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ARKANSAS COURT OF APPEALS

DIVISIONS II & III
No. CR-22-778

LLOYD BARBER, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered February 21, 2024 APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT [NO. 62CR-18-482] HONORABLE E. DION WILSON, JUDGE AFFIRMED

N. MARK KLAPPENBACH, Judge

Appellant, Lloyd Barber, Jr., appeals his convictions for second-degree battery and third-degree endangering the welfare of a minor. His sole argument on appeal is that his right to a speedy trial was denied. We disagree with his argument and affirm.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. Our supreme court adopted Arkansas Rule of Criminal Procedure 28 for the purpose of enforcing the constitutional right to a speedy trial. *Parker v. State*, 2023 Ark. 41, 660 S.W.3d 815. Rule 28.1 establishes a twelve-month limitation period for trying a defendant. Ark. R. Crim. P. 28.1 (2023).

The time for trial begins to run on the date of the defendant's arrest or the filing of the information, whichever occurs first. Ark. R. Crim. P. 28.2(a). It continues to run

uninterrupted except during any applicable "excluded periods" set forth in Rule 28.3. Ark. R. Crim. P. 28.1. The filing of a speedy-trial motion tolls the running of the time for a speedy trial under our rules. *Barefield v. State*, 2021 Ark. App. 151. A delay of more than twelve months between the triggering date and the date of trial constitutes a prima facie violation of the rule. *Ray v. State*, 2023 Ark. App. 515, 678 S.W.3d 882. When a defendant demonstrates a prima facie violation, the burden shifts to the State to show that the delay was the result of the defendant's conduct or was otherwise justified. *Id.* A defendant who is not brought to trial in a timely manner is entitled to dismissal of the charges with an absolute bar to prosecution. Ark. R. Crim. P. 30.1. The general rule is that a contemporaneous objection to an excluded period is not necessary to preserve the argument in a subsequent speedy-trial motion if there was no hearing in which the excluded period was discussed in the presence of the defendant or his counsel. *Jacobs v. State*, 2023 Ark. App. 554, __ S.W.3d __.

Periods excluded from speedy-trial computation "shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary" in Rule 28. Ark. R. Crim. P. 28.3. On appeal, we conduct a de novo review to determine whether specific periods of time are excludable. *Ray*, *supra*.

Barber was arrested on November 2, 2018, and on May 19, 2022, Barber filed a motion to dismiss his case due to lack of a speedy trial.[1] Because more than three years had passed between his arrest and his motion to dismiss (1,294 days), this constituted a prima facie violation of Barber's right to a speedy trial.

At the hearing on appellant's motion to dismiss, the circuit court noted that both parties agreed that 348 days counted against the State in calculating speedy-trial dates.[2] The circuit court focused its ruling on the periods of April 21 to July 13, 2020, and July 14 to September 1, 2020. If either period counted toward the speedy-trial calculation, then Barber's right to a speedy-trial was violated.[3]

Barber asserted that the delay between April and July could not be charged to the defense because that time ran with no action on the docket or by order. Trial had been set for April 21, 2020, and it simply did not happen. Barber asserted that the continuance order signed on July 14 and filed of record on July 15 was signed only by the circuit judge and the prosecuting attorney without notice to Barber and without a hearing.

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[1]Following the denial of his motion to dismiss for a speedy-trial violation, Barber was tried by a jury on May 25, 2022, found guilty, and sentenced accordingly.

[2]On appeal, the parties disagree on that calculation, a few days in either direction, but those differences would not impact whether the speedy-trial rule was violated.

[3]Our de novo review establishes that between the time of Barber's arrest on November 2, 2018, until April 21, 2020, there were 82 days that counted toward speedy-trial calculations. Our de novo review also establishes that between September 1, 2020, and May 19, 2022, when Barber filed his motion to dismiss on speedy-trial grounds, there were 261 days that counted toward speedy trial, thus totaling 343 days against the State. Again, if either of the time periods disputed on appeal between April 21 and September 1, 2020. are chargeable to the State, then Barber's right to a speedy trial were violated.

