Circuit Court for Washington County
Case No. C-21-CR-18-59

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2890

September Term, 2018

ASHTON LEE FRISBY

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Wells,

JJ.

Opinion by Wells, J.

Filed: June 29, 2020

A jury empaneled in the Circuit Court for Washington County found Appellant, Ashton Lee Frisby, guilty of first-degree assault, second-degree assault, reckless endangerment, and use of a handgun in the commission of a felony or crime of violence. The court sentenced Mr. Frisby to 20 years' imprisonment on the first-degree assault charge, 20 years' imprisonment for the use of a handgun with the first five years to be served without parole and merged the second-degree assault and reckless endangerment counts.

Mr. Frisby filed a timely appeal and poses five questions for our review, which we reprint verbatim, but have renumbered:

1. Did the court err in denying Appellant's motion to dismiss based on a violation of Maryland Rule 4-271 and Md. Code Ann., Crim Proc. § 6-103?
2. Did the court err in refusing to propound requested voir dire questions?
3. Did the court err in admitting impermissible lay witness testimony?
4. Did the court err in refusing to allow the defense to call Autumn Frisby as a witness?
5. Was the evidence sufficient to sustain Appellant's convictions?

For the reasons we discuss, we find that the record is incomplete, and we cannot answer the first question. We, therefore, issue a limited remand for the trial court to address the issues raised in this opinion. Because we remand, and the resolution of the first question may be dispositive, we decline to answer Mr. Frisby's remaining questions at this time.

BACKGROUND

Because the sole issue to be addressed in this opinion does not focus on the evidence, we simply summarize the trial testimony. Candance Hawn and Leisha Kendall testified that, separately, they happened to be in the 400 block of Mitchell Street in Hagerstown one evening when they both heard people arguing. Specifically, Ms. Kendal testified that she saw an unknown black man yelling and pointing at a neighbor's house while he vandalized a white SUV that she had seen Mr. Frisby driving. The unknown man left in a black SUV. Both women testified that Mr. Frisby fired a handgun several times at the black SUV as it drove away.

Detective Sargent Andrew Lewis testified that on the same night, a man named Ricky Thomas drove a black Lexus SUV to the police station. Mr. Thomas complained that someone had shot at his vehicle. Det. Sgt. Lewis noted what he described as two "bullet holes" in the rear of the Lexus and photographed them.

After waiving his right against self-incrimination, Mr. Frisby testified that on the day of the incident, he was visiting his girlfriend, Kendall Meyers, who lived in the 400 block of Mitchell Avenue. That evening, while Ms. Meyers and he were on the front porch, two black men arrived and wanted to speak to Ms. Meyers. Mr. Frisby said that after the men arrived, he went inside the house leaving Ms. Meyers with the men on the porch. Mr. Frisby explained that Ms. Meyers and the two men quickly got into an argument.

Mr. Frisby recounted that soon thereafter, one of the men kicked in the front door, entered the house, and tried to assault him. According to Mr. Frisby, Ms. Meyers, her

brother, and the brother's wife intervened and forced the man to leave. After the interloper and the other man left, Mr. Frisby said he heard "a bang." He testified that he looked outside and saw that his vehicle, a white Chevy SUV, was damaged. He admitted on cross-examination that the man who entered the house was Ricky Thomas, Ms. Meyers' former boyfriend. Mr. Frisby denied that he shot at a black Lexus SUV. He said that he did not own any firearms. He claimed that Ms. Hawn and Ms. Kendall were "incorrect" in what they said they saw.

The jury found Mr. Frisby not guilty of attempted second-degree murder, guilty of first-degree assault, guilty of second-degree assault, guilty of reckless endangerment, not guilty of wearing, carrying, or transporting a handgun, and guilty of the use of a handgun in the commission of a felony or crime of violence. Later, the court sentenced Mr. Frisby to 20 years' imprisonment on the first-degree assault charge, merged the second-degree assault and reckless endangerment counts, and to 20 years' imprisonment for the use of a handgun with the first five years to be served without parole. Mr. Frisby filed this timely appeal.

DISCUSSION

The Motion to Dismiss Based on an Alleged Violation of *Hicks*.

In his first assignment of error Mr. Frisby makes two claims: *First*, that the court improperly denied his motion to dismiss based on an alleged violation of Md. Rule 4-271

(the "*Hicks* Rule") [1] and Maryland Code, (2018, 2019 Repl. Vol.), Criminal Procedure Article ("C.P.") § 6-103 (a)-(b). Mr. Frisby argues that the court did not make a good cause finding when it continued the trial from July 12, 2018 to August 9, 2018, a date beyond the *Hicks* date of August 1, 2018. *Second*, Mr. Frisby argues, that even if this Court determined that the trial court found good cause to continue the trial, there was an inordinate delay between May 11, 2018, the date which the clerk's office initially issued notice rescheduling the trial, and the date on which the trial commenced, November 20, 2018.

