

Circuit Court for Prince George's County
Case No.: CT200590X

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 631

September Term, 2021

RUDY AGUILAR GARCIA

v.

STATE OF MARYLAND

Shaw,
Zic,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: March 7, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Rudy Aguilar Garcia, was indicted in the Circuit Court for Prince George’s County and charged with sex abuse of a minor and related charges. After his motion to dismiss for alleged violations of the *Hicks*¹ rule was denied, appellant entered an *Alford*² plea to one count of sexual offense in the third degree. He was then sentenced to ten years, suspended, with all but time served, to be followed by five years of supervised probation. Upon this timely appeal, appellant presents the following question for our review:

1. Did the circuit court err in denying the motion to dismiss?

As will be explained in more detail, due to the tolling of the *Hicks* date caused by the COVID-19 pandemic, as evident in the active administrative orders issued by the Chief Judge of the Court of Appeals of Maryland, we conclude that the *Hicks* date was tolled until October 13, 2021. Whereas appellant entered his *Alford* plea on June 22, 2021, or prior to expiration of the 180 days under the *Hicks* rule, the court did not err in denying the

¹ *State v. Hicks*, 285 Md. 310 (1979) (Hereinafter “*Hicks*”); *see also* Md. Rule 4-271; Md. Code (2008 Repl. Vol.), § 6-103 of the Criminal Procedure (“Crim. Proc.”) Article. Generally, and independent of the constitutional right to a speedy trial, the *Hicks* rule, as it is known, requires that a criminal defendant’s trial date in the circuit court be scheduled no later than 180 days after the earlier of the defendant’s initial appearance in circuit court or the appearance of counsel, unless the administrative judge, or that judge’s designee, finds “good cause” for a postponement. *See Tunnell v. State*, 466 Md. 565, 570-72 (2020).

² An *Alford* plea, derived from *North Carolina v. Alford*, 400 U.S. 25 (1970), ““is a guilty plea containing a protestation of innocence.”” *Williamson v. State*, 413 Md. 521, 526 (2010) (further citation omitted). The individual entering such a plea “waives a jury trial and the right to confront witnesses but retains appellate review of the suppression decision.” *Jackson v. State*, 448 Md. 387, 391 n.3 (2016) (citations omitted).

motion to dismiss. Alternatively, we hold there was good cause for the postponement, and there was no inordinate delay. We affirm.

BACKGROUND

Our discussion of the background of this case focuses on facts and hearings relevant to the issue presented.

On March 20, 2020, appellant was arrested pursuant to an arrest warrant issued by the District Court of Maryland for Prince George’s County. This arrest was based on an allegation that he sexually abused a minor living in the same household. An indictment was filed in Circuit Court for Prince George’s County, Maryland on July 9, 2020. Appellant was charged with ten counts, including the lead count of sexual abuse of a minor.

Appellant first appeared at his arraignment in the circuit court, via Zoom from jail, on August 21, 2020. His Public Defender also appeared on this date, and no trial date was set at this time.³ A status hearing was held on September 29, 2020. At that hearing, a trial was set for June 21, 22, and 23, 2021. Noting that jury trials were set to resume on October 5, 2020, and pertinent to the issue raised, the trial court suggested setting trial for June 6, 7, and 8, 2021. However, as the prosecutor was already scheduled for another trial and was unavailable; the court then suggested trial be set for June 21, 22, and 23, 2021. After

³ No trial date was set at appellant’s arraignment. At the time of this hearing on August 21, 2020, and indeed, when the indictment was filed one month earlier on July 9, 2020, criminal jury trials in Maryland were suspended due to the COVID-19 pandemic. See <https://www.mdcourts.gov/coronavirusorders> (Hereinafter “COVID-19 Orders”). Pursuant to the orders that were active at the time of that hearing, jury trials were not set to resume until October 5, 2020. See COVID-19 Orders, May 22, 2020 Order (Obsolete/Rescinded) – *Lifting the Statewide Suspension of Jury Trials and Resuming Grand Juries* (Hereinafter “May 22, 2020: COVID-19 Jury Trial Order”).

