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The case of the not-so-speedy trial

BY ADMIN

Yesterday in Annapolis, the Court of Appeals addressed the question of whether the 180-day Hicks requirement was violated when the prosecutor nol prossed assault and robbery charges against a defendant due to the unavailability of DNA test results and circumvented an administrative judge's ruling on the day of trial denying the state's motion to continue.

Stephen D. Kupferberg, a former Prince George's County prosecutor and defense counsel for Wilbert Price at the trial level, calls the case 'a meltdown in response' by the state.

The rule, enunciated in the top court's 1979 case of Hicks v. State, is embodied in both Section 6-103 of the Criminal Procedure Article and Maryland Rule 4-271, both of which mandate a criminal defendant must face trial no later than 180 days after the first appearance of the defendant or the defendant's lawyer in court.

"The issue is the applicability of the Hicks rule where the state 'nol prosses' and recharges," Assistant Attorney General Mary Anne Ince told the court, adding that reindictment is perfectly acceptable for a prosecutor to do.

Not always, according to the Court of Special Appeals, which last October affirmed the Montgomery County Circuit Court's decision to dismiss the case against Wilbert Pelzie Price when 180 days had expired for violation of the Hicks rule.

While the 180-day period normally begins to run anew when the charges are nol prossed and the defendant is reindicted, the original time frame will stand where the purpose or necessary effect of the nol pross is to circumvent the Hicks rule.

And the judges seemed to think that may have been the case here — since a portion of the statute states that the case shall not be continued except for good cause shown by an administrative judge.

"There's more to the statute than just the 180 days," retired Judge John C. Eldridge, sitting in for Judge Lynne A. Battaglia, told Ince yesterday. "You are clearly circumventing the requirement that the administrative judge has to give you a postponement."

Bradford C. Peabody, who represented Price on appeal, agreed. "This goes to the very purpose of the rule," he said. ***The case***

Stephen D. Kupferberg, a former Prince George's County prosecutor and defense counsel for Price at the trial level, calls this latest Hicks case "a meltdown in response" by the state.

Price had been arrested and indicted in early May 2002 in connection with a purse-snatching where an 85-year-old woman had been punched in the face, causing her to bleed.

"The state had sent the detective to the Montgomery County Detention Center with a search warrant to take DNA samples from him," Kupferberg said. "They thought they would be able to match her DNA to him."

Since the state failed to supply Kupferberg with reports of experts consulted in connection with the DNA evidence taken from Price's hand, Kupferberg filed a motion to compel discovery in June. On July 29, Circuit Court Judge Debelius entered an order compelling the expert witness discovery, which provided that the state would be prohibited from producing evidence at trial if it failed to supply the defense with the evidence it needed within 10 days.

"Judge Debelius' order says if you didn't do it, you can't use it," Kupferberg said. "They did give us regular discovery, but no discovery as to expert DNA. [On] August 8, they asked for a continuance because the DNA samples had not been analyzed."

At an Aug. 12 status hearing, the same date as the scheduled trial, Administrative Judge Paul H. Weinstein denied the request for the continuance.

"He said, it's not even a poor excuse, it's a pitiful excuse," Kupferberg said. The state had failed to inform the crime lab of the trial date, Kupferberg said, and that "was disturbing to him."***The tool***

"We felt that [with] the absence of DNA — we believed that the victim's blood was on the robber, you had a guy who had five prior convictions — that it was not unreasonable to be asking for a continuance which was well within the 180-day period," said Montgomery County Deputy State's

Attorney Katherine Winfree. “Had Judge Weinstein granted our motion to continue, we could easily have complied with the 180 days. We were not trying to circumvent anything.”

Rather than proceed to trial without the DNA evidence, the prosecutor decided to withdraw the charges and to reindict Price five weeks later.

“Even after the reindictment, the case could have been scheduled within the 180-day period,” Winfree said. “What happens after indictment, [however], is that the clerk’s office spits out a series of dates by computer. We don’t have a lot of control over that.”

The denial of the state’s request meant that the prosecution had no choice but to nol pross the case and rebring it, she said.

But yesterday in oral arguments, the judges were concerned with the five-week delay. “They could have reindicted the next day,” Judge Alan M. Wilner pointed out.

“Nol pross is discretionary with the prosecution; the state can nol pross at any time,” Stephen R. Tully, former prosecutor and Baltimore defense lawyer, told The Daily Record. “It’s part of the responsibility of the prosecutor to use it appropriately.”

The state can nol pross if it feels that justice would be served or if they have insufficient evidence to prosecute the case, Tully said.

Judge Charles E. Moylan discussed the state’s use of the prosecutorial tool in the 2000 Court of Special Appeals case of Baker v. State — where he noted that where the state has nol prossed the charges and reindicts the defendant, the 180-day Hicks period for trial usually begins to run anew following the second prosecution.

“When earlier charges are nol prossed and new charges are subsequently refiled, the new charges have a life of their own. A new 180-day period begins with respect to them,” Moylan wrote. “The nol prossing of initial charges, therefore, is not an occasion for skepticism or suspicion. [I]t is a legitimate way of doing business.”

The exception, however, is the original 180-day period will be used if the purpose or necessary effect of the nol pross is to circumvent the time limit.

“There would be no 180-day rule if the state could [always] nol pross and recharge,” Tully said. “If you were on the 179th day and you nol prossed a case and you waited a week and recharged, you could get around the 180-day. The courts would never allow that.”