The State argues that the critical date was May 9, 2018, the day the court issued an order continuing the trial at the request of the parties. Further, the State maintains that the court found good cause to do so. Two days later, the clerk issued notices for the trial to be rescheduled to August 9, 2018, eight days beyond the August 1 *Hicks* date. The State disagrees with Mr. Frisby's contention that the critical event was the May 11, 2018 postponement. Additionally, the State argues that the extent of the delay is calculated between the postponed trial date, June 21, 2018, and the date to which the trial was initially rescheduled, August 9, 2018.

The legislature passed what was previously codified as Maryland Code, Article 27 § 591, now C.P. § 6–103,[2] which re-codified its prior mandate that "there should be a

[1] *State v. Hicks*, 285 Md. 310 (1979).

[2] **Time for trial**

(a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:

prompt disposition of criminal charges in the circuit courts." *Dorsey v. State*, 349 Md. 688, 700 (1998), quoting *State v. Hicks*, 285 Md. 310, *on motion for reconsideration*, 285 Md. 334 (1979). The Court of Appeals recognized this legislative intent when it promulgated Maryland Rule 746, now Maryland Rule 4-271, which requires the State to bring a defendant to trial within 180 days after the defendant's arraignment or counsel's entry of appearance, whichever is earlier. Specifically, Rule 4-271(a)(1) states:

> (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. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. 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

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(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.

Change of trial date on motion of party or initiative of court
(b)(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.
(2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.

Rules adopted by Court of Appeals
(c) The Court of Appeals may adopt additional rules to carry out this section.

> 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.

The last day that the trial date can occur under Rule 4–271(a)(1) "is commonly referred to as [the] *Hicks* date." *Ashton v. State*, 185 Md. App. 607, 619, *cert. denied*, 410 Md. 165 (2009).

If the State cannot bring a defendant to trial within 180 days, "the county administrative judge or his designee must make a finding of good cause justifying the postponement of the trial date beyond the prescribed time limit. Accordingly, postponements that cause the scheduling of a criminal trial beyond the 180-day period must be granted by the county administrative judge or [their] designee and must be supported by good cause." *State v. Brown*, 307 Md. 651, 657–58 (1986). The Court of Appeals has firmly stated that neither the State, nor a defendant, nor a trial court "are empowered to dispense with the mandates of [C.P. § 6–103] and Rule [4–271]." *Id*. And that Court has reiterated more than once that "the Hicks Rule serves as a means of protecting society's interest in the efficient administration of justice. The actual or apparent benefits of [C.P. § 6–103] and Rule 4–271 confer upon criminal defendants are purely incidental." *Goldring v. State*, 358 Md. 490, 494 (2000) (citations omitted) (quoting *Dorsey*, 349 Md. at 701).

The record reveals that Mr. Frisby's trial counsel, a member of the Office of the Public Defender, entered his appearance for Mr. Frisby on February 2, 2018. It is undisputed that the 180-day *Hicks* date was August 1, 2018. The docket entries show that the clerk's office initially scheduled trial for June 21, 2018 and sent notices to counsel.

On May 8, 2018, Mr. Frisby's counsel filed a "Consent Motion to Continue" the trial date, which, as the title indicates, the State joined. The next day, May 9th, the court granted the postponement without holding a hearing. The order, which the judge signed electronically in the MDEC system,[3] bears the judge's title, "JUDGE, Circuit Court for Washington County," and plainly states "good cause having been found."

Several days after oral argument, Mr. Frisby's appellate counsel filed a motion to supplement the record, which we granted. The supplemental material consists of the circuit court administrative judge's order designating the judge who signed the May 9th order as the acting administrative judge. With this filing, one of our threshold questions was finally answered. When the record initially came to this court, we did not know whether the judge who signed the May 9th postponement order had the administrative authority to do so. We now know that he did.

Another, equally vexing question remains unanswered, however. For reasons that are not explained in the record, on May 11, 2018, the circuit court clerk's office sent a new notice to the parties that announced that the trial date was August 9, 2018, a date eight days past the 180-day *Hicks* deadline. Mr. Frisby argues that the clerk's office postponed the case beyond *Hicks* without the court finding good cause to do so.

[3] Maryland Electronic Courts or MDEC is designed "to create a judiciary-wide integrated case management system that will enable courts at all levels to collect, store, process, and access records electronically." *www.mdcourts.gov/MDEC/about*. MDEC has been implemented throughout Maryland save for the busiest jurisdictions, namely Prince George's and Montgomery Counties, and Baltimore City. Charles County adopted the MDEC system in June 2017.

