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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 66A03-1008-CR-476
)
 JASON PATTON,)
)
 Appellee-Defendant.)

APPEAL FROM THE PULASKI SUPERIOR COURT
The Honorable Patrick B. Blankenship, Judge
Cause No. 66D01-0802-FD-14

February 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The State of Indiana appeals the trial court's grant of Jason Patton's motion for discharge. The State raises one issue which we revise and restate as whether the trial court erred by granting Patton's motion for discharge under Ind. Criminal Rule 4(C). We reverse and remand.

The relevant facts follow. On February 28, 2008, the State charged Patton with operating a vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters or more as a class D felony and operating a vehicle while intoxicated as a class D felony. On April 30, 2008, the court held an initial hearing, Patton entered a plea of not guilty, and the court scheduled a pretrial conference for June 2, 2008.

On June 2, 2008, Patton filed a motion to suppress "any and all evidence seized and any statements made to any police officers . . . during the course of a search of the person of [Patton] that occurred at Pulaski Memorial Hospital on or about February 3, 2008" Appellant's Appendix at 11. The motion to suppress also requested that the court "suppress any and all evidence seized and any statements made during the course of the search by police officers of the body of [Patton] in the form of a blood draw and catheterization; and for all other relief proper in the premises." *Id.* at 12. That same day, the court scheduled a hearing on the motion and a final pretrial conference for September 3, 2008.

On September 3, 2008, the court held a hearing on Patton's motion to suppress and took the matter under advisement. On September 29, 2008, the court granted Patton's

motion. Specifically, the court ordered “that all evidence seized and statements made during the course of the search by law enforcement of the body of [Patton] in the form of a blood draw and forced catheterization, be and hereby is suppressed.” Id. at 13.

On October 21, 2008, the State filed a notice of appeal. The notice of appeal alleged that “[t]he Court’s order . . . granting the Defendant’s Motion to Suppress has the ultimate effect of precluding further prosecution,” and that “this appeal is from a final judgment.” Id. at 14. On November 24, 2008, the State filed its brief. On November 25, 2008, Patton filed a motion to dismiss the appeal. On December 2, 2008, the State filed a response to Patton’s motion to dismiss the appeal.¹

On December 9, 2008, Patton filed a verified motion for extension of time in which to file his brief. On December 15, 2008, the Court of Appeals issued an order which held the briefing schedule in abeyance pending resolution of the motion to dismiss. On December 30, 2008, Patton filed a reply to the State’s response to his motion to dismiss. On January 2, 2009, the Court of Appeals denied Patton’s motion to dismiss and ordered Patton to file his brief within thirty days. On February 2, 2009, Patton filed his appellee’s brief.

On April 24, 2009, this court issued a memorandum decision reversing the trial court’s grant of Patton’s motion to suppress the evidence obtained from the blood drawn for medical purposes.

¹ The record does not contain a copy of Patton’s motion to dismiss the appeal or the State’s response.

On May 8, 2009, the State filed a motion to set jury trial, which the trial court granted the same day by scheduling a jury trial for October 6, 2009. On May 22, 2009, the Clerk of the Indiana Supreme Court received a petition to transfer from Patton which did not comply with Ind. Appellate Rule 57(G)(1). On June 5, 2009, Patton filed another petition to transfer.

On May 29, 2009, Patton filed a motion to stay proceedings with the trial court requesting that the trial court “stay all action in this cause while defendant’s petition to transfer is under review by the Supreme Court.” Appellant’s Appendix at 30. The trial court granted Patton’s motion the same day and vacated the October 6, 2009 trial date.

The Indiana Supreme Court denied transfer on July 6, 2009. On August 14, 2009, the State filed a motion for trial setting, which the court granted. The court scheduled a jury trial for February 1 and 2, 2010. On January 8, 2010, Patton’s attorneys filed a motion to withdraw and to continue the trial, which the court granted. On January 11, 2010, the court rescheduled the trial for April 26, 2010. The next day, the court clarified that the jury trial was scheduled for April 26 and 27, 2010.

