Circuit Court for Baltimore City
Cases No. 119081006-009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1483

September Term, 2019

STATE OF MARYLAND

v.

ERIC JACKSON

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

JJ.

Opinion by Raker, J.

Filed: November 9, 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 and Maryland Rule 4-271, commonly known together as the *Hicks* rule.[1] 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, Eric Jackson, 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 Criminal Procedure Article of the Annotated Code of Maryland (West 2001, 2018 Repl. Vol.).

other men, Bradley Mitchell and Shawn Little,[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 police 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: 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

[2] The circuit court dismissed Mitchell's indictments on the grounds that the prosecution violated the *Hicks* rule. His appeal was argued before this Court with the instant case.

[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 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).

different defendants, the State requested that the cases be tried consecutively, *i.e.*, back to back. The 180th day after the earlier of the first appearance of Jackson or his attorney in the circuit court, the *Hicks* date, was January 30, 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. Jackson objected to the postponement. The first available dates that could accommodate the trial schedules of all the attorneys were beyond the *Hicks* deadline(s) — 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 and charged the postponement to the State.

The State's case was complicated. The State represents that the State 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 ultimately to cooperate. Later the State represented that Little was an essential

witness in Jackson's case. The State did not want to grant Little immunity and so the State attempted to reorder the trials to try Little first.

On February 25, 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, after Little's trial. Jackson's case was called in "reception court," before the judge-in-charge of the criminal docket, who is also the administrative judge's designee. The prosecutor told the court that Jackson's trial was staggered with Little and Mitchell's trials. The administrative judge's designee noted that the other defendants were not included on the docket and she sent the case to another judge. The other judge convened a bench conference, where the prosecutor indicated that the State would move to join the trials of Jackson and Mitchell. The judge asked the prosecutor what the State would do if the court were to deny the motion to consolidate the cases; the prosecutor replied that he would *nol pros* the charges against Jackson, but that Jackson would not go home. Shortly thereafter, the State called the Jackson case and moved to join it with Mitchell's case. Defense counsel opposed the joinder motion, pointing out that the court had granted the State's motion to sever the three defendants when the State asserted initially that they could not be tried together. The State explained that at the time of the motion to sever, the State was trying to get some of the defendants to cooperate; the State likewise explained that this new effort to join and to reschedule was for the purpose of securing Little's testimony.

The court denied the State's request to join the cases for trial, noting that no written motion to join had been filed. The State immediately entered a *nolle prosequi* to the Jackson indictments. Upon learning that the State intended to recharge Jackson, the defense noted Jackson's motion for a speedy trial.

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 administrative judge's designee. The State requested a postponement of Mitchell's trial to May 20, 2019, a date after Little's trial. Mitchell objected. The administrative judge's designee stated that Mitchell's trial would be postponed because a court was not available; defense counsel for Mitchell then requested a bench trial, and the designee sent the case to another judge. In the other judge's 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 Little, an essential witness in its view, to testify. 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, less than a month after the State's *nolle prosequi* of the Jackson indictments, the State filed four indictments charging the same offenses as in the first indictments. (The State also filed new indictments against Mitchell.) Both Mitchell and

Jackson filed motions to dismiss the new indictments, relying on Rule 4-721 and *State v. Price*, 385 Md. 261 (2005).

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). Jackson argued that the *nolle prosequi* of his indictments violated his constitutional right to a speedy trial and circumvented an order of the circuit court. The State argued that the *nol pros* did not violate Rule 4-271 nor implicate *Price* because the circuit court had found good cause to postpone Mitchell's and Jackson's trials beyond the 180-day *Hicks* date. Distinguishing between the protections that defendants enjoy under *Hicks* and those under the Sixth Amendment right to speedy trial, the State argued that the appropriate analysis was whether Mitchell and Jackson had been denied a speedy trial right, not a *Hicks* right. The State argued also that, even if *Hicks* analysis applied, when the parties were before the administrative judge's designee, the State did not move to postpone Jackson's trial (but only to join the trials), and that the designee never did rule on any postponement request. Therefore, the State did not act to circumvent an order of any court.