In the 1984 Court of Appeals case of Curley v. State, the prosecution entered a nol pross on day 180 and refiled the same charges months later. The court held that the 180-day "clock" should not run anew since the necessary effect of the maneuver was clearly to circumvent the time limit.***The rule***

Joseph P. Atkins, an assistant public defender in Montgomery County, adds that while the rule is related to the constitutional right to a speedy trial, it is a separate rule created by the court for its own administrative reasons.

"It's a presumption that criminal matters in the circuit court — the trial — should begin in 180 days to make sure the cases don't drag on forever," he said.

"For the public to have confidence, the system's got to move," says University of Baltimore law professor Byron L. Warnken. "Unlike the Sixth Amendment right to a speedy trial that is owned by the defendant, this is really owned by the system."

The Price defense filed a motion to dismiss in November 2002, when the original Hicks period expired, for violation of the rule. The court accordingly dismissed the second indictment, noting that while the state was not acting to get around the 180-day aspect of Rule 4-271 at the time of the nol pross (since there were 97 days left), it was trying to avoid the component of the Rule which states that the trial date shall not be continued unless good cause is found by an administrative judge.

The Court of Special Appeals affirmed, noting that the state was attempting to circumvent Judge Debelius' discovery order and sanctions as well as Judge Weinstein's denial of the continuance.

"[The] administrative judge has the whole docket at his or her disposal and is considering the whole flow of cases throughout the circuit," explains Warnken. "There's going to be tremendous deference to the judge."

There is no standard definition of what constitutes good cause for a continuance, according to Baltimore defense lawyer Arcangelo M. Tuminelli.

"[Maybe] the witness is ill and cannot appear," Tuminelli said. "Common sense good reasons. There must have been something dilatory about getting the tests done."***Good cause?***

According to the briefs, the prosecutor did not know that he was supposed to tell the Montgomery County Crime Lab to begin the DNA testing, and neither did the detectives.

"This wasn't some lab in another jurisdiction," Peabody told the court yesterday. "They're all spokes of the same wheel."

A lot of times that's where the difficulty is, according to Atkins.

"The state hasn't told them to get cracking on it," he said.

The lab waits for the go-ahead because it is expensive to run the DNA tests, called PCR — Polymerase Chain Reaction, Atkins said.

"If I wanted an approved result, I could get it in a month, if it was important," he said. "It's kind of case-specific, but if they have it and they want to use it, they have to just tell their lab. It's exactly the point of the Hicks rule, to ensure that they are diligent. You can't just say, 'Oh, man, I can't believe we forgot to test the DNA.'"

Kupferberg, former defense counsel for Price, says it is appropriate for the top court to review every case that has an impact on the criminal justice system.

"The Hicks rule started out as a rule with some teeth," he said. "Over the years courts have modified positions in terms of dismissal for violation of the rule."

It is important that the rules are applied evenly, he notes.

"Criminal defense lawyers are like surgeons during a time of war," he said. "You don't get to pick the people you operate on, so therefore you have to play the game by the rules. If you don't play by the rules, it's not an even playing field."

The Court of Appeals has not spoken on the Hicks issue in some time, according to former Prince George's County prosecutor and defense attorney Robert C. Bonsib.

In the 1984 Court of Appeals case of State v. Glenn, the Court allowed the 180-day rule to begin anew with a second prosecution after a nol pross on the day of trial, two months before the expiration of the original Hicks rule, because of a prosecutor's legitimate belief the first charging document was defective.

In the 1996 case State v. Brown, the state nol prossed the charges on an Oct. 5 trial date, 43 days before the expiration of the 180-day period, and recharged three months later because the DNA test results the state wanted had not been received. While the Court of Appeals held that the purpose or necessary effect of the nol pross in that case was not to circumvent the Hicks rule (thereby allowing the clock to begin anew with the second prosecution), the prosecutor had not requested — or been denied — a postponement from the administrative judge.

The Court of Special Appeals has spoken on the issue as well. In the 1997 case of Ross v. State, the state nol prossed the charges on a trial date and subsequently recharged because the

administrative judge had denied the state's request for a continuance. The intermediate court held that the purpose of the nol pross was to circumvent the 180-day rule — since the administrative judge explicitly stated that case could not be put back into the docket before the expiration of the Hicks rule — and reversed the hearing judge's denial of a motion to dismiss.

"These cases remind us not to narrow our focus when dealing with Rule 4-271, to simply focus on how much time may be left before the expiration of the 180-day time period," Bonsib said, quoting a January 2004 article he wrote on the Price case. "We are cautioned to also look at any request for a continuance made within the 180-day time frame."

In State v. Akopian, decided in February, the Court of Special Appeals revived robbery and conspiracy robbery charges against a defendant which had been nol prossed and refiled by the state, holding that the state's use of the prosecutorial tool did not have the purpose or effect of circumventing the Hicks rule.

"Because there were more than 50 days remaining in the original Hicks calendar when the nolle prosequi was entered on Oct. 22, 2002, the state's action did not have the necessary effect of circumventing the 180-day rule," J. Frederick Sharer wrote for the court.

The Akopian court noted further that the state's action did not have the purpose of circumventing the Hicks rule because in that case, the prosecutor had made extraordinary efforts to avoid a Hicks problem.

Price, Bonsib says, requires a careful analysis of what the prosecutor's motives or purpose was in dismissing the case.

"If it was to avoid an adverse ruling by the administrative judge with respect to a continuance, then they may be barred from proceeding," he said. "They are probably going to make it less obvious what their purposes are in the future." ■