## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Brian P. Cozine,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

January 26, 2021

Court of Appeals Case No. 20A-CR-1483

Interlocutory Appeal from the Clark Circuit Court

The Honorable Bradley B. Jacobs, Judge

Trial Court Cause No. 10C02-1711-F5-297

**Bailey, Judge.**

# Case Summary

[1] Brian P. Cozine ("Cozine") brings this interlocutory appeal, over which this Court accepted jurisdiction. Cozine raises one issue, which is whether the trial court erred by denying his motion for discharge under Criminal Rule 4(C).

[2] We affirm.

# Facts and Procedural History

[3] On November 17, 2017, the State charged Cozine with several criminal offenses. A status conference was scheduled for October 3, 2018, and a jury trial was scheduled for November 13, 2018. Cozine personally attended the October 3 status conference, but his public defender did not attend the hearing, possibly due to a vacation. At the October 3 hearing, the court rescheduled the jury trial. The court ultimately set hearings for October 11, 2018, November 1, 2018, and January 2, 2019, and it scheduled the jury trial for January 15, 2019.

[4] Cozine's public defender was replaced on January 2, 2019. Replacement counsel attended a status conference that same day. At the outset of the status conference, counsel made the following remark: "[I]t looks like a potential CR 4 issue that I will probably have to file." Tr. Vol. 2 at 12. Counsel noted that, because he "just received" the case, he "d[id] not feel prepared to go forward" with the trial scheduled for January 15. *Id.* When the trial court later asked counsel about the trial, counsel stated as follows: "Well, I'm going to ask to

continue it[.]" *Id.* at 13. The trial court then scheduled hearings for February 14 and March 13, and moved the jury trial to April 2. Cozine did not object.

[5] Beginning on April 2, 2019, the trial was delayed several times due to court congestion. Cozine objected to those delays, first objecting on April 8, 2019. Eventually, Cozine filed a motion for discharge in March 2020. Following a hearing, the trial court denied the motion and certified its order. Cozine then pursued this interlocutory appeal, over which this Court accepted jurisdiction.

# Discussion and Decision

[6] Where, as here, the material facts underlying a motion for discharge are undisputed, whether the defendant is entitled to discharge is a question of law that we review *de novo*. *Battering v. State*, 150 N.E.3d 597, 600 (Ind. 2020).

[7] In pertinent part, Indiana Criminal Rule 4(C) provides as follows:

> 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 . . . 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[.]

[8] To obtain relief, a defendant must move for discharge. *See* Ind. Crim. R. 4(C). Generally, if the period for holding a trial has passed, the defendant "shall, on motion, be discharged." *Id.* However, "a defendant whose trial is set outside the one-year period must object to the setting at the earliest opportunity or the

right to discharge under the rule is waived." *Brown v. State*, 725 N.E.2d 823, 825 (Ind. 2000). Put differently, "defendants extend the one-year period by seeking or acquiescing in delay resulting in a later trial date." *Battering*, 150 N.E.3d at 601 (internal quotation marks omitted). Requiring the defendant to make a timely objection comports with the purpose of Criminal Rule 4(C), which is to "move cases along and to provide the defendant with a timely trial, not to create a mechanism to avoid trial." *Brown*, 725 N.E.2d at 825.

[9] Cozine argues that the trial court erred in denying his motion for discharge. In so arguing, Cozine asserts—and the State concedes—that the consecutive 320-day period after the information was filed counts toward the one-year period under Rule 4(C). In other words, there is no dispute regarding the 320 days from November 17, 2017, to October 3, 2018. On the latter date, Cozine's counsel failed to attend a hearing. At that hearing, the court moved the jury trial to January 15, 2019, which is more than one year after the charging date.

[10] Cozine argues that the delay resulting from the October 3 hearing should count toward the one-year period because (1) it was not Cozine's fault that counsel failed to attend the hearing and (2) the trial court moved the trial date *sua sponte*, when Cozine could not confer with counsel. In response, the State notes that the court scheduled another hearing for October 11, 2018. The State argues that, even if the eight days from October 3 to October 11 count toward the one-year period under Rule 4(C), Cozine failed to object to his January 2019 trial

date at the next hearing or at any point in the ensuing weeks.[1] According to the State, Cozine ultimately acquiesced in the delay by failing to timely object.

[11] The parties also focus on the hearing on January 2, 2019. By that point, Cozine was represented by a different public defender who had only recently received the case. At the hearing, counsel noted a "potential" issue with Criminal Rule 4 that would "probably" lead to a filing. Tr. Vol. 2 at 12. Nevertheless, counsel requested a continuance to prepare. Upon counsel's request, the court moved the jury trial from January 15 to April 2. In the meantime, the court held hearings in February and March of 2019. However, Cozine did not object to his trial being set for April 2, 2019. Rather, Cozine waited to object until April 8, by which point the trial had been rescheduled due to court congestion.

