MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Joshua Vincent
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Montrez McMath,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 7, 2023

Court of Appeals Case No.
23A-CR-8

Appeal from the
Marion Superior Court

The Honorable
Jeffrey L. Marchal, Judge

Trial Court Cause No.
49D31-1708-F3-30883

Memorandum Decision by Judge Vaidik
Judges Mathias and Pyle concur.

Vaidik, Judge.

Case Summary

[1] Nearly four-and-a-half years after being charged with five felonies, Montrez L. McMath moved to dismiss the charges 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 McMath was convicted of four of the five charges following a jury trial.

[2] McMath now appeals the trial court's denial of his Criminal Rule 4(C) motion to dismiss. We find that the dispositive period is a four-month period that occurred a few months after the COVID-19 pandemic began. Concluding that the first part of this period is attributable to either COVID-19 and the backup it caused or McMath's acquiescence and that the last part is attributable to McMath's failure to object when the court set trial outside the one-year period, we affirm.

Facts and Procedural History

[3] On August 22, 2017, the State charged McMath with three counts of Level 3 felony robbery and two counts of Level 5 felony robbery. According to Criminal Rule 4(C), McMath was required to be tried no later than August 22, 2018, unless the period was extended by McMath's motion for a continuance, a delay caused by his act, or court congestion or emergency. The case was still pending nearly four-and-a-half years later when, on January 28, 2022, McMath moved to dismiss the charges under Criminal Rule 4(C), alleging that "more

than 365 days of delay, not caused by [him] and not subject to an exception, have passed since charges were filed against [him] in this matter." Appellant's App. Vol. III p. 41. Although this case involves several periods of delays, the determinative period is August 15, 2020, to December 14, 2020, which occurred a few months after the COVID-19 pandemic began.[1]

[4] On March 6, 2020, Governor Holcomb declared a public-health emergency in Indiana due to COVID-19. One week later, on March 13, the parties jointly moved to continue the jury trial set to begin on March 16 due to COVID-19. The trial court granted a continuance and set a hearing for March 16 so the parties could determine a new trial date. On March 16, the Indiana Supreme Court issued an order directing trial courts to implement their continuity-of-operations plans in light of COVID-19 and providing that COVID-19 would likely require limiting trial-court operations (including jury trials) and tolling time limits for speedy trials. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to 2019 Novel Coronavirus (COVID-19)*, 141 N.E.3d 388 (Ind. 2020). Later that same day, the parties appeared for the hearing as scheduled, and the trial court scheduled a jury trial for July 20, with a final pretrial conference on

[1] McMath claims that "[i]n total, 458 days of delay accrued towards the Crim[inal] R[ule] 4(C) limitation prior to [him] being brought to trial." Appellant's Br. p. 16. McMath relies on four time periods to arrive at that number: (1) August 22, 2017, to December 15, 2017 (116 days); (2) September 27, 2018, to January 18, 2019 (114 days); (3) September 30, 2019, to January 13, 2020 (106 days); and (4) August 15, 2020, to December 14, 2020 (122 days). The State agrees that the time periods in (1) and (3) count toward the one-year clock. Even if we agreed with McMath that the time period in (2) counts toward the one-year clock, that adds up to only 336 days. Thus, McMath must show that at least some of the time period in (4) was not caused by him or subject to an exception under Criminal Rule 4(C).

July 15. On March 23, the Supreme Court issued an order tolling time limits for speedy trials. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to 2019 Novel Coronavirus (COVID-19)*, No. 20S-SB-123 (Ind. Mar. 23, 2020).

[5] On May 29, the Supreme Court extended the tolling of time limits for speedy trials through August 14. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to 2019 Novel Coronavirus (COVID-19)*, 145 N.E.3d 787 (Ind. 2020). The Court explained that as trial courts started to expand operations, there would be a "backlog of cases," and prioritizing cases would require the courts "to have continued authority to toll some cases while advancing others for hearing or trial." *Id.*

[6] At the July 15 pretrial conference, McMath wasn't present and defense counsel had to send substitute counsel due to a last-minute change in time of the hearing. The trial court noted that it was "extremely short-staffed" and couldn't "do a jury next week." Tr. Vol. III p. 35. The court explained, "My thought is to set [the case] for a remote pre-trial for the purpose of setting [trial], non-speedies aren't going until December at the earliest." *Id.* McMath's substitute counsel reminded the court that McMath's trial would be "a three-dayer," so it might be even "farther out" for McMath. *Id.* The court explained that when it sets a jury-trial date, it likes to have the defendant present because "that is a way of avoiding problems on down the road." *Id.* at 36. Substitute counsel told the court that a "[p]re-trial sounds good," so the court set a pretrial conference for September 28. *Id.*; *see also* Appellant's App. Vol. II p. 20 (CCS entry stating July 20 jury trial canceled for "Reason: Other").

[7] At the September 28 pretrial conference, the trial court set a jury trial for December 14, with a final pretrial conference on December 9. McMath said the date was "good" and didn't object to it or request an earlier one. Tr. Vol. III p. 41.

