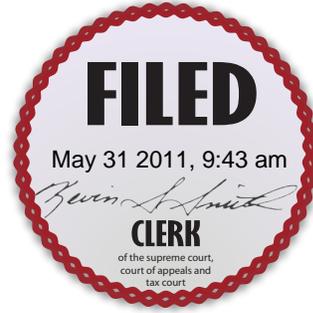


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARLON D. MCKNIGHT,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 20A05-1005-CR-357

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable George W. Biddlecome, Judge  
Cause No. 20D03-0802-FA-6

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May 31, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issues

Marlon McKnight appeals his three felony convictions for dealing in cocaine. McKnight raises two issues for our review, which we restate as: 1) whether McKnight's right to a speedy trial as guaranteed by Indiana Criminal Rule 4(B) was violated; and 2) whether the trial court impermissibly infringed on McKnight's fundamental right to compulsory process. Concluding neither right was violated, we affirm.

## Facts and Procedural History

This case commenced on February 4, 2008, when the State charged McKnight with two counts of dealing in cocaine as Class A felonies and one count of dealing in cocaine as a Class B felony. McKnight's trial was initially set for April 20, 2009. However, due to court congestion, the trial was continued and reset for November 30, 2009. On September 10, 2009, McKnight dismissed his attorney, deciding to proceed pro se. On October 15, 2009, McKnight filed a Motion for Early Trial pursuant to Indiana Criminal Rule 4(B)(1). Based on the date McKnight filed his early trial motion, the State had until December 24, 2009 to bring McKnight to trial. The trial court granted McKnight's motion and reset the trial date for October 26, 2009. The jury trial began as scheduled on October 26, 2009; however, the State filed a motion for mistrial due to impermissible communication between McKnight and a juror who had been selected. After conducting a hearing, the trial court granted the State's motion.

On October 28, 2009, McKnight filed a second motion for early trial. At a hearing held on November 5, 2009, the trial court set McKnight's new trial date for December 1, 2009. During the November 5 hearing, McKnight filed several motions. The trial court set these motions for hearing on November 19, 2009, but warned McKnight it would not

be able to hold a hearing and rule on these motions before the December 1, 2009 trial date. On November 18, 2009, McKnight filed several additional motions.

At the November 19, 2009 hearing, the trial court again told McKnight there was not sufficient time to hear and rule on his pending motions before the scheduled trial date. McKnight wanted his motions to be heard and but also wanted a continuance of the hearing because he was not prepared at that time to argue all of his motions. The trial court warned McKnight about the effect granting the motion to continue would have on his speedy trial request, stating “I am not going to let you put me in a position where I have to discharge you pursuant to [Indiana Criminal Rule 4(B)(1)].” Transcript at 161. The trial court gave McKnight a choice with regard to his motion for continuance:

Either you agree that the time is chargeable to you for [Indiana Criminal Rule 4(B)(1)] or you are going to force me to hear this today, and we will go to trial on December 1st as it is presently scheduled. You can't have it both ways, and I am not going to allow you to put me in an untenable position.

Id. at 163. McKnight decided he would rather continue the trial and have a hearing on his motions at a later time, and ultimately agreed the ensuing delay in trial was chargeable to him under Indiana Criminal Rule 4(B)(1).

The trial court set a hearing on McKnight's various motions for February 17, 2010. On January 12, 2010, McKnight filed a motion to dismiss under Indiana Criminal Rule 4(B)(1). McKnight filed several more motions on January 29 and February 3, 2009, including a third Motion for Early Trial. At the February 17, 2010 hearing, the trial court denied McKnight's Motion to Dismiss under Indiana Criminal Rule 4(B)(1). McKnight was subsequently convicted by a jury of all three counts, and the trial court sentenced him

to an aggregate of forty years in the Indiana Department of Correction. McKnight now appeals.

