MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Devonte D. Perkins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 24, 2022

Court of Appeals Case No. 21A-CR-1111

Appeal from the Whitley Circuit Court

The Honorable Matthew J. Rentschler, Judge

Trial Court Cause No. 92C01-2009-F4-936

Molter, Judge.

[1] Devonte Perkins was arrested after leading law enforcement officers on a high-speed chase. He requested a speedy trial, which the trial court scheduled to

begin within seventy days. But then the court continued his trial twice—first due to the court's calendar congestion with two first-choice trial settings on the same day as Perkins's second-choice setting, and then due to all local jury trials being cancelled in response to the rapid spread of Covid-19 in the area. (There was a third continuance, but that is not the basis for appeal.) Perkins claims that under Indiana Criminal Rule 4 the charges against him should have been dismissed and he should have been released from incarceration due to these delays. However, that rule allows trial courts to continue trials beyond the default seventy-day deadline due to calendar congestion and other emergencies, which were the bases for the continuances here, so we affirm the convictions.

Facts and Procedural History

[2] On September 20, 2020, Trooper Todd Reed observed a vehicle traveling about thirty miles per hour above the speed limit. After the vehicle passed him, he began following it and activated his emergency equipment. But the vehicle did not stop.

[3] Trooper Reed then informed other law enforcement officers of the situation, and they tried to stop the vehicle too. However, the vehicle's driver, Perkins, led them on a high-speed chase. During the chase, Trooper Reed saw something thrown from the vehicle, which officers later identified as two firearms. Once the chase ended, the officers removed Perkins, who identified himself as "Tyshawn Morris," from the vehicle and searched it. The officers found two passengers and a large amount of marijuana in the vehicle.

[4] The State charged Perkins with unlawful possession of a firearm by a serious violent felon as a Level 4 felony, dealing in marijuana as a Level 6 felony, identity deception as a Level 6 felony, resisting law enforcement as a Level 6 felony, operating a vehicle while intoxicated endangering a person as a Class A misdemeanor, operating a motor vehicle without ever receiving a license as a Class C misdemeanor, possession of paraphernalia as a Class C misdemeanor, reckless driving as a Class C misdemeanor, and speeding as a Class C infraction. Perkins appeared before the trial court for his initial hearing on September 22, 2020. He requested a court-appointed attorney and a speedy trial. The trial court, after finding that he was indigent, appointed an attorney to represent him. A few days later, Perkins's attorney reasserted his request for a speedy trial. The trial court granted this request and scheduled the trial to begin on November 24, 2020, as a first-choice setting. But, on November 4, 2020, the trial court moved Perkins's trial from a first-choice setting to a second-choice setting. Appellant's App. Vol. 2 at 5; *see* Tr. at 2.

[5] On November 16, 2020, the trial court held the final pretrial conference. Tr. at 2. The State indicated it intended to try two first-choice setting jury trials on November 24, 2020—the same day that Perkins's trial, which was the second-choice jury trial setting, was set to begin. Thus, due to the court's calendar congestion, the trial court rescheduled Perkins's trial for January 12, 2021. As the trial court explained both on the record and in a written order, it reasoned that the first-choice jury trials took precedence because they were complicated cases which were nearly two years old, and the parties were prepared to

proceed with trial. Appellant's App. Vol. 2 at 52; Tr.at 3. Perkins's counsel acknowledged "there's an older case that is set to be tried," but he nevertheless objected to the new trial date because Perkins was incarcerated. Tr. at 3.

[6] On January 4, 2021, the trial court vacated Perkins's trial due to the Covid-19 pandemic, and, the next month, his trial was rescheduled for March 16, 2021. At the beginning of March, the State moved to dismiss Perkins's charges for operating a vehicle while intoxicated endangering a person, operating a motor vehicle without ever receiving a license, and possession of paraphernalia. Further, the State moved to amend Perkins's charge for identity deception as a Level 6 felony to false informing as a Class B misdemeanor. The trial court granted the State's motions.

[7] On March 7, 2021, Perkins filed a Motion for Dismissal and Discharge, arguing that his right to a speedy trial under Indiana Criminal Rule 4(B) was violated. The trial court denied his motion. It reasoned that Perkins's original trial date was continued due to the court's calendar congestion and that, even if his case had not been continued for that reason, his trial still could not have been held on November 24, 2020, due to the Covid-19 pandemic. Because Whitley County was designated as a "red" county by the Indiana State Department of Health, all trials were continued to prevent the spread of Covid-19.

