Rule 4(B), and claiming that "only minor delay is attributable to [Miller] based on his prior counsel's request for a special judge, which he did not consent to." Appellant's Br. p. 10. The court set the motion for hearing on July 27th after which the court issued an order resetting the matter for hearing on August 14, 2020, because the prosecuting attorney "just received the Defendant's Motion to Dismiss this date and she is not prepared to argue the motion this date." Appellant's App. Vol. II, p. 176. Of course, the Supreme Court's emergency tolling of speedy trial requests remained in effect.

[32] The hearing on Miller's Motion to Dismiss was held on August 14, 2020 after which the court concluded that "Miller's counsel had failed to object to Judge Welker attributing the delay for her recusal against the rule." Appellant's Br. p. 10. Miller says on appeal that the court did not address Judge Calabrese's first recusal or her comment attributing the delay under Criminal Rule 4 to Miller. *See* Appellant's Br. p. 10. However, his argument before the court was that he had not consented to requesting that Judge Welker recuse. A party cannot raise an argument on appeal which is different from the argument raised at trial. *See*

Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999), *trans. denied.* In any event, the motion to dismiss was premature, as there remained twenty-eight days in which to bring Miller to trial in this case.

[33] On September 9, 2020, the court entered its order on the motion, stating that the court had listened to prior recordings of proceedings at which the court had not presided, finding that the time was properly charged against Miller and denied his motion.

[34] Next, on December 10, 2020, Miller filed a pro se motion for discharge and dismissal. He renewed his argument that he should not be charged for the time from July 22, 2019, until September 9, 2019, when Judge Calabrese sua sponte recused herself. He also noted that after Judge Hall's recusal, Judge Calabrese set the matter for an October 31, 2019 hearing to set trial dates, but that hearing was held outside the seventy days under Criminal Rule 4(B). He further contended that because the hearing date was already beyond the speedy trial deadline, he no longer was required to object to trial dates set beyond that October 31st date and that his failure to object could not be considered as acquiescence to the violation.

[35] Additionally, Miller reiterated his Criminal Rule13(C) argument, contending that under the Rule Judge Calabrese "must" accept jurisdiction of the case effective the date the case is transferred, and the case file is received by the Clerk of the Court. *Id.* at 12 (citing Appellant's App. Conf. Vol. II, pp. 201-02).

Miller further argued that the actions he described all culminated in the violation of his right to a speedy trial.

[36] On December 14, 2020, however, the Supreme Court issued another order suspending all in-person trials until March 1, 2021. *See In the Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to 2019 Coronavirus (COVID-19)*, 155 N.E.3d 1191 (Ind. 2020). This order specifically tolled early trial demands from December 14, 2020, through March 1, 2021. *Id.*

[37] Nonetheless, on January 5, 2021, Miller filed a pro se letter with the court outlining the errors he perceived in the court's order denying his first Motion for Discharge. Miller then set forth a detailed timetable, including important dates for consideration of the alleged speedy trial violation. Miller argued that, based on his calculations, as of October 31, 2019, the State was forty-four days past the speedy trial date. He also directed the court to alleged miscalculations, including the initial period when Judge Calabrese had not accepted the case and the recusals of Judge Welker and Judge Calabrese. He claimed that even if the State were allowed to charge that time against him, his trial was beyond the speedy trial date.

[38] On January 15, 2021, a status hearing was held on Miller's pro se filing. The court's order on the status hearing contains an advisement to Miller that the jury trial scheduled for February 8-12, 2021 had to be moved because of the COVID-19 pandemic and the Indiana Supreme Court's suspension of in person jury trials until March 1, 2021. *See* Appellant's App. Vol. II, p. 248. The court

found that Miller had not raised anything new in this pro se filing. The court's order also acknowledges that Miller's counsel "advises the Court that he intends to send the defendant case law received from the Office of the Indiana Public Defender regarding the issue, and further requests that the Court set a new jury trial date." *Id.* More specifically, the order also reflected that case F6-33 was going to be settled and requested that the F4-12 case be set on March 10-12, 2021, as a primary setting with F6-33 as a secondary.

[39] Next, on March 4, 2021, the court rescheduled the March 10-12, 2021 trial date to April 9th and April 12th because the court staff was in quarantine. *See* Appellant's App. Vol. II, p. 29. Again, we view this situation as akin to congestion of the court's calendar. *See Larkin*, 100 N.E.3d at 706. The rescheduling was made without objection. Miller's jury trial was held on April 9th and April 12th at the conclusion of which Miller was found guilty.

