

In two separate causes, Gregory S. Proffitt (“Proffitt”) was convicted in Franklin Circuit Court of Class C felony carrying a handgun without a license, two counts of Class D felony operating a motor vehicle with a suspended license, Class D felony resisting law enforcement, and Class A misdemeanor resisting law enforcement. In this consolidated appeal, Proffitt claims that the trial court erred in denying his motions for discharge pursuant to Criminal Rule 4(B). We affirm.

Facts and Procedural History

On November 25, 2009, an off-duty town marshal in Franklin County heard what sounded like shots from a high-powered rifle and observed a visible light in a field. The marshal then summoned a sheriff’s deputy to help investigate. When they did, they saw Proffitt driving a motor vehicle on a road near the field. Both the deputy and the marshal knew Proffitt and were aware that his driver’s license had been suspended. The deputy used the lights and siren on his car to signal Proffitt to pull his vehicle over. Proffitt instead continued to drive down a dead-end road and pulled into a parking lot. Inside the lot, Proffitt drove his car in circles for over thirty minutes. Proffitt did at one point stop his vehicle and allow two deputies to approach him. But when one of the deputies reached inside the vehicle, Proffitt stated that he did not want to go to jail, accelerated his car, and continued to drive in circles for approximately ten minutes more. Eventually, Proffitt stopped his vehicle and was arrested.

Proffitt was apparently released from jail, and on November 29, 2009, another police officer observed Proffitt yet again operating a motor vehicle in Franklin County. This officer too knew Proffitt and knew that his license had been suspended. The officer

activated his lights and siren to order Proffitt to pull over. Proffitt, however, again refused to stop and drove until he eventually pulled into a private driveway. He then initially refused the officer's commands to exit his vehicle. Eventually, Proffitt did exit the vehicle and was arrested.

As a result of these incidents, the State charged Proffitt on December 2, 2009 in Cause No. 24C01-0912-FC-86 ("Cause No. FC-86") with Class C felony carrying a handgun without a license, Class D felony operating a motor vehicle with a suspended license, and Class A misdemeanor resisting law enforcement. On December 11, 2009, the State charged Proffitt in Cause No. 24C0-0912-FC-89 ("Cause No. FC-89") with Class D felony operating a motor vehicle with a suspended license and Class D felony resisting law enforcement.¹

Proffitt waived his right to be represented by counsel and chose to represent himself. Proffitt then inundated the trial court with pro se motions that were handwritten on what appear to be scraps of paper. By our count, Proffitt filed ninety-nine pro se motions between December 21, 2009 and March 30, 2010—an average of one motion per day. And many of these motions were multi-part and actually included multiple grounds in each motion. While most of the requests contained in these notes were repetitious or nonsense, as set forth below, several of these motions refer to a speedy trial motion that Proffitt claimed to have filed on December 6, 2009.

¹ In Cause No. FC-89, the State also charged Proffitt with Class C felony possession of a narcotic drug, Class D felony possession of a controlled substance, and Class B misdemeanor criminal mischief. The State eventually dismissed these charges, leaving only the operating while suspended and resisting law enforcement charges.

On December 28, 2010, Proffitt filed a four-part motion, the last part of which was titled, “Motion to Submit Prof [sic] of Innocence,” and which stated, “I want my fast and speedy not to be vacated in any way filed Dec. 6, 2009[.] I will not need a lawyer [sic] in this matter[.] Prof [sic] filed in court of my innocence by Judge Cox’s. [sic]” Appellant’s App. p. 207. On January 5, 2010, Proffitt filed a “Motion to Show Proof of Innocent [sic] in a Court of law,” which stated, “I would like to stand on all motion and paper work filed in Judge Cox’s [sic] court to prove [sic] my Innocents [sic] as soon as possible in a court of law (all cases filed). Fast and speedy stands.” Appellant’s App. p. 211. Another motion filed on the same day read, “Motion for a Orr Bond in Judge Cox’s court on the grounds filed in court as filed by the court. The paper work proves my Innocents [sic] in suite [sic] and any other cases. Fast and speedy stands.” *Id.* at 212.