[8] The following week, during the final pretrial conference, Perkins informed the Court that the State had recently uncovered new evidence against him. As a result, he requested the trial court to either exclude this evidence or continue the

trial because he needed more time to further investigate it. The trial court decided to reschedule the trial for April 12, 2021, and attributed the delay to the State. Also, later in March, the State moved to dismiss Perkins's charge for speeding as a Class C infraction. The trial court granted the State's motion. The State also amended Perkins's charge for dealing in marijuana as a Level 6 felony to possession of marijuana as a Class B misdemeanor.

[9] On April 12, 2021, Perkins's trial began. The jury found him guilty of possession of marijuana as a Class B misdemeanor, false informing as a Class B misdemeanor, and resisting law enforcement as a Level 6 felony. He was acquitted of all other charges. The next month, the trial court sentenced Perkins to an aggregate sentence of two and one-half years in the Whitley County Jail. Perkins now appeals.

Discussion and Decision

[10] Both the Sixth Amendment to the United States Constitution and Article 1, section 12 of the Indiana Constitution protect an accused's right to a speedy trial. *Cundiff v. State*, 967 N.E.2d 1026, 1027 (Ind. 2012). Indiana Criminal Rule 4 implements this constitutional right. *Id.* While reviewing a Criminal Rule 4(B) challenge is "separate and distinct from reviewing claimed violations of those constitutional provisions," *Austin v. State*, 997 N.E.2d 1027, 1037 n.7 (Ind. 2013), Perkins does not develop any separate constitutional argument, so we confine our analysis to Criminal Rule 4(B).

[11] Relevant here, Criminal Rule 4(B) provides:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) days from the date of such motion, except where a continuance within said period is had on his 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 days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time.

Ind. Crim. Rule 4(B)(1). The overall goal of Criminal Rule 4 "is to provide functionality to a criminal defendant's fundamental and constitutionally protected right to a speedy trial." *Austin*, 997 N.E.2d at 1037. "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.* "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).

[12] On appeal, a trial court's finding of calendar congestion is presumed valid and need not be contemporaneously explained or documented by the court. *Austin*, 997 N.E.2d at 1039. A defendant may challenge a trial court's congestion finding by filing a motion for discharge and demonstrating that the trial court's

finding was factually or legally incorrect. *Id.* That proof is adequate for discharge absent further findings by the trial court explaining the congestion. *Id.* If the court does provide findings, its explanations are accorded deference, and the defendant will be afforded relief only on a showing of clear error. *Id.* Under the clearly-erroneous standard, we consider only the probative evidence and reasonable inferences supporting the judgment, and reverse only if we are left "with a definite and firm conviction that a mistake has been made." *Id.* (internal quotation marks omitted).

[13] Perkins challenges two continuances, but neither ran afoul of Criminal Rule 4.

I. First Delay

[14] Perkins was arrested on September 20, 2020, and two days later he requested an early trial; therefore, the seventy-day clock under Criminal Rule 4 began to run on that date and would have expired on December 1, 2020. The trial court set Perkins's trial to commence on November 24, 2020, a date within the seventy-day period. But shortly before that date, the trial court issued an order stating that the trial would be postponed because of the court's calendar congestion, and it set the new date for January 12, 2021. *See* Ind. Crim. Rule 4(B)(1) (rule providing that a trial court "may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance.")

[15] Perkins argues the trial court should not have continued his trial so that the trials for the first-choice settings could take place because there was no finding

that those trials were speedy trials under Criminal Rule 4. Our Supreme Court has explained that under Criminal Rule 4(B) a defendant requesting a speedy trial "must be assigned a meaningful trial date within the time prescribed by the rule," which generally must take precedence over trial dates "previously designated for civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent." *Austin*, 997 N.E.2d at 1040. But the Court has also recognized that "emergencies in either criminal or civil matters may occasionally interfere with this scheme," including that "there may be major, complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses, which will, on rare occasions, justify the application of the court congestion or exigent circumstances exceptions." *Id.* Thus, "Rule 4(B) does not necessarily present a bright-line approach whereby all other cases must yield to the defendant who files a speedy trial motion." *Id.* And, while speedy trial motions receive particularized priority treatment, this does not "suggest that a trial judge must . . . wipe his or her calendar clear, or jam a trial into an opening in a schedule or courtroom that lacks the space, time, and resources to accommodate it." *Id.* at 1041.

