UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0989

September Term, 2016

REGINALD MANNING

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 27, 2017

A jury in the Circuit Court for Baltimore City found Reginald Manning, appellant, guilty of first-degree assault, second-degree assault, unlawfully wearing and carrying a handgun, using a handgun in the commission of a crime of violence, reckless endangerment, and discharging a firearm within the city limits. Thereafter, the court sentenced Manning to a total of forty-five years' imprisonment.[1] Although Manning did not immediately file a direct appeal with this Court, he later was granted post-conviction relief in the form of the right to seek a belated direct appeal. This appeal follows.

Manning presents us with the following two questions:

I. Did the trial court err by denying Manning's motion to dismiss based on a *Hicks*[2] violation?

II. Were Manning's speedy trial rights violated?

For the reasons set forth below, we shall affirm.

BACKGROUND

Because the facts of the underlying crimes are not germane to our determination of the issues Manning presents for our review, we do not recite them in detail, other than to note that the charges, including attempted murder, arose from Manning shooting his then-girlfriend six times after she broke a liquor bottle over his head during an argument in the

[1] This sentence was ordered to run consecutive to a sentence of life imprisonment imposed previously by the Circuit Court for Baltimore County on April 21, 2004 for an unrelated crime.

[2] This is a shorthand reference to *Hicks v. State*, 285 Md. 310 (1979), and its progeny, which relate to the requirement found in Md. Rule 4-271, and section 6-103 of the Criminal Procedure article of the Maryland Code ("CP"), that a criminal defendant be brought to trial within 180 days after the earlier of the appearance of counsel, or the first appearance of the defendant before the circuit court, unless good cause is shown.

street. His defense at trial was that the shooting was consistent with an assault, but did not amount to an attempted murder.

Manning first appeared in the circuit court on March 16, 2005 at which time he pleaded not guilty, and elected a jury trial. He was represented by the Office of the Public Defender (OPD). Trial was scheduled to begin on June 7, 2005.

On June 7, 2005, Manning's counsel requested a postponement because the case had been re-assigned to a different lawyer from OPD, who was not present in the courtroom that day, and needed more time to prepare. Trial was rescheduled for August 8, 2005.

On August 8, 2005, Manning, who was represented by "stand-in" counsel from OPD, requested a postponement because Manning's counsel was unable to be present as he was representing another client in an unrelated trial. Trial was rescheduled for October 25, 2005.

The October 25, 2005 trial was later postponed until January 4, 2006,[3] because the State's Attorney assigned to the case was busy conducting a different trial. On January 4, 2006, Manning's counsel requested a postponement to discuss the case with Manning and to prepare for trial. Trial was rescheduled for February 27, 2006.

On February 27, 2006, the State, and Manning's counsel, jointly requested a postponement to give both parties more time to negotiate a resolution of the case. Trial was rescheduled for May 23, 2006.

[3] The Docket Entries reflect that that, on October 25, 2006, a postponement was granted, however no transcript of any proceedings from that date were included in the record.

On May 23, 2006, Manning's counsel requested a postponement because OPD needed to reassign the case to a different lawyer. Trial was rescheduled for September 11, 2006.

On September 11, 2006, Manning's newly assigned counsel requested a postponement because he was new to the case and needed time to prepare. Trial was rescheduled for November 29, 2006.

On November 29, 2006, the parties jointly requested a postponement because the trial date had only been set in the event that a plea agreement had been reached, which had not occurred because Manning rejected the State's plea offer of twenty years' imprisonment, concurrent to the life sentence Manning was then serving for an unrelated murder conviction in Baltimore County. Trial was rescheduled for February 20, 2007.

On February 20, 2007, "stand in" counsel for Manning (who was Manning's co-defendant's lawyer from OPD) requested a postponement because Manning's counsel was unavailable because he was involved in an unrelated trial. Trial was rescheduled for May 9, 2007, and then postponed to June 27, 2007.

On June 27, 2007, Manning's counsel requested that the case be postponed to the following day due to a scheduling issue. On June 28, 2007, it was postponed for yet another day.

On June 29, 2007, counsel for Manning moved for dismissal of the indictment solely on the basis that the court had violated Md. Rule 4-271 and CP § 6-103 when appellant's trial did not begin by September 13, 2005, which was 180 days after appellant's first

appearance in circuit court on March 16, 2005. The court denied the motion. Jury selection began July 9, 2007 and the case concluded on July 11, 2007.