### Discussion and Decision

#### I. Speedy Trial

The first issue on appeal is whether the trial court erred by denying McKnight's motion to dismiss pursuant to Indiana Criminal Rule 4(B)(1) because the State had failed to bring him to trial within seventy days. We review de novo a trial court's denial of a motion to discharge a defendant. Mork v. State, 912 N.E.2d 408, 410 (Ind. Ct. App. 2009).

On October 15, 2009, McKnight filed a Motion for Early Trial pursuant to Indiana Criminal Rule 4(B)(1). By filing a motion for early trial, McKnight invoked the procedures and deadlines laid out in Indiana Criminal Rule 4(B). Indiana Criminal Rule 4(B)(1) states:

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) calendar 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.

Accordingly, when a defendant files a request for an early trial, the State is obligated to bring him or her to trial within seventy days of the request unless delay is caused by court congestion or by the defendant. See id. If the State fails to bring the defendant to trial within the allotted time frame, the defendant is entitled to discharge. Id. When a delay is chargeable to the defendant, the period fixed by the rule is extended only

by the period of the delay. Ind. Criminal Rule 4(F). The relevant sequence of events pertaining to the present case is as follows:

October 15, 2009: McKnight filed a Motion for Early Trial pursuant to Criminal Rule 4(B)(1). The court granted McKnight's motion, and set the trial date for October 26, 2009.

October 26, 2009: The jury trial began. However, during voir dire the State filed a motion for mistrial due to impermissible communication between McKnight and a juror. The trial court granted the State's motion.

October 28, 2009: McKnight filed a second motion for early trial.

November 5, 2009: The trial court set McKnight's trial for December 1, 2009, and considered several motions McKnight had filed at or just prior to the hearing, setting them for hearing on November 19, 2009 but warning McKnight it would not be able to hear and rule on the motions before the trial date.

November 18, 2009: McKnight filed several additional motions.

November 19, 2009: McKnight requested a continuance of the hearing because he was not prepared to argue all of his motions. McKnight agreed the delay in his trial date was chargeable to him under Indiana Criminal Rule 4B. The trial court continued the hearing and set a hearing on McKnight's various motions for February 17, 2010.

January 12, 2010: McKnight filed a Motion to Dismiss under Indiana Criminal Rule 4(B)(1), which was denied at the February 17, 2010 hearing.  
March 8, 2010: McKnight's jury trial begins and he is ultimately found guilty as charged.

McKnight first contends the trial court erred in granting a mistrial based on his ex parte communication with a juror. Therefore, McKnight argues the resulting delay in trial should not have been charged to him. However, the subsequent trial date was set for December 1, 2009, a date still well within the seventy-day time frame required by Indiana Criminal Rule 4(B)(1). Therefore, it is irrelevant which party was or should be charged with the delay resulting from the October 26, 2009 mistrial. Despite this fact, we find the

delay was ultimately chargeable to McKnight. A mistrial is an “extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.” Francis v. State, 758 N.E.2d 528, 532 (Ind. 2001). “On appeal, the trial judge’s discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury.” McManus v. State, 814 N.E.2d 253, 260 (Ind. 2004). The determination of whether to grant a mistrial is within the trial court’s discretion, and we will reverse only for an abuse of that discretion. Id. McKnight presents no evidence that would persuade us to find the trial court erred in its decision to grant the State’s motion for a mistrial; therefore, the delay the mistrial caused is chargeable to McKnight under Indiana Criminal Rule 4(B)(1).

McKnight next contends the trial court erred by charging him with the continuance of the December 1, 2009 trial date. McKnight argues the State should be charged with that time due to its failure to provide discovery McKnight had requested. In State v. Delph, 875 N.E.2d 416, 420-21 (Ind. Ct. App. 2007), trans. denied, the defendant was not charged with the delay caused by his motion for a continuance of the trial date. This court reasoned the delay should be charged to the State because the defendant’s motion was made after the State failed to provide the defendant with access to evidence requested in a motion for discovery. Similarly, in Crosby v. State, 597 N.E.2d 984, 988-89 (Ind. Ct. App. 1992), we encountered a situation where the defendant’s right to a speedy trial was violated due to the State’s failure to provide the defendant with discovery. In that case, the trial court initially scheduled the trial within the seventy-day period. Id. However, the trial date was continued because of the State’s negligence in

complying with discovery and its late addition and amendment of the charges, and accordingly, the State was charged with the delay due to its negligence. Id.