On March 16, 2010, Patton appeared and informed the court that he would be hiring a new attorney, and the court confirmed the jury trial setting of April 26 and 27, 2010. On March 30, 2010, Patton’s attorney filed his appearance and requested a continuance. The next day, the court granted the motion and rescheduled the trial for August 16 and 17, 2010. On April 9, 2010, the State filed a motion to reset the jury trial

because a witness was unavailable for trial. On April 12, 2010, the court granted the State's motion and rescheduled the jury trial for September 27 and 28, 2010.

On June 7, 2010, the court held a pretrial conference at which Patton and his attorney appeared. The court scheduled the final pretrial conference for July 27, 2010. On July 27, 2010, the court held a pretrial conference and scheduled another pretrial conference for August 25, 2010 at the request of the parties and observed that the jury trial remained scheduled for September 27 and 28, 2010.

On August 12, 2010, Patton filed a motion for discharge pursuant to Ind. Criminal Rule 4(C). Patton argued that “[w]hen his trial was scheduled to take place the one year had already expired.” *Id.* at 48. On August 25, 2010, the court held a hearing and granted Patton's motion.

The sole issue is whether the trial court erred by denying Patton's motion for discharge under Ind. Criminal Rule 4(C). Ind. 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.

“The 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). The one-year period is extended by any delay due to: (1) a defendant’s motion for a continuance; (2) a delay caused by the defendant’s act; or (3) congestion of the court calendar. Isaacs v. State, 673 N.E.2d 757, 762 (Ind. 1996). “[W]hen a defendant takes action which delays the proceeding, that time is chargeable to the defendant and extends the one-year time limit, regardless of whether a trial date has been set at the time or not.” Cook, 810 N.E.2d at 1066-1067. The objective of the rule is to move cases along and to provide the defendant with a timely trial, not to create a mechanism to avoid trial. Brown v. State, 725 N.E.2d 823, 825 (Ind. 2000).

“A defendant extends the one-year period by seeking or acquiescing in delay resulting in a later trial date.” Pelley v. State, 901 N.E.2d 494, 498 (Ind. 2009), reh’g denied. “The defendant’s failure to object timely will be deemed acquiescence in the setting of that date.” Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999), reh’g denied. “Although a defendant is not obliged under this rule to push the matter to trial, 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, 725 N.E.2d at 825. However, “[t]he defendant is not required to take affirmative steps to obtain trial within the period provided by the Rule, and waiver arises only where defendant learns, *within* the period during which he could properly be brought to trial,

that the court proposes trial on an untimely date.” State v. Tomes, 466 N.E.2d 66, 70 (Ind. Ct. App. 1984).

When a defendant asks for a continuance, the time between the motion for a continuance and the new trial date is chargeable to the defendant. Vermillion, 719 N.E.2d at 1204. When a motion for discharge for an Ind. Criminal Rule 4 violation is made prematurely, it is properly denied. Stephenson v. State, 742 N.E.2d 463, 487, n.21 (Ind. 2001), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002). The determination of whether a particular delay in bringing a defendant to trial violates the speedy trial guarantee depends on the specific circumstances of the case. Payton v. State, 905 N.E.2d 508, 511 (Ind. Ct. App. 2009), trans. denied.

Patton was charged on February 28, 2008. Thus, the State was required to bring him to trial by February 28, 2009, unless the one-year period was extended by delays not chargeable to the State. We begin with addressing the delay between the State’s filing of its notice of appeal of the court’s order granting Patton’s motion to suppress and the Indiana Supreme Court’s denial of transfer, which appears to be the dispositive inquiry.²

The parties disagree as to the relevance of Pelley v. State, 901 N.E.2d 494 (Ind. 2009). In Pelley, Robert Jeffrey Pelley was charged with murdering his father, stepmother, and two stepsisters. 901 N.E.2d at 496. The State issued a subpoena duces

² The State argues that the time period between Patton’s motion to suppress and the Indiana Supreme Court’s denial of transfer extended the one-year period. Because we conclude that the delay between the date of the State’s filing of its notice of appeal of the court’s suppression order and the denial of transfer extended the one-year deadline and Patton is not entitled to discharge, we need not determine whether the delay chargeable to Patton began on the date of his motion to suppress.

tecum to the Family & Children’s Center. Id. at 497. The subpoena directed production of the family’s counseling records but did not provide a specific response date. Id. The Center moved to quash the subpoena on February 26, 2003 on the ground that the counseling records were privileged. Id.

