Circuit Court for Somerset County
Case No. C-19-CR-22-000133

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1879

September Term, 2022

KEVIN CLARK

v.

STATE OF MARYLAND

Ripken,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: November 15, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The State of Maryland charged Appellant, Kevin Clark ("Appellant"), with first- and second-degree assault and reckless endangerment in the Circuit Court for Somerset County. The charges stemmed from an incident involving Appellant and his cellmate at the Eastern Correctional Institute. After Appellant was indicted, the State entered a nolle prosequi[1] of the charges and filed a new statement of charges, removing the charge for reckless endangerment and adding charges of first- and second-degree assault of an inmate pursuant to section 3-210[2] of the Criminal Law Article ("CR") of the Maryland Code and two counts of second-degree assault.

[1] A nolle prosequi, or "nol pros," is "an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v. Huntley*, 411 Md. 288, 291 n.4 (2009) (citing *Ward v. State*, 290 Md. 76, 83 (1981)). *Accord* Maryland Code Annotated Criminal Procedure Article ("CP") § 1-101(k) (defining "nolle prosequi" as "a formal entry on the record by the State that declares the State's intention not to prosecute a charge"). This opinion uses the terms "nol pros" and "nolle pros" interchangeably depending upon the spelling in the authority we cite to. *See Gilmer v. State*, 389 Md. 656, 659 n.2 (2005) ("A nolle prosequi is often shortened and referred to as a nolle prosse or nol pros.") (internal citations omitted).

[2] CR section 3-210, titled "Assault by incarcerated individual -- Sentencing" provides, in relevant part:

> (a) An incarcerated individual convicted of assault under this subtitle on another incarcerated individual or on an employee of a State correctional facility, a local correctional facility, or a sheriff's office, regardless of employment capacity, shall be sentenced under this section.
> (b) A sentence imposed under this section shall be consecutive to any sentence that the incarcerated individual was serving at the time of the crime or that had been imposed but was not yet being served at the time of sentencing.

Appellant moved to dismiss the indictment for a violation of the *Hicks*[3] rule and to dismiss the misdemeanor counts for a violation of the statute of limitations. The circuit court denied Appellant's motion to dismiss for the alleged *Hicks* violation but granted in part the dismissal for the misdemeanor counts, with the exception of second-degree assault of an inmate.

Appellant pled not guilty pursuant to an agreed statement of facts and was convicted of second-degree assault of an inmate. Appellant was sentenced to seven years' incarceration to be served consecutively to any sentences he was already serving. Appellant noted this timely appeal.

Appellant presents the following issue for our review:[4] whether the circuit court erred in denying his motion to dismiss the indictment for an alleged *Hicks* violation. For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2021, Appellant, an inmate at the Eastern Correctional Institution, struck his cellmate repeatedly in the head and face, causing the victim's eyeball to dislodge. The State filed a statement of charges in the district court, charging Appellant with first- and

[3] The "*Hicks*" Rule is codified in Section 6-103 of the Criminal Procedure Article of the Maryland Code and Maryland Rule 4-271. In *State v. Hicks*, 285 Md. 310 (1979), the Supreme Court of Maryland held that a criminal defendant must be brought to trial within 180 days after the earlier of the appearance of counsel, or first appearance of the defendant before the circuit court, unless good cause is shown. *Id.* at 315–16. A *Hicks* violation results in the dismissal of the charges with prejudice. *Id.* at 318.

[4] Rephrased from: Did the trial court err in denying Appellant's motion to dismiss the indictment for a violation of the *Hicks* rule?

second-degree assault and reckless endangerment in connection with the assault. Three months later, the State filed a criminal information in the circuit court, charging Appellant with the same offenses. The case was originally set for trial on February 1, 2022; however, it was postponed to May 23, 2022.

On the new trial date, the State requested a continuance due to the unavailability of an officer. The court, noting that the *Hicks* date was July 1, 2022, found good cause to continue the trial to June 28 and 29.[5] On the June 28, 2022 trial date, the State entered a nol pros on the record, with both Appellant and defense counsel present. That same day, the State filed a new statement of charges in the district court. The new statement of charges stemmed from the same incident but did not contain the charge of reckless endangerment and did contain the additional charges of first- and second-degree assault of an inmate pursuant to CR section 3-210 as well as two counts of second-degree assault. The State subsequently filed a criminal information in the circuit court charging Appellant with the same offenses listed in the new statement.