The circuit court found that both periods were excludable for speedy-trial purposes because the court was dealing with the COVID-19 pandemic and was guided by the supreme court's per curiam orders regarding the pandemic. As to the first period of delay, the circuit court reviewed the per curiam orders and noted that summonses for jury trial were prohibited through June 30, 2020, so that period was excluded because the jury trial set in April 2020 could not occur. The circuit court then counted July 1 through July 13, counting thirteen days toward the State's total, which did not exceed the one-year limit. The circuit court concluded that the written order explaining the continuance from July 14 through September 1, 2020, as due to the COVID-19 pandemic was presumptively good cause and would not count toward the speedy-trial calculation. This appeal followed.

The appellate court conducts a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules. *Parker v. State*, 2023 Ark. 41, 660 S.W.3d 815. The proper administration of the law cannot be left merely to the stipulation of the parties. *See Burrell v. State*, 65 Ark. App. 272, 986 S.W.2d 141 (1999) (rejecting State's stipulation of speedy-trial violation and instead affirming after de novo review on appeal). "Other periods of delay for good cause" provided by Rule 28.3(h) means something unique from the specific requirements that apply to "docket congestion" provided by Rule 28.3(b), which requires a contemporaneously written order or docket entry and explanation. *See Parker*, *supra*.

Our supreme court issued per curiam orders in March and April 2020 suspending in-person proceedings, including jury trials, and declared that the public-health emergency was

an extraordinary circumstance that would presumptively constitute good cause and be excluded days for speedy-trial purposes. *See In re Response to the COVID-19 Pandemic*, 2020 Ark. 116 (per curiam); *In re Response to the COVID-19 Pandemic*, 2020 Ark. 132 (per curiam). More specifically applicable to the present appeal, on April 3, 2020, the supreme court announced that "[a]ny summonses for persons to participate in jury panels are hereby suspended through Tuesday, June 30, 2020." 2020 Ark. 132, at 2. In June 2020, the supreme court issued another per curiam, stating that the suspension of jury trials would end on June 30, 2020, and jury summonses could be issued for jury service that began on or after July 1, 2020. This per curiam, however, did not mandate the resumption of in-person proceedings but rather left it to the individual circuit court judges to decide whether it would be safe to resume in-person proceedings. The per curiam noted that "jury trials in some counties may resume in July, whereas most parts of Arkansas might not resume jury trials until September or later," and that "for criminal trials, any delay for speedy-trial purposes due to precautions against the COVID-19 pandemic shall presumptively constitute good cause[.]" *See In re Response to COVID-19 Pandemic*, 2020 Ark. 249, at 2-3.

This case was being prosecuted in the midst of the COVID-19 pandemic. Before and after the COVID-19 pandemic, if a defendant showed a prima facie speedy-trial violation, then the State had the burden to show that the delay was due to good cause or attributable to the defendant.[4] The supreme court's directives in the successive per curiams issued in

[4]On March 30, 2023, the supreme court issued a per curiam stating that "[d]ue to the waning of the pandemic, the court finds that the presumption instituted in favor of the State

2000 created a presumption that, if delay was due to precautions against COVID-19, the delay was for "good cause" and shifted the burden to the defendant to negate the presumption.

In light of these supreme court per curiams, the originally set April 21, 2020 trial date could not happen because summonses for jury panel duty were suspended, and the per curiam orders provided presumptively good cause for the case to be continued to at least July 1, 2020. The dates of April 21 through June 30, 2020 were, thus, not chargeable to the State. Thereafter, no action was taken on the docket until July 14, 2020. Assuming those thirteen days should count against the State for speedy trial purposes, appellant was still on track to be tried within the one-year requirement.

