Circuit Court for Prince George's County
Criminal Trial No. CT111112X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1216

September Term, 2016

BENJAMIN ERNEST VANCE

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E. Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 11, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2013, a jury sitting in the Circuit Court for Prince George's County convicted Benjamin Vance, appellant, of felony murder, armed robbery, and use of a handgun in the commission of a felony. Three years later, in July 2016, Vance filed a motion for new trial pursuant to Md. Rule 4-331(b).[1] As grounds for the motion, Vance claimed that the court "improperly granted" a motion for postponement of the trial date beyond the 180-day limit provided for in Md. Rule 4-271(a). The circuit court denied the motion.

The State has raised several procedural challenges to Vance's appeal. Assuming, without deciding, (1) that Vance's claim was preserved for appellate review, and (2) that the claim amounts to one of "fraud, mistake, or irregularity" that is reviewable on a motion for new trial filed more than 90 days after the imposition of sentence, we conclude that Vance's claim lacks merit. Accordingly, we shall affirm.

Section 6-103(a) of the Criminal Procedure Article (2001, 2008 Repl. Vol.), and Maryland Rule 4-271(a)(1), "mandate that a criminal defendant must be brought to trial within 180 days after the earlier of the arraignment of the defendant or the appearance of defense counsel." *Goldring v. State*, 358 Md. 490, 493 (2000) (citation omitted). The date by which the State must bring a criminal defendant to trial is known as the *Hicks* date.[2]

[1] In pertinent part, Md. Rule 4-331(b)(1)(B) provides that where more than 90 days has passed since the imposition of sentence, a court has "revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial" in the "case of fraud, mistake, or irregularity."

[2] Referring to *State v. Hicks*, 285 Md. 310 (1979).

"[P]ostponements that cause the scheduling of a criminal trial beyond the 180 day period must be granted by the county administrative judge or his [or her] designee and must be supported by good cause." *Id*. (citation omitted) (emphasis added). Maryland Rule 16-105(d)(2)(a)(B)[3] authorizes the county administrative judge, at his or her discretion, to designate "not more than one judge at a time" to hear and decide continuance requests in criminal matters originating in the circuit court.

Where a postponement resulting in a trial date beyond the 180-day limit has not been granted by the administrative judge, or his or her designee, for good cause, dismissal of the charges is the appropriate sanction. *Goldring*, 358 Md. at 502-03. This sanction "is not for the purpose of protecting a criminal defendant's right to a speedy trial; instead, it is a prophylactic measure to further society's interest in trying criminal cases within 180 days." *Dorsey v. State*, 349 Md. 688, 702 (1998) (citations omitted).

Vance's *Hicks* date was January 21, 2012, and his trial was originally scheduled to begin on January 10, 2012. On the day of trial, according to docket entries, a "good cause hearing" was held, and a "defense continuance" was granted by Judge Whalen.[4] On the same date, a form bearing Vance's signature was filed with the court, indicating that he

[3] Formerly Rule 16-101(d)(3)(B)(a)(ii). The parties' briefs refer to the former rule, but we shall refer to it as it is currently numbered.

[4] Although the record before us does not contain a written motion for a continuance or a transcript of court proceedings on January 10, 2012, we presume that the grounds for the defense motion for a continuance of the trial date were related to the notice of substitution of defense counsel that was filed on that day.

"expressly consent[ed]" to a trial date beyond the 180-day time period required by Rule 4-271, and that he did so "freely and voluntarily" and "without any condition, qualification, or limitation whatsoever." Trial was rescheduled to April 24, 2012. Trial was subsequently continued three more times at the request of defense counsel, and ultimately began on January 28, 2013.[5] As stated above, the trial resulted in Vance's convictions.

As grounds for his motion for new trial, Vance claimed that Judge Whalen was one of nine judges designated by the administrative judge to postpone criminal trials, in violation of Md. Rule 16-105(d)(2)(a)(B). Vance claimed, as he does in this appeal, that the charges against him should therefore be dismissed. In support of his claim, Vance relies primarily on *Goldring*, *supra.* In that case, the Court of Appeals noted that there was a violation of the rule where the county administrative judge authorized "each of the county circuit court judges, at the same time," to postpone criminal trials, 358 Md. at 500, and held that dismissal of the charges was the appropriate sanction for the violation. *Id.* at 505 (emphasis added).

We are satisfied that there was no violation of the Rule 16-105(d)(2)(a)(B) here. According to the documentation attached to Vance's motion for new trial, and also included in the appendix to his brief, although the administrative judge may have

[5] When there are several orders postponing a criminal trial, "[t]he critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of extending the trial date beyond 180 days." *Thompson v. State*, 229 Md. App. 385, 398 (2016) (citations omitted). Here, the "critical order" is the postponement that was granted by Judge Whalen on January 10, 2012.

authorized more than one judge to postpone criminal trials, the judges were not so authorized at the same time. Rather, it is clear that Judge Whalen was the designee of the administrative judge, and that, in the event Judge Whalen was absent or unavailable, the first "back up" judge on the list would replace Judge Whalen as the designee. In the event that both Judge Whalen and the first "back up" judge were absent or unavailable, the next judge on the list would become the designee, and so on. This procedure is consistent with the rule as it ensures that, at any one time, only one judge is authorized to grant continuances in criminal cases.

Even if the record supported Vance's claim that there was a violation of the rules governing postponements that result in a trial date beyond the 180-day limit, Vance would not be entitled to dismissal of the charges against him. As we have observed, dismissal is inappropriate "where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date" beyond the 180-day limit proscribed in Rule 4-271, as it would be "entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation." *Moody v. State*, 209 Md. App. 366, 374–75 (2013) (quoting *Hicks,* 285 Md. at 335). *See also Dorsey*, 349 Md. at 709 (holding that dismissal was not required where postponement of trial beyond 180-day limit was not granted by the administrative judge or the administrative judge's designee, because, by voluntarily failing to appear at trial, defendant was deemed to have sought a continuance beyond the *Hicks* date).

Vance does not dispute that he signed the form expressly indicating that he "freely and voluntarily" consented to a trial date beyond the 180-day limit. *See State v. Brown*,

307 Md. 651, 659-661 (1986) (holding that document filed by defendant, expressly and unconditionally waiving 180-day limitation for criminal trial, constituted express consent to trial outside of the 180-day limit, and, therefore, dismissal was not an appropriate sanction.)[6] In addition, the record demonstrates that the postponement that resulted in a trial date beyond the 180-day limit was a "defense continuance."

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6] Vance asserts in his initial brief that the circuit court postponed the January 10, 2012 "over [his] objection" and, in his reply brief, claims that he "did not knowingly and intelligently waive his rights." He provides, however, no support for these inconsistent claims.