Appellant filed a motion to dismiss the indictment alleging a violation of the *Hicks* rule and moved to dismiss the misdemeanor counts because the statute of limitations had expired prior to the filing of the information. The court heard argument on Appellant's motion on November 7, 2022. Appellant's counsel asserted that, while there was no postponement request, the State entered a nol pros "two days before *Hicks* runs" to circumvent the 180-day requirement. The court stated, and Appellant's counsel conceded,

[5] After finding good cause to continue the trial date, the court noted that "this [would] be the last postponement for the State."

that it could make no inference regarding the intent of the State as to the entry of the nol pros based on the record. The court explained:

> I can only assume, unless the State tells me otherwise, that this second count of first degree assault being added was additional information the State received about the case and would that not be rational and reasonable to nolle pros and recharge the case properly if that were the case that – and if this additional information came to light as a second assault?

In response, the State indicated that "[t]here was additional information that came to light regarding incidents in terms of other second degree assault charges for [the victim] . . . that the State wanted to include in the charging document." The State explained that it removed the reckless endangerment charge and "added the additional first degree assault charge based on . . . the fact that [the victim] is an inmate at [Eastern Correctional Institute] and then also added the other second degree assault charges[.]" The State further asserted that it "was within its right . . . to reevaluate the charges that had already been lodged against [Appellant] and make a re-charging decision." Appellant's counsel countered that, "the fact that the victim in this case was an inmate doesn't change the offense" but rather, "[i]t changes the sentence." The court explained that the addition of the charge pursuant to CR section 3-210 removed any discretion to sentence Appellant concurrently on that charge. The State also emphasized that "there was no request by the State for a postponement" and the court could not infer the reasons why the State may have issued a nol pros.

The court issued a ruling at a subsequent hearing, explaining:

> As the moving party, the Defendant bears the burden of persuasion to establish that the State entered a nolle pros in the case . . . in bad faith to circumvent the July 1st, 2022 *Hicks* date rather than as an acceptable means

> of conducting prosecutorial business. After reviewing the evidence presented in this matter, the Court finds that Defendant has not met this burden. First, there are no indicators of intent by the State to circumvent the July 1st, 2022 Hicks date . . . as a postponement was not sought by the State prior to entering a nolle pros. Similarly, the State may replace a record – may reason on the record as to why the nolle pros was entered. But further, . . . to the contrary as well, the State added additional charges that were not initially charged in this case, and specifically those charges being Counts III and IV, assault of a – in the first degree of either a DOC employee or inmate and also assault in the second degree, either as it pertains to a DOC employee or inmate, and therefore, the Court must conclude that a nolle pros was entered for the purpose of re-charging the matter properly. Therefore, the Defendant has not produced other evidence sufficient to establish the nolle pros was entered in bad faith to circumvent the time requirements . . . and therefore, the Court finds that the present *Hicks* date of February 12, 2023 is the *Hicks* date that the Court must follow.

The court dismissed counts 2, 5, and 6 as misdemeanors barred by the statute of limitations. The court denied Appellant's motion to dismiss as to count 4, second-degree assault of an incarcerated individual or an employee of a correctional facility, pursuant to CR section 3-210.[6] Additional facts will be included as they become relevant to the issues.

DISCUSSION

Appellant asserts that the circuit court erred in denying his motion to dismiss the indictment for a violation of the *Hicks* rule. Appellant contends that the "purpose and necessary effect" of the State's entry of a nol pros was to "circumvent the *Hicks* deadline." According to Appellant, the nol pros was not entered for the purpose of re-charging the matter properly because "[t]here was no such fatal flaw in the original indictment." Appellant emphasizes that when the State requested a continuance at the trial date on May

[6] The following counts remained: first-degree assault (count 1), first-degree assault of an inmate of the Division of Correction (count 3), and second-degree assault of an inmate of the Division of Correction (count 4).

23, 2022, the court "made clear that there would be no further continuances of the matter." According to Appellant, because the State was aware that the court had already concluded there would be no good cause finding for further continuances, the State's intent in nol prossing the case at a subsequent hearing without first requesting a continuance was to circumvent *Hicks*.

The State counters that the circuit court properly exercised its discretion in denying Appellant's motion to dismiss for the alleged *Hicks* violation. According to the State, the nol pros was neither entered for the purpose of delaying trial nor did it have the "necessary effect" of delaying trial and evading *Hicks*. The State maintains that the nol pros was entered in the "good-faith belief that the charging document was flawed."

