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IN THE
COURT OF APPEALS OF INDIANA

ANDRE PAYTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0810-CR-628
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0706-MR-122873

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Andre Payton appeals his convictions for murder, a felony,[1] class A felony attempted murder,[2] four counts of class B felony criminal confinement,[3] and class A misdemeanor carrying a handgun without a license.[4] We affirm.

Issue

Payton raises a single issue, which we restate as follows:

Whether he was denied his statutory and constitutional rights to a speedy trial.

Facts and Procedural History

On June 26-27, 2007, James Fields, Brandi Dalton, and several others were having a party in a Marion County motel room that Fields had rented for that purpose. At approximately 6:00 a.m. on June 27, 2007, Payton and his brothers, Kevin and Keith, forcibly entered the motel room with guns drawn. They robbed the men in the room, taking their clothes, money, a gun, and crack cocaine. They tied up the men with shoestrings and wrapped Dalton in a comforter. During the robbery, Fields was shot five times and killed. Dalton was shot in the head as she was attempting to flee the room and lost her right eye.

The motel manager was notified about a disturbance in Fields' room and called 911. The Lawrence police quickly arrived at the scene, spotted the suspects' car, and gave chase.

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[1] Ind. Code § 35-42-1-1.

[2] Ind. Code § 35-42-1-1.

[3] Ind. Code § 35-42-3-3.

[4] Ind. Code § 35-47-2-1.

The fleeing car crashed. Payton's brothers fled, but police found an injured Payton in the back seat of the car with two handguns. Keith was soon apprehended on I-465 driving a vehicle he had hijacked. Kevin was found about a week later, hiding in the crawl space of his grandmother's home.

On July 2, 2007, the State charged Payton and Keith with Count I, murder, a felony; Count II, class A attempted murder; Counts III-VI, class B felony criminal confinement; Count VIII, class D felony possession of cocaine; and Count X, class A misdemeanor carrying a handgun without a license.[5]

Payton's initial hearing was held on July 3, 2007, followed by a pre-trial conference on August 14, 2007. On August 24, 2007, an attorneys-only conference was held, during which a date for depositions was set and another attorneys' conference was set for October 24, 2007. That conference was actually held on October 25, 2007, at which time the parties agreed to complete depositions by the next hearing, December 20, 2007.

At the December 20, 2007, hearing, the depositions were not complete due to the failure of certain of the State's witnesses to appear for their scheduled depositions. The trial court and the parties agreed that the depositions would be able to be completed by late February. The State then asked the trial court, "Does the court want to set a trial date today to give all the attorneys something to work towards?" Tr. at 1279. The trial court answered, "I'm happy to set one if any defendant wants it, otherwise I'll show that no defendant is

[5] Keith was separately charged with Count VII, class A felony kidnapping, Count IX, class A misdemeanor resisting law enforcement, and an enhancement which elevated Count X to a class C felony in cause number 49G05-0706-MR-122883. Kevin was charged with various crimes stemming from the incident at a later date in cause number 49G05-0708-MR-155965.

requesting a trial date at this time." *Id*. Payton's attorney responded, "That's fine with us, Judge." *Id*. Keith's attorney stated, "I'm not requesting one." *Id*. Kevin's attorney concurred, saying "That's fine." *Id*. The trial court scheduled the next conference for February 19, 2008.

At the February 19, 2008, conference, the trial court scheduled jury voir dire and a pre-trial conference for May 22, 2008, and the evidentiary portion of the trial for June 2, 2008. On May 15, 2008, the State filed a motion to compel defendants to give buccal swab samples. On May 16, 2008, the State moved for a continuance based on the need for additional DNA testing. In its motion for continuance, the State explained,

> 2. The State submitted evidence to the Marion County Crime Lab requesting serology and DNA analysis on July 5, 2007. The material was outsourced by the Crime Lab to Strand Laboratories and the serology results were produced on May 12, 2008.
> 3. Based on the positive results from the serology analysis, the State submitted it's [sic] motion to collect buccal swabs of each of the Defendants on May 15, 2008. Time is needed for the State to collect the buccal swabs and conduct the final DNA analysis. The Director of the DNA unit at the Crime Lab, advised the State once the swabs of the Defendant's [sic] were collected, it should only take a couple of weeks to complete the analysis.

