

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR11-443

JOHN BRODY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered NOVEMBER 2, 2011

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[NO. CR10-325]

HONORABLE PHILLIP T.
WHITEAKER, JUDGE

AFFIRMED

CLIFF HOOFFMAN, Judge

Appellant John Brody appeals the denial of his motion to dismiss the charge against him based on violation of his speedy-trial rights. He argues that the trial court erred in charging a continuance to him. We find no error and affirm.

Brody was arrested on May 12, 2008, and charged with careless and prohibited driving, driving left of center, driving while intoxicated, and refusing to submit to a chemical test. Brody was convicted of all of the charges by the Ward District Court on September 7, 2010. On September 21, 2010, Brody appealed his DWI conviction to the Lonoke County Circuit Court.

On December 8, 2010, Brody filed a motion to dismiss based on violation of his speedy-trial rights. He disputed 147 days charged to him as a result of a continuance from January 27, 2009, to June 23, 2009, which he claimed he did not request. At a hearing on the motion, Pam Glover, chief court clerk for the Ward District Court, testified regarding



records kept in Brody's district court case. Glover identified a certified copy of the court docket, which she said showed that a motion for a continuance was made by the defense on January 27, 2009. Glover stated that the attorney made the motion orally in court. Glover testified that it was the practice of her and the judge to make notations on their dockets in court at the time motions were made, and after court, Glover would enter the notations into the computer. Glover identified a copy of her docket from January 27, 2009, on which she had made such a handwritten notation. She testified that the notation indicated that there was a motion by the defense, and trial was set for June 23. She testified that she wrote this in court at the time it happened. Glover also identified the judge's copy of the January 27 court docket, on which she had written "judge." Glover testified that this docket sheet as well indicated that trial was re-scheduled for June 23, 2009, per the defense. She said that this notation was made in court at the time the motion was made. Lastly, Glover identified a copy of court slips that are given to the defendant upon receiving a new court date. She testified that the slip stating that trial was set for June 23, 2009, should have stated which party asked for a continuance but it did not.

Hubert Alexander, Brody's former attorney, testified that he did not ask for the continuance on January 27, 2009, and that he had never received a continuance as long as six months. He testified that, at the time, he told Brody not to worry because the continuance got them past speedy trial. Alexander acknowledged that both he and the court clerk could not be right, but he claimed that he would not be testifying if he thought he had continued the case for six months. He testified that the court slip given to Brody reflecting



that court was re-scheduled for June 23 did not state that the continuance was granted upon the request of the defense. Brody testified that the defense was ready for trial on January 27 and that he did not recall what happened on that date for trial to be re-scheduled other than the fact that Alexander told him “don’t worry; speedy trial is running.”

The trial court denied Brody’s motion to dismiss, and Brody entered a conditional plea pursuant to Arkansas Rule of Criminal Procedure 24.3 to the charge of driving while intoxicated. Brody now appeals the denial of his motion to dismiss.

Under Rule 28.1 of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial within twelve months unless there are periods of delay that are excluded under Rule 28.3. Ark. R. Crim. P. 28.1(c) (2011). If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 30.1 (2011). Once a defendant establishes a prima facie case of a speedy-trial violation, i.e., that his or her trial took place outside of the speedy-trial period, the State bears the burden of showing that the delay was the result of the defendant’s conduct or was otherwise justified. *Branning v. State*, 371 Ark. 433, 267 S.W.3d 599 (2007). Brody was arrested on May 12, 2008, and he was convicted by the district court on September 7, 2010. The State concedes that Brody made a prima facie showing of a speedy-trial violation and that the burden shifted to the State to show that the delay was the result of the defendant’s conduct or was otherwise justified.

On appeal, we conduct a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules. *Branning v. State*, 371 Ark. 433, 267 S.W.3d



599 (2007). Brody argues that the period from January 27, 2009, to June 23, 2009, should not be excluded from the speedy-trial calculation because the court slip given to him did not reflect which party requested the continuance or why the continuance was granted. He argues that the paper was signed by a deputy clerk as opposed to the chief clerk and that the chief clerk admitted that this record did not reflect her recollection that the continuance was granted at the request of the defendant. Brody also argues that the State failed to call the district court judge, city prosecuting attorney, or deputy clerk to testify when all of them should have had some recollection as to what transpired. Brody argues that there should be a presumption that their testimony would have been adverse to the State.

Periods excluded in computing the time for trial include periods of delay resulting from a continuance granted at the request of the defendant or his counsel. Ark. R. Crim. P. 28.3(c) (2011). As the State notes, Brody has failed to consider the evidence that the certified copy of the court docket, as well as the clerk's and judge's docket copies, reflect that the defense moved for a continuance on January 27, 2009. Excluded periods should be set forth by the court in a written order or docket entry. Ark. R. Crim. P. 28.3. Furthermore, where a case is delayed by the accused and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Rule 28.3. *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002). Because the continuance granted at the request of the defendant was reflected both in a docket entry and in records made at the time it occurred, the time period was properly excluded. Thus, the circuit court correctly concluded that Brody's right to a speedy trial was not violated, and we affirm.

Affirmed.

PITTMAN and ABRAMSON, JJ., agree.



Cite as 2011 Ark. App. 667

Johnson Law Firm, by: *Jon Johnson*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Ashley Argo Priest*, Ass't Att'y Gen., for appellee.