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IN THE
COURT OF APPEALS OF INDIANA

JAMES E. HOWARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0706-CR-285
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 15C01-0405-FD-6

December 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

James Howard appeals his conviction for operating while intoxicated, a class A misdemeanor. We affirm.

Issues

Howard raises two issues, which we rephrase as follows:

I. Whether the trial court was within its discretion when it denied Howard's Criminal Rule 4(C) motion for discharge; and

II. Whether the trial court committed reversible error when it allowed the State to cross-examine him regarding other instances of driving while intoxicated.

Facts and Procedural History

The facts most favorable to the verdict are that on March 6, 2004, at approximately 2:00 a.m., Aurora Police Officer Jared Dausch was on patrol in his marked police vehicle when he saw a small SUV ahead of him cross the line that divided the slow and fast lanes. Tr. at 37-39. The vehicle did this three times, each time without a signal and each time drifting back into the original lane. The third time, the vehicle straddled the dividing line for 100 yards.

Officer Dausch initiated a stop and approached the SUV, which was driven by Howard. Officer Dausch immediately detected a strong odor of alcohol on Howard's breath, observed that his eyes were red, and noted that his speech was slurred. When asked to exit the vehicle, Howard "staggered" out, walked unsteadily to the rear of his SUV, and proceeded to fail the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. *Id*. at 44, 98, 102-11. A second officer, who had arrived to

assist, also noticed Howard displaying signs of intoxication and witnessed Howard fail the three different field sobriety tests. Upon being informed of the Implied Consent Law, Howard agreed to submit to a chemical test; his BAC registered as .14.

On March 8, 2004, the State charged Howard with class A misdemeanor operating a vehicle while intoxicated and class D felony operating a vehicle while intoxicated with a prior conviction within five years. Delays ensued. On June 23, 2006, the State filed a motion to set Howard's case for jury trial. On October 11, 2006, Howard filed an Indiana Criminal Rule 4 motion for discharge, which was denied. On November 28, 2006, the State moved to revoke Howard's bond; the court granted the motion on December 13, 2006.

On March 3, 2007, the court granted Howard permission to appear for his trial in civilian clothes without visible restraints. On March 5, 2007, Howard filed a renewed motion for dismissal and discharge, which was denied, and his jury trial commenced. The trial concluded the following day with the jury finding Howard guilty of operating a vehicle while intoxicated. Tr. at 18. On April 10, 2007, the court held a sentencing hearing. By the end of April 2007, the court issued an order sentencing Howard to the Indiana Department of Correction for 365 days, with 228 days executed, and the final 137 days to be served as "in-home incarceration." Appellant's App. at 9-10. The court noted that Howard "shall receive credit for time served as well as good time for the same of one hundred fourteen (114) actual days, two hundred twenty-eight (228) good time days as agreed upon by the parties in open Court." *Id*. at 10. In addition, costs and fees were assessed, and Howard's driver's license was suspended for one year.

Discussion and Decision

I. Motion for Discharge

In challenging the denial of his motion for discharge, Howard claims that the trial date was "well outside the deadline" set forth in Criminal Rule 4(C). Appellant's Br. at 6. We disagree.

The Sixth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution guarantee the right to a speedy trial. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Criminal Rule 4 help implement this right by establishing time deadlines by which trials must be held. *See id*. at 550. Criminal Rule 4(C) provides in relevant part:

> Defendant Discharged. 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*[.]

(Emphasis added).

Thus, the rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons. *Ritchison v. State*, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), *trans. denied*. The defendant is under no obligation to remind the State of its duty. *Rhoton v. State*, 575 N.E.2d 1006, 1010 (Ind. Ct. App. 1991), *trans. denied*. However, a defendant has a duty to *alert the court* when a trial date has been scheduled beyond the one-year limit set forth in the rule. *Id*. (citing *Huffman v. State*, 502 N.E.2d 906 (Ind. 1987)). If a

defendant remains silent while the court schedules a trial beyond the allowable date, then his action estops him from enforcing any right of discharge. *Id*. (citing *Utterback v. State*, 261 Ind. 685, 310 N.E.2d 552 (1974)). Indeed, if a defendant acquiesces in a delay that results in a later trial date or if a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly. *Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind. 1999); *Wooley v. State*, 716 N.E.2d 919, 924 (Ind. 1999); *Cook v. State*, 810 N.E.2d 1064, 1066-67 (Ind. 2004) (noting that time for trial is extended for delays caused by the defendant's own acts or continuances had on the defendant's motion); *Frisbie v. State*, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997), *trans. denied*.

