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IN THE
COURT OF APPEALS OF INDIANA

Dan L. Broering,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 30, 2021

Court of Appeals Case No. 20A-CR-2232

Appeal from the Ripley Circuit Court

The Honorable Ryan King, Judge

The Honorable Carl H. Taul, Senior Judge

Trial Court Cause No. 69C01-2003-F2-2

Brown, Judge.

[1] Dan L. Broering appeals the denial of his motion to reduce bond and claims the trial court abused its discretion when it did not hold his initial hearing within forty-eight hours of his arrest. We affirm.

Facts and Procedural History

[2] On February 27, 2020, Indiana State Police Trooper Thomas C. Ratliff observed a vehicle turn into a gas station without signaling two hundred feet prior to making the turn.[1] Trooper Ratliff observed signs of nervousness from Broering and his female passenger, and he deployed his certified narcotics detection K9 which positively alerted to the presence of narcotics within the vehicle. Trooper Ratliff began a vehicle search and located a bag stuffed between the driver's seat and center console containing approximately thirty-three grams of what he suspected to be methamphetamine, and under the driver's seat a single syringe, digital scales containing white residue, and a small plastic bag containing approximately two grams of suspected crystal methamphetamine. He placed Broering under arrest and transported him to the Ripley County Jail.

[3] The next day, the trial court found probable cause for Broering's arrest and detainer and further ordered that he "shall remain incarcerated until he appears before the Court. No bond."[2] Appellant's Appendix Volume II at 20. On the

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[1] Broering cites to the affidavit of probable cause for his version of the facts.

[2] This handwritten statement appears at the end of the affidavit of probable cause which bears a filing stamp of "CASE NUMBER: 69C01-2003-F2-000002 FILED: 3/4/2020," but which also indicates in handwriting that the foregoing affidavit was "examined . . . this 28[th] day of February 2020 @ 10:37 a.m." and bears the signature of Judge Ryan J. King. Appellant's Appendix Volume II at 19-20.

same day, the State filed a motion for a 72-hour extension to evaluate charging Broering under a different cause number, 69D01-2002-MC-25,[3] indicating it "would show . . . that more time is required to evaluate the case and determine whether a charge should be filed and/or what charge would be appropriate" and requesting that the initial hearing be continued so the State could "review the case and/or receive the appropriate information from the police officer(s)." *Id.* at 11. The motion noted the State recognized that Broering had a right pursuant to statute to be brought before the court for a prompt, initial hearing; at that time, no formal charges had yet been brought against him; and "it appears the potential defendant has an extensive criminal record" and that, "[a]t this time, the inmate is informed of: (1) His right to counsel, (2) His right to assigned counsel, if he is indigent, (3) His right to a speedy trial, (4) The amount and conditions of bail, and (5) Of his privilege against self-incrimination." *Id.* The court granted the motion on the same day in an order which stated: "Sheriff's Department - to serve the Defenant [sic] personally with both the Motion and Order." *Id.* at 13.

[4] On March 4, 2020, the State charged Broering with attempted dealing in methamphetamine as a level 2 felony, dealing in methamphetamine as a level 2

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[3] In the Odyssey case management software system, the case under the second cause number lists an offense of "1. No Charge Applicable," a case opening date of February 27, 2020, and a "Statistical Closure[]" of February 28, 2020, and the corresponding chronological case summary appears to consist of a limited number of entries and filings including: the motion for 72-hour extension which was filed on February 28, 2020; the same probable cause affidavit as in cause number 69C01-2003-F2-2, save for a different cause number and file stamp; and an entry of appearance filed by the same defense counsel who appeared at the November 23, 2020 hearing. Chronological Case Summary, Cause Number 69D01-2002-MC-25.

felony, unlawful possession of a syringe, a level 6 felony, and maintaining a common nuisance as a level 6 felony. The State also alleged Broering was a habitual offender. That same day, the court held an initial hearing and set Broering's bail at $100,000 cash.

[5] On October 19, 2020, Broering filed a motion to reduce bond and argued the bail amount was unreasonable and that the court should release him on his own recognizance or reduce bail because his constitutional rights were violated when he was denied bail for seven days.

[6] At the hearing on the motion on November 23, 2020, Broering's counsel indicated that Broering was being held without bond on a probation violation under cause number 24C02-1709-CM-1271. His counsel stated, "I don't excuse that there was a procedure followed . . . by the prosecution to after a 72-hour extension that [the prosecutor] referenced," and he argued Broering was not brought "in front of a Court promptly for initial hearing" as required by Ind. Code §§ 35-33-7. Transcript Volume at 9. He argued that the "72-hour extension contemplates it actually being done in a courtroom orally where the Defendant is present," because, "if the State needs that additional 72 hours, the Defendant should have an opportunity to be in front of the Court for the initial hearing purposes and at least at that point, make arguments that he should be entitled to bail right then." *Id.*

[7] Following arguments and Broering's request for review of his motion, the court took the matter under advisement, and the next day, it denied Broering's motion in an order stating:

> at the time of arrest, [Broering] was under the allegation of Possession of Methamphetamine, a Level 5 felony, he was on probation in Franklin County, . . . and he admitted to desiring to sell the methamphetamine in his possession, a substance for which he had been charged in another county. The Court believes all of which make[s] [Broering] a danger to the community. Further, . . . the Habitual Offender poses an additional risk for the non-appearance of [Broering]. The Court finds that the legal argument of the Defense in his Motion does not persuade the Court that the . . . initial determination of bond was improper.

