Circuit Court for Baltimore City
Cases No. 119081010-013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1438

September Term, 2019

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STATE OF MARYLAND

v.

BRADLEY MITCHELL

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Berger,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: November 17, 2020

This case is a State appeal from the dismissal of the indictments in the Circuit Court for Baltimore City based upon an alleged violation of Maryland Code of Criminal Procedure § 6-103[1] and Maryland Rule 4-271, commonly known together as the *Hicks* rule. The State presents for our review the question of whether the circuit court erroneously dismissed the indictments, which we have rephrased into two questions as follows:

1. Did the circuit court err by dismissing the indictments based on an alleged *Hicks* violation?
2. Was dismissal of the indictments required by a violation of appellee's right to speedy trial under the Sixth Amendment to the United States Constitution?

We shall hold that the circuit court erred in dismissing the indictments based upon *Hicks* and § 6-103. As to the constitutional speedy trial claim, we shall remand the matter to the circuit court to address the issue.

## I.

In June 2018, the Grand Jury for Baltimore City indicted appellee, Bradley Mitchell, returning four separate indictments arising out of a deadly shooting in which Ray Glasgow III was murdered in a car and three other occupants of the vehicle were fired upon. Two

[1] All subsequent statutory references herein shall be to the Criminal Procedure Article of the Annotated Code of Maryland (West 2001, 2018 Replacement Volume).

other men besides appellee, Shawn Little and Eric Jackson,[2] were indicted in connection with the same criminal event.

Because the two issues in this appeal relate to the application of Maryland's *Hicks* rule and speedy trial, we shall briefly summarize the facts underlying the crimes and discuss the procedural facts in more depth. A victim who survived the shooting identified Shawn Little as one of the three perpetrators. Little was arrested and made a statement to the police. He identified Jackson as the driver and Mitchell as the gunman, although later investigation led the police to believe that Little's statements were inconsistent, and that he, not Mitchell, was the shooter.

The State charged all three men with the same crimes: first-degree murder, attempted murder, conspiracy to commit murder, and use of a firearm during a deadly crime. Because of *Bruton v. United States*, 391 U.S. 123 (1968), and anticipated future proffer sessions[3] with different defendants, the State requested that the cases be tried

[2] The circuit court dismissed Jackson's indictments on the grounds that the prosecution violated the *Hicks* rule. Jackson's appeal was argued before this Court on the same day as Mitchell's.

[3] A "proffer session" is often the forerunner to a guilty plea. One court described a proffer as follows:

> "Plea negotiations may be initiated by either the government or defense counsel. If the negotiations proceed to a possibility that a defendant may be willing to plead guilty, there is usually a requirement of a 'proffer' by defendant, with counsel and the prosecutor present, pursuant to a 'proffer letter.' The terms of the proffer letter may differ from district to district, but generally it is prepared by the prosecutor, on the prosecutor's stationery, signed by the prosecutor, and usually counter-signed by the defendant and defendant's counsel before it is effective. The proffer letter generally provides that the defendant is going to make a verbal statement in the presence of his counsel and the prosecutor, truthfully disclosing his participation

consecutively, *i.e.*, back to back. The 180th day after the earlier of the first appearance of Mitchell or his attorney in the circuit court, the *Hicks* date, was January 7, 2019. The court set the trial date for both Mitchell and Jackson for November 13, 2018.

On November 13, 2018, the first trial date, the prosecutor and defense counsel for Jackson, Mitchell, and Little, appeared before the circuit court administrative judge's designee. The State requested a continuance, presenting three reasons: (1) the medical examiner who performed the autopsy had left the office and it would take until February or March for a new examiner to be assigned; (2) the State was continuing its investigation, including review of extensive video footage and police body-cameras; and (3) supplemental discovery provided recently to the defense. Mitchell objected to the postponement. The first available dates that could accommodate the trial schedules of all the attorneys were beyond the *Hicks* deadline — February 25, 2019, for Jackson's trial; March 4, 2019, for Little's trial; and March 12, 2019, for Mitchell's trial. The court noted that the proposed trial dates were after the *Hicks* deadlines. The court found good cause to continue the trials beyond the *Hicks* date(s) and charged the postponement to the State.