[40] The charges in F6-33 were resolved by plea agreement on August 18, 2021.

[41] In sum, we find that each of the delays in the current case, F4-12, were either 1) brought about by Miller's prompting, or as a direct result of Miller's requests for the recusal of judges, 2) tolling by Supreme Court order due to the COVID-19 pandemic, 3) congestion of the court's calendar, or 4) by the agreement of counsel to new trial settings. We find no violation of Criminal Rule 4(B).

II. Ineffective Assistance of Trial Counsel

[42] Miller says that his trial counsel was ineffective for failing to enforce his request for a speedy trial. We have held that a defendant may raise a claim of

ineffective assistance of counsel on direct appeal; however, the defendant is foreclosed from subsequently relitigating claims of ineffective assistance. *See Heyen v. State*, 936 N.E.2d 294, 303 (Ind. Ct. App. 2010), *trans. denied*.

[43] Our review of this claim is well established and follows:

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
>
> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied.*

[44] Miller argues that the CCS, on its face, clearly showed a violation of his speedy trial rights, and that "from both the record and the hearing on the Motion for Discharge [] his counsel failed to adequately represent his interests." Appellant's Br. p. 20. Miller claims that "he should have been a free man as of September 28, 2019," but his "multiple pro se filings" "were largely ignored," and his counsel failed to act on the court's suggestion that "if [your counsel] at

some point in time believes that there's something to be heard by the Court in the two motions you filed . . . he can go ahead and request a hearing on it." *Id.* at 21-22.

[45] We first address Miller's contention that his pro se filings were ignored. The record reflects that Miller, while represented by counsel, submitted pro se filings to the court, asking for immediate discharge based on his calculations. As noted above, our Supreme Court has held that once counsel is appointed, the defendant speaks to the court through his or her attorney. *See Underwood*, 722 N.E.2d at 832. In that situation, if a pro se filing is made, the court is "not required to respond to the defendant's request or objection." *Id.* "To require the trial court to respond to both Defendant and counsel would effectively create a hybrid representation to which Defendant is not entitled." *Id.* Here, Miller's pro se filings were addressed by the court, the court ordered the documents filed, and stated that any further action on the content of those filings would rest with trial counsel. *See* Tr. Vol. II, p. 72.

[46] At one point while this case was pending, counsel informed the court that he would be "scheduling and taking depositions within the next couple of months[.]" *See* Appellant's App. Vol. II, p. 165 (November 6, 2019 order). Also, in the court's order on the January 15, 2021 status hearing, the court noted as respects Miller's pro se filings that,

> Attorney Timothy Lemon, counsel for the Defendant, advised the Court that he intends to send the defendant case law received

> from the Office of the Indiana Public Defender regarding this issue, and further requests that the court set a new jury trial date.
>
> A discussion is held between the Court, the Prosecuting Attorney, and Attorney Timothy Lemon regarding a trial date. The Prosecuting Attorney and counsel for the Defendant advise the Court that they do not need five (5) days for the trial as was previously set by the Court.
>
> The Prosecuting Attorney and counsel for the Defendant advise the Court and the Court Reporter that the trial scheduled for March 10, 2021 and March 11, 2021 is going to be settled and they orally request that this case be set on those dates. The Court hereby sets this matter for a Jury Trial on March 10, 2021, and March 11, 2021 at 8:00 a.m. Eastern Time, as a primary setting in 66C01-1906-F4-00012, and as a secondary setting in 66C01-1702-F6-00033. All parties are ordered to appear.

Id. at 248-49.

[47] "When counsel's action or inaction is premised upon matters relating to trial preparation, such decisions are matters of trial strategy and the power to make binding decisions of trial strategy is generally allocated to defense counsel." *Broome v. State*, 694 N.E.2d 280, 281 (Ind. 1998). Here, the record reveals that there was some effort to place all three of Miller's cases in front of one judge. As noted above, the parties had informed that court that one of the cases likely would be settled. F6-33 was resolved through a plea agreement. The evidence leads us to the conclusion that counsel informed the court that depositions would be scheduled and taken in the "next couple of months" and that he intended to provide Miller with caselaw to aid his understanding of Criminal Rule 4 calculations. *See* Appellant's App. Conf. Vol. II, pp. 165, 248.