confirming that both parties were available on those dates, the court found good cause to set the case beyond the 180 days rule under *Hicks*, explaining as follows:

THE COURT: Well, you see the funny thing is think what’s going to happen starting next week. All those people who jumped in on that first week and they’re asking for a trial. Now they’re going to be instead of at the front, they are going to be way back. That’s why I could never understand why people – I would start picking January, you know what I’m saying? If I was in the front of the line, give me January, because realistically I know we sent out over 800 jury summons and only 160 people have responded. That was last week. So, you know, a lot of people are just – you know, some people have moved. It's just going to be interesting what’s going to happen. Okay.

So what I’m going to do is the *Hicks* in this case is in May, the revitalized *Hicks* when you add the dates in. I am going to find good cause to set the trial on those dates for the same reasons. One, the day we closed, we had 670 pending CT cases. Since we’ve been back without the jurors for three months, the State has been indicting people and there’s more new cases coming in. The only thing that has slowed to a trickle is new CAs, because District Court hasn’t been doing that much for people to prey [sic] jury trials. And, frankly, this is the earliest dates we have.

[DEFENSE COUNSEL]: Your Honor, please note my objection for the record.

THE COURT: Yes absolutely, [Defense Counsel]. I would do it too.

At this point, I agree with you, but I don’t have options. I could have got the week before, but if I put in the same week that [the Prosecutor] has another trial, and you wait until June, then you are going to be looking at December to pick another date. So, if for some reason you guys work something out, and I’m not, you know, trying to twist your arm, you let me know and I’ll get it set in right away.⁴

⁴ Throughout the briefs, the parties both refer to the “postponement” of September 29, 2020 as the “critical postponement.” As indicated, our reading of this record reveals that no “trial date” was set in this case *until* the September 29, 2020 hearing. And that is because criminal jury trials were suspended throughout Maryland pursuant to the COVID-19 Orders. In other words, June 21, 2021 was the *first* trial date set in this case.

The State filed a written motion to continue on July 16, 2021. That motion was denied in a one-page order signed on June 17, 2021.

On June 21, 2021, the first day of the scheduled trial, the State renewed its motion to continue the case until August 23, 24, 25, 2021. The State informed the court that: (1) the case had been reassigned within the State’s Attorney’s Office after the former prosecutor left the office; (2) there were unresolved evidentiary issues, including delayed procurement of the 911 call, and a missing interview with the victim’s mother that was not in the State’s possession at the time of the hearing; and (3) essential witnesses, including the forensic interviewer, were unavailable due to unserved subpoenas. Defense counsel objected and opposed the request. The court denied the State’s motion for continuance. The court stated: “I’m denying the continuance. If you guys want a trial, we’ll sit around and see if we can do it today. Otherwise, you’ll come back tomorrow.”⁵

The following day, after recounting the aforementioned procedural background, appellant moved to dismiss the case for a violation of the *Hicks* rule. Defense Counsel argued, in part, as follows:

[DEFENSE COUNSEL] . . . The last time I was in here, Your Honor said, step back; we’ll figure out what is going on. I went away to get my calendar. When I came back, I was told that we were supposed to come back here tomorrow. So I don’t know what happened while we were here, but I looked at the docket entries in the Court Access Portal and it said that according to the Court Access Portal it says 6/21 trial was continued in court, Court’s continuance.

We’re objecting to that continuance, Your Honor . . . I think that the cases are applicable, because the case restates the proposition that the rule

⁵ There is no transcript of any further proceedings occurring on this date in the appellate record.

cannot be violated, Rule 4-271. And I thought about me not being here to object to what was happening yesterday and the case is very clear that even if I'm not here, the rule is the rule. It can't be continued without a finding of good cause. The case says that the only remedy is for the Court to dismiss the case. That's what happened in this case.

So, what I'm arguing, Your Honor, and the issue that I'm raising is that after you denied the case [sic], you, in effect – you denied the State's continuance and you, in effect, continued the case without a finding of good cause. I don't think that's permitted under the rules. And for those reasons, Your Honor, we're asking that the Court dismiss the case.

