IN THE COURT OF APPEALS OF MARYLAND

No. 89

September Term, 1994

STATE OF MARYLAND

v.

STEVEN DONNELL PARKER

Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
McAuliffe, John F.
(retired, specially assigned)

JJ.

Concurring Opinion by Raker, J.,
in which Rodowsky and Chasanow, JJ.,
join.

Filed: May 9, 1995

I join in Parts I and II of the majority opinion of the Court and in the mandate. I disagree, however, with the approach adopted in Parts III and IV of the opinion where the Court embarks on an analysis, purportedly required under *Hicks v. State*, 285 Md. 310, 403 A.2d 356 (1979), to determine whether there was inordinate delay requiring dismissal of the case between the good cause postponement and the trial date set by the assignment authority. In my view, the Court, having found good cause for the postponement, should not make an inquiry to determine if there was inordinate delay between the time of the good cause postponement and the trial date set by the assignment authority.

"Inordinate delay" in the context of Rule 4-271 and Article 27, § 591 crept into our case law beginning with *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984). Today in the majority's opinion, "inordinate delay" becomes an independent basis (apart from failing to set a trial within 180 days without obtaining a continuance for good cause) for imposing the sanction of dismissal of a criminal case. In *Hicks*, we held that the sanction of dismissal was appropriate to enforce the mandatory 120-day period (now 180 days), where a case is not brought to trial within the time period and there is no postponement of the trial date complying with Rule 4-271 and § 591. 285 Md. at 318, 403 A.2d at 360. We should refrain, however, from expanding application of that extreme sanction to a new post-postponement "no inordinate delay" requirement that is not found in either § 591 or Rule 4-271.

The majority relies on *Rosenbach v. State*, 314 Md. 473, 551 A.2d 460 (1989), which relies on *Frazier* for the proposition that a two-step analysis is required once the critical postponement date is ascertained. The majority proceeds as follows: "First, we must ask whether there was good cause for the postponement which occurred on the critical date, and then we must determine if there was inordinate delay between the time of the good cause postponement and the trial date set by the assignment authority . . . ." Majority Op. at 7.

This new requirement that we have grafted onto Rule 4-271 has confusing antecedents. In *Frazier*, 298 Md. 422, 470 A.2d 1269, we held that "nonchronic" unavailability of a court or isolated instances of mistakes by court personnel could be "good cause" for a postponement under Rule 746 (now Rule 4-271). We went on to say that there were "two aspects of 'good cause.'" *Id*. at 448, 470 A.2d at 1283. "[T]here must be good cause for not commencing the trial on the assigned date," and "there must be good cause for the extent of the delay" to the new trial date. *Id*., 470 A.2d at 1282-83. We held:

> When the administrative judge or his designee postpones a case beyond the 180-day deadline *because of court unavailability*, there is a violation of § 591 and Rule 746 only if it is demonstrated that the change of trial date, or the period of time until a new trial date, represented a clear abuse of discretion.

Id. at 461-62, 470 A.2d at 1289-90 (emphasis added). If a trial is

postponed because of court unavailability, and there will be an "inordinate length of time" before a court does become available, *id*. at 462, 470 A.2d at 1290, the administrative judge may be facing chronic court congestion, which might not be "good cause" for a postponement.[1] In this context, the length of the post-postponement delay could shed light on the cause of the postponement itself, *i.e.*, whether the cause was chronic or nonchronic congestion. Thus, the two-step look at "good cause" made perfect sense in *Frazier*, where the Court focused on postponements caused by an overcrowded docket. Although it suggested that an inordinately long delay might shift the burden of proof from the defendant to the State, the *Frazier* Court was not actually faced with such a case. *Id*. The Court's concern with the period of delay was inextricably intertwined with the determination of whether the postponement was for good cause.