The State's case was complicated. The State represented that it wanted initially to try Jackson first, hoping to engage him in a proffer session. The State wanted information from Jackson to help determine whether Mitchell or Little was the shooter. He declined

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> in the offense charged. The letter may, but does not necessarily have to, include an obligation for the defendant to disclose other crimes which he committed or of which he may have knowledge."

*United States v. Giamo*, 153 F. Supp. 3d 744, 748 (E.D. Pa. 2015).

ultimately to cooperate. Later the State represented that Little was an essential witness in Jackson's case and Mitchell's. The State did not want to grant Little immunity, resulting in the State attempting to reorder the trials to try Little first.

On February 25, 2019, Jackson's second trial date, outside the 180-day *Hicks* window, the State sought to consolidate for trial Jackson's and Mitchell's cases to Mitchell's trial date of March 12, 2019, which would have been after Little's trial. The court denied the State's request. The State then entered a *nolle prosequi* to the indictments in Jackson's case.

On March 4, 2019, the parties appeared before the circuit court for Little's trial, but a judge's calendar necessitated a postponement until April 8, 2019 (*i.e.*, after the March 12 trial date scheduled for Mitchell).

On March 12, 2019, Mitchell's trial date, the parties appeared in court before the judge-in-charge of the criminal docket, who is also the administrative judge's designee. The State requested a postponement of Mitchell's trial to May 20, 2019, after Little's trial. Mitchell objected. The designee stated that Mitchell's trial would be postponed because a courtroom was not available; defense counsel then requested a bench trial, and the designee sent the case to another judge in a nearby courtroom. In the new courtroom, the prosecutor explained that he could not proceed to trial unless Mitchell's trial was scheduled after Little's trial, because the State needed the testimony of Little, an essential witness in its view. The prosecutor stated that if Mitchell planned to proceed with the bench trial, the State would *nol pros* the indictments. The State then entered the *nolle prosequi.*

On March 22, 2019, ten days after the State's *nolle prosequi* of the charges against Mitchell, the State filed four new indictments charging the same offenses as in the first indictments. (The State also filed new indictments against Jackson.) Both Mitchell and Jackson filed motions to dismiss the new indictments. In September 2019, the court held a hearing on these motions. Mitchell relied on Rule 4-271 and *State v. Price*, 385 Md. 261 (2005). The State argued to the circuit court that the *nolle prosequi* did not violate Rule 4-271 nor implicate *Price* because the circuit court had found good cause to postpone Mitchell's trial beyond the 180-day *Hicks* date. Distinguishing between the protections defendants enjoy under *Hicks* and the Sixth Amendment right to speedy trial, the State argued that the appropriate analysis was whether Mitchell (or Jackson) had been denied a speedy trial right, not a *Hicks* right. The State argued also that the administrative judge's designee did not formally rule on the State's postponement request in Mitchell's case when she sent the case to the other judge for a bench trial.

The circuit court dismissed all the Mitchell indictments, based upon a violation of Rule 4-271 and reasoning that *State v. Price* was controlling law for this fact pattern. The court found that the administrative judge's designee denied the State's postponement request by sending the case to another judge for a bench trial, thereby inferentially finding lack of good cause for further postponement.

The motions judge explained as follows:

> "Even though our facts are different because there had already been a finding of good cause bringing us outside of Hicks, I believe that the purpose of the nol pros in Mr. Mitchell's case makes clear that [the prosecutor] requested a postponement. [The administrative judge's designee] denied

> the request having found no good cause. Therefore, the State's nol pros and recharge of the charge constituted exactly that circumvention of the authority and decision of the administrative judge that *Price* considers."

After the prosecutor asked the court to reconsider, the court responded and explained further, as follows:

> "I do find as a matter of fact that judges denied either postponement or continuance requests on the date you asked for them. You have been candid with me telling me that you were not in a position to try those cases on those trial dates. You asked for a postponement. They were effectively denied…. I believe that they're, by you having been sent to trial, that the judge denied your postponement request and that's where I'm stuck on *Price."*

Following the court's dismissal of the indictments, the State appealed.