At Mr. Frisby's urging, we examine the Court of Appeals' holding in *Grant v. State*, 299 Md. 47 (1984), which he asserts is dispositive. There, the *Hicks* date was June 22, 1982. *Id*. at 461. Grant and his co-defendant were scheduled for trial on March 24, 1982. *Id*. On that date, the defense informed the court that an ethical conflict had arisen, and the co-defendant would have to be referred to the Office of the Public Defender. *Id*. Grant, however, was ready for trial. *Id*. The State opposed severance and desired that either both defendants' cases be postponed, or both defendants be tried that day. After the hearing, the administrative judge postponed the trial. *Id*. The Assignment Office inserted the date, "6/3/82," into a written order, which the administrative judge signed. *Id*. But, soon thereafter, the Assignment Office sent the parties a new trial date: June 30, 1982, which was eight days past the *Hicks* deadline. *Id*. On June 30, the defense moved to dismiss, asserting a violation of then-controlling Maryland Rule, 746, and then-operable statute, Maryland Code, Article 27, § 591. *Id.*

Unlike Mr. Frisby's case, the court held a hearing on the motion to dismiss. *Id*. at 462. After extensive testimony was taken, one fact was evident: the administrative judge had not authorized the June 3 postponement. The court, therefore, dismissed Grant's case. *Id*.

The Court of Appeals noted that upon the State's appeal to this Court, in an unreported opinion, we held that the hearing judge erred in overturning the administrative judge's good cause determination and remanded for a new trial. *Id*. Although we did not address the apparent failure of the administrative judge (or his or her designee) to grant the

June 3 postponement, we suggested that the Assignment Office could have set the trial date beyond the *Hicks* date "pursuant to the same good cause postponement order of March 24, 1982." *Id.*

The Court of Appeals disagreed on two important grounds. *First*, the Court held that the trial court and this Court erred in focusing on the March 24 order. "Instead, the critical postponement for the purposes of ruling upon the motion to dismiss was the postponement of the trial date from June 3rd to June 30th. It is this postponement which frustrated the statutory purposes of trying the case within 180 days." *Id*. at 462 (citation omitted).

Second, the Court disagreed with our "intimation" that the March 24th good cause order "authorized the personnel in the Assignment Office to postpone the trial date from June 3, 1982 to June 30, 1982."

> The June 3rd trial date was an assigned trial date pursuant to the March 24th order. Under the plain language of the statute and rule, only "the county administrative judge or a judge designated by him may grant a change of trial date" (Rule 746 b). *See Calhoun v. State*, 299 Md. 1 (1984), filed today.

Id. at 463. Consequently, the Court vacated our decision, and ordered that we remand to the trial court,

> for a further evidentiary hearing and findings concerning the postponement of the trial date from June 3rd to June 30th. If, after a hearing, the trial court finds that the postponement of the June 3rd trial date was in violation of § 591 and Rule 746, the case should be dismissed. If, however,

> the trial court finds this postponement complied with § 591 and Rule 746, the case should be scheduled for a prompt trial.

Id.

The State posits that the issue of an administrative order permitting an assignment office or the clerk's office to set a date beyond *Hicks* pursuant to a good cause order was addressed in *Rosenbach v. State*, 314 Md. 473 (1989) and ostensibly permits what happened here. There, the *Hicks* date was October 20, 1987 and the trial was scheduled for July 15, 1987. *Id*. at 477. On that day, however, the designated administrative judge postponed the hearing due to an unavailable witness and ordered that the Central Assignment Office (CAO) schedule a trial date. *Id*. The CAO reset the trial for August 26, 1987, but the case was postponed again for lack of a courtroom. The administrative judge's designee ordered the CAO reset the case once again, and the CAO rescheduled the trial for November 12, 1987, beyond the *Hicks* date. *Id*. On the day of trial, the defendant filed a motion to dismiss, which was denied, and ultimately appealed to this Court. *Id*.

On direct appeal to this Court, we certified four questions to the Court of Appeals. The only question which the Court chose to address was:

> When a judge postpones, within the prescribed 180 days, but delegates the assignment of a new trial date to Central Assignment [Office] (CAO) which assigns a trial date beyond the 180 day limit, does the original postponement qualify as a good cause postponement under Rule 4-271(a) and [C.P. § 6-103]?"

Id. at 476. The Court answered in the affirmative and held 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 date beyond 180 days." (quoting *State v. Frazier*, 298 Md. 422, 428 (1984)). *Id*. at 478. The Court also acknowledged "that the postponing judge need not make a specific finding that the postponement will of necessity carry the case beyond the 180 days" or "personally reset or cause the case to be reset for a particular date." *Id*. at 478-79 (citations omitted).