The State and the Center submitted memoranda and lengthy arguments at the hearing on the motion to quash. Id. Pelley submitted no written materials but responded orally and was substantively aligned with the Center, except that Pelley alone objected to the trial court’s in camera examination of the counseling records. Id. Ultimately, the trial court reviewed the records in camera and granted the Center’s motion to quash. Id. at 497-498. The trial court noted that none of the records contained information related “directly to the fact or immediate circumstances” of the murders even under an expansive interpretation of that phrase. Id. at 498.

At the State’s request, the trial court certified its order for interlocutory appeal, finding that the order involved a substantial question of law and that the State would have an inadequate remedy without the interlocutory appeal. Id. The Court of Appeals accepted the appeal and stayed proceedings in the trial court pending resolution of the appeal. Id. The issue was ultimately resolved by the Indiana Supreme Court’s opinion of June 14, 2005, holding in part that the trial court erred in quashing the subpoena. Id. (citing State v. Pelley, 828 N.E.2d 915, 923 (Ind. 2005)). Pelley did not participate in the appeal. Id.

The case was remanded to the trial court, and on October 28, 2005, trial was set for July 10, 2006. Id. Pelley did not object to this trial date. Id. On January 4, 2006, Pelley filed a motion to dismiss under Rule 4(C), arguing that the July 10, 2006 trial date was beyond the one-year period provided by Rule 4(C), and Rule 4(C) does not contain an exception for interlocutory appeals. Id. The trial court denied Pelley's motion, finding that although Pelley did not cause the delays incident to the interlocutory appeal, the Criminal Rule 4(C) period was tolled during the appeal. Id. The trial court also noted that the stay issued by the Court of Appeals "preclud[ed] the trial court from exercising jurisdiction," and assumed that "the Appellate Court was aware that such stay would, interfere with observance of the Defendant's C.R. 4(C) Rights." Id. The jury found Pelley guilty of all four murders. Id. at 498.

On appeal, the Indiana Supreme Court observed that the only question involving Ind. Criminal Rule 4(C) was "whether Rule 4(C) excludes the time for the State's interlocutory appeal from its one-year limitation." Id. The Court held:

This Court has previously examined the effect of the State's interlocutory appeal on the period in which a defendant must be brought to trial. In Martin v. State, 245 Ind. 224, 228, 194 N.E.2d 721, 723 (1963), the State filed a mandamus proceeding following the trial court's denial of the State's motion for a change of judge. During the course of the mandamus action, the statutory time limit – then framed in terms of court – expired. The defendant moved for discharge, arguing that the time for the State's mandamus proceeding could not be attributed to him. We upheld the trial court's denial of the discharge motion, in part because the defendant was the real party in interest in the change of judge, and his attorneys represented the respondent judge in the original action. Id. at 229, 194 N.E.2d at 724. We also stated that the three-term statute did not apply "where the delay was caused by proceedings in this court." We

explained that neither the prosecutor nor the trial judge could control the time required for an appeal, and most appeals would trigger a dismissal, a result that the legislature could not have intended. Id. Following the adoption of our criminal rules, we quoted Martin with approval in State ex rel. Cox v. Super. Ct. of Madison County, 445 N.E.2d 1367, 1368 (Ind. 1983), in holding that Rule 4(B)'s early trial requirement was tolled pending the State's interlocutory appeal of the trial court's ruling on defendant's motion in limine.