The State responded, in part, as follows:

[PROSECUTOR] ... [T]he reason the Court had to continue the case was because the defendant wants a jury trial with pretty much impossibility due to the Court health closure on Friday, which was a last minute decision. The jurors weren't here. If they had been called in within the regular Court, then we would have proceeded to trial yesterday over Your Honor's objection.

The State is as prepared as we can be under the circumstances. So I believe that in this instance that it's not a situation where if I – let's say my first motion to continue last week was denied and then you granted it without good cause. Without a good cause finding, I believe the impossibility of not having any jurors is good cause to continue it for just one day. Today, where we're actually able to conduct a trial because we do have, I'm assuming, jurors coming in today.

The court denied the defense motion to dismiss, as follows:

THE COURT: It's a cool issue. Quite honestly, [Defense Counsel], I thought you were in here, because we were running back and forth. What happened yesterday is I denied the continuance. At that point, we were trying to find out did we have a judge. Then the judge who we had had been given something else. And then we were talking about trying to switch it, but then we decided that we didn't have jurors. The jurors weren't here. So I made it a Court's continuance for one day, because of a complete lack of jurors. And part of the problem was, and it's nobody's fault, there was nobody here on Friday and we didn't know we were closing until probably – I didn't find out until after two o'clock on Thursday – yeah, Thursday that we weren't going to be here. And so this case at the time, because I was trying to figure out what happened, the State had filed a continuance. Calendar Management hadn't gotten a ruling on the continuance, so it wasn't assigned to a judge for

trial and it was nobody in here to order a jury. So I believe good cause. I don't know if I actually said it, but all of my continuances had to be for good cause. And the fact was we didn't have a jury and I didn't have a judge. That's why I ended up – because Thomas Matthews [unidentified] was in here yesterday and I had two criminal cases, but he only wanted motions. I was able to get a judge who could do an hour motion, but I didn't have any judge available to do a trial. Plus, when I talked to Calendar Management and moving around, we didn't have any jurors. So I'm going to deny a continuance. If I'm wrong, I'm wrong, but I did not want the State – I wanted to go yesterday. We just couldn't do it yesterday.

[DEFENSE COUNSEL]: Just to be clear, Your Honor, on the record yesterday good cause was not found?

THE COURT: I don't think so. The record will say what the record will say. I just said – because everybody was sitting in the audience. I don't actually think I called the case up, because I had both sides in here and I thought you were in here, but it might have been Thomas, because I had a bunch of people in here and I said, we got to go tomorrow. We don't have a judge or I don't have any jurors. So I said, we'll just retrial it, reset it, whatever I said. The record is what the record is. If I'm wrong, I'm wrong. I don't think I actually said good cause, but when I grant continuances, I don't say good cause every time. I only use the word good cause when I'm going beyond Hick[s], pretty much, because the rules say every continuance has to be for good cause. But, no, this trial is going to go today. If not, there's no State's continuance.

[DEFENSE COUNSEL]: Thank you, Judge.

Appellant took an *Alford* plea on June 22, 2021. As part of the statement of facts in support of the *Alford* plea, the court heard that, on February 28, 2020, the 12-year-old victim came home from school and encountered 28-year-old appellant, the boyfriend of the victim's aunt, in the kitchen. No one else was home at the time. Shortly thereafter, the appellant led the victim into a bedroom and forced her to perform fellatio on him. Moments later, after the victim's mother and aunt returned home, the appellant hid in the victim's

closet, and then fled out of her bedroom window. All events occurred in Prince George’s County, Maryland.

After finding that the appellant freely, knowingly, and voluntarily waived his right to a jury trial and entered an *Alford* plea, the court found him guilty of one count of sexual offense in the third degree. Appellant was then sentenced to ten years, suspended, with all but time served, to be followed by a period of supervised probation, and including certain conditions of probation. This timely appeal followed.

