

Circuit Court for Prince George's County
Case No. CT221267C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1294

September Term, 2023

STATE OF MARYLAND

v.

DAVANTE ASHAR ELLERBEE

Nazarian,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 5, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellee Davante Ashar Ellerbee was charged in the Circuit Court for Prince George’s County with 34 counts related to a theft scheme involving property valued at \$100,000 or more. The circuit court granted Ellerbee’s motion to dismiss based on *State v. Hicks*, 285 Md. 310 (1979).¹ The State timely appealed, presenting the following question for appellate review:

Did the court err in granting Ellerbee’s motion to dismiss for a *Hicks* violation?

We hold that the court erred and therefore remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On September 22, 2022, a Prince George’s County grand jury indicted Ellerbee on 34 counts related to a complicated theft ring involving “many, many vehicles” and multiple defendants. We carefully recount the procedural history to provide context for the alleged *Hicks* violation.

On September 26, 2022, Ellerbee’s attorney filed an opposition to the State’s motion to revoke bond. On September 28, 2022, the State moved for a joint trial of Ellerbee and his three co-defendants. Ellerbee appeared at his arraignment on October 28, 2022, and the court set his trial for February 28, 2023.

Ellerbee and two of his co-defendants appeared for a motions hearing on February

¹ Under Md. Code (2001, 2018 Repl. Vol.) § 6-103 of the Criminal Procedure Article and Maryland Rule 4-271, a criminal trial in the circuit court must commence within 180 days of the earlier of the defendant’s first appearance in court or “the appearance of counsel.” “[T]he requirements established by the statute and rule are often referred to colloquially as the ‘Hicks rule’ and the deadline for commencing trial under those provisions as the ‘Hicks date.’” *Jackson v. State*, 485 Md. 1, 13 (2023) (quoting *Tunnell v. State*, 466 Md. 565, 571 (2020)).

17, 2023. Because of the complexity of the cases, the prosecutor requested that the court specially set a motions hearing for all defendants on March 9, 2023. Ellerbee’s counsel responded that he would “like to be heard separately” on his opposition to the State’s motion for a joint trial, and that he intended to file a separate motion to sever some of the counts charged in Ellerbee’s indictment. Determining that the cases “should stay together,” the court set a motions hearing for all defendants on March 9, 2023. Over Ellerbee’s objection, the court postponed Ellerbee’s February 28, 2023 trial date to April 4, 2023 (the same date for trial of the co-defendants), expressly recognizing that it was the “State[’s] motion to continue the trial date over [Ellerbee’s] objection.”

On March 31, 2023, the State’s motion for a joint trial was granted. At a hearing on April 4, 2023, the court found good cause to continue the joint trial beyond the 180-day *Hicks* date and rescheduled trial for October 23, 2023. That same day, Ellerbee filed a “Motion to Dismiss for Violation of Hicks.” In his motion to dismiss, Ellerbee argued that on February 17, 2023, the court granted, over his objection, the State’s request to continue his trial date from February 28, 2023, to April 4, 2023. Ellerbee further asserted that, based on the first appearance of counsel on September 26, 2023 (the filing of an opposition to the State’s motion to revoke bond), the 180-day *Hicks* date expired on March 25, 2023. Accordingly, Ellerbee averred that dismissal of the charges was required because the court never found good cause to postpone his initial February 28, 2023 trial to April 4, 2023. In short, Ellerbee claimed that the good cause finding on April 4, 2023, was too late because his *Hicks* date had expired on March 25, 2023.

The circuit court held a hearing on Ellerbee’s motion to dismiss on June 29, 2023. The parties and the court agreed that, as to Ellerbee’s charges, the 180 days started to run on September 26, 2022, because defense counsel’s opposition to the State’s motion to revoke bond constituted the “appearance of counsel” for purposes of Rule 4-271(a). Thus, Ellerbee’s *Hicks* date was March 25, 2023. The court noted that the *Hicks* date listed in Maryland’s electronic filing system (“MDEC”)—April 26, 2023—was incorrect because it was calculated based on Ellerbee’s arraignment in the circuit court on October 28, 2022. The parties also agreed that the critical postponement for *Hicks* purposes was the court’s granting of the State’s request to continue the trial on February 17, 2023, thereby postponing Ellerbee’s trial from February 28, 2023, to April 4, 2023. At the conclusion of the June 29, 2023 hearing, the court indicated that it wanted to review caselaw cited by the parties prior to ruling on the motion to dismiss.