We review a trial court's ruling on a Rule 4 motion for discharge for an abuse of discretion. *Smith v. State*, 802 N.E.2d 948, 951 (Ind. Ct. App. 2004). In analyzing this Criminal Rule 4(C) issue, we find a fairly detailed timeline of pertinent events to be particularly helpful. Unless otherwise indicated, we use quotation marks where we have cited verbatim from the Chronological Case Summary ("CCS"). Appellant's App. at 1-7. We include in parentheses the number of days charged to Howard, which we highlight by underlining, and those attributable to the **State**, which we highlight in bold. In addition, we provide our rationale for our calculations where necessary.

> March 8, 2004: State filed two charges against Howard in Dearborn Superior Court: operating while intoxicated charge, A misdemeanor, and operating with past conviction, D felony. The one-year time period began. *See Sweeney v. State*, 704 N.E.2d 86, 100 (Ind. 1998) ("The one year period begins with the date criminal charges are filed against the defendant or with the arrest of defendant, whichever is later.").
>
> April 14, 2004: Dearborn Superior Court judge disqualified self after Howard hired attorney related to judge. (**Previous 37 days – State**).

May 12, 2004: "Judge's disqualification and order of reassignment filed[;] Order to transfer to Dearborn Circuit Court filed." (Previous 28 days – Howard). Howard's hiring of a defense attorney who was related to the judge necessitated a change of judge. That is, Howard's action caused this delay. *See Vermillion*, 719 N.E.2d at 1204 (one-year limit extended when delay is caused by defendant's own motion or action).

August 20, 2004: "Pre-trial conference held"; jury trial "scheduled January 10, 2005, at 9:00 a.m."

January 12, 2005: "Order for Continuance filed [by Howard]; - this matter scheduled for jury trial on July 26, 2005, at 9 a.m. (second choice)." (**Previous 244[1] days – State**).

July 26, 2005: "Jury trial not held; the parties will be filing with the Court a negotiated plea agreement." (Previous 196 days – Howard). Howard's January 2005 filing of continuance caused the six-month delay, thus the time period was extended accordingly. *See Wheeler v. State*, 662 N.E.2d 192, 193 (Ind. Ct. App. 1996) ("A defendant is responsible for any delay caused by his action including seeking or acquiescing in any continuance. *Ferguson v. State*, 594 N.E.2d 790, 792 (Ind. Ct. App. 1992).").

August 3, 2005: In his belated "Motion for Continuance," Howard "request[ed] a continuance of the jury trial set for July 26, 2005 in the above matter on the grounds that counsel for defendant and the prosecutor are in the process of negotiations." Appellee's App. at 1 (defense's motion). This was a written document filed by Howard to officially memorialize what was orally conveyed to the trial court on July 26, 2005. Of particular note, neither the CCS entry nor Howard's written motion for continuance contained a request that any new trial date be set. Stated otherwise, Howard sought a continuance for an indefinite time, which stops the running of the Criminal Rule 4(C) clock. *See State v. Powell*, 755 N.E.2d 222, 225 (Ind. Ct. App. 2001) (concluding that because defendant did not indicate a specific length of delay, but rather stated that additional time was needed to negotiate with State, he was making a motion for an indefinite continuance; moreover, having never indicated that he desired to go to trial or that his negotiations with the State had ended, defendant

[1] Interestingly, in Howard's reply brief, he calculated this to be a 201-day period, that is, beginning on June 23, 2004 and ending on January 10, 2005. Appellant's Reply Br. at 2. We see no reason why the State would not be charged with the additional thirty-four days; thus, we utilize our 244-day calculation here.

caused the delay, thus his motion to discharge was premature), *trans. denied*.

August 8, 2005: "Order for continuance; jury trial now scheduled for October 31, 2005 at 9:00 a.m.; jury trial in this cause of action is 28th choice."

October 31, 2005: No entry in CCS; no record of objection by Howard.

June 23, 2006 (first entry since August 8, 2005): "Motion to set for jury trial filed by State." (Previous 324 days – Howard). As already stated, Howard's August 3, 2005 indefinite continuance for plea negotiations caused this lengthy delay. The trial court's setting of an unlikely-to-ever-occur *28th choice* trial date that was not requested by the negotiating parties and, not surprisingly, apparently did not come to fruition, does not change the attribution of the 324-day delay to Howard. Howard did not notify the court that negotiations had broken down or that he desired to go to trial. *See Wheeler*, 662 N.E.2d at 194 ("When a defendant requests an indefinite continuance and later becomes dissatisfied that his trial has not been reset, *he* must take some affirmative action to notify the court that he now desires to go to trial to reinstate the running of the time period. [S]ince Wheeler in no way notified the trial court that he was now ready to go to trial, the subsequent delay should be attributed to him.") (emphasis added; citation omitted).