[12] Cozine argues that delays resulting from the January 2 hearing should count toward the one-year period. Cozine asserts that he "noted the existence of a Criminal Rule 4(C) issue" at the January 2 hearing. Br. of Appellant at 18. Cozine acknowledges that his counsel ultimately requested a continuance, but he argues that "[t]here is nothing in the record indicating that the substitution of Cozine's counsel was any fault of Cozine's" and that "when a change in counsel delays trial and is not the result of the defendant's actions, the delay is

[1] The State counts this period as seven days rather than eight. In any case, a one-day difference is immaterial in this case. We also note that the Chronological Case Summary shows that there was no hearing held on October 11, 2018, and that the next hearing was instead held on November 1, 2018. Nevertheless, Cozine and the State focus on the period from October 3 to October 11 rather than October 3 to November 1. We follow their lead. However, as noted below, counting the additional days would not affect the outcome.

not attributable to the defendant for purposes of Criminal Rule 4(C)." *Id.* For support, Cozine directs us to *Young v. State*, wherein our Supreme Court determined that a fourteen-day delay caused by defense counsel's resignation was not chargeable to the defendant because the defendant's actions did not cause the delay. 521 N.E.2d 671, 673 (Ind. 1988). The State distinguishes *Young*, pointing out that, in *Young*, the court *sua sponte* removed the case from its trial schedule during a gap in representation whereas, here, Cozine had requested a continuance. The State also argues that, even if some delay should be counted toward the period, Cozine did not timely object to the trial date.

[13] "[A] defendant has a duty to alert the trial court when the trial date has been set beyond the [prescribed] limits of the rule." *Thomas v. State*, 491 N.E.2d 529, 531 (Ind. 1986). Thus, "[i]f a defendant faced with a trial set outside the prescribed one-year period fails to object at the earliest opportunity, he is deemed to have acquiesced to the belated trial date." *Havvard v. State*, 703 N.E.2d 1118, 1121 (Ind. Ct. App. 1999). "At the earliest opportunity' does not necessarily mean 'immediately.'" *Id.* However, the objection must be lodged in time to permit the court to reset the trial within the period provided in Rule 4(C). *Thomas*, 491 N.E.2d at 531; *see also Battering*, 150 N.E.3d at 601 (noting that a defendant "generally waives rights under Rule 4(C) by failing to offer a timely objection to trial dates set outside the one-year limitation, unless the setting of that date occurs after the one-year period has expired").

[14] Here, Cozine failed to object to his trial date until April 8, 2019, despite ample opportunity to do so. Turning to the events in October 2018, even assuming

*arguendo* that the eight days from October 3 to October 8, 2018, did not count toward the one-year period, Cozine could have objected in the days or weeks thereafter, at which point the period had not expired. As to the timeline, we disagree with Cozine's assertion that "[u]nder the circumstances, it would be unreasonable to expect that Cozine and his attorney communicate and come to a decision to object to the untimely trial date in the time that was available[.]" Reply. Br. at 6. Cozine was represented by counsel and deciding whether to object under Rule 4(C) does not reasonably take weeks of decision-making.

[15] We are also unpersuaded by Cozine's argument that, because Cozine lacked counsel at the October 3 hearing, moving the trial amounted to fundamental error and should result in the entire delay counting toward the one-year period. Rather, because Cozine failed to timely object to the scheduled trial date, the 4(C) period was extended. Thus, as of the hearing on January 2—at which Cozine was first represented by a different public defender—at most, 328 days had counted toward the one-year period, leaving at least thirty-seven days.[2]

[16] At the January hearing, Cozine requested a continuance, which ordinarily extends the period. *See* 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 [Rule 4(C)] shall be extended by the amount of the resulting period of such delay caused thereby."). Even assuming *arguendo* that some delay

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[2] If we instead assume the period continued to run from October 11 to when the next hearing was held on November 1, there would be at least sixteen days. Assuming as much would not change the outcome.

associated with the replacement of counsel should not be chargeable to Cozine, we are unpersuaded that *Young* requires that the **entire** period from the hearing on January 2, 2019, to the rescheduled trial date of April 2, 2019, be counted toward the one-year period. Rather, if any of that time ran toward the period, we think that—at most—it would be a reasonable time for counsel to review the case. Yet, Cozine failed to object until months later, on April 8. We conclude that this objection was untimely. Thus, Cozine acquiesced in that delay.

[17] All in all, Cozine acquiesced in significant delays prior to April 8, 2019, and he cannot show entitlement to discharge based on delay to that point. Moreover, because Cozine is not arguing on appeal that delay after April 8 counted toward the 4(C) period, we discern no error in the denial of the motion for discharge.[3]

[18] Affirmed.

Robb, J., and Tavitas, J., concur.

[3] Because Cozine acquiesced in delays that sufficiently extended the one-year period, we need not actually decide whether any portion of the delay from October 3, 2018, to April 4, 2019, counts toward the period.