The court reconvened on August 14, 2023, for the court to deliver its ruling on the motion to dismiss. The court made the following findings:

- The April 26, 2023 *Hicks* date reflected in MDEC and based on the arraignment date was incorrect.
- The correct *Hicks* date—based on defense counsel’s entry of appearance on September 26, 2022—was March 25, 2023.
- On February 17, 2023, the court granted the motion to continue Ellerbee’s trial to April 4, 2023, over Ellerbee’s objection.
- The court did not make a good cause finding for the continuance because the court believed the rescheduled trial date was within *Hicks*.
- On April 4, 2023, the court continued trial again, this time finding good cause because the court believed that this continuance would

result in the trial being scheduled beyond the *Hicks* date as reflected in MDEC (April 26, 2023).

Because the court never made a good cause finding prior to the March 25, 2023 *Hicks* date, the court granted the motion to dismiss. Immediately prior to concluding the hearing, the court stated:

If it was a motion to keep [the cases] together . . . , I probably would have found - - **I would have found good cause if I was asked, but I was never asked and the reason I was never asked is nobody knew it was beyond *Hicks*, but it was beyond *Hicks*.**

(Emphasis added).

The State noted this timely appeal.

DISCUSSION

We begin by noting that we shall review the circuit court’s decision *de novo* because the court’s dismissal of the indictment involved the interpretation of a Maryland statute, rule, and caselaw. *Jackson*, 485 Md. at 28.

The State asserts that the court erred in granting the motion to dismiss because “the court focused exclusively on its failure to expressly find and articulate good cause for the postponement at the February 17, 2023 hearing.” The State argues that established Maryland precedent holds that “judges are not required to *expressly* find and articulate good cause for the postponement.” Although Ellerbee acknowledges that Maryland courts have recognized implicit findings of good cause, he urges us to affirm, noting that the trial judge here did not make a good cause finding because he believed that the postponement of trial to April 4, 2023, was within *Hicks*. As we will explain, we agree with the State that

the trial court erred.

We find *State v. Fisher*, 353 Md. 297 (1999), instructive. There, the 180-day period for trying the case was set to expire on January 6, 1998. *Id.* at 300. The case was set for trial on December 2, 1997, but Fisher’s attorney anticipated that Fisher would plead guilty. *Id.* The court proceeded with a jury trial in another case, which concluded at approximately 2:00 p.m. on December 2. *Id.* Fisher’s case was then called for trial. *Id.* By that point, Fisher apparently had a change in heart about pleading guilty as his attorney advised the court that “Fisher wanted to plead not guilty and wanted a jury trial[.]” *Id.* Although the record was not entirely clear as to the basis for a continuance, the *Fisher* Court noted that the docket entries showed that the administrative judge “granted a motion by the prosecuting attorney to postpone the case so that it could be tried before a jury.” *Id.* Fisher’s trial was rescheduled for February 17, 1998, which was 42 days beyond the 180-day *Hicks* date. *Id.* The record did not evidence any good cause finding for the postponement. *Id.* at 301.

When the case was called for trial on February 17, 1998, defense counsel moved to dismiss because Fisher was not tried within the prescribed 180-day period. *Id.* at 300. The trial judge, who was the same administrative judge who postponed the case on December 2, denied the motion to dismiss, noting that he had the authority as the administrative judge to postpone cases and that he had “found good cause to continue the case.” *Id.* at 301.

On appeal, this Court reversed and directed that the case be dismissed. *Id.* In *Fisher*, the Supreme Court recited the holding in our unreported opinion:

While the determination of good cause is a discretionary matter rarely subject to reversal upon review, when an administrative judge fails to find good cause on the record, there is no determination for us to review. The court below had broad discretion to find that the late time of day and its overcrowded docket constituted good cause for postponement. Unfortunately, even if there was good cause for the postponement, the trial judge failed to articulate what it was. The judge should have made a finding of good cause on the record, and the error was an abuse of discretion that prejudiced appellant[.]