June 26, 2006: "Order scheduling jury trial filed; - this matter now scheduled to begin on October 23, 2006, at 9 a.m. (4th choice)." (**Previous 3 days – State**). Of note, Howard made no objection on June 26, 2006 to this new trial date (October 23, 2006) despite the fact that 284 days had elapsed/were charged against the State as of June 26, 2006; thus, 81 days remained,[2] which would have made September 15, 2006 the end of the Criminal Rule 4(C) 365-day period.

August 18, 2006: "Motion to withdraw filed by" defense attorney. *Isaacs v. State*, 673 N.E.2d 757, 763 (Ind. 1996) (noting that delays caused by the withdrawal of a defendant's attorney do not accrue against the rule period).

August 28, 2006: "Order to withdraw[.]"

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[2] We add up the days attributed to the State: 37 + 244 + 3 = 284. Subtracting 284 from 365, we are left with 81.

September 15, 2006: By not objecting to the October 23, 2006 trial date by this date (81 days after June 26, 2006), Howard acquiesced to the new trial date and/or waived his right to object. *See Vermillion*, 719 N.E.2d at 1204 (noting defendant's failure to object timely will be deemed acquiescence in setting of trial date or waiver of objection thereto); *see also Utterback*, 261 Ind. 685, 310 N.E.2d 552 (noting that if a defendant remains silent while the court schedules a trial beyond the allowable date, then his action estops him from enforcing any right of discharge). Thus, the 81-day period remaining was extended accordingly to after October 23, 2006.

October 10, 2006: Notice of substitution and appearance filed by new defense counsel.

October 11, 2006: "Motion to set hearing; hearing on pending motions scheduled for October 17, 2006 at 8:45 AM; pre-trial conference scheduled in this matter for October 13, 2006 at 8:30 AM." (Previous 107 days – Howard). Howard failed to alert the court within the 365-day period that the October 23, 2006 trial date was beyond the 365-day period. Also on this date, Howard filed his Criminal Rule 4 motion for discharge

October 17, 2006: "Hearing on motion to dismiss held; - taken under advisement; - Counsel may submit additional argument by October 18, 2006."

October 23, 2006: No trial held; court had not yet ruled on Howard's 4(C) motion.

October 26, 2006: "Order denying motion for discharge." "Petition to certify an order for interlocutory appeal and to stay proceedings pending the outcome filed by [Howard]."

November 27, 2006: "Order denying petition to certify an order for interlocutory appeal and to stay proceedings pending the outcome." (Previous 47 days – Howard). Howard's action in pursuing unmeritorious 4(C) discharge resulted in this delay. *See Vermillion*, 719 N.E.2d at 1204. The remaining 81- day period should have started running again.

February 16, 2007: By not objecting to the March 5, 2007 new trial date by this date (81 days after November 27, 2006), Howard again acquiesced to being tried beyond the Criminal Rule 4(C) 365-day period. Thus, the 81 days was extended again, this time beyond March 5, 2007.

> March 5, 2007: Howard filed a renewed motion for dismissal and discharge, which was denied; jury trial began. (Previous 98 days – Howard). Howard did not object to March 5, 2007 trial date until that day, therefore, he waived any objection to a trial date beyond the 365-day period.

In summary, by the time Howard's case went to trial, almost three calendar years had passed since charges had been filed. However, as the above lengthy recitation of facts and accompanying explanation demonstrate, Howard caused or acquiesced to the vast majority of the delay. Indeed, when the jury finally heard his case on March 5, 2007, the State still had 81 days of the 365-day Criminal Rule 4(C) period to spare. Accordingly, the trial court did not abuse its discretion by denying Howard's motion for discharge.

II. Admission of Evidence

Howard contends that the court erred in permitting the State to cross-examine him about other incidents of driving while intoxicated. He argues that driving while intoxicated is not included under Evidence Rule 609, which permits evidence of convictions to be introduced under certain circumstances. The State maintains that Howard opened the door to the other incidents, notes that the court read a limiting instruction, and asserts that any error was harmless.

Whether to admit evidence is within the sound discretion of the trial court, and we will not reverse a decision to admit evidence absent a manifest abuse of that discretion. *Goldsberry v. State*, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. at 454. In reviewing the trial court's decision, we

will consider only the evidence in favor of the ruling and any unrefuted evidence in the defendant's favor. *Id*. Indiana Evidence Rule 404(b) provides that although evidence of a defendant's prior misconduct may not be admitted to prove that the defendant acted in conformity with a certain character trait, such evidence is admissible for other purposes.