Appellant's App. at 112. The motion also stated that the State had contacted Payton's attorney regarding the motion and that he objected.

On May 21, 2008, the trial court held a hearing on the State's motions, granted both, and reset trial for July 11, 2008.

On July 8, 2008, Payton filed a motion for discharge pursuant to Indiana Criminal Rule 4(C) and a motion for State charged continuance, arguing that due to the timing of the State's request for additional DNA testing (the May 15, 2008 motion to compel defendants to

give buccal swabs), Payton had not received the results of all the DNA testing until July1, 2008, and needed more time to review the results. *Id*. at 145.

On July 11, 2008, the trial court held a hearing on Payton's motions. The trial court denied the motion for discharge reasoning that the delay from December 20, 2007, to February 19, 2008, was chargeable to the defense. The trial court explained that at the December 20, 2007 hearing, "all three defendants were given a chance affirmatively to have a trial date and did not request one. I believe that that gives us 61 days outside of the year period." Tr. at 134. Thus, the one-year time period provided by Criminal Rule 4(C) had not expired.

The trial court then turned to Payton's motion for state charged continuance. Payton argued that the continuance should be charged to the State because he was unable to prepare a competent defense due to his receipt of DNA evidence so close to the trial date. *Id*. at 135. The State explained that their request for the buccal swabs so close to the trial date was a result of the lengthy time period it took to get the first DNA results back; that is, even though the State had submitted evidence for DNA testing on July 15, 2007, it did not get the results back until May 12, 2008. *Id*. at 146, 151. In the absence of a willful violation of a discovery deadline by the State, the trial court denied Payton's motion for state charged continuance. *Id*. at 146.

Nevertheless, Payton still wanted a continuance to review all the DNA evidence. The trial court granted the continuance but charged it to Payton.[6] *Id*. at 162, 164. The trial court

[6] Keith did not object to the continuance, but Kevin did.

determined that two weeks would be sufficient for the defense to retain an expert to review the DNA evidence and suggested a trial date of July 28, 2008. *Id*. at 154-55. However, Keith's counsel objected to that date because he had a vacation scheduled, and Kevin's counsel objected because he had another trial scheduled. Payton also declined the trial court's suggestion of August 4, 2008, on the basis that it would not allow him enough time to prepare. *Id*. at 142. Payton suggested August 25, 2008, but other trials were already scheduled for that date, and the trial court was concerned that court congestion would cause Payton's trial to be continued. The trial court had been attempting to keep the trial date within the sixty-one day extended speedy trial time period, but then noted that because Payton had requested a continuance that was chargeable to him, in effect he was waiving his right to a speedy trial. *Id*. at 161. The trial court then set trial for September 15, 2008. *Id*. at 163-64.

On September 4, 2008, Payton and his brothers waived jury trial. At the start of trial on September 15-17, 2008, Payton renewed his motion for discharge, which the trial court denied. The trial court found Payton guilty of Count I, murder; Count II, class A attempted murder; Counts III-VI, class B felony criminal confinement; and Count X, class A misdemeanor carrying a handgun without a license. Payton appeals.

Discussion and Decision

Payton asserts that his statutory and constitutional rights to a speedy trial were violated by the trial court's denial of his motion for discharge. "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." *State v. Huber*, 843 N.E.2d 571, 573 (Ind. Ct. App. 2006), *trans. denied*. The defendant's speedy trial rights are implemented by the provisions of Indiana Criminal Rule 4, which provides in pertinent part:

> 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 ….