We believe that Martin's rationale controls here. When trial court proceedings have been stayed pending resolution of the State's interlocutory appeal, the trial court loses jurisdiction to try the defendant and has no ability to speed the appellate process. As a practical matter, applying the Criminal Rule 4(C) one-year requirement to interlocutory appeals would render an appeal by the State impossible because it would in all likelihood trigger a mandatory discharge of the defendant. Accordingly, we conclude that Rule 4(C)'s one-year limitation does not include the time during which trial proceedings have been stayed pending interlocutory appeal.

Id. at 499-500 (footnote omitted). The Court noted that "the time for an interlocutory appeal is excluded from Rule 4(C)'s limitation only when trial court proceedings have been stayed." Id. at 500.

The State argues that Pelley is distinguishable. Specifically, the State argues that "the earlier appeal in the present case was not an interlocutory appeal" because the trial court's grant of Patton's motion to dismiss "essentially served to dismiss the action against [Patton]." Appellant's Brief at 9. The State argues that the trial court's granting of Patton's motion to suppress "excluded all of the State's evidence," and that "at the time of the State's appeal, and throughout the pendency of that appeal, no case remained against Defendant" and it "had essentially been dismissed." Id. The State asserts that "[a] stay of dismissed proceedings is an oxymoron and would be nothing more than a

hollow order in such a case as this.” Id. at 10. The State also argues that Pelley “is also not applicable here because the appeal arose in the context of a delay that originated with an action of a third party, not an action by the defendant.” Id. Specifically, the State argues that in Pelley, the defendant “could argue that he had done nothing to cause the delay resulting from that appeal,” but, here, “Patton was very much involved in the action at the center of the State’s first appeal in his case.” Id.

Patton argues that Pelley is instructive and that his “motion to suppress moved to exclude evidence seized during a blood draw and catheterization, but did not move to suppress any evidence obtained before the blood draw and catheterization.” Appellant’s Brief at 16. Patton points out that “[a]s this court explained in its prior decision in this case, before the blood draw and catheterization Patton was observed by an officer, speeding, slurring his speech, and smelling of alcohol.” Id. Patton argues that this and other evidence “was surely sufficient for the state to proceed to trial.” Id. Patton argues that “the court’s ruling on the motion to suppress did not dispose of the entire controversy; it was merely an interlocutory order.” Id.

Initially, we observe that unlike Pelley, which involved a discovery dispute involving a subpoena issued by the State to a third party and an appeal of a ruling on that discovery issue, this appeal involves a motion to suppress filed by Patton himself. See Cox, 445 N.E.2d at 1369 (holding that Rule 4(B)’s early trial requirement was tolled pending the State’s interlocutory appeal of the trial court’s ruling on the defendant’s motion in limine); Martin, 245 Ind. at 230, 194 N.E.2d at 724 (holding that a defendant is

not entitled to discharge where the defendant sets in motion the chain of events that causes the delay).

To the extent that Patton argues that the court's ruling was merely an interlocutory order, we disagree. Ind. Appellate Rule 2(H) provides that "[a] judgment is a final judgment if . . . it is otherwise deemed final by law." Ind. Code § 35-38-4-2 provides that "[a]ppeals to the supreme court or to the court of appeals, if the court rules so provide, may be taken by the state in the following cases . . . [f]rom an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution." Here, the order granting Patton's motion to suppress had the ultimate effect of precluding further prosecution of the State's charge of operating a vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters or more as a class D felony. Thus, the trial court's order was tantamount to a dismissal of the action. See State v. Hunter, 904 N.E.2d 371, 373 (Ind. Ct. App. 2009) ("A trial court's grant of a defendant's motion to suppress is 'tantamount to a dismissal of the action' and is 'appealable as a final judgment under subsection (5)' of Indiana Code Section 35-38-4-2.") (quoting State v. Snider, 892 N.E.2d 657, 658 (Ind. Ct. App. 2008) (quoting State v. Williams, 445 N.E.2d 582, 584 (Ind. Ct. App. 1983))).³

³ To the extent that Patton argues that the court's order was merely interlocutory for purposes of whether a stay was required because there was evidence of the remaining charge of operating a vehicle while intoxicated as a class D felony, we disagree. Under the circumstances, we cannot say that the mere fact that other charges were pending required the State to request a stay.

