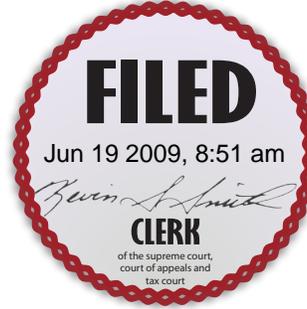


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN PAYTON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0810-CR-960

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0708-MR-155965

June 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kevin Payton appeals his convictions for murder, Class A felony attempted murder, four counts of Class B felony criminal confinement, and Class A misdemeanor carrying a handgun without a license. We affirm.

Issues

Payton raises two issues, which we restate as:

- I. whether the trial court properly denied his motion to dismiss; and
- II. whether there is sufficient evidence to support his convictions.

Facts

On June 26 and 27, 2007, James Fields, Brandi Dalton, and several others were drinking and using cocaine in a motel room in Marion County. At approximately 6:00 a.m. on June 27, 2007, Nigel Joiner and Greg Williamson went to the motel room. At the same time, Payton and his brothers, Keith and Andre, entered the motel room with guns and robbed Fields, Joiner, and Williamson. The Payton brothers forced Joiner and Williamson to remove all of their clothes except their underwear. They tied up Joiner, Williamson, and Fields and forced them into the bathtub. Fields and Andre struggled. Fields was shot five times and died of his injuries. During the incident, Dalton was told to cover herself with a comforter. She tried to flee the room when two other men knocked on the door, but she was shot in the head, causing her to lose sight in her right eye.

As the Payton brothers fled the motel in a Chevrolet Impala, Andre ran back into the motel room and fired another shot. The motel manager immediately called 911. A police chase ensued between Lawrence police officers and the Impala. During the chase, the Impala crashed. Payton and Keith fled on foot onto I-465, leaving Andre injured in the backseat. Keith got into a truck on I-465 and forced the driver to exit the interstate. Keith was apprehended shortly thereafter. Payton was involved in a foot chase with a Lawrence police officer, but ultimately escaped.

On July 2, 2007, Keith and Andre were charged with numerous offenses. On August 6, 2007, the State charged Payton with murder, Class A felony attempted murder, four counts of Class B felony criminal confinement, Class D felony possession of cocaine, and Class A misdemeanor carrying a handgun without a license. On August 8, 2007, Payton was found hiding in a crawl space in his grandmother's house.

On December 20, 2007, a pre-trial conference was held. During the conference the State asked, "Does the court want to set a trial date today to give all the attorneys something to work towards?" Tr. p. 1297. The trial court stated, "I'm happy to set one if any defendant wants it, otherwise I'll show that no defendant is requesting a trial date at this time." Id. Counsel for Payton replied, "That's fine." Id. at 1298. Counsel for Payton's brothers also agreed not to set a trial date at that time. The trial court responded, "All right then. Show the defendants aren't requesting trial dates, State's not requesting a trial date. . . ." Id.

At the next pre-trial conference, on February 19, 2008, the trial court set a trial date, which was eventually continued. On July 11, 2008, the trial court held a hearing on

Andre's and Keith's motions to dismiss based on Indiana Criminal Rule 4(C) and denied their motions. The trial court attributed the sixty-one-day delay from December 20, 2007, until February 19, 2008, to the defendants. On August 13, 2008, Payton filed a motion to dismiss based on Indiana Criminal Rule 4(C). At the August 20, 2008 hearing on Payton's motion, the trial court reiterated that the sixty-one day delay from December to February was attributable to the defendants.

On September 4, 2009, Payton waived his right to a jury trial. A bench trial began on September 15, 2007. On September 17, 2007, the trial court found Payton guilty of murder, attempted murder, four counts of criminal confinement, and carrying a handgun without a license. Payton now appeals.¹

Analysis

I. Indiana Criminal Rule 4(C)

Payton argues that the charges against him should have been dismissed because he was not timely tried. "The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution." Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995). This fundamental principle of constitutional law has long been zealously guarded by our courts. Id. "To this end, the provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right." Id. Indiana Criminal Rule 4(C) provides in part:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing

¹ Keith's convictions were affirmed in a published opinion. See Payton v. State, 905 N.E.2d 508 (Ind. Ct. App. 2009). Andre's appeal is pending under cause number 49A04-0810-CR-628.

