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ARKANSAS COURT OF APPEALS
DIVISION III
No. CR-23-430

LARRY WILSON		Opinion Delivered March 13, 2024
	APPELLANT	APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. 40CR-20-26]
V.		
STATE OF ARKANSAS		HONORABLE JODI RAINES DENNIS, JUDGE
	APPELLEE	AFFIRMED

RITA W. GRUBER, Judge

Larry Wilson was served with an arrest warrant on February 18, 2020, for second-degree battery and possession of a weapon by an incarcerated person. The charges arose from the stabbing of a corrections officer in the Arkansas Division of Correction (ADC) where Wilson was incarcerated and the discovery of a homemade weapon in the ensuing search of his prison cell. On April 12, 2023, nearly thirty-eight months after the arrest warrant had been served, he filed a motion in the Lincoln County Circuit Court to dismiss for violation of his right to a speedy trial. The circuit court denied the motion.

Wilson subsequently entered a conditional plea of guilty to possession of a weapon by an incarcerated person, reserving his right to appeal the denial of his motion to dismiss based on speedy-trial violation.¹ He was found guilty and was sentenced to three years'

¹The battery charge was nolle prossed.

imprisonment. He now appeals, contending that the circuit court erred in denying his motion to dismiss for violation of his right to speedy trial.

The appellate court conducts a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules. *Branning v. State*, 371 Ark. 433, 437, 267 S.W. 599, 601; *Jacobs v. State*, 2023 Ark. App. 554, at 13, 682 S.W.3d 15, 23. We note at the outset of our analysis that the periods of time that delayed Wilson’s trial occurred while the COVID-19 pandemic protocols were present in our state.

The time for speedy-trial calculation commences on the date of arrest or service of summons, Ark. R. Crim. P. 28.2(a), and the filing of a speedy-trial motion tolls the speedy-trial clock. *Smith v. State*, 2021 Ark. App. 253, 624 S.W.3d 718. A defendant charged with an offense and incarcerated in prison in Arkansas pursuant to conviction of another offense, as Wilson was, is entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months from the date of arrest or service of summons, excluding only such periods of necessary delay as are authorized in Rule 28.3. Ark. R. Crim. P. 28.1(b); Ark. R. Crim. P. 28.2(a).

Periods of time that are excluded from computing the speedy-trial period under Rule 28.3 include (a) periods of delay resulting from other proceedings concerning the defendant, such as hearings on pretrial motions; (b) delays resulting from a continuance attributable to congestion of the trial docket if certain conditions are met; (c) delays due to continuances granted at the request of the defendant or defendant’s counsel; and (h) “other periods of delay for good cause.” Ark. R. Crim. P. 28.3(a), (b), (c), and (h).

Prior to the COVID-19 pandemic, the State generally bore the burden of proving “good cause” to exclude a period of delay under Rule 28.3(h) if the defendant made a prima facie showing of a speedy-trial violation. *In re Response to the COVID-19 pandemic*, 2023 Ark. 55 (per curiam); *see also Parker v. State*, 2023 Ark. 41, at 12, 660 S.W.3d 815, 824 (once a defendant establishes that his trial took place outside the speedy-trial period, the State bears the burden of showing that the delay was the result of the defendant’s conduct or otherwise justified); *Romes v. State*, 356 Ark. 26, 36, 144 S.W.3d 750, (2004) (a prima facie case for a speedy-trial violation is made when there is a period of delay beyond twelve months from the date of the charge).

During the pandemic, the Arkansas Supreme Court issued a series of per curiam orders addressing the burden of proving “good cause” delays for speedy-trial purposes. Pertinent to the present case, precautionary measures were implemented to combat the spread of the disease to the public and employees of the judiciary in a per curiam delivered on March 17, 2020. Our supreme court directed that , with regard to 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 3 (per curiam) (emphasis added).² It is incumbent on the defendant to present proof negating the presumption that

²By using this language, our supreme court appears to view subsection Rule 28.3(h) as the operative provision for “any delay” addressing the judiciary’s COVID-19 response with regard to speedy trial.