Defense attorneys rapidly picked up on this language and asserted lack of good cause for the extent of the delay until a new

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[1] In *Frazier*, we addressed the question of whether nonchronic congestion could be good cause for a postponement. We did not reach the question of whether chronic court congestion could ever constitute good cause. We noted, however, that in other states with statutes and rules similar to § 591 and Rule 4-271, "chronic court congestion is ordinarily not regarded as good cause for postponement." 298 Md. at 455, 470 A.2d at 1286. Further, as Judge Davidson pointed out in her dissent in *Frazier*, the Court has held that, in the context of constitutional speedy trial protections, chronic court congestion is inexcusable and is a factor to be weighed against the State. *Id*. at 474, 470 A.2d at 1269 (Davidson, J., dissenting).

trial date. In *State v. Bonev*, 299 Md. 79, 81, 472 A.2d 476, 477 (1984), and *Carey v. State*, 299 Md. 17, 23, 472 A.2d 444, 447 (1984), the Court summarily rejected the defendants' arguments, holding that there was no showing of an abuse of discretion by the administrative judge (or those acting under the judge's supervision) in setting the new trial dates.

In *Rosenbach*, 314 Md. at 479, 551 A.2d at 463, the defendant did not argue that post-postponement delay was inordinate. Nevertheless, the Court discussed the issue, taking the "inordinate length of time" and "undue delay" language in *Frazier* and combining it with a discussion of the purpose underlying Rule 4-271. The result was a statement that the "policy of the rule" (not the Rule itself) required dismissal if there was inordinate delay until the rescheduled trial after a good cause postponement that took the trial outside the 180 days. *Id.*

Thus, whereas "inordinate delay" was a component of the "good cause" finding for the postponement in *Frazier*, it was transformed in *Rosenbach* to an independent consideration, subsequent to and independent of a finding of good cause for the postponement. This reasoning is now enshrined in the majority opinion as the law. But neither § 591 nor Rule 4-271 addresses timeliness of a trial date set in the post-180 day period -- and we should not do so.

Once the case is properly postponed beyond the 180 days, the dismissal sanction under § 591 and Rule 4-271 should have no

relevance. As Judge Eldridge noted, writing for the Court in *Farinholt v. State*, 299 Md. 32, 41, 472 A.2d 452, 456 (1984) (emphasis added):

> Dismissal of a serious criminal case, on grounds unrelated to the defendant's guilt or innocence, is a drastic sanction. As the above-quoted language from *Frazier* indicates, the dismissal sanction for violating § 591 and Rule 746 should only be applied when it is needed, as a prophylactic measure, to further the purpose of trying a circuit court criminal case within 180 days. *Once a postponement beyond the 180-day deadline is ordered in accordance with § 591 and Rule 746 (or upon the defendant's motion or with his express consent), it would not further this purpose to utilize the dismissal sanction for subsequent violations of the statute and rule.* The sanctions for such subsequent violations must be ones of internal judicial administration, relating to circuit court personnel and/or procedures. *See State v. Hicks*, *supra*, 285 Md. at 335, 403 A.2d 368. The defendant, of course, remains protected by his federal and state constitutional rights to a speedy trial.

See also State v. Brookins, 299 Md. 59, 62, 472 A.2d 465, 467 (1984) ("'[A]fter a case has already been postponed beyond the 180-day period, either in accordance with § 591 and Rule 746, or upon the defendant's motion, or with the defendant's express consent, the dismissal sanction has no relevance to subsequent postponements of the trial date unless the defendant's constitutional speedy trial right has been denied.'") (quoting *Farinholt*, 299 Md. at 40, 472 A.2d at 456).

Our cases seem to disagree on what is necessary to further the purpose of Rule 4-271. Under *Rosenbach*, a lengthy delay to the new

trial date after a good cause postponement could be the basis for dismissal, but under *Farinholt*, the same delay caused by repeated postponements after the 180 days, even if not for good cause, could not be sanctioned by dismissal. The simplest and fairest solution is to limit our use of the dismissal sanction to violations of the Rule itself, and to look to internal judicial administration procedures to control the dockets.

The defendant in this case failed to appear for his trial, which was set within the 180-day period. There is no evidence in the record that he was unaware of this trial date. The reason for the postponement was his voluntary failure to appear; in my view, this is the equivalent of a motion by the defendant to continue the case. The administrative judge had good cause to order the "critical" continuance. Our inquiry should stop there. Rule 4-271 does not require that we scrutinize the process of rescheduling a trial date after the defendant's re-arrest. I would hold that under these circumstances, the sanction of dismissal has no relevance and any consideration of the length of the delay should be limited to constitutional speedy trial concerns.

Judge Rodowsky and Judge Chasanow have authorized me to state that they join in this concurring opinion.