On January 25, 2010, Proffitt filed three motions. The first of these motions stated, “For Trail data [sic] on my fast and speedy filed by me Dec. 6, 2009.”² *Id.* at 220. Proffitt filed another motion four days later, which contains a marginal note of “70 days.” Appellant’s App. p. 222. Despite Proffitt’s repeated references to a motion filed on December 6, 2009, the record indicates that Proffitt filed no motion on December 6, 2009. In fact, the record before us indicates that Proffitt’s first motions were not filed until December 21, 2009, and these motions did not contain or even mention any request for a fast and speedy trial.

² The other two motions filed by Proffitt on January 25 were multi-part motions, but made no mention of any speedy trial rights. However, the motion for discovery, a motion hearing, and a bond reduction was the only one of Proffitt’s numerous motions which was accompanied by a certificate of service. *See* Ind. Trial Rule 5(C) (“An attorney or unrepresented party tendering a document to the Clerk for filing shall certify that service has been made, list the parties served, and specify the date and means of service.”).

On February 1, 2010, the trial court issued orders in both Cause No. FC-86 and Cause No. FC-89. The orders appear to be based on a form ordering the defendant to appear for one of several reasons, each of which is next to an underlined space that the court could select. The space next to “Set for Trial by Jury” is unmarked in both orders. Instead, an “X” appears next to “Defendant’s Pro Se Motion for a Fast and Speedy Trial set for:” Appellant’s App. pp. 22, 133. In the adjacent column, a date and time of Monday March 22, 2010 and March 29, 2010 are listed in the respective orders. It is therefore unclear whether these orders were issued to order Proffitt to appear for a hearing on a purported motion for a fast and speedy trial, or whether they were setting the trial date in each cause. The CCS entries in both causes are substantially the same, stating in Cause No. FC-86 “ORD: Defendant’s Pro Se Motion for a Fast and Speedy Trial set for 3-22-2010” and in Cause No. FC-89 “ORD: Defendant’s Pro Se Motion for a Fast and Speedy Trial set for 3-29-2010.” Appellant’s App. pp. 7, 117-18.

Subsequent orders from the trial court, however, indicate that the court did consider March 22 and March 29 as the dates set for Proffitt’s jury trial. On March 17, 2010, the trial court made a CCS entry that reset the “[t]rial heretofore set for March 22” in Cause No. FC-86 and noted that the trial in Cause No. FC-89 “remains set for March 29, 2010.” Appellant’s App. pp. 30, 142.

On February 12, 2010, Proffitt filed a motion which stated, “Motion for a desmessal [sic] on grounds that my fast and speedy was up on Feb. 13, 2010. Filed Dec. 6, 2009. The last data [sic] on fast and speedy trial 2/13/2010.” Appellant’s App. p. 235. That same day, he filed another motion which stated, “A early pretrial data [sic] because

of the fast and speedy trial date was on 2/13/2010. I was not convicted by the prosecutor in this lenth [sic] of time. Thank you!” Id. at 236. Yet another motion filed that same day stated, “Motion A demessal [sic] in these two cases because on Feb. 13, 2010 my seventy days has passed & motion the court for a settlement or law suite [sic] as filed in court by the court.” Id.

On March 4, 2010, the trial court ordered the motions Proffitt filed on or before March 3, 2010, to be stricken because they were “deficient and c[ould not] be considered in the present form.” Appellant’s App. pp. 8, 23, 119, 134. As noted above, the only one of Proffitt’s motions which contained a certificate of service contained no mention of the fast and speedy trial motion purportedly filed on December 6, 2009.

On March 29, 2010, Proffitt appeared in court for a pretrial hearing. The trial court became concerned about Proffitt’s behavior and issued a *sua sponte* order that he be evaluated for his competence. The order also continued the trial dates in both cause numbers “until such time as Defendant’s competency can be ascertained.” Appellant’s App. p. 36.