DISCUSSION

Appellant argues the circuit court erred in denying his motion to dismiss under the *Hicks* rule because, after it initially denied the State’s request for a continuance, it then granted it off the record and without any showing of good cause. Appellant continues that reversal is also required because there was inordinate delay, and that the delay must be measured from the day the case was set beyond *Hicks*, or on September 29, 2020, to the actual trial date of June 22, 2021.

The State responds that appellant never made this latter argument concerning inordinate delay and the issue is unpreserved for our review. Further, the State asserts that the postponements were made with good cause and that there was no inordinate delay between the original trial date of June 21, 2021 and the actual trial of June 22, 2021.

Standard of Review

Generally, pursuant to Crim. Proc. § 6-103(a) and Maryland Rule 4-271(a)(1), “the trial in a circuit court criminal prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant’s counsel or (2) the first

appearance of the defendant before the circuit court.” *State v. Huntley*, 411 Md. 288, 290 (2009) (footnotes omitted); *accord Choate v. State*, 214 Md. App. 118, 139, *cert. denied*, 436 Md. 328 (2013). The last day that the trial date can occur pursuant to Rule 4-271(a) “is commonly referred to as [the] *Hicks* date.” *Ashton v. State*, 185 Md. App. 607, 619, *cert. denied*, 410 Md. 165 (2009).

There is, however, an exception to this requirement. “On motion of a party, or on the court’s initiative, and for good cause shown, the county administrative judge or that judge’s designee may grant a change of a circuit court trial date.” Md. Rule 4-271(a)(1). Appellate review of a postponement of a criminal trial past the *Hicks* date involves two inquiries: “(1) Was there ‘good cause’ for the administrative judge to grant a postponement of the scheduled trial date? [and] (2) Was there an inordinate delay from the scheduled trial date to the new trial date in commencing the trial?” *Tunnell v. State*, 466 Md. 565, 589 (2020).

In assessing “good cause,” we are concerned only with the critical postponement, which is “the postponement that extends the trial date beyond the *Hicks* date[.]” *Id.* at 589. And that postponement does not depend on “whether or not the administrative judge was precisely aware of the relation of postponement to the *Hicks* date at the time that judge granted the continuance.” *Id.* (citing *State v. Fisher*, 353 Md. 297, 305-06 (1999)); *accord State v. Parker*, 347 Md. 533, 540 (1995). “[A] determination of what constitutes good cause is dependent upon the facts and circumstances of each case as the administrative judge, in the exercise of his discretion, finds them to be.” *State v. Toney*, 315 Md. 122, 132 (1989). Moreover, “the burden is on the defendant to establish either a clear abuse of

discretion or a lack of good cause for postponement as a matter of law.” *State v. Brown*, 355 Md. 89, 108 (1999).⁶

Additionally, the question of “inordinate delay” is reviewed under the abuse of discretion standard. *Id.* at 98. Inordinate delay is measured from the scheduled trial date to the new trial date. *See Tunnell*, 466 Md. at 589; *accord Brown*, 355 Md. at 109. “If a defendant makes a prima facie showing of inordinate delay, the burden shifts to the State to justify that delay.” *Tunnell*, 466 Md. at 589-90 (quoting *State v. Frazier*, 298 Md. 422, 462 (1984)). Finally, “[d]ismissal is the appropriate remedy where the State fails to bring the case to trial within the 180-day period and good cause has not been established.” *Choate*, 214 Md. App. at 139 (citing *State v. Hicks*, 285 Md. at 318).

The tolled Hicks date had not passed when appellant entered his Alford plea.

Initially, and before we proceed any further, we must determine the *Hicks* date in this case. Appellant avers that the *Hicks* date was sometime in May 2021.⁷ Indeed, when the circuit court made the critical postponement on September 29, 2020, and accounting for the circumstances known at that stage of the pandemic, the tolled *Hicks* date was approximately 180 days after November 4, 2020. In other words - May 3, 2021. *See* May 22, 2020: COVID-19 Jury Trial Order (ordering that all jury trials are authorized to resume

⁶ “‘Abuse of discretion’ . . . has been said to occur ‘where no reasonable person would take the view adopted by the [trial] court,’ or when the court acts ‘without reference to any guiding rules or principles.’” *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13 (1994)), *cert. denied*, 574 U.S. 911 (2014).

