Circuit Court for Wicomico County
Case No. C-22-CR-18-000142

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 994

September Term, 2018

STATE OF MARYLAND

v.

RICKY STEVEN SANABRIA, SR.

Fader, C.J.,
Nazarian,
Friedman,

JJ.

Opinion by Fader, C.J.

Filed: June 25, 2019

The State, the appellant, initially charged Ricky Sanabria Sr., with offenses relating to theft and possession of one of several firearms discovered in his home. After the State later discovered evidence linking him to the other firearms, it nol prossed the original charges and reindicted him on those charges and 14 others related to the additional firearms. Mr. Sanabria moved to dismiss the new indictment on the grounds that he had been denied his right to be brought to trial within 180 days pursuant to Maryland Rule 4-271. The Circuit Court for Wicomico County agreed and granted the motion to dismiss. The State appealed. Finding no violation of the Rule, we will reverse.

BACKGROUND

Rule 4-271 and the Hicks *Date*

Rule 4-271, in pertinent part, provides: "The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events." In *State v. Hicks*, the Court of Appeals held that "dismissal of the criminal charges is the appropriate sanction" for a violation of Rule 4-271. 285 Md. 310, 318 (1979). The "*Hicks* date" is the date on which the 180-day period established in Rule 4-271 expires.

The Charges Against Mr. Sanabria

Police searched Mr. Sanabria's home pursuant to a warrant and discovered several firearms.[1] The State initially charged him with six offenses relating to the theft and illegal

[1] At the hearing on the motion to dismiss, the State stated that police discovered "five or six" firearms in Mr. Sanabria's home. The indictment, however, describes nine

possession of one of those firearms. On the day of trial, 13 days before the *Hicks* date, the State nol prossed the initial charges. Four days later, the State charged Mr. Sanabria with a 20-count indictment, charging him with illegal possession and theft relating to all of the firearms.

One month after the original *Hicks* date, Mr. Sanabria moved to dismiss the second indictment, arguing that he was deprived of both (1) his constitutional right to a speedy trial and (2) his statutory right to be brought to trial within 180 days of his first appearance pursuant to Rule 4-271. At the hearing, Mr. Sanabria asserted that, while trial was pending on the initial charges, the prosecutor communicated to defense counsel that "her intention would be to place Mr. Sanabria's matter on the stet docket, specifically because she did not believe that the Court would grant another postponement, even with a Hicks waiver, for Mr. Sanabria." Mr. Sanabria claimed that the purpose of the nol pros was to circumvent "the speedy trial rule and for, frankly, no other reason."

The State argued that its purpose in entering the nol pros was not to evade the *Hicks* date, but to add the new counts relating to the additional firearms to the indictment. The prosecutor argued that although the State knew from the beginning that there were other guns in the house, it did not initially have evidence to charge Mr. Sanabria with offenses relating to those other firearms. While trial was pending, however, the State intercepted phone calls between Mr. Sanabria and his son, who was in jail at the time, suggesting that

different guns, although two of them—described as a handgun and a shotgun—are listed as having the same serial number.

Mr. Sanabria had knowledge of, and a possessory interest in, all of the firearms located in his home, not just the one supporting the charges in the initial indictment. Thus, the State argued, it "merely went back and cleaned up the charging document and charged Mr. Sanabria, Sr. with all of the guns that were located in that home based on evidence that they received through the ongoing investigation."

Mr. Sanabria argued that, under applicable case law, "an ongoing investigation is not an excuse" for violating the 180-day rule, and that that was "pretty much what the State is saying now . . . ." The court agreed, stating "[t]hat's what I'm seeing," and granted the motion. The court did not make any findings regarding whether the State nol prossed the charges for the purpose of circumventing the 180-day rule or whether the nol pros had the necessary effect of circumventing the *Hicks* date.

The State appealed. Mr. Sanabria, who did not file an appellate brief, informed this Court that he did not intend to participate in the appeal because of his "desire to further litigate the underlying facts of the case."

DISCUSSION

We review a circuit court's grant of a motion to dismiss for violation of the 180-day rule for legal correctness, although we will accept the court's findings of fact unless clearly erroneous.[2] *See Glover v. State*, 368 Md. 211, 220-21 (2002).

[2] Although Mr. Sanabria's motion included arguments for dismissal on grounds of violation of both his constitutional speedy trial right and the 180-day rule, he only argued the 180-day rule claim at his hearing and the court only ruled on that claim. Because Mr. Sanabria declined to participate in this appeal, he has not raised the constitutional claim as an alternative ground for dismissal. As a result, we do not address that issue.

THE TRIAL COURT IMPROPERLY GRANTED THE MOTION TO DISMISS.

