

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

DUANE LEE BAYS

APPELLATE CASE NO: 2014-AP-14-A-O

Appellant,

Lower Case No. 2014-CT-157-A-O

vs.

STATE OF FLORIDA,

Appellee.

_____/
Appeal from the County Court
for Orange County, Florida
Stephen R. Jewett, County Court Judge

Robert Wesley, Public Defender
and Megan Robison Albrecht, Assistant Public Defender
for Appellee

Jeffrey Ashton, State Attorney
and David A. Fear, Assistant State Attorney
for Appellant

Before MYERS, MUYNON, EGAN, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant seeks review of the trial court's denial of his motion for discharge following an alleged speedy trial violation. The denial of a motion for discharge is reviewed *de novo*. *Reid v. State*, 114 So. 3d 277, 279 (Fla. 4th DCA 2013). Where a trial has commenced but is continued, the continuance is reviewed under an abuse of discretion standard. *Casimir v. McDonough*, 932 So. 2d 471, 473 (Fla. 3d DCA 2006).

Appellant was arrested on October 24, 2013 and did not bond out of jail. Counsel filed a notice of expiration of speedy trial on January 24, 2014 pursuant to Florida Rule of Criminal Procedure 3.191(h). Under Rule 3.191(p)(3), where a notice of expiration has been filed, the court must hold a hearing within 5 days and set the matter for trial to begin within 10 days after that. The

trial court timely held the recapture hearing on January 28, 2014 and timely set jury selection to begin on February 3, 2014.

Jury voir dire was held on February 3, 2014 and the jury was selected. The court told the parties that it did not have any open time to conduct the trial until February 24, 2014. Appellant's counsel made a motion for discharge, asserting that this continuance violated Appellant's speedy trial rights. The trial court denied the motion before the start of the State's case on February 23, 2014. It found that trial had commenced when the jury venire was sworn and that this occurred within the time limits set by Rule 3.191(p)(3). Appellant entered a plea, reserving the right to appeal the denial of his motion for discharge.

Under Rule 3.191(c), "[t]he trial is considered to have commenced when the trial jury panel for that specific trial is sworn for voir dire examination." See, likewise, *Moore v. State*, 368 So. 2d 1291, 1292 (Fla. 1979); *Casimir*, 932 So. 2d at 473. The trial court was correct that the trial began on February 3, 2014. The requirements of Rule 3.191 were met.

"Where the speedy trial rule has been complied with but there has been an interruption in the progress of the trial, other considerations come into play. . . . These considerations include the length and reason for the delay, the defendant's assertion of his right to proceed to trial, and possible prejudice to the defendant. Any such prejudice must be demonstrated by the defendant and cannot be presumed." *Compo v. State*, 525 So. 2d 505, 506 (Fla. 2d DCA 1988). A defendant must show prejudice resulting from a continuance. *Holmes v. State*, 883 So. 2d 350, 351 (Fla. 3d DCA 2004). A continuance "is *not* governed by the speedy trial rule, and . . . a continuance, even when it results in a lapse between jury selection and the examination of witnesses, lies within the sound discretion of the court." *Casimir*, 932 So. 2d at 473. (Emphasis in original).

In this case, the 21-day delay was caused by a crowded court docket. Scheduling problems may constitute good cause for a continuance after jury voir dire has begun. *Johnson v. State*, 660

So. 2d 648, 661 (Fla. 1995) (21-day delay after jury selected, no prejudice shown). Similarly, *Holmes* 883 So.2d at 351(13 days); *Hernandez v. State*, 572 So.2d 969 (Fla. 3d DCA 1990) (11 days). Appellant has not demonstrated the court did not have good cause for the continuance.

Appellant raises several possible grounds for finding prejudice as a result of the continuance. He contends that the State was able to improve its case during the delay since it turned up a videotape it had not disclosed earlier. However, “nothing in the Constitution forbids trial scheduling that may coincidentally advantage the State's case . . . so long as the scheduling decision is otherwise reasonable.” *Johnson*, 660 So. 2d at 661.

He argues that it was prejudicial to hold him in jail longer than 90 days. One of the purposes of the constitutional speedy trial guarantee is to prevent oppressive pretrial incarceration. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). However, here, the speedy trial rule had been complied with and the continuance was for good cause; it cannot be said that 21 additional days of pretrial jail time was oppressive, especially where Appellant had the right to pretrial release upon payment of his relatively low bond. Appellant’s third claim of prejudice--that, in theory, the jury could have been tainted or exposed to improper influences during the delay--was not presented to the trial court and therefore has not been preserved for appeal. *Freeman v. State*, 969 So. 2d 473, 480 (Fla. 5th DCA 2007). Appellant has not met his burden of showing prejudice or abuse of discretion.

IT IS THEREFORE ORDERED AND ADJUDGED that the decision of the trial court is AFFIRMED.

DONE AND ORDERED in Orlando, Orange County, Florida this 10th day of June, 2015.

/S/ _____
Donald A. Myers
Presiding Circuit Judge

Munyon and Egan, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **the Honorable Stephen R. Jewett**, Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801; **David A. Fear**, Assistant Public Defender, 415 N. Orange Avenue, Orlando, Florida 32802-1673; and **Megan Robison Albrecht**, Assistant State Attorney, 435 N Orange Avenue, Orlando, Florida 32801-1526 this 11th day of June, 2015.

/S/ _____
Judicial Assistant