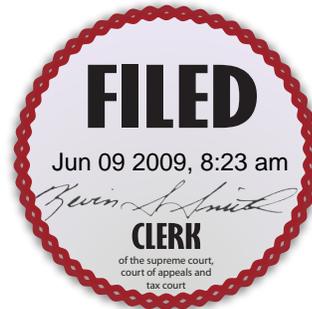


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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STATE OF INDIANA, )  
 )  
 Appellant-Plaintiff, )  
 )  
 vs. ) No. 87A05-0812-CR-695  
 )  
 HEATHER OWENS, )  
 )  
 Appellee-Defendant. )

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APPEAL FROM THE WARRICK SUPERIOR COURT  
The Honorable Robert R. Aylsworth, Judge  
Cause No. 87D02-0711-FD-115

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**June 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

The State of Indiana appeals the trial court's grant of Heather Owens' motion for discharge pursuant to Indiana Criminal Rule 4(C).<sup>1</sup> According to *Johnson v. State*, 708 N.E.2d 912 (Ind. Ct. App. 1999), *trans. denied*, when a summons is issued instead of an arrest warrant, the timetable for Indiana Criminal Rule 4(C) begins to run on the date that the summons orders the defendant to appear in court. Because the summons ordered Owens to appear in court on December 10, 2007, the one-year period had not expired when Owens filed her motion for discharge on September 29, 2008. We therefore reverse the trial court.

## Facts and Procedural History

On May 25, 2007, an Indiana State Trooper pulled over a truck on Interstate 64 in Warrick County, Indiana, in which Owens was a front seat passenger.<sup>2</sup> The trooper found marijuana and paraphernalia inside the truck. The trooper also found a baggie corner containing a white powder. The trooper cited Owens for possession of marijuana and possession of paraphernalia and required her to sign a promise to appear. The trooper then released Owens so that she could care for the minor children who were also in the truck. The citations for possession of marijuana and possession of paraphernalia were filed under Cause No. 87D02-0709-CM-533 ("Cause No. 533") on September 27, 2007, and a summons was issued for Owens to appear in court on December 10, 2007.

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<sup>1</sup> The State appeals pursuant to Indiana Code § 35-38-4-2(2), which provides that "[a]ppeals to the supreme court or to the court appeals, if the court rules so provide, may be taken by the state in the following cases: . . . [f]rom an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act . . . ."

<sup>2</sup> The facts are taken from the probable cause affidavit.

Appellant's App. p. 22, 23. However, on November 30, 2007, the State filed a motion to dismiss Cause No. 533 "for the reason that these charges have been filed and included in defendant's felony matter." *Id.* at 24. The trial court granted this motion on December 15, 2007.

Meanwhile, on November 13, 2007 (before the above citations were dismissed), the State charged Owens with Class D felony possession of methamphetamine, Class A misdemeanor possession of marijuana, and Class A misdemeanor possession of paraphernalia under Cause No. 87D02-0711-FD-115 ("Cause No. 115"). The State also filed a probable cause affidavit and sought an arrest warrant. The trial court issued the warrant on November 16, 2007, and the warrant was served on Owens on December 10, 2007, when she appeared in court for Cause No. 533.

The trial court conducted an initial hearing for Cause No. 115 on January 11, 2008. Trial was set for July 7, 2008, but the State moved to continue that date. The trial court granted the State's motion over Owens' objection and reset the trial for September 29, 2008, over Owens' objection that the date was outside the one-year period as required by Criminal Rule 4(C).

On September 29, 2008, the day of trial, Owens filed a motion for discharge and supporting memorandum. The trial court granted the motion that day. The State filed a motion to correct error pointing out that because Owens was not arrested on the citations when they were filed on September 27, 2007, the 4(C) clock did not begin running then. The trial court denied the motion. The State now appeals.

### **Discussion and Decision**

The State argues that the trial court erred in discharging Owens pursuant to Criminal Rule 4(C) because, according to *Johnson*, the 4(C) clock did not begin running on September 27, 2007, the day the citations were filed, but instead began running on December 10, 2007, the day the summons required Owens to appear in court. Owens recognizes the holding in *Johnson* but asks us to reconsider it. This is a rule of law which we review *de novo*. *Pelley v. State*, 901 N.E.2d 494, 498 (Ind. 2009).

Criminal Rule 4(C) provides:

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.

(Emphasis added). This rule 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).

In *Johnson*, this Court considered how to apply Criminal Rule 4(C) when a summons is issued instead of an arrest warrant. Johnson was charged with misdemeanor battery on September 29, 1995, and was later served with a summons that ordered her to appear in court on November 17, 1995. Upon her motion for discharge, Johnson argued that the one-year period commenced on the day she was charged. On appeal, this Court

reasoned that Indiana Code § 35-33-4-1, the statute permitting the issuance of a summons instead of an arrest warrant in misdemeanor cases, serves a benefit on a defendant who is charged with an offense because “it eliminates the need for an arrest.” *Johnson*, 708 N.E.2d at 915. Thus, we were “unwilling to conclude that after benefitting from such a statute, [Johnson] subsequently escape[d] the timetable requirements of Criminal Rule 4(C).” *Id.* Accordingly, we held that the timetable of Criminal Rule 4(C) started on the day the summons ordered Johnson to appear in court, November 17, 1995, because that was the date that Johnson’s liberty was truly restrained as she was ordered to appear before the court and was subject to arrest if she failed to appear. *Id.*

Applying *Johnson* to our case, it becomes readily apparent that there is no Criminal Rule 4(C) violation here either. The citations for possession of marijuana and possession of paraphernalia were filed against Owens on September 27, 2007. However, the summons for these citations did not order Owens to appear in court until December 10, 2007.<sup>3</sup> Appellant’s App. p. 23. It was not until this point in time that Owens’ liberty was truly restrained as she was ordered to appear before the court and was subject to arrest if she failed to appear. *See Johnson*, 708 N.E.2d at 915. Although Owens asks us to reconsider *Johnson*, she offers no compelling reason why we should not follow this decade-old precedent. Pursuant to *Johnson*, the 4(C) clock began running on December 10, 2007. Therefore, the one-year period had not expired on September 29, 2008, when she filed her motion for discharge. The trial court erred in granting Owens’ motion for discharge.

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<sup>3</sup> Recall, these charges were not dismissed until December 15, 2007. Thus, there was not a period of time in which Owens was not charged in connection with the May 25, 2007, incident.

Reversed.

NAJAM, J., and FRIEDLANDER, J., concur