“good cause” existed to cast sufficient doubt on the presumption. *Quackenbush v. State*, 2023 Ark. App. 58, at 26–27, 660 S.W.3d 889, 903–04 (Thyer, J., concurring); see also *In re Response to the COVID-19 Pandemic*, 2023 Ark. 55.

The “good cause” presumption remained in place for three years while our supreme court guided the judiciary through the COVID-19 pandemic. See *id.* at 1; *In re Response to the COVID-19 Pandemic—Resumption of Jury Trials*, 2021 Ark. 72, at 2, 619 S.W.3d 397 (per curiam); *In re Response to the COVID-19 Pandemic*, 2020 Ark. 384, at 3 (per curiam); *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 3. Particularly relevant to Wilson’s appeal is the per curiam that was delivered on March 30, 2023, announcing new directives due to the waning pandemic in Arkansas and specifying that the State no longer would benefit from the “good cause” presumption. That per curiam states:

The presumption instituted in favor of the State 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 the COVID-19 Pandemic, 2023 Ark. 55, at 2 (per curiam); *Barber v. State*, 2024 Ark. App. 121, at 5 n.4, ___ S.W.3d ___, ___ n.4.

In the present case, 1149 days elapsed from Wilson’s February 18, 2020 arrest until his counsel filed the motion to dismiss for violation of right to a speedy trial on April 12, 2023. Because his trial was not held within twelve months, a prima facie case for speedy-trial violation was established.

We must determine if the periods of delay for Wilson’s trial were excludable under our speedy-trial rules. Important to our analysis, all those periods occurred while the “good cause” presumption was in effect. The appellate courts are not constrained by the circuit court’s rationale on speedy-trial issues and may go to the record for reasons to affirm. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); *Galvin v. State*, 2021 Ark. App. 121, at 3, 618 S.W.3d 475, 477.³

I. 35 Days from March 10 to April 14, 2020

Wilson appeared before the circuit court at his initial arraignment on March 10, 2020, and requested time to obtain private counsel. An order entered on that date reflects that the circuit court set a hearing on the defendant’s request and continued the matter until April 14, 2020, excluding the time calculated for speedy trial.

This period of time was excludable under Arkansas Rule of Criminal Procedure because the continuance was granted at the defendant’s request. Ark. Rule Crim. P. 28.3(c). Wilson does not challenge the court’s order on appeal.

II. 28 Days from April 14 to May 12, 2020

In a March 26, 2020 amended order for video court appearance, the circuit court ordered the ADC to transport Wilson to its designated video communication site on May

³The circuit court’s decision to deny Wilson’s motion was based on the pleadings in the case. We have not found in the record that Wilson requested a hearing, attempted to address why the presumption of good cause for speedy trial was inapplicable, or otherwise mentioned the COVID-19 per curiam opinions.

12, 2020, for a plea and arraignment hearing. On appeal, Wilson complains that this order was silent as to speedy trial.

Wilson's argument misses the point of the "good cause" presumption of excludability in effect during this time. The State was entitled to rely on the presumption that this period of delay constituted "good cause under Arkansas Rule of Criminal Procedure 28.3(h)," *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 3, and Wilson did not present proof to negate the presumption. See *In re Response to the COVID-19 Pandemic*, 2023 Ark. 55. This time period is therefore excludable for good cause. Additionally, because this period overlaps with the excluded period of March 10 to April 14, 2020 (Ark. R. Crim. P.. 28.3(c) exclusion), the twenty-seven days from April 14 to May 12, 2020, constitute a separate excluded period.