We conclude that the holdings in *Grant* and *Rosenbach* are distinguishable. Both holdings make clear that an administrative judge, or her designee, must find good cause to continue a trial date. Consistent with *Rosenbach*, if the administrative judge delegates the task of selecting a trial date to an administrative office, such as an assignment office or clerk's office, and that office selects a date beyond *Hicks*, then the court's good cause finding is sufficient.

But, consistent with *Grant*, we must conclude that the May 11, 2018 trial notice was the "critical postponement," not the continuance order of May 9 as the State insists, because it was the May 11th postponement that set the trial beyond the August 1, 2018 *Hicks* date. *Grant*, 299 Md. at 462. Significantly, we find nothing in the record that shows that the administrative judge authorized the clerk's office to postpone and reschedule the trial beyond *Hicks*. As the Court stated in *Grant*, "[t]he record in this case fails to show that this postponement was approved by the administrative judge or his designee, and the [evidence in the record] infers that it was not. At the very least, a prima facie case of non-compliance was shown." *Id*.

We are cognizant of the language the Court used in *Rosenbach* that seemingly sanctions what the court did here.

> Nor is it essential, under the statute and rule, that the postponing judge, at the time of postponement or thereafter, personally reset or cause the case to be reset for a particular date. It may be desirable to do this, and in some cases, it has been done. *See, e.g.*, *Frazier*, 298 Md. at 438, 470 A.2d at 1277 (administrative judge took an active part in rescheduling case no. 95, Weems). But the only prerequisite is that the administrative judge or that judge's designee find good cause. *Id.* at 426, 470 A.2d at 1271. Once that determination is made, the postponement is valid for purposes of the rule, subject only to the deferential review accorded the judge's good cause finding.

Rosenbach, 314 Md. at 479. But, we determine that *Rosenbach* concerned a scenario where the administrative judge *explicitly directed* the court's assignment office to reset the trial date.

That is not what happened here. *Grant* cautions that if the administrative judge finds good cause to continues a court date, then every subsequent rescheduling by the clerk or assignment office is not automatically covered by that single good cause ruling if a rescheduling takes a defendant's case beyond the 180-day limit. Our facts align with *Grant* in that it seems as if here the clerk unilaterally chose a court date beyond *Hicks* when the court did not direct it to select a new trial date. *Grant* requires the administrative judge find good cause for a postponement that sets a trial date beyond the *Hicks* date. We readily acknowledge that it is perhaps undesirable for an administrative judge to micro-manage calendar assignments. But when the effect of a postponement takes a case beyond the 180-day deadline without court direction, that should be cause for concern, because such delays could be constitutionally prohibited.

Our concern grows because the record reveals that the clerk's office pushed the trial date beyond August 9, 2018. On July 30, 2018, for reasons also unexplained, the clerk's office sent notices to the parties that motions were now to be heard on August 9th and the trial was rescheduled to August 28, 2018. Then, on August 9th, the State moved to postpone the motions hearing due to the unavailability of a police officer who was scheduled to testify in an adjacent courtroom. Trial was continued again. Without addressing the constitutionality of the length of the delay, we reiterate that Mr. Frisby's trial did not take place until November 20, 2018.

We note that at the August 9th hearing, through counsel, Mr. Frisby objected to the State's postponement request. Mr. Frisby also directly addressed the court, expressing his frustration that the State, "for the last eight months, they've been prepping for trial. And they had ample amount of time to - - to have the witnesses on call to be here today." "I - - I object to it. They're in violation of my *Hicks* date with no good cause shown as to why they're pushing it past my *Hicks* date."

To be sure, we realize that "[o]nce a postponement beyond the 180-day deadline is ordered in accordance with [C.P. § 6-103] and [Rule 4-271] (or upon the defendant's motion or with his express consent), it would not further this purpose to utilize the dismissal sanction for subsequent violations of the statute and rule." *Frazier*, 298 Md. at 428. But this fact cannot obscure the threshold question of whether the administrative judge or their designee, as required by C.P. § 6-103 and Rule 4-271, sanctioned the May 11th postponement.

Because we cannot resolve this issue with the information contained in this record, we remand to the circuit court for a further evidentiary hearing concerning the postponement of the trial date from July 12th to August 9th. If, after a hearing, the trial court finds that the postponement that occurred on May 11, 2018 was in violation of C.P. § 6-103 and Rule 4-271, the case should be dismissed. If, however, the trial court finds that this postponement complied with C.P. § 6-103 and Rule 4-271, the case should be transferred to this Court so that we may consider the effect of the length of the delay, as well as addressing the other issues raised.

CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL OTHER ISSUES RAISED IN THIS APPEAL ARE RESERVED. WASHINGTON COUNTY TO PAY THE COSTS.