## II.

Section 6-103 of the Criminal Procedure Article and Maryland Rule 4-271 provide that a trial date for a criminal trial may not be later than 180 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court; and that any change of trial date may only be made by the county administrative judge or her designee for good cause shown.[4] The 180-day deadline has become known as the "*Hicks* date," a reference to *State v. Hicks*, 285 Md. 310 (1979). In *Hicks*, the Court of Appeals held that dismissal of a case is the appropriate sanction when a criminal trial does not occur within a fixed number of days of the earlier of the appearance of counsel or the defendant's first appearance before the circuit court,[5] absent a determination of good cause by the

[4] MD. CODE ANN., CRIMINAL PROCEDURE § 6-103 (West 2001, 2018 Repl. Vol.).
[5] The deadline is now 180 days, but it was 120 days at the time of the *Hicks* decision.

county administrative judge or her designee. The *Hicks* rule was intended primarily to carry out the public policy favoring the prompt disposition of criminal cases, independent of a defendant's constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution and under Article 21 of the Maryland Declaration of Rights. *See Tunnell v. State,* 466 Md. 565, 570–572 (2020). The *Hicks* Court was careful to distinguish the underlying *Hicks* rationale from a defendant's constitutional right to a speedy trial, noting that Rule 4-271 "stands on a different legal footing" from the federal constitutional speedy trial requirement. *Hicks*, 285 Md. at 320. The purpose of the Rule and statute is to promote the expeditious disposition of criminal cases and to operate as a prophylactic measure to further society's interest in the prompt disposition of criminal cases. *See Rosenbach v. State,* 314 Md. 473, 479 (1989).

The general rule is that when the State enters a *nolle prosequi* and later recharges the defendant with the same offenses and identical charges, the *Hicks* 180-day time window for bringing the defendant to trial begins to run anew under the second prosecution. *State v. Huntley*, 411 Md. 288, 293 (2009) (holding that, ordinarily, where criminal charges are dropped and the State files identical charges, the 180-day period for commencing trial begins to run anew after the refiling). There are two exceptions to the general rule: where the *purpose* of the State's *nolle prosequi*, or 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. *Id*. The purpose-or-effect exception does not apply where

the prosecution is acting in good faith, *i.e.*, so as to not "evade" or "circumvent" the requirements of § 6-103 and Rule 4-271. *Id*.

The resolution of the case at bar depends upon whether the *Hicks* dismissal remedy applies when, following a good-cause finding by the administrative judge (or designee), a case has been postponed outside of the original 180-day *Hicks* period, and then the prosecution uses a *nolle prosequi* to avoid proceeding with the re-scheduled trial even though the administrative judge does not grant an additional postponement.

III.

Before this Court, appellant State argues that the circuit court erred in dismissing the indictments based upon a *Hicks* violation where the circuit court made a good cause finding to postpone the trial beyond the 180-day *Hicks* deadline months before the State entered the *nol pros* to the indictments. The State points out that the administrative judge's designee found good cause to continue Mitchell's trial beyond the *Hicks* deadline. That postponement, the State argues, is the only one that matters for *Hicks* purposes, and "an analysis under *Hicks* and its progeny, including [*State v. Price*, 385 Md. 261 (2005)], was not applicable." According to the State, any exception to the general rule has not been met here because when the prosecutor entered the *nolle prosequi* on March 12, 2019, he could not have had the purpose to evade the 180-day *Hicks* rule as the trial court had found good cause to postpone the trial months earlier. Appellant argues that the correct analysis would

be under the Sixth Amendment to the United States Constitution speedy trial right.[6]

Appellee argues that the trial court did not err in granting Mitchell's motion to dismiss and found properly that the prosecutor's *nolle prosequi*, which occurred after the judge declined to grant the postponement request, violated Rule 4-271. Appellee focuses on the March 12, 2019, trial date. That day, the parties appeared initially before the administrative judge's designee, where the prosecutor requested a postponement. The designee did not grant the postponement; she nevertheless expressed that court availability was an issue; and then the defense requested a bench trial, for which the designee sent the parties to another judge's courtroom. Appellee argues that the administrative judge's designee denied the prosecutor's request for a postponement.[7] The *nolle prosequi* that the State entered on March 12, appellee argues, was to evade the denial of the State's continuance request. Appellee argues that the State's conduct before the circuit court is conduct that *Price* sought to prevent — to preclude prosecutors from using the power of the *nolle prosequi* to get around the administrative judge's decision.