The record does not indicate when the competency evaluation took place, but on April 27, 2010, the trial court set trial dates of May 11, 2010 in Cause No. FC-86 and May 12, 2010 in Cause No. FC-89. When Proffitt appeared for trial in these causes, he made oral motions to be discharged based on his purported December 6, 2009 motion for a fast and speedy trial. The trial court denied these oral motions, and Proffitt was subsequently found guilty as charged in two separate jury trials.

The trial court held a consolidated sentencing hearing in both causes on June 10, 2010. In Cause No. FC-86, the court sentenced Proffitt to six years on the Class C felony and a concurrent term of three years on the Class D felony. In Cause No. FC-89, the trial court sentenced Proffitt to concurrent terms of three years on each Class D felony, but ordered the sentences in Cause No. FC-86 to be served consecutively to the sentences in Cause No. FC-89. Proffitt now appeals.

Discussion and Decision

On appeal, Proffitt's sole argument is that the trial court erred in denying his motion for discharge, claiming that he was not tried within seventy days of his request for a fast and speedy trial pursuant to Criminal Rule 4(B), which provides in relevant part:

(1) Defendant in Jail—Motion for Early Trial. 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 order shall also set the case for trial within a reasonable time.

“The Sixth Amendment to the United States Constitution and Article 1, section 12 of the Indiana Constitution guarantee the right to a speedy trial. The provisions of Ind. Criminal Rule 4 implement these protections.” Mork v. State, 912 N.E.2d 408, 410 (Ind. Ct. App. 2009) (quoting Wilkins v. State, 901 N.E.2d 535, 537 (Ind. Ct. App. 2009)); see

also Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995). Under Criminal Rule 4(B), the State has an affirmative duty to try an incarcerated defendant who requests a speedy trial within seventy days. State v. Jackson, 857 N.E.2d 378, 380 (Ind. Ct. App. 2006). A defendant has no obligation to remind the State of this duty or to remind the trial court of the State's duty. Id. Once the time period under Criminal Rule 4(B)(1) has elapsed, the defendant need only move for discharge. Id. We are mindful, though, that Criminal Rule 4(B) was designed to assure criminal defendants of a speedy trial, not provide them with a technical means of avoiding trial. Id.

Generally, our review of the trial court's denial of a motion to dismiss pursuant to Criminal Rule 4(B) is *de novo*. Mork, 912 N.E.2d at 410; Jenkins v. State, 809 N.E.2d 361, 367 (Ind. Ct. App. 2004) (both citing Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), trans. denied). But assessing the cause of a delay in bringing a defendant to trial involves factual determinations appropriately determined by the trial court. McKay v. State, 714 N.E.2d 1182, 1188 (Ind. Ct. App. 1999). The reasonableness of any delay must be judged in the context of the particular circumstances of the case, and absent an abuse of discretion, we will not disturb the trial court's decision. Id. (citing Sholar v. State, 626 N.E.2d 547, 549 (Ind. Ct. App. 1993)).

We note at the outset that our review is hampered by the scarcity of adequately descriptive entries in the trial court's CCS. As a determined pro se litigant, Proffitt certainly bears much responsibility for this through his repetitive notes to the court that often required much scrutiny and some educated guesswork to make any sense of at all, and almost none of which contained certificates of service on the prosecutor's office. But

we must also point out that it is the trial court's duty to maintain a CCS and general record of the proceedings that is clear enough to provide a meaningful appeal. We are especially troubled by the trial court's March 4, 2010 order striking all of Proffitt's prior motions, some eighty-five by that time, as "deficient." A better practice would have been to warn Proffitt upon receipt of his first note to the court of the procedural requirements attendant to motion practice (e.g., intelligibility and certificate of service on the prosecutor), and then showing subsequent notes failing to meet those criteria as received but not filed, with notice of such to Proffitt and to the prosecutor.