Because the State was appealing a grant of a motion filed by Patton and the grant of that motion precluded further prosecution, we conclude that the time period between the State's filing of its notice of appeal of the suppression order and the Indiana Supreme Court's denial of transfer extended the one-year period by 258 days⁴ to November 13, 2009. (Cumulative extension (hereinafter, "C.E.") 258 days). See Cox, 445 N.E.2d at 1369 (holding that the defendant was properly charged with the delay occasioned by the State's appeal of the favorable ruling on his motion in limine and that the time limitation was tolled pending the State's interlocutory appeal).

On August 14, 2009, the State filed a motion for trial setting, and the court granted the motion that same day and scheduled a jury trial for February 1 and 2, 2010, which was outside the extended one-year period within which Patton should have been tried, and Patton did not object at the earliest opportunity. We conclude that Patton is deemed to have acquiesced in the delay because he did not object at the earliest opportunity when the court set the trial outside of the one-year period. See Everroad v. State, 590 N.E.2d 567, 569 (Ind. 1992) (holding that the defendants failed to make a timely objection when they did not object to the setting of the trial date until over a month after the trial had been set beyond the one-year limit), reh'g denied; Blair v. State, 877 N.E.2d 1225, 1232 (Ind. Ct. App. 2007) (holding that the defendant waived his rights under Ind. Criminal Rule 4(C) where he waited almost two months before objecting to the trial court's scheduling of trial), trans. denied; Townsend v. State, 673 N.E.2d 503, 506 (Ind. Ct. App.

⁴ This represents the delay between October 21, 2008, and July 6, 2009.

1996) (“However, even if this court accepts Townsend’s contention [that his motion to dismiss constituted an implied objection on speedy trial grounds], his motion to dismiss was filed almost two months after the trial court set the trial date. Townsend failed to object at the earliest opportunity.”). This extended the one-year period by 171 days⁵ to May 3, 2010. (C.E. 429 days).

On January 8, 2010, Patton’s attorneys filed a motion to withdraw and to continue the trial, which the court granted. The court rescheduled the trial for April 26 and 27, 2010. This extended the one-year period by eighty-four days⁶ to July 26, 2010. (C.E. 513 days). See Vermillion, 719 N.E.2d at 1204 (holding that when a defendant asks for a continuance, the time between the motion for a continuance and the new trial date is chargeable to the defendant).

On March 30, 2010, Patton’s attorney filed his appearance and requested a continuance. The next day, the court granted the motion and rescheduled the trial for August 16 and 17, 2010. This extended the one-year period by 112 days⁷ to November 15, 2010. (C.E. 625 days).

⁵ This represents the delay between August 14, 2009, and February 1, 2010.

⁶ This represents the delay between February 1, 2010, and April 26, 2010. We use February 1, 2010, as the starting point for this calculation because the previous calculation included the days between August 14, 2009, and February 1, 2010. See Henderson v. State, 647 N.E.2d 7, 13 (Ind. Ct. App. 1995) (holding that this court does not charge defendant twice for those days of delay that overlap), reh’g denied, trans. denied.

⁷ This represents the delay between April 26, 2010, and August 16, 2010. We use April 26, 2010, as the starting point for this calculation because the previous calculation included the days between February 1, 2010, and April 26, 2010. See Henderson, 647 N.E.2d at 13.

The delays discussed above extended the one-year deadline by a total of 625 days to November 15, 2010. We conclude that Patton's motion for discharge on August 12, 2010, was premature and his right under Ind. Criminal Rule 4(C) to be brought to trial within one year of being charged has not been violated. Thus, the trial court improperly granted Patton's motion for discharge under Ind. Criminal Rule 4(C).⁸

For the foregoing reasons, we reverse the trial court's grant of Patton's motion for discharge and remand for proceedings consistent with this opinion.

Reversed and remanded.

ROBB, C.J., and RILEY, J., concur.

⁸ Because we conclude that the above delays extended the one-year limit beyond the date of Patton's motion for discharge we need not discuss any other possible delays.