⁷ Absent COVID-19, the 180th day after appellant’s initial appearance in the circuit court on August 21, 2020 would have been February 17, 2021.

on October 5, 2020 and that an additional thirty (30) days are to be allowed for rescheduling purposes).

However, this May 3, 2021 *Hicks* date, which was correct on September 29, 2020, was no longer correct as of November 12, 2020. That is because, unbeknownst to the circuit court at the September hearing, the pandemic would not end as predicted on October 4, 2020, but would continue to cause further disruption. In fact, due to the ongoing nature of the virus, on November 12, 2020, the Maryland Judiciary returned to Phase III operations and again suspended criminal jury trials. See COVID-19 Orders, November 12, 2020 Order (Obsolete/Rescinded) - *Third Amended Administrative Order Re-Imposing The Statewide Suspension Of Jury Trials And Maintaining Grand Juries*.

Subsequently, and without recounting the myriad of administrative orders that have been enacted, clarified, and rescinded since that time, our analysis in this case ultimately is governed by the active *Sixth Amended Administrative Order on Lifting the Statewide Suspension of Jury Trials and Maintaining Grand Juries* (filed March 1, 2022) (Hereinafter “March 1, 2022: COVID-19 Sixth Amended Jury Trial Order”). That order provides, in pertinent part, as follows:

(g) In tolling the statutory and rules deadlines related to the start of criminal jury trials and other criminal matters, the Administrative Order on Expanding the Statewide Suspension of Jury Trials and Suspending Grand Juries, filed April 3, 2020, provided that statutory and rules deadlines related to the adjudication of pending criminal matters *were to be suspended and extended by the number of days that the courts are closed to the public*; and

(h) For the purposes of this Order, “*tolled or extended by the number of days that the courts were closed*” means that *the days that jury trials were not able to be offered to criminal defendants due to the COVID-19 emergency during the periods beginning **March 16, 2020, through October***

4, 2020; November 16, 2020, through April 25, 2021; and December 29, 2021 through March 6, 2022, pending further Order of the Chief Judge of the Court of Appeals, do not count against the time remaining for the start of a criminal jury trial; and

(i) The resumption date of criminal jury trials further shall serve as the resumption date for days to be counted toward any adjusted deadline for the start of any trial pursuant to Section 6-103 of the Criminal Procedure Article and Rule 4-271(a)(1), commonly known as the *Hicks* date; and

(j) There further shall be an *additional tolling of thirty days* from the time that jury trials resumed on October 5, 2020, ending on November 4, 2020, for criminal cases that were pending in the Circuit Courts on March 12, 2020, or initiated prior to the resumption of jury trials on October 5, 2020, to allow the Circuit Courts to conduct status hearings and reschedule jury trials as appropriate; and ...

(Emphasis added).

Applying this order to this case leads to the following *Hicks* timeline:

- A. August 21, 2020 (Initial Appearance) to October 4, 2020 – *Hicks* tolled;
- B. October 5, 2020 to November 4, 2020 – *Hicks* tolled for additional thirty days for rescheduling because case was “initiated prior to resumption of jury trials”;
- C. November 5, 2020 to November 15, 2020 – *Hicks* not tolled for 10 days;
- D. November 16, 2020 to April 25, 2021 – *Hicks* tolled;
- E. April 26, 2021 to June 21, 2021 (first trial date) – *Hicks* not tolled for 56 days.

According to this timeline, only sixty-six (66) days had elapsed for *Hicks* purposes from appellant’s initial appearance in the circuit court until his first trial date. And, more importantly, *Hicks* would not expire for another one hundred fourteen (114) days thereafter, or on or around October 13, 2021. Whereas appellant was tried within 180 days of his initial appearance, as required by Maryland Rule 4-271, Crim. Proc. § 6-103, and the

rule of *Hicks*, we hold that the circuit court did not err in denying appellant’s motion to dismiss.