Under CP section 6-103(a) and Maryland Rule 4-271(a)(1), criminal cases in a circuit court must begin no later than 180 days after the earlier of (1) the entry of appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court. Md. Code Ann., CP § 6-103(a); Md. Rule 4-271(a)(1). Typically, where a nol pros is entered and a defendant is later recharged with the same offenses, the 180-day time period for commencing trial begins to run anew after the refiling. *Curley v. State*, 299 Md. 449, 458–59 (1984). Where there is a nol pros and refiling of charges, "the only existing prosecution or case is that begun by the new charging document," and that is the prosecution for which the trial must be timely commenced. *Id.* at 460.

In *Curley*, the Supreme Court of Maryland 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.

State v. Huntley, 411 Md. 288, 293 (2009) (citing *Curley*, 299 Md. at 459). When these exceptions apply, "[i]f trial does not begin then within 180-days of the first appearance of the defendant or defense counsel in the initial prosecution, the subsequent indictment must be dismissed under *Hicks*." *Huntley*, 411 Md. at 293–94; *see also Hicks*, 285 Md. at 318. However, the exceptions will not apply where the prosecution acts "in good faith or so as to not 'evade' or 'circumvent' the requirements" of the 180-day rule. *Huntley*, 411 Md. at 295.

Whether the entry of a nol pros has the 'necessary effect' of circumventing the 180-day rule depends on the factual circumstances of each case. As this Court explained in *Baker v. State*, 130 Md. App. 281, 290 (2000), *Curley* provides the "quintessential example" of when a nol pros will have the necessary effect of circumventing the rule:

> In that case, the nol pros was entered on the 180th day available for trial under the indictment. Even as of that day, the State was not prepared for trial. No witnesses were present; the defendant was not present; defense counsel was not present. Had the nol pros not been entered, the prosecution would necessarily have been dismissed for a violation of the 180-day rule. That was the extreme situation that caused the [Supreme Court of Maryland] to conclude:
>
> > In reality, the prosecution had already lost this case under [the prior versions of CP 6-103 and Rule 4-271] when the nol pros was filed. Regardless of the prosecuting attorney's motives, the necessary effect of the nol pros was an attempt to evade the dismissal resulting from the failure to try the case within 180 days.

Baker, 130 Md. App. at 290 (citing and quoting *Curley*, 299 Md. at 462–63). The *Baker*

Court explained that in *Curley*, "if the nol pros on the 180th day had not been entered, the **only** alternative would inevitably have been a dismissal of the charges with prejudice for non-compliance with the 180-day rule. There was no way that the trial could possibly have gone forward on that day." *Id*. at 292–93 (emphasis in original).

The Supreme Court of Maryland issued decisions in *Curley*, *supra,* and a companion case, *State v. Glenn*, 299 Md. 464 (1984) on the same day but reached different outcomes. In *Glenn*, the *Hicks* date was January 13, 1982 and trial was scheduled for November 17, 1981. *Id*. at 465. Prior to trial, the State discovered that the charging documents were defective because they failed to allege an element of the crime charged. *Id*. Defense counsel would not agree to an amendment of the charging document, leading the State to enter a nol pros on the day of trial. *Id*. at 465–66. That same day, the State refiled the charging documents alleging the same offense. *Id*. The Supreme Court of Maryland held that, "[u]nlike the situation in *Curley*, the necessary effect of the nol pros" in *Glenn* was not to circumvent the 180-day rule. *Id*. at 467. The Court explained, "[i]f the cases had not been nol prossed, and if for some reason trial had not proceeded when the cases were called on [the trial date], there remained fifty-seven days before the expiration of the 180-day deadline." *Id*.

The Court's decision in *State v. Huntley*, *supra*, is also instructive. 411 Md. 288 (2009). In *Huntley*, one day before the expiration of the 180-day period, the State nol prossed the charges and moved to amend the indictment based on new information it had received from the victim's family indicating that the dates alleged in the original indictment were incorrect. *Id*. at 290–92. Huntley objected to the amendment and the trial court denied

the State's motion. *Id*. at 292. Rather than proceeding to trial on the defective indictment, the State entered a nol pros. *Id*. The Supreme Court of Maryland reasoned that there was "no direct suggestion . . . of any misconduct or ulterior motive to delay behind the State's entry of the nol pros" and held that the nol pros did not have the necessary effect of circumventing the 180-day rule. *Id*. at 301–02. The Court explained:

> When the State seeks to try a case beyond the 180-day deadline through the strategic use of a nol pros, its actions are . . . subject to the analysis discussed in *Curley*.
>
> Where the State instead is prepared to try the case on the trial date, pending approval of its motion to amend the flawed indictment, that motion is denied, and the State nol prosses the indictment in order to re-indict later on corrected charges, the significant concern of the statute, the rule, *Hicks*, and *Curley* regarding the "prompt disposition of charges" and the elimination of "excessive scheduling delays" is absent. In such a situation, the State has no obvious or secret motive to delay prosecution of the defendant beyond 180 days and there is no ruling by the trial court regarding its calendar that the State may be said to be circumventing.