Ind. Crim. Rule 4(C). Under this rule, the State has an affirmative duty to bring the defendant to trial within one year of being charged or arrested, but extensions are allowed for various reasons. *Cook v. State*, 810 N.E.2d 1064, 1065 (Ind. 2004). For instance, "[i]f a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly." *Frisbie v. State*, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997), *trans. denied* (1998) (citation omitted). However, the defendant has no obligation to remind the court of the State's duty, nor is he required to take any affirmative action to see that he is brought to trial within the statutory time period. *State v. Smith*, 495 N.E.2d 539, 541 (Ind. Ct. App. 1986).

As an initial matter, we observe that the parties do not agree on the standard of review. Payton asserts our review is de novo, citing *Baumgartner v. State*, 891 N.E.2d 1131, 1133 (Ind. Ct. App. 2008). The State contends that we review the trial court's decision for an abuse of discretion, citing *Bowman v. State*, 884 N.E.2d 917, 919 (Ind. Ct. App. 2008), *trans. denied*.

"Whether delays in the scheduling of the trial have occurred and to whom they are chargeable are factual determinations for the trial court." *Leek v. State*, 878 N.E.2d 276, 277 (Ind. Ct. App. 2007). In the instant case, the parties agree on the facts. Hence, our review of the trial court's ruling on Payton's motion for discharge is a question of law, which we review de novo. *See Pelley v. State*, 901 N.E.2d 494, 498 (Ind. 2009) (stating the question whether Rule 4(C) excludes the time for the State's interlocutory appeal is one of law requiring de novo review).

Here, the one-year time period began to run on the date of the filing of the information, July 2, 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 July 2, 2008, to bring him to trial. However, the trial court charged the delay from December 20, 2007, to February 19, 2008, a period of sixty-one days, to Payton. Payton argues that "[d]iscovery of the State's case was not complete as the State's witnesses had failed to appear for deposition and the Crime Lab reports had yet to be provided" and that "[d]elays in the discovery process attributable to the State are charged to the State." Appellant's Br. at 15.

In support of his argument, Payton cites *Biggs v. State*, 546 N.E.2d 1271 (Ind. Ct. App. 1989). There, the one-year period began March 8, 1988, and the State was required to bring Biggs to trial by March 8, 1989.[7] However, the final trial date was set for May 18, 1989. Biggs contended that the reason the trial was delayed so long was because of the

[7] There was a co-defendant, but we omit reference to him for simplicity's sake.

State's failure to comply with his discovery requests. The State countered that Biggs should be charged with some delay based on his July 18, 1988, motion for continuance, asserting that it was "an event brought about by the defendant causing an indefinite delay." *Id*. at 1274. The *Biggs* court declined to charge the defendant with any delay that may have resulted from the July 18 motion for continuance, reasoning as follows:

> We first note that the defendants' motion for a continuance was never ruled upon by the trial court. Secondly, the July 18 motion was filed in conjunction with a motion to preclude the testimony of the confidential informant who failed to appear for depositions scheduled for June 28, 1989. The motion for a continuance, requested in the alternative, asked only that the trial be delayed until such time as the defendants' discovery requests were complied with by the State, so that the defendants would be adequately prepared for trial. … To put the defendants in a position whereby they must either go to trial unprepared due to the State's failure to respond to discovery requests or be prepared to waive their rights to a speedy trial, is to put the defendants in an untenable situation.

Id. at 1274-75.

We find that the holding in *Biggs* does not extend to the circumstances present here. Although in both cases the State's witnesses failed to appear for depositions, here the parties agreed that the depositions would be able to be completed by late February and the State affirmatively attempted to keep the case moving toward trial. Payton asserts that at the December 20, 2007, hearing "the State had not asked that a trial date be set." Appellant's Br. at 15. However, Payton fails to recognize that the State specifically asked the trial court, "Does the court want to set a trial date today to give all the attorneys something to work towards?" Tr. at 1279. Clearly, the State raised the prospect of setting the trial so as to avoid delay. The trial court then stated that "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*. Payton's attorney said, "That's fine with us, Judge." In this instance, Payton was invited to set a trial date and affirmatively declined the offer. As such, Payton demonstrated a desire to delay the advancement to trial. Our supreme court has stated that the "objective of [Criminal Rule 4] 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). Moreover, the defendants here, unlike those in *Biggs*, were not, as of December 20, 2007, put in the position of going to trial unprepared or waiving their speedy trial rights. As mentioned, the parties were confident that the depositions and other discovery could be complete by late February. Therefore, setting a trial date sometime after that would not have placed Payton in a position of having to go to trial unprepared.