[8] At the December 9 pretrial conference, the trial court continued the December 14 trial due to COVID-19. *Id.* at 44; Appellant's App. Vol. III p. 26; *see also In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123 (Ind. Nov. 10, 2020) (encouraging trial courts to take proactive steps to minimize the spread of COVID-19 in light of increasing cases and emphasizing courts' inherent authority to continue any criminal trial upon the finding of an emergency without the need for a motion). The court scheduled a jury trial for March 15. Five days after the December 9 pretrial conference, on December 14, the Supreme Court issued an order suspending all in-person jury trials until March 1, 2021, because of COVID-19. *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123 (Ind. Dec. 14, 2020). The order tolled time periods for Criminal Rule 4 from the date of the order, December 14, through March 1, 2021. *Id.*

[9] As already noted, over a year later, on January 28, 2022, McMath moved to dismiss the charges under Criminal Rule 4(C). The trial court denied the motion, and a jury trial was held in November 2022. The jury found McMath guilty of two of the three Level 3 felony counts and both Level 5 felony counts.

[10] McMath now appeals.

Discussion and Decision

[11] McMath contends the trial court erred in denying his motion to dismiss the charges under Criminal Rule 4(C). 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.*

[12] 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 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; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under 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. Any defendant so held shall, on motion, be discharged.

Ind. Crim. Rule 4(C).[2] As the rule suggests, criminal defendants extend the one-year period "by seeking or acquiescing in delay resulting in a later trial date." *Battering v. State*, 150 N.E.3d 597, 601 (Ind. 2020) (quotation omitted), *reh'g denied*; *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."). "Additionally, 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." *Battering*, 150 N.E.3d at 601; *see also State v. Larkin*, 100 N.E.3d 700, 704 (Ind. 2018) ("A defendant waives his right to be brought to trial within the period by failing to raise a timely objection if, during the period, the trial court schedules trial beyond the limit."), *reh'g denied*.

[13] The disputed period is August 15 to December 14, 2020, which occurred a few months after the COVID-19 pandemic began. On May 29 of that year, the Supreme Court extended the tolling of time limits for speedy trials through August 14. McMath says the one-year clock restarted on August 15 and didn't

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[2] Effective January 1, 2024, Criminal Rule 4(C) will provide:

> No person can be held on recognizance or otherwise to answer a criminal charge for a period in aggregate exceeding one year from the date the criminal charge against such defendant is filed, or from the date of the arrest on such charge, whichever is later. Delays caused by a defendant, congestion of the court calendar, or an emergency are excluded from the time period. If a defendant is held beyond the time limit of this section and moves for dismissal, the criminal charge against the defendant must be dismissed. . . .

stop again until December 14, when the Supreme Court suspended all in-person jury trials. Accepting McMath's appellate arguments and math that 336 days of the one-year period had passed before August 2020, *see* supra note 1, August 15 was Day 337.

[14] The problem with McMath's argument that the one-year clock restarted on August 15 is that there was a pretrial conference on July 15 at which the trial court said it couldn't hold the jury trial as scheduled on July 20 and that "non-speedies aren't going until December at the earliest." Although the court didn't use the term "COVID-19," it is apparent that COVID-19 and the backlog it caused once courts started to resume operations was the reason the jury trial couldn't be held on July 20. Moreover, when the trial court proposed scheduling a remote pretrial conference, at which time a new trial date would be set, McMath's substitute counsel agreed. The court then scheduled a pretrial conference for September 28. Contrary to McMath's argument, the one-year clock did not restart on August 15. Rather, from July 15 to September 28 the clock was stopped due to either COVID-19 and the backup it caused or McMath's acquiescence.

[15] So, again accepting McMath's appellate arguments and math, Day 337 was September 29. Thus, Day 365 would have been October 27, meaning that McMath's trial must have started that day at the latest. But on September 28, when the trial court set trial for December 14, McMath agreed with the date and didn't object to it or request an earlier one. McMath thus waived his rights under Criminal Rule 4(C) by failing to object when the court set trial for

December 14, which was outside the one-year period. *See Battering*, 150 N.E.3d at 601. We acknowledge that nearly two years passed between December 14, 2020, and McMath's November 2022 trial. However, McMath's appellate argument is limited to the time only up to December 14, 2020. We therefore affirm the trial court's denial of McMath's motion to dismiss the charges under Criminal Rule 4(C).[3]

[16] Affirmed.

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

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[3] Citing *Barker v. Wingo*, 407 U.S. 514 (1972), McMath also argues that his constitutional right to a speedy trial was violated. But McMath didn't make a constitutional argument in the trial court and has therefore waived this issue for review. *See Sauerheber v. State*, 698 N.E.2d 796, 805 n.7 (Ind. 1998); *cf. S.L. v. State*, 16 N.E.3d 953, 957 (Ind. 2014) (addressing defendant's argument that his constitutional right to a speedy trial was violated where defendant raised that issue in the trial court).

Waiver notwithstanding, McMath is not entitled to relief. The test under *Barker* assesses both the government's and the defendant's conduct and takes into consideration (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy-trial right, and (4) any resulting prejudice. *Watson v. State*, 155 N.E.3d 608, 614 (Ind. 2020). Although over five years between charging and trial is undoubtedly a long period of time, McMath was responsible for a significant portion of that delay, including multiple continuances and motions. Court congestion and emergencies, including COVID-19 and moving the courts to the new Community Justice Campus, accounted for significant delay as well. But most importantly, McMath didn't move to dismiss the charges under Criminal Rule 4(C) until January 2022, over a year after he claims the clock had run. And after McMath moved to dismiss the charges, he sought two more continuances.