The circuit court dismissed all of the Jackson indictments. The court ruled that the prosecutor entered the *nolle prosequi* of the first indictments to circumvent the denial of the State's February 25 motion to continue. The judge reasoned as follows:

> "The record is clear though that [the prosecutor] was not in a position to try Mr. Jackson's case on the February 25th trial date. The record is clear, despite the semantics question that exists of whether it was a continuance request or a postponement request, that that request was denied by the administrative judge or the administrative judge's designee. In this case, [the judge] did not find good cause, I believe he said he did not have the authority to grant a

> postponement. [The prosecutor] requested a continuance and [the judge] denied it. [The prosecutor] then again made no mystery of the fact that he was entering a nol pros for the purposes of recharging Mr. Jackson. In this Court's view, I believe that the facts contained in this record in [the prosecutor] entering a nol pros to circumvent the denial of either a postponement or continuance puts us firmly in the facts, in the fact scenario albeit they are different in *State v. Price*. . . . [G]iven the facts and the record in front of me, I believe that the State's entry of a nol pros and recharge for both defendants violated what's allowable with the use of a nol pros in the scenario that we have."

After the prosecutor asked the court to reconsider, the court responded 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 Maryland Code Criminal Procedure Article and 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 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

[4] MD. CODE ANN., CRIMINAL PROCEDURE § 6-103 (West 2001, 2018 Repl. Vol.).

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 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 of the federal Constitution and 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). Whether the entry of a *nolle prosequi* has the "necessary effect" of circumventing the 180-day rule depends upon the unique factual circumstances of each case.

The general rule is that when the State enters a *nolle prosequi* and later the State recharges the defendant with the same offenses and identical charges, the *Hicks* 180-day period 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 time period for commencing

[5] The deadline is now 180 days, but it was 120 days at the time of the *Hicks* decision.

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 the statute or rule setting a deadline for trial. *Id.*

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

III.

Before this Court, appellant State argues that the circuit erred in dismissing the indictments, emphasizing that the circuit court found good cause to postpone the trial beyond the 180-day *Hicks* period months before the entry of the *nolle prosequi*. The State points out that the administrative judge's designee found good cause to postpone Jackson'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 *Price*, was not applicable." According to the State, any exception to the general rule had not been

met in this case, because when the prosecutor entered the *nolle prosequi* on February 25, 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's argument is multi-faceted.[7] He argues that the motions judge granted the motion to dismiss: (1) because the State violated the *Hicks* rule; or, alternatively, (2) the State violated appellee's constitutional right to a speedy trial; and that (3) the motions judge did not err in finding that the State entered the *nolle prosequi* to the first indictment to circumvent the speedy trial guarantee. Appellee argues that the trial court granted Jackson's motion to dismiss properly, and that the prosecutor's *nol pros* violated Rule 4-271 because the State entered it after the judge denied the prosecutor's postponement request for lack of good cause.

Appellee asserts that the motions judge did not err in finding that the State used the *nolle prosequi* in bad faith, *i.e.*, to avoid complying with the circuit court's refusal to postpone the second trial date — and to circumvent the administrative judge's authority,

[6] Because we shall hold that the circuit court erred in dismissing appellees' 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] Appellee's argument appears to us to scramble the speedy trial arguments and *Hicks* arguments. He reiterates that the State's *nol pros* was to circumvent the speedy trial guarantee. As to appellee's *Hicks* rights, appellee recognizes that the administrative judge's designee found good cause to postpone trial beyond the *Hicks* date and the State was "in compliance with the *Hicks* rule until the February 2019 trial date, at which time the State attempted to move Jackson's trial again."

and thus circumvent the requirements of Rule 4-271 and § 6-103. Appellee supports this argument in favor of the motions judge's conclusions by pointing to the prosecutor's statements on the record. These statements include his remarks about his intent to use a *nolle prosequi* if he did not prevail in his effort to postpone Jackson's case via joinder, his later remarks that he would use 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 and Jackson's trials.

Appellee points to Maryland case law discussing legitimate reasons to terminate a prosecution. Examples of legitimate reasons include a determination that the first set of allegations are not true, a loss of identification evidence, a change of heart by a victim who wants to drop charges and refuses to testify, or a change in the investigation that leads the prosecutor to reevaluate the charging and investigating strategy. Appellees assert that the *nolle prosequi* in the instant case was categorically different and illegitimate**.**

Appellee concludes by arguing that "[b]ecause the trial court found no good cause for a postponement, the State's nol pros amounted to a circumvention of the requirement that good cause support any changes to the trial date." Appellee Br. at 22.

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,

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

Since the Court of Appeals opinion in *Hicks v. State*, the 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 (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 in part relies upon *Price v. State* to support his argument that dismissal based upon *Hicks* and the statute was the appropriate remedy. 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*, 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, he found just the opposite. In the case at bar, 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 limitation, and the *nol pros* did not have (and could not have had) the necessary *effect* of evading the 180-day rule.

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 following the administrative judge or her designee's finding of good cause. In the instant case, the *Hicks* date was no longer a trial date benchmark. *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 appellant's speedy trial rights were violated under the United States Constitution. We shall remand 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.