Furthermore, we observe that "delays caused by action taken by the defendant are chargeable to the defendant regardless of whether a trial date has been set." *Cook*, 810 N.E.2d at 1067. The date for Payton's trial would have been set on December 20, 2007, but for Payton's decision not to set it. The trial date was then not set until February 19, 2008. Accordingly, we conclude that the trial court did not err in attributing the sixty-one day delay to Payton.[8] Sixty-one days added to July 2, 2008, results in an expiration of the one-year time period on September 2, 2008 (because September 1, 2008, was a holiday). Payton's motion to discharge filed on July 8, 2008 was premature. When a motion for discharge for an

[8] We note that our reasoning and conclusion are in agreement with those in *Keith Payton v. State*, Cause No. 49A02-0810-CR-961, 2009 WL 1213683 (Ind. Ct. App. May 4, 2009).

Indiana Criminal Rule 4 violation is made prematurely, it is properly denied. *Stephenson v. State*, 742 N.E.2d 463, 487 n.21 (Ind. 2001). Therefore, the trial court did not err in denying Payton's motion for discharge.

Payton also argues that his federal and State constitutional speedy trial rights were violated by the State's delays in the discovery process. While the federal and state constitutions guarantee every accused person the right to a speedy trial, "they do not guarantee a trial within a particular time." *Sturgeon v. State*, 683 N.E.2d 612, 615 (Ind. Ct. App. 1997), *trans. denied*. The inquiry as to whether a defendant has been denied a speedy trial under the Sixth Amendment involves balancing a number of factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) any resulting prejudice to the defendant. *Danks v. State*, 733 N.E.2d 474, 481 (Ind. Ct. App. 2000) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)), *trans. denied*. "[N]one of the four factors ... [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. The *Barker* analysis is triggered where the delay exceeds one year. *Danks*, 733 N.E.2d at 481 (Ind. Ct. App. 2000) (citing *Doggett v. U.S.*, 505 U.S. 647, 652 n.1 (1992)).

Payton asserts that (1) the necessity of the DNA samples was foreseeable to the State, and therefore it was unreasonable for the State to wait eleven months after filing the information to request the samples, and (2) the "dumping of extensive DNA discovery upon [him] on the eve of trial was prejudicial; it forced him to ask for a continuance until

September in order to adequately prepare." Appellant's Br. at 19. With regard to speedy trial rights, our supreme court has stated,

> [I]t is not enough to make out a constitutional violation to say only that the State has caused delay or that a defendant has not. Rather, the inquiry must include consideration of the reasons for the delay assignable to the State and "whether and how" a defendant has asserted the speedy trial right. The following excerpts from the *Barker* opinion make these points clear:
>
> > A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.
> >
> > ...
> >
> > Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

State v. Azania, 865 N.E.2d 994, 1002-03 (Ind. 2007) (quoting *Barker*, 407 U.S. at 531).

We now address the first *Barker* factor. Payton was brought to trial on September 15, 2008. This was fourteen and a half months after the filing of the charges. A post-accusation delay exceeding one year has been termed "presumptively prejudicial" to a defendant and triggers the *Barker* analysis. *Vermillion v. State*, 719 N.E.2d 1201, 1206 (Ind. 1999).