On July 14, 2020 the circuit court signed an order to continue the case "in light of the global pandemic" as recognized in March 2020 as state and national emergency by our state governor and the United States President.[5] The circuit court recited that it would be unsafe to the parties, court staff, and citizens to hold court, and it found good cause to continue the case from July 13 until September 1, 2020, and toll the time for speedy-trial

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for periods of delay due to precautions against COVID-19 is no longer necessary. Effective immediately, future delays due to COVID-19 precautions will no longer be presumed 'good cause.' As was required before the pandemic, when a defendant presents a prima facie showing of a speedy-trial violation, the State will bear the burden of proving whether any delay constitutes 'good cause' without the benefit of any presumption." *In re Response to COVID-19 Pandemic*, 2023 Ark. 55, at 2.

[5]The circuit judge who signed this order was Judge Christopher Morledge, signing for Judge E. Dion Wison, who was in quarantine due to exposure to COVID-19. For reasons unrelated to this litigation, defense counsel was not permitted to appear or conduct a trial before Judge Morledge.

purposes. This order was filed on July 15, 2020. Notably, the circuit court that was to handle this jury trial was unable to conduct trial in July 2020 due to the circuit judge's exposure to COVID-19. The prosecuting attorney signed this order, but the defense attorney's signature line was blank.

Barber argued that this order was entered without any motion for a continuance and without any notice to him so he was deprived an opportunity to object, virtually or in person. Rule 28.3 does not require the court to make the determination of good cause for delay until a speedy-trial allegation is made to the court, and at the hearing on Barber's motion, Barber was provided ample opportunity to set forth his objections, and the circuit court set forth its reasoning from the bench and in an order why the time periods were excluded for good cause due to the COVID-19 pandemic.[6] We find no reversible error.

Affirmed.

GRUBER, BARRETT, THYER, and BROWN, JJ., agree.

MURPHY, J., dissents.

MIKE MURPHY, Judge, dissenting.

"*The courts of the State of Arkansas shall remain open.*"[1]

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[6]Notably, there were several continuances between September 1, 2020, and May 19, 2022 (when the speedy-trial-violation motion was filed). Several continuances were requested by defense counsel and unopposed, some were specifically "continued due to COVID," and one was granted because defense counsel tested positive for COVID-19.

[1]*In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 1 (per curiam) (emphasis added).

I disagree with my colleagues that the seventy-day period of time between April 21 and June 30 was properly excluded; I would hold that Barber's right to a speedy trial was violated. The majority disposes of this time period, reasoning that "the per curiam orders provided good cause for the case to be continued to at least July 1, 2020. The dates of April 21 through June 30, 2020 were, thus, not chargeable to the State."

Respectfully, the per curiam orders did not summarily designate whole blocks of time as automatically excludable, which is what today's holding now establishes. Rather, it suspended certain in-person proceedings and further provided that "[f]or criminal trials, in light of the public health emergency, any delay for speedy-trial purposes during this time shall be deemed to presumptively constitute good cause *under* Arkansas Rule of Criminal Procedure 28.3(h)." *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 1 (emphasis added). This directs that we are to continue analyzing speedy-trial cases within our current framework, and in the event good cause—as it is defined under Rule 28—is at issue, we may readily incorporate COVID-19 delays into that analysis.

Arkansas Rule of Criminal Procedure 28.1 provides that

> [a]ny defendant charged with an offense and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

Rule 28.3 requires that excluded periods "shall" be set forth by the court in a written order or docket entry. The word shall means mandatory. *Moody v. Ark. Cnty. Cir. Ct., S. Dist.*, 350 Ark. 176, 185–86, 85 S.W.3d 534, 540 (2002). Under the rule, if the delay is for docket