[16] We therefore cannot say the trial court clearly erred in its calendar congestion finding based on the other two first-choice trial settings for complex trials that were roughly two years old. Perkins essentially asks us to draw a bright-line rule that any case designated a speedy trial pursuant to Criminal Rule 4(B) shall take precedence over a case in which such a designation has not been made.

But both our court and the Supreme Court have rejected such bright-line rules. *See McKay v. State*, 714 N.E.2d 1182 (Ind. Ct. App. 1999) (finding no error where the defendant's trial was continued due to the trial of another defendant who had not filed a request for a speedy trial, explaining that the mere fact that the other defendant did not file a speedy trial request was, by itself, "insufficient to establish that the [trial] court's finding of congestion was clearly erroneous"); *Austin*, 997 N.E.2d at 1040 (citing *McKay*, 714 N.E.2d at 1188). Even though Perkins's case was designated a speedy trial pursuant to Criminal Rule 4(B), and the cases set for the first-choice setting were not, this alone is insufficient to establish that the trial court clearly erred in continuing Perkins's trial so that the first-choice setting jury trials could take place.

[17] Moreover, even if the trial court did not prioritize the first-choice setting cases, Perkins's trial would have necessarily been continued (properly) anyway. On November 10, 2020, a couple of weeks before Perkins's original trial setting, our Supreme Court issued an order addressing court operations in light of the continuing Covid-19 pandemic. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, 155 N.E.3d 1191 (Ind. 2020). The Court ordered trial courts to "comply with, and enforce, local and statewide public health orders as they relate to court facilities, staff, and proceedings." *Id.* at 1192. It also reminded trial judges of their "obligation to help protect their communities by taking proactive, responsible steps to minimize the potential for exposure and infection in—and from—their courtrooms by reducing in-person proceedings." *Id.* at 1191.

[18] Soon after, the trial court, on its own motion, determined that the ongoing Covid-19 pandemic in Indiana—and specifically in Whitley County—constituted an emergency under Criminal Rule 4. Appellant's App. Vol. 2 at 84–85. The trial court noted that as of November 18, 2020, Whitley County was designated a "red" county due to its Covid-19 positivity rates, and it determined that no jury trials would occur while the county was in "red" status. *Id.* at 82. So, regardless of whether the trial court continued Perkins's trial due to the court's calendar congestion, Perkins's trial would have been continued due to emergency circumstances. Similar continuances have been upheld on appeal. *See Blake v. State*, 176 N.E.3d 989 (Ind. Ct. App. 2021) (holding that a trial court's finding that an emergency existed was reasonable in light of the circumstances relating to the Covid-19 pandemic).

II. Second Delay

[19] It is unclear whether Perkins is also arguing his rights were violated under Criminal Rule 4(B) when his trial was rescheduled for the second time due to the Covid-19 pandemic. Appellant's Br. at 13. In his argument he notes that his trial date was rescheduled from January 12, 2021, to March 16, 2021, due to a Supreme Court order that halted all in-person jury trials until March 1, 2021. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, 2020 Ind. LEXIS 959 (Ind. Dec. 14, 2020). The emergency order explained:

> The public health emergency continues. The threat of exposure from any in-court proceeding during these conditions, even when

> conducted under strict protocols, is high. And any exposures from such proceedings contribute to prolonging the emergency.

Id.

[20] First, we observe that Perkins has waived this argument by failing to raise it in the trial court. Generally, a party waives on appeal an issue that was not raised before the trial court. *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004). Regardless, Perkins does not challenge the validity of the emergency order, and his jury trial was scheduled merely fifteen days after the end of the moratorium. Criminal Rule 4(B) allows trial courts to continue trials beyond the default seventy-day deadline for "an emergency." Ind. Crim. Rule 4(B)(1). Thus, because the continuance was based on a public health emergency, and Perkins was given the earliest possible trial date under the circumstances, his rights under Criminal Rule 4(B) were not violated.

[21] Affirmed.

Robb, J., and Riley, J., concur.