However, the delay extending beyond the one-year threshold is only two and one-half months. *See Davis v. State*, 819 N.E.2d 91, 96 (Ind. Ct. App. 2004) (noting that the length of delay is considered in light of the extent to which it stretches beyond the bare minimum needed to trigger judicial examination of the claim), *trans. denied* (2005). In light of the severity and number of crimes with which Payton was charged, i.e., murder, attempted murder, four counts of criminal confinement, and carrying a handgun without a license, two and a half months beyond the one-year threshold is not excessive.

As to the second *Barker* factor, the record shows that the State's delay was not willful or taken in bad faith. The State submitted the evidence to the Marion County Crime Lab on July 5, 2007, just a month after the charges were filed. The Crime Lab outsourced the evidence to Strand Laboratories. At the July 11, 2008, hearing the State explained,

> It was outsourced to Strand in an attempt to actually get it done more quickly because that's the purpose of outsourcing it. It didn't happen in this case, we don't know why it didn't happen with respect to Strand. We have stopped outsourcing stuff to Strand because of the issue, but because of so many submissions for DNA within our own lab, it was actually done with good intent.

Tr. at 151. Thus, the length of the delay was minor and the reason for the delay shows that the State was not engaging in a bad-faith attempt to gain an impermissible tactical advantage.

Turning to Payton's assertion of his constitutional speedy trial right, we note that he asserted that right in his motion to dismiss on July 8, 2008. However, at the May 21, 2008, hearing on the State's motion for continuance, the trial was reset for July 11, 2008, a date beyond the one-year period. While Payton did object to the State's motion for continuance at the hearing, he did not object on speedy trial grounds. Payton's attorney stated, "Well, the

problem is if they do the swabs, what if we have to do some work, investigating after that so I, we'll be hit with the evidence right before the jury trial so we would object to the timing on this type of case that ha[s] been pending for a long time." Tr. at 98-9. His attorney later said, "I don't necessarily see a criminal Rule 4 issue here." *Id*. at 108. We observe that, "when a trial court, acting within the one-year time limit of Criminal Rule 4(C), schedules trial to begin beyond the one-year limit, the defendant must make a timely objection to the trial date or waive his right to a speedy trial under that rule." *State ex rel. Bramley v. Tipton Cir. Ct.*, 835 N.E.2d 479, 481 (Ind. 2005). While we are now addressing Payton's constitutional claim rather than his statutory claim, we cannot overlook the fact that Payton did not assert his right to a speedy trial at the first opportunity. However, there is more to the story. At the May 21, 2008, hearing, the trial court mistakenly stated that the defendants did not have to object at that time but could wait until July 8, 2008, to object. Tr. at 109.[9] Payton did file his motion for discharge on July 8, 2008. Therefore, although Payton did not assert his speedy trial right when the trial was reset outside the one-year period, we will not weigh his tardiness against him because he did assert it in accord with the trial court's statement. However, neither will we weigh his assertion of his speedy trial right in his favor.

Finally, as to prejudice, we observe that there is a relationship between the reason behind a delay and the defendant's need to demonstrate actual, particularized prejudice caused by the delay. *Danks*, 733 N.E.2d at 481. This Court explained,

[9] This may be the reason that the State did not argue that Payton waived his Criminal Rule 4(C) claim.

> [I]n between delay caused by bad faith, which weighs heavily against the government, and delay that results even though the government has diligently pursued prosecution, lies delay caused by official negligence. Such delay is weighed more lightly than deliberate delay but it still is an unacceptable reason for delaying a prosecution.

Id. The issue of prejudice must be considered in light of the interests of defendants that the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Indiana courts have placed the burden of demonstrating actual prejudice on the defendant to prove a speedy trial deprivation." *Lee v. State*, 684 N.E.2d 1143, 1146 (Ind. 1997) (citations and quotation marks omitted).