congestion, an accompanying order that addresses specific enumerated issues must be entered at the time the continuance is granted. Ark. R. Crim. P 28.3(b). Any other excluded periods under the rule are allowed to be documented with a little more flexibility, but they still require the reason for the delay to be "memorialized in the proceedings at the time of the occurrence." *Id.*; *see, e.g.*, *Yarbrough v. State*, 370 Ark. 31, 35, 257 S.W.3d 50, 54 (2007) (docket entries sufficient to establish delay was attributable to defendant); *Romes v. State*, 356 Ark. 26, 37, 144 S.W.3d 750, 757 (2004) (transcript from hearing sufficient to establish excludability of delayed period); *Jones v. State*, 347 Ark. 455, 460–61, 65 S.W.3d 402, 405 (2002) (a filed bill of exceptions showing where the State moved to dismiss the charges demonstrated excludability under Rule 28.3). But in all these cases, there was something in the record explaining the delay. Here? There are no docket entries, no transcripts, no motions. Why then should we afford the State a "good cause" analysis when there is nothing memorialized to analyze? Until today, this court and our supreme court have consistently held that where the record is silent regarding a period of delay, the delay is attributable to the State. *See, e.g.*, *Parker v. State*, 2023 Ark. 41, at 14, 660 S.W.3d 815, 825; *Jacobs v. State*, 2023 Ark. App. 554, at 17, ___ S.W.3d ___, ___.

The holding today now establishes that the hearing on speedy trial is an acceptable time to first memorialize a delay. This holding misses the nuance between memorializing a delay and determining whether a (previously memorialized) delay was for good cause.

The introductory paragraph of 28.3 provides that a court is not required to make a determination on excluded periods until the defendant has moved to enforce his right to a

speedy trial. The clause is not an invitation for the State to reverse-engineer good cause for periods of time where a record is silent well after the fact. It is, instead, a tool of judicial efficiency, instructing parties to not look for trouble: the record could be silent about a period of time and the State still undisputedly bring a defendant to trial in a year.

A de novo review of Barber's case demonstrates several gaps of unaccounted-for time on the record; in fact, there were six periods, and the State concedes five of those periods in their entirety. At the hearing on Barber's motion for speedy trial, the State justified the April 21 to July 15 gap by explaining that they could not bring the defendant to trial on April 21 and "the next available appearance was July the 15." The prosecutor stated,

> So according to the Arkansas Supreme Court, we were prohibited from coming to court on that April the 21st day of 2020, which explains the lack of an entry. And the next available appearance was July the 15. Your honor, because . . . the case could not have been brought to trial during the term of court on April the 21, 2020. So, Judge, that shows that the time between April the 21 , 2020, and July the 15 , 2020, the state could not because by order of the Arkansas Supreme Court bring this defendant to trial. That time is excludable.

If, however, on April 21, the "next available appearance" was in fact on July 15, then there should have been some record made to that effect. Who came up with the July 15 date? And why was there no entry to that effect? Because Barber was immediately prejudiced: neither he nor his counsel was present at that "next available appearance" on July 15, and an order—signed by the court and the prosecutor—was entered continuing Barber's case

without his knowledge, without his input, and without giving him any opportunity to object.[2]

As a general rule, we are bound to follow prior caselaw under the doctrine of stare decisis, a policy designed to lend predictability and stability to the law. Indeed, it is well settled that precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. *Low v. Ins. Co. of N. Am.*, 364 Ark. 427, 431, 220 S.W.3d 670, 673 (2005) (internal citations omitted). Today's holding does not read the COVID-19 per curiam order in tandem with our existing caselaw and rules, and I am troubled by the precedent it creates.

Barber was set to go to trial on April 21, 2020. The courts were still open. And judges were charged with the responsibility that they ensured "that core constitutional functions and rights are protected." *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 1. At an absolute minimum, on April 21, Barber was owed the decency of someone opening his case file, acknowledging that his trial was delayed due to circumstances beyond anyone's control, rescheduling that date, and making a record of it so that Barber and his attorney would know what was happening to him and be available for the next court date.

[2]In *Parker v. State* our supreme court was very critical of an in-chambers discussion between the court and the prosecutor (there was a disagreement if defense counsel was also present) after which a sua sponte continuance was entered. The State attempted to argue that the continuance was due to, among other reasons, good cause. Our supreme court rejected the argument and further suggested it fringed on a due-process violation for the defendant to be unrepresented at such a critical stage in the proceeding. 2023 Ark. 41, at 17–19, 660 S.W.3d 815, 827–28.

I dissent.

Robert M. "Robby" Golden, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.