III. 168 Days from May 12 to October 27, 2020

On May 12, 2020, the circuit court entered an order setting a jury trial for October 27, 2020. Wilson appeared on that date for a hearing via Webex. Because no private counsel had been hired, the court appointed a public defender to meet with Wilson and prepare his defense. Wilson complains that the order is silent as to speedy trial. As in the previous excluded period, the defense did not come forward with proof to negate the good-cause presumption that inured to the State's benefit. Thus, this period is also excluded for good cause.⁴

We note that a portion of this time period would also be excluded because of a general suspension of in-person proceedings from March 18 to June 30, 2020, in our appellate,

⁴The circuit court noted at the hearing that the Arkansas Supreme Court had not yet given permission to start having jury trials. Wilson replied, "Well, take your time."

circuit, and district courts. *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 1-2. In accord, on May 12, 2020, the circuit court entered an order setting a jury trial for October 27, 2020.

IV. 238 Days from October 27, 2020, to June 22, 2021

In an order entered on October 27, the circuit court noted the global pandemic and the significant measures taken at the federal and state levels to halt the spread of the COVID-19 virus. The order included these findings and conclusions:

Accordingly, the Court finds that it would be unsafe to the parties, court staff, and the citizens of Arkansas to hold court on the currently scheduled date. Due to the ongoing public health crisis, the Court finds GOOD CAUSE to continue the present setting and toll speedy trial until the next available court date. The Court further finds that this delay is necessary to ensure public safety and will not result in prejudice to the Defendant.

IT IS THEREFORE ORDERED AND ADJUDGED that the jury trial is continued from October 27, 2020, to June 22, 2021, at 8:30 a.m. Speedy trial and the nine-month rule, if applicable, are tolled from the date of this order until the next court date, pursuant to Arkansas Rule of Criminal Procedure 28.3(h).

Wilson does not challenge this ruling on appeal. After conducting our de novo review, we agree with the circuit court that the period of time from October 27, 2020, to June 22, 2021, is excluded as good cause under Rule 28.3(h) and per curiam orders.

V. 217 Days from June 22, 2021, to January 25, 2022

The circuit court entered a June 22, 2021 order continuing the jury trial scheduled for that date and rescheduling it. The order included the following explanation:

The period of delay is a result of the jury trial scheduled in *State of Arkansas v. Corey Steward*, 40CR-20-27, and there is no prejudice to the defendant due to this delay. Pursuant to Arkansas Rule of Criminal Procedure 28.3, the period of delay from June 22, 2021, until January 25, 2022, is excluded from the time calculated for speedy trial.

While the State and defense counsel appeared briefly at an in-chambers proceeding on the date, the need for a continuance in this case was not discussed on the record.

In contrast to periods of time excluded from speedy-trial calculations for good cause under Rule 28.3(h), a period of delay for docket congestion is excluded for speedy-trial calculations if the circuit court enters a written order or docket entry at the time of the continuance. Ark. R. Crim. P. 28.3(b). The circuit court must (1) explain with particularity the reasons the trial docket does not permit trial on the date originally scheduled, (2) determine that the delay will not prejudice the defendant, and (3) schedule the trial on the next available date permitted by the trial docket. *Id.*

Wilson argues that the order was insufficient to toll time because it failed to show how he was not prejudiced by the continuance and allegedly did not schedule his trial on the next available date on the docket. We reject his argument.

Rule 28.3(b)(2) does not require, as Wilson argues, that the court explain *how* he was not prejudiced.⁵ Nor does Rule 28.3(b)(3) require, as Wilson argues, that the circuit court include the words “next available date permitted by the trial docket” in setting such a date. Subsection 3 simply requires the circuit court to schedule the trial on the next available date as permitted by the trial docket. Nothing more, nothing less.

⁵At all times relevant to this case, Wilson was incarcerated for unrelated criminal convictions. The thirty-six-month sentence he received here was to be served consecutive to those unrelated convictions. As a result, it is difficult to articulate what possible prejudice would result to him for a continuance, even one of this length.