I. *Hicks*

The scheduling of a trial date in a criminal matter is governed by Md. Code (2001, 2008 Repl. Vol., 2016 Supp.), § 6-103 of the Criminal Procedure Article ("CP"), which states, in pertinent part:

> (a) *Requirements for setting date*. – (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.
>
> (b) *Change of date*. – (1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:
>
> (i) on motion of a party; or
>
> (ii) on the initiative of the circuit court.

We read CP §6-103 in tandem with Md. Rule 4-271, which states, in pertinent part:

> (a) Trial date in circuit court. (1) 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. … 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. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

CP §6-103(a) and Md. Rule 4-271(a) together require that "a criminal case be brought to trial within 180 days of the appearance of counsel or the appearance of the defendant before the circuit court, whichever occurs first." *Choate v. State*, 214 Md. App. 118, 139 (2013). The 180-day rule is "mandatory and dismissal of the criminal charges is the appropriate sanction for violation of that time period" if good cause has not been established.[4] *Ross v. State*, 117 Md. App. 357, 364 (1997). "[T]he critical postponement for purposes of Rule 4–271 is the one that carries the case beyond the 180[-]day deadline." *State v. Brown*, 355 Md. 89, 108–9 (1999).

A determination by the administrative judge to postpone trial past the *Hicks* date is given "wide discretion" and carries a "heavy presumption of validity." *Fields v. State*, 172 Md. App. 496, 521 (2007). "If it is the administrative judge who extends the trial date and the order is supported by necessary cause, the postponement is valid and both the requirements and purposes of the statute and rule have been fulfilled." *Id*.

In the instant case, the August 8, 2005 postponement, which postponed the case to October 25, 2005, was the critical postponement for the *Hicks* analysis because it was that postponement that carried the case beyond the 180-day period which began on March 16,

[4] The Court of Appeals has explained, however, that while the rule was adopted to facilitate the prompt disposition of criminal cases, the *Hicks* rule serves "'as a means of protecting *society's* interest in the efficient administration of justice. The actual or apparent benefits [CP §6-103] and Rule 4-271 confer upon criminal defendants are purely incidental.'" *Choate*, 214 Md. App. at 140 (quoting *State v. Price*, 385 Md. 261, 278 (2005)) (emphasis added). Unlike the Sixth Amendment speedy trial guarantee, "the *Hicks* rule is a statement of public policy, not a source of individual rights." *Id*.

2005 and ended on September 13, 2005.

During the hearing on Manning's motion to dismiss the indictment based on a violation of the *Hicks* rule, Manning's counsel argued that Manning's prior counsel requested the August 8, 2005 postponement because he "was tied up in a very lengthy trial" and had not spoken to Manning or done anything to prepare his case at the time of the postponement. Manning's counsel then argued:

> And keep in mind too that although he is the lawyer that the Public Defender system provided to [appellant], it's not is if [appellant] went and hired a lawyer, paid a fee with the understanding that lawyer would be ready, willing and available to go to trial. He got the lawyer he was given, who couldn't even take the time to come see him, and ended up requesting a postponement and taking [appellant] over the *Hicks* deadline.
>
> I don't think that is actually [appellant's] fault that that postponement happened. It is a cumulative effect of his indigence in not being able to necessarily pick the lawyer of his choice and the way that the Public Defender system operates.

Manning contends that, even though his counsel requested the critical postponement, the circuit court erred in denying his motion to dismiss on *Hicks* grounds because Manning was not responsible for the delay, and Manning personally strenuously objected to the postponement. Without citation to authority, Manning suggests that "[t]his Court should not hold that the unavailability of defense counsel is good cause for a postponement where the defendant complains about the delay."

As an initial matter, we note that "[i]t is settled law that when an accused is present in court and represented by competent counsel, he is bound by the actions and concessions of counsel, and that even constitutional rights may be waived in the course of a trial." *Prescoe v. State*, 231 Md. 486, 494 (1963) (internal quotation and citation omitted).