During direct examination, Howard was discussing the rough condition of the road, noting that it "erodes some, so they have to do some patch work on it." Tr. at 175. The defense then inquired: "Did the fact that there is a problem with the road there cause you to do anything with respect to your driving on that night [that you were arrested]?" *Id*. at 176. Howard responded: "I try to be a safe driver, and I try … if I can avoid a pot hole or a place in the road, I try to edge over to the corner if it's … there's no traffic around or if it's safe to do that." *Id*.

On cross-examination, the State asked: "And, it's your testimony … and I wrote this down as a quote as well, that you 'try to be a safe driver.' Is that correct?" *Id*. at 208. Howard replied: "I would say I am a safe driver." *Id*. Immediately thereafter, an extensive sidebar was held. After a break, the court, still outside the presence of the jury, explained its thought process:

> The line of questioning as I recall, this came up upon, this was on direct examination, and I recall it being in the context of dodging a pothole or some problem with the roadway, and in discussing that, the witness volunteered … my memory is, "I try to be a safe driver." That response was repeated on cross examination by the Prosecutor, and my notes indicate that the response was, "I am a safe driver." I don't believe that the testimony here is being offered under 609, because it's not one of the *Ashan v. Anderson* [sic; should be *Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210 (1972))] prior convictions that is being sought to be used that in and of itself, impeaches a witness' credibility, the issue here that's been raised, is a statement raised and volunteered by Mr. Howard that he is a

> safe driver, and I think in … at least to a certain extent, he has opened the door to cross examination, and I believe that the … and it's not that I was acting like a safe driver on March 6, 2004th, it was "I try to be a safe driver," and then bolstering that further on cross examination, "I am a safe driver," and I think that goes beyond frankly what was sought to be elicited on direct examination, and I think it was volunteered testimony by the defendant. The prior conviction I'm finding presented in 1995, I think the door has been opened because of the extent to which the statement is made, "I try to be a safe driver," and then even further, "I am a safe driver," and I think that the … that evidence that he has been arrested twice since this offense, is now open to questioning by the State. Now, that being said, this evidence would be introduced for a limited purpose, and not for the purpose of proving more likely that [Howard] committed this offense, and I believe that if requested, a limiting instruction would be appropriate after admission of this evidence, [defense counsel], such that "evidence has been introduced that [Howard] was involved in crimes or wrongful conduct other than those charged in the Information. Evidence has been received solely on the issue of [Howard's] credibility. Evidence should be considered by you only for the limited purpose for which it was received." If you request it, I would be inclined to give a limiting instruction.

Id. at 213-15.

Not surprisingly, the State introduced evidence of the other instances of Howard committing driving offenses. *Id.* at 217-19. When the evidence was introduced, the court gave this limiting instruction:

> [E]vidence has been introduced that [Howard] was involved in crimes, wrongful conduct, bad acts, other than those charged in the Information. This evidence has been received solely on the issue of [Howard's] credibility. This evidence should be considered by you only for the limited purpose for which it was received.

Id. at 219-20. Because the final instructions have not been provided on appeal, we do not know if the same limiting instruction was read again at that time.

The evidence of Howard's prior conviction for operating while intoxicated, as well as the evidence of his two recent operating arrests, was not admissible under Evidence

Rule 609. That is, these offenses clearly do not fall within the category of murder, treason, rape, etc., nor did they involve dishonesty. Such evidence ordinarily would not have been admissible for fear of the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. *Goldsberry*, 821 N.E.2d at 455. However, "our supreme court has determined that evidence that is otherwise inadmissible may become admissible when the defendant opens the door to questioning on that evidence." *Bryant v. State*, 802 N.E.2d 486, 500 (Ind. Ct. App. 2004) (citing *Kubsch v. State*, 784 N.E.2d 905, 919 n.6 (Ind. 2003), and *Ortiz v. State*, 741 N.E.2d 1203, 1208 (Ind. 2001)), *trans. denied*; *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000).

Here, Howard's assertion of safe driving habits left the jury with a false, misleading, or incomplete impression that Howard was a safe driver, which opened the door to evidence to the contrary. The trial court did not abuse its discretion in admitting the State's evidence of Howard's driving record to correct the misperception that Howard had created. Moreover, the jury received an immediate admonition regarding the proper use of the evidence. Finally, the jury, faced with determining whether Howard operated a vehicle while intoxicated, heard evidence that Howard drove his vehicle across the lane line more than once – even straddling it for 100 yards – that two officers observed Howard exhibiting multiple signs of intoxication, that Howard failed all sobriety tests administered, and that his BAC measured at .14, almost twice the legal limit. Considering this overwhelming evidence, we conclude that any erroneous admission of

evidence regarding Howard's other instances of operating while intoxicated would have been harmless.

Affirmed.

DARDEN, J., and MAY, J., concur.