MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Mark K. Leeman
Leeman Law Office
Logansport, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Andrew K. Evans,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 29, 2023

Court of Appeals Case No. 23A-CR-13

Appeal from the Marion Superior Court

The Honorable Jeffrey L. Marchal, Judge

Trial Court Cause No. 49D31-2104-F5-11708

Memorandum Decision by Judge Vaidik
Judges Mathias and Pyle concur.

Vaidik, Judge.

Case Summary

[1] Nearly nineteen months after being charged, Andrew K. Evans moved for discharge under Indiana Criminal Rule 4(C), claiming the State failed to bring him to trial within the one-year period established by that rule. The trial court denied the motion, and Evans now brings this interlocutory appeal. Finding that Evans's motion for discharge was premature and the State has 5 more days to try him, we affirm the trial court's denial of his motion for discharge.

Facts and Procedural History

[2] On April 15, 2021, the State charged Evans with Level 5 felony possession of a narcotic drug and Level 6 felony operating a vehicle while intoxicated. An initial hearing was held on April 21. At the hearing, Evans told the trial court that he had been talking to an attorney, although he had not hired one yet, and that the attorney told him "to ask for 30 days." Tr. p. 5. The court scheduled a status-of-counsel hearing for May 21, which it said it would cancel if Evans had an attorney by then, and a pretrial conference for June 11.

[3] Evans hired an attorney, who entered an appearance on May 12. The trial court then canceled the status-of-counsel hearing. Evans and his attorney appeared at the June 11 pretrial conference and moved for a continuance, which the court granted. Evans later moved for three more continuances, and the court set a pretrial conference for November 18. At that hearing, Evans moved for another

continuance and asked for a date falling "after the holidays." *Id.* at 31. Evans suggested January 11, 2022, and the court agreed, setting a pretrial conference for 9:30 a.m. that day.

[4] For unknown reasons, the hearing did not get put on the trial court's calendar or the CCS and therefore the hearing was not held. *See id.* at 49-50. On October 1, 2022, a new judge was sworn in and ran a report of the cases that did not have a date set, and this case showed up. On October 11, nearly eleven months after the last hearing, the court set a pretrial conference for November 10. Two days before the hearing, on November 8, Evans moved for discharge under Criminal Rule 4(C), claiming the State failed to bring him to trial within the one-year period established by that rule. Appellant's App. Vol. II p. 43. Specifically, Evans alleged that as of November 10 (the date of the upcoming pretrial conference), 575 days[1] had passed since he had been charged.

[5] At the November 10 pretrial conference, the trial court said it didn't have enough information to rule on Evans's motion for discharge and ordered the State to respond to Evans's motion by November 18. In the event the court did not grant Evans's motion for discharge, it set a pretrial conference for December 6 and a trial for December 14. Evans did not object to this timeline. On November 21, the court denied Evans's motion for discharge and reaffirmed the December 6 and 14 dates. Evans filed a motion to reconsider on December

[1] Our calculation shows that it was 574 days.

2, and a hearing was held. The court denied Evans's motion to reconsider. Evans then sought and received permission to bring this interlocutory appeal.

Discussion and Decision

[6] Evans contends the trial court erred in denying his Criminal Rule 4(C) motion for discharge. When, as here, the relevant facts are undisputed and the issue presents a question of law, our review is de novo. *State v. Larkin*, 100 N.E.3d 700, 703 (Ind. 2018), *reh'g denied*.

[7] Criminal Rule 4(C) "places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons." *Cook v. State*, 810 N.E.2d 1064, 1065 (Ind. 2004). The rule specifically states:

> 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 . . . .

Ind. Crim. Rule 4(C). "[I]f a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly." *Cook*, 810 N.E.2d at 1066; *see also* Crim. R. 4(F) ("When a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in

this rule shall be extended by the amount of the resulting period of such delay caused thereby.").

[8] Here, the one-year clock began to run on April 15, 2021, when Evans was charged. Thus, Evans was required to be tried no later than April 15, 2022, unless Evans caused a delay. There are several periods at issue on appeal. The first period is April 15, 2021, when charges were filed, to June 11, when the first pretrial conference was held. Evans argues these 57 days are not chargeable to him; the State argues 30 of the 57 days are chargeable to Evans because he asked for "30 days" at his initial hearing so that he could hire an attorney.