Appellee asserts that the motions judge did not err in finding that the State used the

[6] Because we shall hold that the circuit court erred in dismissing appellee's indictments, we will not address either party's constitutional speedy trial arguments and we shall remand this case to the circuit court to address those arguments in the first instance.

[7] The State and Mitchell interpret the designee's action and comments differently. Mitchell argues that the designee denied the prosecutor's request for a postponement. The State argues that the designee never ruled on the State's postponement request but, following Mitchell's counsel's objection, the designee stated that no court was available and the trial would have to be set on a different date. Then, Mitchell requested a bench trial, and the designee sent the case to another judge, where the prosecutor explained why he was entering a *nol pros.* The motions judge found that Judge Phinn denied the request.

*nolle prosequi* in bad faith, *i.e.*, to avoid complying with the trial court's refusal to postpone the second trial date — and to circumvent the administrative judge's authority. Appellee supports this argument by pointing to the prosecutor's statements on the record. These statements include the prosecutor's remarks about his intent to use a *nolle prosequi* if he would not prevail in joining Jackson's case with Mitchell's and to postpone Jackson's trial, that he would enter a *nolle prosequi* if Mitchell insisted on proceeding with a bench trial, and his remarks to the motions judge about his intent to postpone Mitchell's trial and Jackson's.

Possibly recognizing that his argument does not comport entirely with Maryland case law, appellee proposes a change to the *Hicks* dismissal remedy.[8] He suggests that, as a matter of logic, extensions of a trial date become more prejudicial rather than less as a case drags on further from the date of the first appearance. Thus, appellee argues, the *Hicks* dismissal remedy should apply also to a violation that occurs outside of the initial 180-day window rather than only to violations that occur within it, both as a matter of policy and his reading of the *Hicks* reconsideration opinion.

## IV.

Generally, we review a trial court's decision on a motion to dismiss an indictment for an abuse of discretion. *Kimble v. State*, 242 Md. App. 73, 78 (2019). Where the trial court's decision involves an interpretation and application of Maryland constitutional,

[8] The statute and Rule are silent on the question of remedies.

statutory, or case law, we determine *de novo* whether the trial court's conclusions are legally correct. *Id.*

Since the Court of Appeals decided *Hicks,* Maryland courts have had many occasions to consider the application of the statute and Rule 4-271. Court congestion is an acceptable basis for the administrative judge to find good cause for a postponement. *State v. Frazier*, 298 Md. 422, 457 (1984). Significantly, for purposes of our analysis in the instant case, the Court in *Frazier* noted that "[t]he critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of extending the trial beyond 180 days." *Id*. at 428.

Appellee relies primarily upon *Price*, 385 Md. at 261, to support his argument that dismissal based upon *Hicks* and the statute was the appropriate remedy and analysis. In *Price*, the defendant was indicted for the offenses of robbery and assault. The State entered a *nolle prosequi* within the 180-day timeframe. The Court of Appeals considered whether § 6-103 and Rule 4-271 were violated when the State re-indicted him for the same charges but did not commence and dispose of those later charges within 180 days of the *initial* court appearance. The trial court dismissed the case for violation of *Hicks*, the Court of Special Appeals affirmed, and the Court of Appeals affirmed. The State argued that "where a case has been nolle prossed for unavailability of DNA evidence, the 180 day period runs from the date of the appearances of counsel and defendant pursuant to *the subsequent indictment, rather than the one that was nolle prossed*." *Id*. at 268–69. The State relied on *State v. Brown*, 341 Md. 609 (1996); *State v. Glenn*, 299 Md. 464 (1984); and *Curley v. State*, 299

Md. 449 (1984).