Unlike the circumstances in Delph and Crosby, the delay of McKnight's trial did not result from the State's failure to provide McKnight with discovery. The trial court gave McKnight the option of having his Motion to Compel heard at the November 19, 2009 hearing, which would allow the trial date set for December 1, 2009 to be maintained. Alternatively, the trial court would grant McKnight's Motion to Continue and hold hearings on his various motions on a later date. The State was ready to conduct a hearing on these motions on November 19. The State also suspected McKnight's Motion to Continue was gamesmanship in hopes of getting his charges dismissed pursuant to Indiana Criminal Rule 4(B)(1). Therefore, the State objected to McKnight's Motion to Continue "based upon his perceived interpretation of the State's deficiencies in the discovery rules." Tr. at 158.

The trial court agreed with the State's surmise and when giving McKnight his choice of continuing the trial date or having his various motions heard on November 19, stated: "I am not going to let you put me in a position where I have to discharge you pursuant to [Indiana Criminal Rule 4(B)(1)]." Id. at 161. McKnight decided he would rather continue the trial date and have a hearing on his motions at another time, and agreed the delay was chargeable to him under Indiana Criminal Rule 4(B)(1). McKnight does not present a convincing argument that the State purposefully withheld any discovery to which he was entitled, nor does he show the State was negligent in the discovery it did turn over. Allowing this type of gamesmanship to result in Indiana Criminal Rule 4(B)(1) dismissals would result in unnecessary delays and backlogs in our

criminal justice system. The trial court did not err in denying McKnight's Motion to Dismiss.

## II. Right to Compulsory Process

McKnight next contends the trial court violated his right to compulsory process under the Sixth Amendment to the United States Constitution. The United States Supreme Court discussed the constitutional guarantee of compulsory process for obtaining witnesses in Washington v. Texas, 388 U.S. 14 (1967), stating:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19. Under Washington, two inquiries must be made when the denial of such a right is alleged: 1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness, and 2) whether the witness was competent to testify and his testimony would have been relevant and material to the defense. Davis v. State, 529 N.E.2d 112, 114-15 (Ind. Ct. App. 1992); see Washington, 388 U.S. at 23.

First we mention that McKnight did not raise the compulsory process issue at trial, and therefore the issue is waived on appeal. An argument may not be raised for the first time on appeal. Whitfield v. State, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998), trans. denied. McKnight acknowledged to the trial court that he did not request a subpoena for the confidential informant who participated in the drug buys.

Waiver notwithstanding, it has been long established that although a criminal defendant has the right to confront an adverse witness, the onus is on the defendant to make sure the witness is called at trial. The State “cannot be compelled to call witnesses at the instance of the accused, but if the accused desires, in the conduct of his defense, the testimony of witnesses who are not called, he has the burden of seeing that they are called.” Denton v. State, 246 Ind. 155, 160, 203 N.E.2d 539, 541 (1965). McKnight relies on the trial judge’s statement made on February 25, 2010, informing McKnight, “If they’re State’s witness, you don’t need to subpoena them.” Tr. at 311. However, at a hearing one week prior to the judge’s statement, the prosecutor notified McKnight that the confidential informant would not be one of the State’s witnesses called at trial. Therefore, the obligation shifted to McKnight to subpoena this witness, which he failed to do. While McKnight notes the trial court denied his requests to subpoena other witnesses, he does not explain how those witnesses would have been competent to testify or material to his defense. Therefore, McKnight has not established any violation of his Sixth Amendment right to compulsory process.

#### Conclusion

The trial court properly denied McKnight’s Motion to Dismiss under Indiana Criminal Rule 4(B)(1) and also did not deny McKnight the right of compulsory process.

Affirmed.

NAJAM, J., and CRONE, J., concur.