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CSA nixes prosecutors' bid to create new deadline

BY ADMIN

The state violated a defendant's speedy-trial rights by dismissing, then re-filing, the charges against him when prosecutors were unable to obtain a continuance, the Court of Special Appeals has held.

The decision affirmed Montgomery County Circuit Judge Michael D. Mason's dismissal of robbery and first- and second-degree assault charges against Wilbert Pelzie Price on the grounds that the state had violated the 180-day limit established by Hicks v. State.

Price was first indicted in May 2002, but the charges were nolle prossed when the administrative judge denied a postponement because, according to the opinion, the state had ordered the DNA tests too late and was unwilling to proceed without the results. Price was reindicted four months later.

Steven D. Kupferberg, Price's trial lawyer, called it "the most classic Hicks case I've ever had."

"The previous decisions had taken all the teeth from Hicks," Kupferberg said, "and therefore gave the prosecutor the opportunity to charge-dismiss, charge-dismiss unless it was absolutely clear that they were dismissing to get around the Hicks rule — which for obvious reasons, they're never going to admit."

However, in this case, the state's attempt to circumvent the 180-day rule was "so glaring and so obvious" that then-Montgomery County Circuit Administrative Judge Paul H. Weinstein, who denied the continuance, "was just beside himself," the lawyer said.

However, John McCarthy, deputy state's attorney for Montgomery County, said the case is the only instance of which he was aware that no continuance was granted to complete DNA testing.

"We're troubled by the decision because of the realities of getting DNA testing done," McCarthy said. "What we had here was a prosecutor who was trying to do thorough case preparation.

Nothing could be further from the truth [than] that there was an intention to circumvent the 180-day rule."

Everybody in the system knows there are delays — it's just the practical reality of getting all the material together and tested by overworked, understaffed units that must prioritize their work, he said.

"If your case hinges on scientific evidence and that evidence is not ready, your case is seriously flawed. The irony here, of course, is that there was scientifically neutral information being developed that could have exonerated this defendant," McCarthy said.

However, writing for the intermediate appellate court, Judge Arrie W. Davis noted that the "necessary effect of the nol pros" was to circumvent the statutory and rule time limits as well as the sanction that "the State be prohibited from introducing any witness or evidence at trial or hearing which relates in any way to the nondisclosure for failure to comply" with the motion to compel discovery.

"The 180-day period under Hicks began at the time of the filing of the initial indictment and the trial judge therefore did not err when he dismissed the case on November 27, 2002 — day 194," Davis wrote.

Kathryn Grill Graeff, chief of the attorney general's criminal appeals division, disagreed with the appellate panel's conclusion.

A substantial period of time remained between the dismissal and the expiration of the Hicks period in the initial case, Graeff said, and in such circumstances, the Hicks rule should start to run when the charges are refiled.

"We will review the court's decision carefully to see if we'll seek further review," she said.

Bradford C. Peabody, Price's appellate public defender, said he thought the state's problem came down to miscommunication between the police, the prosecutor and the lab.

Peabody said the case reminded him of Bill Murray's character in the film "Groundhog Day," made to repeat the same day over and over, trying to get it right.

"The prosecution kept telling the court the DNA testing was not done, but they didn't tell the lab when they needed the results — a costly mistake," Peabody said. ■