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

“If a defendant seeks or acquiesces in a delay that results in a later trial date, the time limitations set by Criminal Rule 4 are extended by the length of such delays.” Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999). A defendant waives his or her 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. Id. at 498-99. “However, a defendant has no duty to object to the setting of a belated trial date if the setting occurs after the year has expired.” Id. at 499.

Here, the one-year time period began to run on the date of Payton’s arrest—August 8, 2007. See Isaacs v. State, 673 N.E.2d 757, 762 (Ind. 1996) (“The one-year period commences with the date of arrest or filing of information, whichever is later.”). If there were no delays chargeable to Payton, the State would have had until August 8, 2007 to bring him to trial.

The dispositive issue here is whether the sixty-one days from December 20, 2007, to February 19, 2008, are attributable to Payton. Payton argues that the trial court improperly attributed these days to him because he took no affirmative action that caused the delay. Although Payton did not move for the continuance, he did agree to forego setting a trial date by stating it was “fine” not to set one. Tr. p. 1298. In this regard, Payton acquiesced to the delay. See Vermillion, 719 N.E.2d at 1204. As we said of this

delay in Keith's case, "this delay in setting the trial date must be viewed as also delaying the trial itself." Payton v. State, 905 N.E.2d 508, 512 (Ind. Ct. App. 2009).

Because Payton acquiesced to the delay between December and February, the State had until October 8, 2008, to bring Payton to trial. Payton was timely tried from September 15 to 17, 2007. The trial court properly denied Payton's motion to dismiss.

II. Sufficiency of the Evidence

Payton also argues there is insufficient evidence to support his convictions. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. When confronted with conflicting evidence, we must consider it most favorably to the trial court's ruling. Id. We affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Payton argues that Dalton's and Joiner's testimony was "inherently incredible." Appellant's Br. p. 21. Payton challenges Dalton's testimony on the bases that she had been smoking cocaine and drinking alcohol prior to the offense and that she had been covered by a blanket during part of the incident. Payton challenges Joiner's testimony on the bases that he had given pre-trial statements that conflicted with his trial testimony and that he had received a reduced sentence on an unrelated charge in exchange for his trial testimony.

Within the narrow limits of the “incredible dubiousity” rule, we may impinge upon a fact-finder’s function to judge the credibility of a witness. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002).

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id.

Payton’s conviction is not based on the testimony of a sole witness, nor is there a lack of circumstantial evidence. Three witnesses, two of whom identified Payton at trial, were present during the commission of the crime and testified at trial. Several other witnesses observed the Payton brothers’ flight and ensuing police chases. The motel manager identified Payton as the person driving the Impala as they fled the motel. The police officer who chased Payton on foot identified him at trial. Further, Payton’s fingerprints were found on the driver’s side visor mirror and a CD case in the Impala after the crash. Accordingly, the incredible dubiousity rule does not apply to this case. To the extent that Payton challenges the credibility of Dalton’s and Joiner’s trial testimony, this was an issue for the fact-finder that was fully scrutinized during cross-examination.

Payton’s assertions that two of the State’s witnesses did not identify him at trial and that the police officer who engaged in the foot chase did not have a sufficient

opportunity to observe him, despite identifying him at trial, are nothing more than requests to judge witness credibility and reweigh the evidence. Dalton and Joiner identified Payton as an active participant in the offenses, and it was for the fact-finder to weigh this evidence accordingly.

Payton also asserts that because he was not arrested at the scene or during police questioning on an unrelated matter, there is insufficient evidence to support his conviction. To the extent this is relevant to whether Payton committed the crimes on June 27, 2007, however, this is nothing more than a request to reweigh the evidence, which we must decline.

Finally, Payton claims that although his fingerprints were found in the Impala and on a CD case in the car, this is not evidence that he participated in the crimes. As we have already discussed, there is extensive evidence that Payton actively participated in the crimes and was not merely present at the scene. We will not judge witness credibility or reweigh the evidence. There is sufficient evidence to support Payton's convictions.

Conclusion

Payton has not established that the trial court improperly denied his motion to dismiss, and there is sufficient evidence to support his convictions. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.