[9] This Court addressed whether the time it takes to hire an attorney is chargeable to a defendant in *Hoskins v. State*, 83 N.E.3d 124 (Ind. Ct. App. 2017). There, the defendant was charged on June 17, 2015, and retained counsel on July 23. On appeal, the State argued that the 36 days were chargeable to the defendant. We disagreed, finding that the time was not chargeable to the defendant because he "did not change trial counsel, wait an unreasonable amount of time to retain counsel, or in any way delay the setting of the trial with respect to the retention of counsel." *Id.* at 127. In so holding, we distinguished cases cited by the State where a defendant (1) obtained "new counsel well into litigation after trial had been set," (2) "discharged [his] public defender to hire private counsel after trial dates had been set and [the] case had been ongoing for some time," and (3) "failed to request [a] public defender or obtain counsel for over five months after the initial hearing." *Id.*

[10] Here, Evans was charged on April 15, 2021, and obtained counsel less than a month later on May 12. There is no indication in the record, and the State does not argue on appeal, that the June 11 pretrial conference would have been held any sooner but for Evans's request for time to retain an attorney. We agree with Evans that this period is not chargeable to him.

[11] The second period is June 11, 2021, to January 11, 2022, when a pretrial conference was supposed to be held. Evans doesn't dispute that he is responsible for this 214-day delay because he requested several continuances. *See State ex rel. O'Donnell v. Cass Superior Ct.*, 468 N.E.2d 209, 210 (Ind. 1984); *Wellman v. State*, 2023 WL 3329650, at *3 (Ind. Ct. App. May 10, 2023) ("Under Criminal Rule 4(C), a defendant generally is chargeable with a delay effected by his own motion for a continuance."). The one-year period was extended by 214 days. Thus, Evans was required to be tried no later than November 15, 2022.

[12] The third period is January 11, 2022, to November 10, when the pretrial conference was held and Evans's motion for discharge was first discussed. This largely represents the period when no action was taken because the hearing did not get put on the trial court's calendar or the CCS. The State doesn't contest that this period is not chargeable to Evans.[2] Indeed, the State has an affirmative

[2] The State questions whether the period should end on November 8 (when Evans moved for discharge) or November 10 (when the hearing was held). Regardless, the State says the two dates are "inconsequential" because Evans is not entitled to discharge using either one. Appellee's Br. p. 9 n.2.

duty to bring a defendant to trial within one year, and the defendant has "no obligation to remind the State of its duty or to remind the trial court of the State's duty." *Gibson v. State*, 910 N.E.2d 263, 266 (Ind. Ct. App. 2009).

[13] The final period is November 10 to December 14, when trial was scheduled to begin. The State argues that the time after November 10 does not count against the one-year period because Evans did not give "the trial court an opportunity to pass judgment on whether" Criminal Rule 4(C)'s exceptions for court congestion or emergency applied "to any of the time after November 10, 2022." Appellee's Br. p. 8. We agree. At the November 10 hearing, the trial court said that it wasn't prepared to rule on Evans's motion for discharge and set a pretrial conference for December 6 and a trial for December 14. Evans did not object to this timeline. As the State points out, had Evans done so, the court could have "move[d] the trial earlier" or "explain[ed] why it could not under one of the exceptions in Criminal Rule 4(C)." *Id.* at 9 n.1.

[14] Moreover, this Court has held that when a defendant files a Criminal Rule 4(C) motion for discharge, the delay that results is chargeable to the defendant. *State v. Delph*, 875 N.E.2d 416, 421 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*; *see also Andrews v. State*, 441 N.E.2d 194, 199 (Ind. 1982) ("Defendant's Motion for discharge was filed on November 14, 1980, so the crucial time period runs from June 16, 1978, to November 14, 1980, a total of eight hundred and eighty-two (882) days."). The time after November 10 does not count against the one-year period.

[15] Based on the above, the State had until November 15, 2022, to bring Evans to trial. At the time of the November 10 hearing, the State had 5 more days to try him. Thus, following the certification of this opinion, the State has 5 days to bring Evans to trial (subject to the exceptions in Criminal Rule 4(C)).

[16] Affirmed.

Mathias, J., and Pyle, J., concur.