Appellant's Appendix Volume II at 69.

Discussion

[8] The issue is whether the trial court abused its discretion in denying Broering's motion to reduce bond on the basis that it did not hold an initial hearing within forty-eight hours of his arrest. Broering asks this Court to find that the usage of the term "promptly" in Ind. Code § 35-33-7-1(a) means "within 48-hours of arrest," and points to the general purpose of initial hearings and the history and principles surrounding bail at common law and within United States Supreme Court jurisprudence. Appellant's Brief at 12-13. He contends by analogy that, as a defendant is entitled to a probable cause determination that is made within forty-eight hours – despite, as he admits, the term "promptly" or the phrase "within 48-hours" being absent from Ind. Code § 35-33-7-2, the defendant is also

entitled to an initial hearing within forty-eight hours of arrest. *Id.* He asserts that initial hearings unlock Indiana's constitutional right to bail, that defendants are informed at the initial hearing of their entitlement to pretrial release under reasonable terms and conditions set by the court, *see id.* at 18 (citing Ind. Code § 35-33-7-5(4); Ind. Const. art. 1, § 17), and that the right to bail does not vest until the initial hearing. *See id.* (citing *Schmidt v. State*, 746 N.E.2d 369, 373 (Ind. Ct. App. 2001)). He argues that, when read in it its entirety, the statutory framework of Ind. Code §§ 35-33-7 describes "a quick and continuous process" from the time of arrest to the initial hearing and, in doing so, he examines the requirements set forth in Ind. Code § 35-33-7-3 which "appear[] to set a 48-hour cutoff within which the initial hearing shall be held and bail set." *Id.* at 19-20. He further cites Ind. Code § 35-33-7-7 and asserts that, if an initial hearing does not occur within forty-eight hours of arrest, the defendant is to be released upon his own recognizance.

[9] The State responds that Broering acknowledges the term "promptly" is not defined in the Indiana Code. It asserts that he improperly relies on caselaw when he likens probable cause determinations to the initial hearing, and argues the importance of a timely judicial probable cause determination "ensures that a defendant is not detained for a substantial period of time based solely on the probable cause determination of the arresting officer," whereas an initial hearing "covers the basic rights afforded to a criminal defendant and establishes the conditions and amount of bail." Appellee's Brief at 10, 16.

[10] Ind. Code § 35-33-7-1(a) provides that a "person arrested without a warrant for a crime shall be taken promptly before a judicial officer . . . in the county in which the arrest is made; or . . . of any county believed to have venue over the offense committed . . . for an initial hearing in court." Ind. Code § 35-33-7-2(a) provides in relevant part that, "[a]t or before an initial hearing of a person arrested for a crime without a warrant, the facts of the arrest must be submitted, ex parte, to a judicial officer in a probable cause affidavit."[4]

[11] Ind. Code § 35-33-7-3 provides:

> (a) When a person is arrested for a crime before a formal charge has been filed, an information or indictment shall be filed or be prepared to be filed at or before the initial hearing, ...
>
> (b) If the prosecuting attorney states that more time is required to evaluate the case and determine whether a charge should be filed, or if it is necessary to transfer the person to another court, then the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays.
>
> (c) Before recessing the initial hearing and after the ex parte probable cause determination has been made, the court shall

[4] Ind. Code § 35-33-7-2(b) additionally contemplates a situation unlike the one here, and provides that, "[i]f the facts submitted do not establish probable cause . . . , the judicial officer shall order that the arrested person be released immediately."

> inform a defendant charged with a felony of the rights specified in subdivisions (1), (2), (3), (4), and (5) of section 5 of this chapter.[5]

[12] To the extent that Broering cites to a trial court's probable cause determination and *May v. State*, 502 N.E.2d 96 (Ind. 1986), we note that the case involved prior versions of Ind. Code §§ 35-33-7-1, -2, and -3,[6] and that Justice Shepard authored an opinion in which Justices DeBruler and Dickson concurred, which stated:

> The warrantless arrestee must be "taken promptly before a judicial officer" for an initial hearing.[7] The statute does not state the period of time which can elapse between the arrest and the initial hearing for a warrantless arrestee who remains in jail. Several purposes which attach to the requirement of a prompt initial

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[5] Ind. Code § 35-33-7-5 provides that, at the initial hearing of a person, the judicial officer shall inform the person orally or in writing:

> (1) that the person has a right to retain counsel and if the person intends to retain counsel the person must do so within:
>
> (A) twenty (20) days if the person is charged with a felony; or
>
> (B) ten (10) days if the person is charged only with one (1) or more misdemeanors;
>
> after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;
>
> (2) that the person has a right to assigned counsel at no expense to the person if the person is indigent;
>
> (3) that the person has a right to a speedy trial;
>
> (4) of the amount and conditions of bail;
>
> (5) of the person's privilege against self-incrimination . . . .