Id. at 298–99 (citations omitted). The Court added that, "[t]he State *was not refused a continuance*, and it did not seek to evade any scheduling orders of the court due to missing evidence." *Id*. at 301 (emphasis added). The Court concluded that "the 180-day time period for the trial beg[an] anew with the second indictment." *Id*. Thus, where the purpose of the State's nol pros is "to remedy a genuinely flawed indictment, the concerns of *Curley* are not present." *Id*. at 302.

Having set forth the applicable legal framework, we return to the present case. As discussed *supra*, on the day of trial, the State entered a nol pros and filed a new statement of charges on the same day. The new statement of charges removed the charge of reckless endangerment and added the charges of first- and second-degree assault of an inmate

pursuant to CR section 3-210 as well as two counts of second-degree assault. The State did not seek a continuance prior to entering a nol pros. Moreover, the State noted, it was within its right to make a re-charging decision.[7] The circuit court credited the State's explanation, finding that the nol pros was entered for the purpose of properly re-charging Appellant, rather than in a bad faith attempt to circumvent *Hicks*.

Despite the short time period between the entry of the nol pros and the *Hicks* deadline, based upon the record presented, the nol pros did not have the "necessary effect" of circumventing the 180-day rule. Indeed, as in *Huntley*, the State did not seek a continuance prior to entering a nol pros. *See* 411 Md. at 301. The record clearly supports the trial court's conclusion that charges were nol prossed so that the State could amend the charging document to properly reflect that the victim was an inmate pursuant to CR section 3-210. Moreover, like in *Glenn*, here, the record further supports the trial court's conclusion that the charges were nol prossed because of the State's good faith belief that the charging document was flawed. *See* 299 Md. at 467.

We are also unpersuaded by Appellant's reliance on *Alther v. State*, 157 Md. App. 316 (2004) and *State v. Price*, 385 Md. 261 (2005) in support of his assertion that the purpose of the State's nol pros was to circumvent the 180-day rule. As the Supreme Court

[7] To be sure, it is well settled that "[t]hat the entry of a nolle prosequi is generally within the sole discretion" of the State, "free from judicial control and not dependent upon the defendant's consent." *State v. Huntley*, 411 Md. 288, 291 n. 4 (2009) (quoting *Ward v. State*, 290 Md. 76, 83 (1981)). Moreover, "while a nolle prosequi discharges the defendant on the charging document or count which was nolle prossed, and while it is a bar to any further prosecution under that charging document or count" it does not preclude the State from prosecuting "the same offense under a different charging document or different count." *Id*. (quoting *Ward* 290 Md. at 84).

of Maryland discussed in *Huntley*, those cases involved scenarios in which

> the State's proven purpose in nol prossing the charges was to evade the trial court's or the administrative judge's denial of the State's motion for a continuance or postponement, or to force rescheduling of a trial date for which it was not ready to proceed. It is distinctly those types of scenarios, *where the nol pros is used as a clear stand-in for a failed continuance request*, that the prophylactic analysis of *Curley* and the sanction of *Hicks* were designed to address.

411 Md. at 296–97 (emphasis added) (footnote omitted). As in *Huntley*, Appellant's reliance on these cases is misplaced. Here, as we have explained, the State was not refused a continuance request prior to entering a nol pros. The circuit court observed that if the State had asked for a postponement and that postponement was denied, then the State's intention would be clear. While the nol pros did delay Appellant's trial as to the initial charging document beyond the 180-day requirement, the circuit court appropriately found that the delay was justifiable because the State's intent was not to evade the 180-day rule but rather, the State's purpose in entering the nol pros was to recharge the matter more accurately to reflect the offense and potential sentencing.

The circuit court did not find that the State was motivated by a bad faith desire to circumvent *Hicks*. The record before us does not present a basis for a contrary determination. Thus, we conclude that the *Curley* exceptions do not apply as the record supports the finding that the State entered the nol pros in good faith. Accordingly, the trial court properly determined that the nol pros did not have the necessary effect of circumventing the 180-day rule.

JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.