Turning to Proffitt's argument on appeal, Proffitt claims that he had to be brought to trial in both causes no later than April 5, 2010, but instead was tried on May 11 and 12, 2010. By arguing that the deadline for his trials was April 5, 2010, Proffitt's claim necessarily must rest on one of his motions filed on January 25, 2010, i.e. seventy days before April 5, 2010, which motion is noted above. Indeed, Proffitt claims on appeal that, "[t]he trial court treated the motion Mr. Proffitt filed on January 25, 2010 as his motion for an early trial and the State did not object to this." Appellant's Br. at 5. On appeal, the State claims that Proffitt did not file any motion which could properly be considered a motion for a speedy trial.

As set forth above, Proffitt filed three motions on January 25, 2010, only one of which mentioned a speedy trial. This motion itself, however, did not purport to be a motion for a speedy trial. Instead, it referenced a motion for a fast and speedy trial Proffitt claimed to have filed on December 6, 2009—a motion which is not in the CCS or in the materials in the record before us. Indeed, Proffitt's other motions claimed that he

should have been tried by February 13, 2010, based upon the erroneous assumption that he had filed a motion for a speedy trial on December 6, 2009. Indeed, all of Proffitt's motions mentioning a fast and speedy trial appear to be based on this erroneous assumption.

We fail to see how the one January 25 motion referencing a non-existent December 6 motion for a fast and speedy trial could have been considered a motion for a speedy trial. More importantly, on March 4, 2010, the trial court ordered that all of Proffitt's motions be stricken, including the motions filed on January 25, 2010. See Appellant's App. pp. 8, 23, 119, 134. And Proffitt does not challenge this March 4 order on appeal. In addition, it is important to remind Proffitt that his competency evaluation was a delay that is attributable to him. While, once again the trial court's records could be much clearer in this regard, this delay seems to have been twenty-nine days, running from March 29 to April 27.

From this, we conclude that Proffitt's appellate argument that he should have been brought to trial by April 5, 2010 is not supported by the record. We acknowledge that the State at one point apparently did believe that Proffitt had to be tried by April 5, 2010. Specifically, on March 12, 2010, the State filed a motion to reschedule the trial in which it stated that Proffitt had to be brought to trial "on or before April 5, 2010" because "[t]he Chronological Case Summary in this matter shows that Defendant filed a pro se 'Motion for a Fast and Speedy Trial' on January 25, 2010." Appellant's App. p. 139. Actually, the CCS entry for January 25, 2010 in Cause No. FC-89 indicated that Proffitt had filed a "Motion for Date on Fast and Speedy Trial[.]" Id. at 117. This obviously refers to the

January 25 motion where Proffitt referred to his non-existent December 6, 2009 speedy trial motion. Thus, the State was factually incorrect when it read the CCS as showing that Proffitt had moved for a fast and speedy trial on January 25.

Proffitt claims that the State is bound on appeal by its position at the trial court, citing State v. Delph, 875 N.E.2d 416 (Ind. Ct. App. 2007). At issue in that case, however, was how to attribute and calculate the days of delay in bringing the defendant to trial. Id. at 419. And in Delph, the State acknowledged that it had conceded several times below that the delay at issue was chargeable to the State, including in the State's proposed order. Id. at 419-20. The Delph court thus concluded that the trial court did not err in attributing this delay to the State. Id. at 420.

Here, we are not dealing with a concession by the State regarding how to calculate a delay. We are instead dealing with a question of empirical fact, i.e., whether Proffitt actually filed a motion for a speedy trial on January 25, 2010. That the prosecuting attorney below appears to have misread the CCS cannot alter the fact that Proffitt did not file a speedy trial motion on January 25. Instead, he filed a motion referring to his alleged earlier December 6 motion for a speedy trial—one that is not in the record before us. And again, even if Proffitt had somehow filed a motion for a speedy trial on January 25, the trial court subsequently struck all motions filed before March 4, 2010, including the January 25, 2010 motion, as deficient.

Accordingly, we conclude that Proffitt did not file a motion for a speedy trial on January 25. In fact, based on the record before us, it does not appear that Proffitt ever filed a proper motion for a speedy trial. Therefore, the trial court did not err in denying

Proffitt's pre-trial motions for discharge based on his claim that his speedy trial rights were violated.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.