Moreover, it is well settled that "'it is inappropriate to dismiss the criminal charges … where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date in violation of [the *Hicks* Rule],'" because "'[i]t would … be entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation.'" *Farinholt v. State*, 299 Md. 32, 39-40 (1984) (quoting *State v. Hicks*, 285 Md. 310, 335 (1979)). See also *Moody v. State*, 209 Md. App. 366, 374 (2013). Thus, Manning, who was present in court, and represented by counsel – whom Manning never sought to discharge – was bound by the request of his lawyer to postpone the case.

The question of whether the reason for a request for a postponement amounts to "good cause" is a matter left purely within the wide discretion of the administrative judge. *Fields*, 172 Md. App. at 521. Here, we discern no abuse of discretion for finding "good cause" to support postponing the case because appellant's attorney was unavailable while he was "in trial" on another unrelated case. In *State v. Toney*, the Court of Appeals reversed this Court's decision finding a prosecutor's unavailability for trial was not good cause to warrant postponement, and reiterated that "an appellate court may not reverse an administrative judge's finding of good cause for postponement unless the defendant demonstrates a clear abuse of discretion or a lack of good cause as a matter of law." 315 Md. 122, 131 (1989) (citing *State v. Frazier*, 298 Md. 422, 454 (1984)). We don't think the rule should be more lenient when the request is based on defense counsel's unavailability.

II. Speedy Trial.

Manning contends that the circuit court erred in failing to dismiss the charges against him "based on a speedy trial violation after … Manning was incarcerated for well over two years awaiting trial."

Initially we hold that this contention is not preserved for review as Manning never argued to the circuit court that his 6th Amendment right to a speedy trial was violated. In fact, Manning's counsel specifically disclaimed such a contention during the hearing on the motion to dismiss the indictment. When Manning's counsel was asked by the court "[a]re we arguing [*Hicks*] or are we arguing Sixth Amendment speedy trial?" counsel responded "[w]ell, I'll stick to the [*Hicks*]." By raising the issue for the first time on appeal, Manning waived the issue for appellate review. *Klauenberg v. State*, 355 Md. 528, 556-57; Md. Rule 8-131(a). Furthermore, we decline Manning's invitation to invoke our power to review this unpreserved error as plain error under Md. Rule 8-131(a). Nevertheless, even if we were to consider Manning's contention that his right to a speedy trial were violated, we would find it to be wholly without merit.

In reviewing a motion to dismiss for violation of the right to a speedy trial, we make "our own independent constitutional analysis" to determine whether this right has been denied. *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id*. at 221.

The United States Supreme Court has established a four-factor balancing test to assess whether a defendant's right to a speedy trial has been violated. *Barker v. Wingo*, 407

U.S. 514, 530-32 (1972). These four factors include: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530; *State v. Kanneh*, 403 Md. 678, 688 (2008). None of these factors is "'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Jules v. State*, 171 Md. App. 458, 482 (2006) (quoting *Barker*, 407 U.S. at 533).

In the instant case, the first factor, the length of the delay, is the only factor that tips in favor of Manning. Appellant's trial was delayed about 28 months. Nevertheless, this factor is the least determinative of the four factors. *Howard v. State*, 440 Md. 427, 447-48 (2014).

The next factor, the reason for the delay, weighs heavily against Manning because appellant, through his counsel, asked for, or joined in asking for, every postponement that was granted in this case except for one. Thus, Manning was responsible for all of the delay in this case except the roughly six week period between October 25, 2005, and January 4, 2006.

As mentioned above, Manning asserted for the first time on appeal that his 6th Amendment right to a speedy trial was violated, and, as a result, the third factor weighs against appellant.[5]

[5] It should be noted that although Manning's counsel sought postponements, Manning personally objected to several of them.

Regarding the final factor, Manning contends generally that he was presumptively prejudiced based on the delay of over two years. Such an argument, however, which points to no specific prejudice such as the loss of an important defense witness, completely overlooks the fact that during all of the time he was incarcerated awaiting trial in this case, he was already incarcerated for an unrelated murder conviction for which he was sentenced to life imprisonment on April 21, 2004. Because he was already incarcerated, Manning cannot claim to have suffered any additional "presumptive" prejudice stemming from the delay in bringing the instant matter to trial.

On balance, even if we were to consider this unpreserved issue, we would not have found that Manning's right to a speedy trial was violated.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.