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IN THE
COURT OF APPEALS OF INDIANA

MARK A. SHEPARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-CR-1244
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARON SUPERIOR COURT
CRIMINAL DIVISION, ROOM 16
The Honorable Kimberly Brown, Judge
Cause No. 49G16-0907-FD-62139

July 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Mark A. Shepard (Shepard), appeals his conviction for battery, as a Class D felony, Ind. Code § 35-42-2-1(a)(2)(B).

We affirm.

ISSUE

Shepard raises one issue on appeal, which we restate as: Whether the trial court erred by denying his motion for discharge based on Indiana Criminal Rule 4(B).

FACTS AND PROCEDURAL HISTORY

In July of 2009, Shepard was living in a home with his sister, and her three children. On July 6, Shepard began yelling at his sister's youngest son. The dispute escalated and his sister intervened, followed by his sister's thirteen-year-old daughter. Shepard became enraged and hit the thirteen-year-old girl in the mouth with his elbow causing her tooth to chip. The police were called and Shepard was arrested.

On July 7, 2009, the State filed an Information charging Shepard with battery on a person less than fourteen years old, a Class D felony, I.C. § 35-42-2-1(a)(2)(B). Shepard requested a speedy trial and the trial court set a trial date for September 17, 2009. On September 15, 2009, the trial court issued a continuance of Shepard's jury trial, upon its own motion, stating in part that: "there is a congestion of the [c]ourt's calendar due to the Annual Judicial Conference scheduled for September 16, 2009 through September 18, 2009. There are insufficient judges and senior judges to preside over the jury trial calendar." (Appellant's App. p. 63). On September 16, 2009, Shepard filed an objection to the continuance of the

trial date, noting that the judicial conference had been scheduled more than a year in advance and should not be considered as court congestion. On September 21, 2009, Shepard moved for his discharge, arguing that his right to a speedy trial had been violated. The trial court denied Shepard's motion for discharge.

On October 22, 2009, the trial court conducted a jury trial. At the close of the trial, the jury found him guilty as charged. The trial court sentenced Shepard to one and one-half years, with six months suspended to probation.

Shepard now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Shepard contends that his right to a speedy trial was violated by the trial court's continuance of his jury trial date. Specifically, he contends that the trial court's claim of court congestion was not factually accurate.

A right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, Section 12 of the Indiana Constitution. *Truax v. State*, 856 N.E.2d 116, 120 (Ind. Ct. App. 2006). Indiana Criminal Rule 4 implements the right to a speedy trial, and specifically, Criminal Rule 4(B)(1) provides as follows:

> 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. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in 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 shall also set the case for trial within a reasonable time.

Discharge for violation of a defendant's speedy trial right operates as a bar to further prosecution for the same offense and is effectively a final judgment in the cause. *State v. Roberts*, 171 Ind.App. 537, 542, 358 N.E.2d 181, 184 (1976). "While the rule expressly requires that a defendant be discharged if not brought to trial within certain prescribed time limits, the rule and subsequent interpretations have recognized that court congestion and other exigent circumstances may justify a reasonable delay beyond the seventy-day period." *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995).

In reviewing a trial court's denial of a motion to discharge pursuant to Criminal Rule 4(B), we apply a clearly erroneous standard. *Truax*, 856 N.E.2d at 120. On appeal, we will not reverse the trial court's decision unless the defendant has made a showing of clear error that leaves us with a firm conviction that a mistake was made. *Id*.

In *Clark*, our supreme court defined Criminal Rule 4's requirement for trial scheduling, "the steps which must be taken by a defendant claiming a violation of the rule and by the trial court that denies such a claim, and the standard of appellate review of such a denial." *Clark*, 659 N.E.2d at 550. Clark's trial was set to begin on January 7, 1993, the seventieth day after he had orally requested a speedy trial. *Id*. However, on January 7, the trial court issued an order reassigning his trial date to May 20, 1993, citing "congestion of the [c]ourt's calendar." *Id*. Clark filed a motion for discharge and requested a hearing. At the hearing, Clark called the bailiff in charge of jury trials, who testified that no jury trial was

held on January 7, and that no juries were summoned to appear that day. *Id*. The trial court denied the motion for discharge, noting that the schedule for the day included seventeen criminal jury trials and two eviction hearings. *Id*.

Our supreme court stated that "[u]pon an incarcerated defendant's request for a speedy trial, Criminal Rule 4(B) requires particularized priority treatment." *Id*. To provide such treatment, the case "must be assigned a meaningful trial date within the time prescribed by the rule." *Id*. However, certain "exigent circumstances" or "court congestion" may excuse the provision of a speedy trial and permit the trial court to postpone the trial. *Id*.

> Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. However, a defendant may challenge that finding, by filing a Motion for Discharge and demonstrating that, at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate. Such proof would be prima facie adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.

Id. at 552.

Our supreme court noted that the State did not prove that any of the criminal trials scheduled the same day as Clark's "were themselves entitled to priority setting under Criminal Rule 4." *Id*. Furthermore, no jury trial was conducted that day, and "[n]either the State nor the trial court established or asserted that any bench trial was in fact conducted or otherwise explained or supported the finding of congestion." *Id*. For these reasons, our

supreme court remanded with instructions that the trial court grant Clark's motion for discharge. *Id*.

Here, Shepard's motion to dismiss contending a violation of his speedy trial rights was not accompanied by evidence of any sort, but rather relied on the blanket assertion that "[t]he trial has not been delayed due to any congestion of the court calendar." (Appellant's App. p. 67). We know from the trial court's Order continuing Shepard's trial date that the Annual Judicial Conference was scheduled at the same time. However, we cannot discern from this fact alone what the trial court's calendar contained or that no trials were conducted by the trial court during this time by a judge *pro tem*. The trial court's finding of congestion is presumed valid and need not be documented by the trial court unless a defendant demonstrates that the trial court's claim of congestion is factually or legally inaccurate. *Clark*, 659 N.E.2d at 552. Since Shepard presented no evidence whatsoever, he has failed to demonstrate that the trial court was not experiencing congestion. Therefore, Shepard did not prove that the trial court's claim of congestion was factually or legally inaccurate, and we conclude that the trial court did not commit clear error by denying his motion for discharge.

CONCLUSION

Based on the foregoing, we conclude that the Shepard has not demonstrated that the trial court committed clear error when it denied his motion for discharge.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.