Generally, where criminal charges are nol prossed and subsequently refiled, the 180-day period for commencing trial restarts after the refiling. *State v. Huntley*, 411 Md. 288, 293 (2009). That is, in part, because a nol pros "is a legitimate and accepted way of doing prosecutorial business." *Baker v. State*, 130 Md. App. 281, 288 (2000).

In *Curley v. State*, 299 Md. 449 (1984), the Court of Appeals "identified two exceptions to this general rule. Where (1) the purpose of the State's nol pros, or (2) the necessary effect of its entry, is to circumvent the statute and rule governing time limits for trial, the 180-day period for trial begins with the triggering event under the initial prosecution, rather than beginning anew with the second prosecution." *Huntley*, 411 Md. at 293 (discussing *Curley*, 299 Md. at 459). In those circumstances, if the trial on the new prosecution does not begin by the original *Hicks* date, the second indictment must be dismissed. *Huntley*, 411 Md. at 293-94. However, "these exceptions will not apply where the prosecution acts 'in good faith or so as to not evade or circumvent the'" 180-day rule. *Id.* (quoting *Curley*, 299 Md. at 459) (internal quotations omitted).

Mr. Sanabria's argument below seems to have been premised on a misunderstanding that the exceptions noted in *Curley* apply any time the State's action in nol prossing charges will have the effect of postponing trial until after the original *Hicks* date. That interpretation of *Curley* would, of course, be entirely incompatible with the general rule, reaffirmed in *Huntley*, 411 Md. at 293, that the 180-day period restarts after a nol pros and

refiling of charges. *See also Baker*, 130 Md. App. at 291 ("[T]he norm is for the running of the 180-day period to begin anew with the refiling of new charges.").

As a general matter, the *Curley* exceptions apply when the State uses a nol pros followed by a reindictment for the purpose of delay past the *Hicks* date, not when it uses that procedure for a permissible purpose that results in such a delay. Thus, the first *Curley* exception, when "the purpose of the State's nol pros" is to circumvent the 180-day rule, applies when "the State's proven purpose . . . was to evade the trial court's or administrative judge's denial of the State's motion for a continuance or postponement, or to force a rescheduling of a trial date for which it was not ready to proceed." *Huntley*, 411 Md. at 296; *see also State v. Price*, 385 Md. 261, 278-79 (2005); *Alther v. State*, 157 Md. App. 316, 338 (2004); *Ross v. State*, 117 Md. App. 357, 361, 370 (1997). And the second *Curley* exception, when the "necessary effect" of the nol pros is to circumvent the 180-day rule, applies only when that is the *necessary*, not just the actual, effect of the action. *See Baker*, 130 Md. App. at 297-99. A nol pros will thus have the necessary effect of evading the 180-day rule "*only* when the alternative to the *nol pros* would have been a dismissal with prejudice for noncompliance with" the rule. *Id.* at 293 (quoting *State v. Brown*, 341 Md. 609, 619 (1996)) (emphasis in *Brown*).

Here, the trial court did not identify which of the exceptions it found applicable, but neither applies. The record provides no support for a conclusion that the State's purpose in entering the nol pros was to circumvent the 180-day rule. To the contrary, the purpose as stated and as seemingly apparent from the prompt reindictment, was to add charges

related to the additional firearms, not to advance any "obvious or secret motive to delay prosecution of the defendant . . . ." *Huntley*, 411 Md. at 299. "Where the State's nol pros [] is used to remedy a genuinely flawed indictment, the concerns of *Curley* are not present." *Id.* at 302. Mr. Sanabria's only suggestion of an improper motive was grounded in the prosecutor's alleged statement that she did not believe the court would grant a postponement. That, however, suggests that the State believed a nol pros and reindictment was necessary to accomplish its goal of charging and trying the additional offenses, not that one was necessary to try the offenses in the original indictment.

The nol pros also did not have the necessary effect of violating the 180-day rule because the State had alternatives to a nol pros short of dismissal. Most importantly, the State could have proceeded to trial on the initial charges. The record contains no suggestion that it was not prepared to do so. *See Baker*, 130 Md. App. at 293 (explaining that a nol pros does not have the necessary effect of evading the 180-day rule where "the trial could have gone forward, albeit on a possibly flawed indictment, on any" day prior to the 180-day deadline). The State also could have moved to amend the indictment. *See id.* at 298 ("The possibility that the State might have [requested a postponement] at the time the nol pros was entered negated the conclusion that the *nol pros, ipso facto*, had had the necessary effect of circumventing the 180-day rule.") (emphasis removed). That the State may have believed it unlikely that the court would have granted a postponement to accomplish the amendment does not mean that it was not an option.

The record fails to support the application of either *Curley* exception to the normal rule that a reindictment following a nol pros restarts the *Hicks* clock. The circuit court erred in dismissing the indictment.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. COSTS ASSESSED TO APPELLEE.