We agree with the State—as set forth in its response to Wilson’s motion to dismiss for speedy-trial violations—that neither *Parker*, 2023 Ark. 41, nor *Moody v. State*, 350 Ark. 176, 85 S.W.3d 534 (2002), is applicable here. In *Parker*, the circuit court failed to reschedule the trial to a definite date. The *Moody* court addressed the notation “older cases disposed of” as an insufficient explanation of why the trial was continued, not as a failure to determine the next available date on the trial docket. 350 Ark. at 185, 85 S.W.3d at 539–40.

Here, the circuit court’s June 22 order setting forth the period of continuance met each requirement. It explained the particular reason the trial had to be continued—the trial of a separate case, which the circuit court provided by case heading and number; determined that the delay would not prejudice Wilson; and rescheduled the trial to a date certain. This was all the circuit court was required to do under the rule; therefore, this is an excludable period.

VI. 182 Days from January 25 to July 26, 2022

The circuit court’s order filed on January 25, 2022, states, “Due to the rising number of Covid-19 cases, the Arkansas Department of Correction is on lockdown until January 31, 2022. The Jury trial scheduled for January 25, 2022, is rescheduled for July 26, 2022.” It further states that pursuant to Arkansas Rule of Criminal Procedure 28.3, the period of delay from January 25 until July 26, 2022, is excluded from the time calculated for speedy trial.

Wilson asserts that the order was insufficient to toll speedy trial because it did not identify a specific rule or basis for tolling speedy trial or contain a finding that ADC’s

lockdown actually prevented the State from bringing Wilson to trial.⁶ Again, at the time of this order, delays due to precautions against the COVID-19 pandemic “presumptively constituted good cause under 28.3(h).” 2023 Ark. 55, at 1. The State benefited from this presumption, and the defense did not come forward with proof to rebut the presumption. The period of time from January 25 to July 26, 2022, is therefore excluded for purposes of speedy trial.

VII. *238 Days from July 26, 2022, to March 21, 2023*

A July 19, 2022 motion for continuance filed by the office of the public defender states that counsel had been unable to meet with Wilson due to an increased caseload and scheduling conflicts at the ADC. The circuit court granted the motion for continuance by an order entered on July 20, 2022, and rescheduled the July 26, 2022 jury trial for March 21, 2023. An amended order was entered less than twenty minutes later, again granting the defendant’s motion by rescheduling the July 26, 2022 trial for April 25, 2023. Each order excluded the periods of delay from the time calculated for speedy trial under Rule 28.3.

Wilson argues that neither the docket nor the record notes the basis for continuing the jury trial from March 21 to April 25, 2023, minutes after the March date was set. The State argues that the second order—entered less than twenty minutes after the first—was merely the correction of a clerical error. While the State’s assertion that the second order

⁶We note that the circuit court’s April 24, 2023 order denying Wilson’s motion to dismiss included this finding: “The days from January 25, 2022 to July 26, 2022 (182 days) should be excluded as provided by Court Order due to an ADC lockdown due to the COVID-19 pandemic.” There was no reference to an end of the lockdown on January 31.

was entered to correct a clerical error in the trial dates may be correct, we need not determine that here, because the continuance was granted at Wilson's request. As a result, the 224 days from July 26, 2022, until March 21, 2023 remain an excluded period from speedy-trial calculations. Ark. R. Crim. P. 28.3(c).

VIII. *Conclusion*

In summary, 1,149 days elapsed between the date of Wilson's arrest and the date on which Wilson's counsel filed his motion for dismissal due to violation of his right to a speedy trial. The periods of excluded time that we have set forth totaled 1,106 days. Thus, only 43 days had run for speedy-trial purposes. Accordingly, we affirm the circuit court's denial of Wilson's motion to dismiss on the basis of speedy-trial violations, as well as his conviction for possession of a weapon by an incarcerated person.

Affirmed.

THYER and BROWN, JJ., agree.

Lassiter & Cassinelli, by: Michael Kiel Kaier, for appellant.

Tim Griffin, Att'y Gen., by: Walker K. Hawkins, Ass't Att'y Gen., for appellee.