[6] The portion of Ind. Code § 35-33-7-1 which the *May* decision quotes remains in the statute. *See May*, 502 N.E.2d at 100 (quoting Ind. Code § 35-33-7-1 (Burns Supp. 1981)) ("A person arrested without a warrant for a crime shall be taken promptly before a judicial officer . . . .").

[7] A footnote appears here which states: "'Prompt', in the context of a 'prompt judicial hearing' for an administrative suspension of a driver's license, 'denotes readiness without delay or unreasonable hesitation.'" *May*, 502 N.E.2d at 105 n.1 (quoting *Ruge v. Kovach*, 467 N.E.2d 673, 679 (Ind. 1984)).

> hearing serve as guidelines for a proper time frame: to advise the arrestee of the charges against him and of his constitutional rights, to provide an arrestee with an attorney if he is without funds to hire one, and to determine whether there is sufficient evidence that the crime charged has been committed and that the accused committed it. One reason for informing the accused of the crime charged is to enable the accused to prepare a defense.
>
> These purposes are not achieved when a warrantless arrestee remains in jail and does not appear before a judge until one week after his arrest. That such a delay defeats these purposes is particularly apparent when counsel is not appointed until six weeks after the arrest.
>
> Preparation of a defense may have been impeded in this case. However, appellant has the burden to show that the delay between his arrest and the initial hearing was both prejudicial and unreasonable. At the hearing on the motion to dismiss, May testified that within the week of his arrest he could have subpoenaed a witness from Indiana, but that this witness had subsequently moved to another state. He did not make an adequate offer of proof concerning the witness' testimony and how it would have assisted his defense. Accordingly, I concur in the decision to affirm the conviction.

502 N.E.2d at 104-105 (internal citations and footnote omitted).

[13] Here, when the State filed its request for a 72-hour extension, the trial court should have denied the request and set an initial hearing at which the

prosecuting attorney could make the request on the record with Broering present.[8]

[14] Nevertheless, in *Stafford v. State*, this Court indicated:

> The normal remedy for the violation of such a delay is the suppression of the evidence obtained during the unreasonable delay. *Buie v. State*, 633 N.E.2d 250, 258 (Ind. 1994), *reh'g denied*, *abrogated on other grounds by Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). It is the defendant's burden "to show the delay between his arrest and the initial hearing was both *prejudicial* and unreasonable." *Anthony v. State*, 540 N.E.2d 602, 605 (Ind. 1989) (emphasis added).

890 N.E.2d 744, 749 (Ind. Ct. App. 2008). Broering does not assert that he was prejudiced by any delay, and we thus cannot provide the relief he requests. *See May*, 502 N.E.2d at 105.

[15] For the foregoing reasons, we affirm the trial court.

[16] Affirmed.

Vaidik, J., concurs.

Bradford, C. J., concurs in result with separate opinion.

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[8] To the extent that the concurring opinion advises restraint, we note that the State's motion for 72-hour extension recognized that Broering had a right "pursuant to I.C. 35-33-7-1, . . . to be brought before the [c]ourt for his prompt, initial hearing," and we view the question of promptness, given all the attendant circumstances, to be squarely before the court. Appellant's Appendix Volume II at 11.

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Bradford, C.J., concurs in result with opinion.

[17] I concur with the majority's affirmance of the trial court's judgment, and I agree with the majority's conclusion that Broering has not established that he was prejudiced by any failure by the State to promptly bring him before a judicial officer for an initial hearing. I write separately, however, because I would begin and end my analysis there.

[18] In my view, we should exercise restraint in cases such as this, where it is not absolutely necessary to address certain arguments. Principles of judicial restraint counsel that a court should not decide more than is necessary to dispose of the case before it. To do otherwise is to issue an advisory opinion, which we should do but rarely, if ever. *See Reed v. State*, 796 N.E.2d 771, 775 (Ind. Ct. App. 2003) ("This court does not issue advisory opinions."); *see also* 20 Am. Jur. 2d Courts § 43 (2015) ("Unnecessary decisions by a court are to be avoided."); 21 C.J.S. Courts § 179 (2007) ("Under the cardinal principle of judicial restraint, if it is not necessary to decide more, then it is necessary not to decide more."). Restraint is particularly advisable in this case, where the majority's disposition is arguably making new law. The majority implicitly concludes that a six-day delay in bringing a defendant before a judge for an initial hearing automatically violates the promptness requirement of Indiana Code section 35-33-7-1(a), which can be fairly characterized as an extension of the Indiana Supreme Court's decision in *May*, in which the Court concluded that a delay of one week was not sufficiently prompt. 502 N.E.2d at 104–05. I feel strongly that such extensions should only be made in cases where the question is squarely before the court. Consequently, I concur in result.