Id. at 302.

The Supreme Court reversed, holding that Maryland precedent “clearly establish[ed]” that there was no violation of the *Hicks* rule. *Id.* at 303. After reviewing its prior decisions on the subject, the Supreme Court held:

Consequently, even in the situation where the administrative judge **does not expressly or even consciously** frame an order in terms of [Art. 27] § 591 [the predecessor to § 6-103 of the Criminal Procedure Article] and Rule 4-271, if an order has the effect of postponing a circuit court criminal trial beyond the 180-day period, and if the order was issued by the county administrative judge or his designee for such purposes, the order will be in compliance with § 591 and Rule 4-271 unless the *defendant* meets the burden of demonstrating a clear abuse of discretion or a lack of good cause as a matter of law.

Id. at 307 (emphasis added).

The *Fisher* Court’s discussion—and approval—of *Goins v. State*, 293 Md. 97 (1982), is likewise instructive. There, the order that effectively postponed the case beyond 180 days “made no mention of the scheduled trial date or a postponement of the trial, and there was no express reference to ‘good cause’ for a postponement.” *Fisher*, 353 Md. at 304. At the hearing on Goins’s motion to dismiss, the parties proffered that they had contacted the county administrative judge who, if called to testify, would affirm that he

granted the relevant postponement “without calculating or considering the one hundred and eighty day Rule, that it was not his intention to waive the Rule, and that the Rule was not taken into consideration[.]” *Id.* (citing *Goins*, 293 Md. at 103-04). Despite that representation, the trial judge denied the motion to dismiss, determining that the county administrative judge’s postponement of trial was supported by good cause, specifically, to afford the Department of Health time to evaluate Goins related to a not criminally responsible plea. *Id.* at 304-05.

After noting that it had affirmed the trial court’s denial of the motion to dismiss, the *Fisher* Court summarized its holding in *Goins*:

We further held that an order by the administrative judge or designee which had the effect of postponing the criminal trial, and which was in fact supported by good cause, was sufficient for purposes of the statute and rule, regardless of whether the administrative judge viewed the action as a good cause postponement under the statute and rule.

Id. at 305. In short, even though the county administrative judge in *Goins* failed to make any good cause finding for the postponement and expressly stated that “it was not his intention to waive the Rule,” the Supreme Court recognized that the postponement was “in fact supported by good cause,” *i.e.*, the necessity to secure the Department of Health’s mental examination of the defendant. *Id.* at 304-05.

Applying these precepts here makes clear that the trial court erred. First, in light of the fact that there is no dispute that the postponement was properly issued by “the county administrative judge or that judge’s designee” in compliance with Rule 4-271, it was Ellerbee’s burden to show “a clear abuse of discretion or a lack of good cause as a matter

of law[,]” *id.* at 307. Nothing in the record convinces us that Ellerbee was held to this standard. Moreover, although *Fisher* makes clear that “the burden is not on the administrative judge to explain or delineate the reasons amounting to good cause for a postponement[,]” *id.*, the judge here stated that he “would have found good cause if [he had been] asked.” Under the circumstances, we infer that the court was referring to its intention to schedule all of the defendants’ trials for the same date, a decision that would constitute good cause. *See, e.g., Satchell v. State*, 299 Md. 42 (1984). Consistent with that intention, the court postponed Ellerbee’s February 28, 2023 trial to April 4, 2023. In the parlance of *Fisher*, the trial court’s postponement of Ellerbee’s trial to April 4, 2023, was “in fact supported by good cause . . . regardless of whether the administrative judge viewed the action as a good cause postponement under the statute and rule.” *Id.* at 305.

For the foregoing reasons, we reverse and remand this matter for further proceedings.

**JUDGMENT OF THE CIRCUIT COURT FOR
PRINCE GEORGE’S COUNTY GRANTING
MOTION TO DISMISS REVERSED. CASE
REMANDED TO THE CIRCUIT COURT FOR
FURTHER PROCEEDINGS. COSTS TO BE
PAID BY APPELLEE.**