Here, Payton has not asserted that the delay resulted in oppressive pretrial incarceration or undue anxiety and he has not articulated any actual prejudice to his ability to present his defense. *See id*. ("The right prevents an impairment to a defense by protecting the defendant from such problems as the death or disappearance of witnesses during the delay or the inability of witnesses to recall events accurately after delay."). While he asserts that he was forced to choose between going to trial unprepared or accepting a trial date outside the one-year period, we disagree. The trial court offered him a trial date of August 4, 2008, which would have given him one month from the time he received the DNA evidence on July 1, 2008, to review it before trial. Accordingly, after balancing the *Barker* factors, we conclude that Payton's constitutional speedy trial rights were not violated.

Affirmed.

BRADFORD, J., concurs.

BROWN, J., dissents with separate opinion.

IN THE

COURT OF APPEALS OF INDIANA

ANDRE PAYTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0810-CR-628
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Brown, J., dissenting

I respectfully dissent as to the majority's determination that the trial court was correct in charging sixty-one days from December 20, 2007 to February 19, 2008, to the defendant and do not agree that the defendant's failure to request a trial date on December 20, 2007 is a "delay caused by actions taken by the defendant." Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004). The State chose not to request a trial date at that time, and the burden under Ind. Criminal Rule 4(C) did not pass to the defendant.

The transcript of the May 21, 2008 hearing on the State's motion to continue the June 2, 2008 trial date reflects the following comments and clarifies that the trial court gave defense counsel until July, 2008 to file a motion for discharge pursuant to Criminal Rule 4(C):

> Mr. Martin [for Andre Payton]: . . . . I think that this case has been pending 300-some odd days at this point. The fact that DNA is just now becoming an issue is somewhat problematic. I did discuss these issues with the State and I do object for the record with respect to that.
>
> * * * * *
>
> Mr. Martin: . . . . [M]y recollection was that we had made several joint motions for continuances as far as pre-trials go. I don't recall us requesting a trial date prior to the one that we set back in February, so with respect to that, I don't necessarily see a Criminal Rule 4 issue.

Transcript at 99, 108.

Following this latter comment there was further discussion among the court and counsel about the delay in bringing the defendant(s) to trial and the following dialogue occurred:

> The Court: If the State wants to take the chance –
>
> Mr. Freeman [for the State]: Yes. Yes, Judge.
>
> The Court: <u>And you're wrong, the dismissal for this charge is on you. We agree?</u>
>
> Mr. Freeman: Yes, Judge, I would agree with that.
>
> * * * * *
>
> The Court: Show the State's motion to continue will be granted over objection. State, do you want the motions for discharge filed by a date certain?
>
> Mr. Hollingsworth [for the State]: Well, we'd just as soon have, because of the calculations involved, if applicable, we'd like to have them before the 11th [of July] so maybe a week, two weeks early.
>
> The Court: Okay. The target date is June 27, that's when the ripe – that's when the motion would become ripe. . . . .

Mr. Martin: Which date, Judge?

The Court: Well, I'm saying it sounds like June 26, 27 is when the motion for discharge would become ripe if it's well taken. So I certainly can't require you to file it before then. State wants a chance to look at it and whoever the jurist is[1] will probably want a chance to look at it and do independent research . . . . The real key is whether that December nobody requested a trial date extends the time or not. I don't know how that's going to fall out, since there was no trial setting at that time.

Mr. Martin: Right.

* * * * *

The Court: Defendants' motion to discharge, if filed, will be filed by July 1st.

Id. at 111, 118-119 (emphasis supplied).

The July 11, 2008 hearing on Payton's motion for discharge was held before a different judge who ruled that the sixty-one day delay in question was attributable to the defendant. In so ruling, the judge said "[t]hey were, all three defendants were given a chance affirmatively to have a trial date and did not request one. I believe that that gives us 61 days outside of the year period." Id. at 134.

I do not agree with the trial court's interpretation or with the majority's decision that Payton's motion for discharge filed on July 8, 2008 was premature.

For these reasons, I respectfully dissent.

[1] The trial judge had previously indicated he would be out of the office at the time the hearing on the motion for discharge would be held.