Alternatively, there was good cause for the postponement in this case.

Although we could end our discussion here, even were we to consider appellant’s claim that the court erred on September 29, 2020 by setting trial for June 21, 2021, or beyond the assumed *Hicks* date sometime in May 2021, we still would affirm. Notably, the June 21st trial date was the first trial date set in this case. There was no “postponement” *per se*.

However, we understand that appellant’s argument is that, when, on September 29, 2020 the court first set June 21, 2021 as the trial date, both parties and the trial court were under the impression that the *Hicks* date was in May 2021, and that this had the effect of setting trial beyond *Hicks*. Notwithstanding this impression, even were we to consider September 29, 2020 as the “critical postponement,” we conclude the circuit court properly exercised its discretion in setting trial beyond the presumed May 2021 *Hicks* date, or on June 21, 2021. According to the circuit court, when the court closed in March 2020 due to the COVID-19 pandemic, there were approximately 670 criminal cases, a number that has not been disputed here. Further, more criminal cases were being added during that time. In addition to this apparent backlog, it appears that potential jurors were not responding to their call to duty, as the court observed, again without dispute, that “over 800 jury summons and only 160 people have responded.” It is well settled that “the unavailability of a judge, prosecutor, or courtroom – or general court congestion in a particular jurisdiction – c[an]

satisfy the good cause standard for a continuance under the *Hicks* rule.” *Tunnell*, 466 Md. at 587.

Furthermore, there is no dispute that the courts were closed in Maryland due to good cause. As explained in part by one of the Chief Judge’s orders:

WHEREAS, In instances of emergency conditions, whether natural or otherwise, that significantly disrupt access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Judiciary to operate effectively, the Chief Judge of the Court of Appeals may be required to determine the extent to which court operations or judicial functions shall continue; and

WHEREAS, Due to the outbreak of the novel coronavirus, COVID-19, and consistent with guidance issued by the Centers for Disease Control and Prevention (CDC) and the Maryland Department of Health (MDH), *an emergency exists* for which measures continue to be required to mitigate potential for exposure for individuals visiting a court or judicial facility and for judicial personnel; ...

See March 1, 2022: COVID-19 Sixth Amended Jury Trial Order, p. 1 of 6 (emphasis added). Thus, even if considered, we conclude that there was good cause on September 29, 2020 to set trial in this case beyond the then assumed *Hicks* date of May 3, 2021. We agree with the State that simply because a judge makes “no express finding of good cause” the rule is not violated if “it is patently obvious” that there was cause for the postponement. *State v. Parker*, 347 Md. 533, 540 (1995); *see also Fisher*, 353 Md. at 307. Here, it was patently obvious.

Alternatively, there was no inordinate delay in postponing trial for one day.

As for appellant’s claim that there was inordinate delay, we concur with the State that appellant never raised this argument, and it is not preserved for appellate review. *See Hartman v. State*, 452 Md. 279, 299 (2017) (“We made clear in *State v. Bell*, 334 Md.

178, 638 A.2d 107 (1994) that our review of arguments not raised at the trial level is discretionary, not mandatory”); *see also* Md. Rule 8-131 (a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . .”).

Even if his argument is preserved, we are persuaded that there was no inordinate delay in this case. As the case law makes clear, the delay is measured, not from the date of the hearing when the determination is made to postpone the case, but from the scheduled trial date to the new trial date. *Tunnell*, 466 Md. at 589. The first scheduled trial date was June 21, 2021. Appellant entered the *Alford* plea the next day, June 22, 2021. The circuit court explained that the case was reset from the 21st to the 22nd because neither a judge nor a jury were available to proceed. Given that there are numerous cases where even longer delays were upheld as not being “inordinate,” we decline to hold to the contrary in this case. *See, e.g., Tunnell*, 466 Md. at 591-92 (observing there was a 125-day delay between original trial date and the actual trial and noting that the actual trial occurred 41 days beyond the original *Hicks* date).

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE’S
COUNTY AFFIRMED; COSTS TO
BE PAID BY APPELLANT.**