[48] Additionally, Miller's counsel, attorney Timothy Lemon, requested the preparation of the transcript of the July 12, 2019 hearing for his review. *See id.* at 24. That was the hearing during which the issue of Judge Welker's recusal was raised. The court granted the request. *Id.* Consequently, any decision not to further challenge the speedy trial calculations was left for counsel to consider. The record also reveals that Miller's counsel made the strategic decision to take depositions to better prepare for trial should trial become necessary. Miller has not met his burden of overcoming the strong presumption that counsel rendered effective performance. There is no error here.

Conclusion

[49] Considering the foregoing, we conclude that the court did not err by denying Miller's motions for discharge. We further conclude that Miller did not receive ineffective assistance of counsel.

[50] Affirmed.

Robb, J., and Mathias, J., concur.

Attachment 1

Date	Event	Time period	Remaining days
June 14, 2019	Miller charged in this case (F4-12) which joins his pending cases F1-1 and F6-33 in Judge Welker's court.		
June 25, 2019	Miller makes speedy trial request with the 70-day period beginning on June 26 per Crim. Rule 4 (B)(2); trial scheduled for August 6, 2019 (3rd choice).		70 days = September 3
July 12, 2019	Miller says Judge Welker has a conflict, she agrees, recuses (from all cases), and says speedy trial period is tolled until new judge accepts jurisdiction.	June 26 to July 12 = 17 days	70 – 17 days = 53 days

July 16, 2019	F1-1 and this case are assigned to Special Judge Calabrese. F6-33 is assigned to Judge Hall.		
August 27, 2019	Judge Hall files acceptance and oath in F6-33; Judge Calabrese signs recusal order suggesting all cases be assigned to Judge Hall.		
September 9, 2019	Judge Calabrese's recusal order is filed on September 6 and reflected on CCS on September 9.		
September 10, 2019	All cases are assigned to Judge Hall.		
September 20, 2019	Judge Hall assumes jurisdiction.		
October 3, 2019	Miller moves for new judge; motion granted on October 15, 2019, cases assigned to Judge Calabrese.	September 20 to October 3 = 14 days	53 – 14 days = 39 days

October 21, 2019	Judge Calabrese assumes jurisdiction.		
October 31, 2019	Defense counsel does not object to February 10, 2020 trial setting based on congestion of court calendar (they're scheduling his three cases for jury trial to be tried in chronological order; this case will be tried third) (parties agreed that if the older cases went to trial, then this case would be continued to a later date accordingly). See Appellant's App. Conf. Vol. II, p. 179.	October 21 to October 31 = 11 days	39 – 11 days = 28 days
February 10, 2020	Order says that the oldest case (F1-1) went to trial, so F6-33 and this one were continued. See Appellant's App. Conf. Vol. 2, p. 179.		

February 14, 2020	Announced in open court that F6-33 and this case were set for trial on August 3-6, 2020, with no objection.		28 days
February 17, 2020	Order on February 14 hearing says court calendar congestion (see Appellant's App. Conf. Vol. 2, p. 169), but the hearing language reflects an agreement (see Appellant's App. Conf. Vol. 2, p. 179).		
May 29, 2020	Supreme Court order tolls Criminal Rule 4 trial settings until August 14, 2020.	Tolled	28 days
June 8, 2020	During the tolled period, court continues trial to February 8, 2021 "due to COVID-19" and court calendar congestion. See Appellant's App. Conf. Vol. 2, p. 180.	Tolled	28 days

June 26, 2020	Miller appears for PTC and agrees to new trial settings in F6-33 and this one.	Tolled	28 days
July 24, 2020	During the tolled period, Miller moves for discharge.	Tolled	28 days
August 14, 2020	Hearing on Miller's motion; denied on September 9, 2020.		
December 10, 2020	Pro se motion for discharge filed and amended pro se motion filed on January 5, 2021, even though represented by counsel, and he had agreed to the trial date of February 8, 2021.		
December 14, 2020	Supreme Court order suspends all in-person trials until March 1, 2021, tolling speedy trial settings.	Tolled	28 days
January 15, 2021	Status hearing at which court discussed pro se filings. This matter is set as second choice	Tolled	28 days

	behind F6-33 for March 10 & 11, 2021, with no objection.		
March 4, 2021	Court vacates March 10 & 11 trial dates because court staff are in quarantine. Resets trial for April 9 & 12, 2021.		
April 9 & 12, 2021	Trial.		28 days