The *Price* Court agreed with the State that, *ordinarily,* based upon *Curley v. State*, 299 Md. at 462–63, the 180-day *Hicks* period begins to run with the arraignment or first appearance of defense counsel under the *second* prosecution. But *Curley* recognized an exception to the general rule. That exception is "where the prosecution's purpose in filing the nol pros, or the necessary effect of the nol pros, was to circumvent the requirements of § [6-103] and Rule [4-271]." *Price*, 385 Md. at 269. The *Price* Court found that the State's *nolle prosequi* had the purpose of circumventing the requirements of the statute and the rule, explaining as follows:

> "In the case sub judice, the State sought and was refused a continuance, the administrative judge expressly finding no good cause for one. The effect of that ruling was to mandate that trial proceed, as scheduled. The consequence of the State not going forward or not producing evidence was dismissal of the case or an acquittal. When the State nolle prossed the case, it was, as the State concedes, to avoid those results. Thus, the State is correct, the nolle pros did not have the 'necessary effect' of circumventing the 180 day requirement of the statute and the rule; rather, it was for the purpose of circumventing, and, indeed, that intention was achieved, the requirement of the statute and the rule that trials proceed except when there has been a finding of good cause by the administrative judge. Accordingly, we agree with the Court of Special Appeals that 'the purpose for entering the nol pros in the case under consideration was to circumvent the authority and decision of the administrative judge.'"

*Id.* at 278. Thus, the rule is that the 180-day *Hicks* time period will begin to run with the arraignment or first appearance of defendant under the first prosecution and that date can start over upon the initiation of new charges after a good-faith *nolle prosequi*, except that a *nolle prosequi* for the purpose of circumventing Rule 4-271 or with the necessary effect of circumventing the Rule will not start anew the 180-day window. *Curley v. State*, 299

Md. 449 (1984). The critical postponement date for the purposes of Rule 4-271 is the one that carries the case beyond the 180-day deadline. *State v. Brown*, 355 Md. 89, 108–09 (1999). The exception does not apply where the prosecution acts in good faith and does not act to evade or circumvent the 180-day rule. *State v. Huntley,* 411 Md. 288, 295 (2009).

The instant case is distinguishable from *Price,* and the *Price* exception is inapplicable. In *Price,* the trial court did not find good cause for the continuance. In fact, the court found just the opposite. In the case at bar, most significantly, and controlling, the administrative judge's designee found good cause on November 13, 2018, to postpone Mitchell's trial beyond the 180-day limitation, months before the prosecutor entered the *nolle prosequi* on February 25, 2019. We agree with the State that when the prosecutor entered the *nolle prosequi*, he did not have (and could not have had) the *purpose* of evading the rule because the trial court had found good cause previously to postpone the trial beyond the 180-day rule limitation, and the *nol pros* did not have (and could not have had) the necessary *effect* of evading the 180-day rule because, likewise, the court previously had found good cause to postpone the trial to a date beyond the 180-day limitation.

Whether the State entered the *nolle prosequi* for the purpose of circumventing the authority of the administrative judge is not the animating question of our analysis. The Court of Appeals has expressed that the dismissal remedy does not apply after the 180-day timeframe is exceeded based on a finding of good cause. In the instant case, the *Hicks* date was no longer a trial date benchmark. *See State v. Brown,* 355 Md. 89, 101 (1999) (stating that the dismissal sanction for violation of Rule 4-271 "has no relevance to the subsequent

postponement of the trial date unless the defendant's constitutional speedy trial right has been denied.").

We have often reiterated that the sanction of dismissal implementing the statute and *Hicks* rule is not for the purpose of protecting a defendant's right to a speedy trial. It is, as we have stated, a prophylactic measure to further *society's* interest in trying criminal cases within 180 days. *See, e.g.*, *State v. Brown,* 307 Md. 651, 658 (1986); *Farinholt v. State*, 299 Md. 32, 41 (1984). Accordingly, we hold that the circuit court erred in dismissing the indictments based on a violation of *Hicks*. The appropriate analysis is whether appellee's speedy trial rights were violated under the Sixth Amendment to the United States Constitution. We shall remand this matter to the circuit court to determine that question in the first instance.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.**