

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

State of Delaware,	:	Cr.A. No. 07-06-1519 through 1523
	:	Case No. 0706023074
vs.	:	
	:	
Thaimesha D. Adkins	:	
	:	
Defendant.	:	

Upon State's Motion to Vacate Rule 48(b) Dismissal

Date of Hearing: November 6, 2007

Date Decided: November 6, 2007

State's Motion to Vacate Rule 48(b) Dismissal is denied.

Kenneth Haltom, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.

Kevin Howard, Esquire, Young, Malmberg & Howard, P.A., 30 The Green, Dover, Delaware 19901, attorney for Defendant.

Trader, J.

This case is before the Court on the State's motion to vacate this Court's order of dismissal of a criminal case pursuant to Criminal Rule 48(b). *See Court of Common Pleas Criminal Rule 48(b)*. Since the unnecessary delay in bringing this case to trial is attributable to the State, and the delay works some definable prejudice to the defendant, the State's motion is denied.

The posture of the case is as follows: on June 19, 2007, the defendant, Thaimesha D. Adkins, was charged with two counts of assault in violation of 11 *Del. C.* §611 and three counts of endangering the welfare of a minor child in violation of 11 *Del. C.* §1102. The defendant was arraigned in the Court of Common Pleas on August 10, 2007, and a case review was scheduled for August 29, 2007. The State's witnesses failed to appear on the scheduled trial date and the case was dismissed pursuant to Criminal Rule 48(b) on October 1, 2007. In its motion to vacate the Court's order of dismissal, the State contends that the failure of the witnesses to appear was attributable to the fact that the police report contained the incorrect addresses of the State's witnesses. The State has now obtained the witnesses' correct addresses and seeks to vacate the Criminal Rule 48(b) dismissal and have the case proceed to trial.

A hearing was scheduled on the State's motion for November 6, 2007, at 9:00 A.M. The hearing was held at 9:40 A.M. and the State's witnesses had not appeared for the hearing; therefore, the State's motion was denied. After the defendant had left, a State's witness appeared at 10:35 A.M. and the State requested reconsideration of its motion. The witness testified that her address is 539 Millchop Lane, Magnolia, Delaware, and that she never received notice of the trial. The State did not offer any reason why it did not obtain the correct address of its witnesses prior to trial and the

testifying witness did not offer a credible reason for her failure to appear for the hearing at the scheduled time.

An information may be dismissed when there is unnecessary delay in bringing a defendant to trial. *Court of Common Pleas Criminal Rule 48(b)*. The dismissal is within the discretion of the Court and is not governed by the established concepts of the Speedy Trial Clause of the Sixth Amendment. *State v. Fischer*, 285 A.2d 417, 418 (Del. 1971). Subdivision (b) of Rule 48 is a codification of the Court's inherent power to dismiss a case for want of prosecution. *Id.* The granting or denial of a motion to vacate a dismissal order is also discretionary. *State v. Kozak*, 1999 WL 1946459, at *2 (Del. Super. Ct. 1999).

A trial court may dismiss a case pursuant to Rule 48(b) if it finds unnecessary delay attributable to the prosecution and the defendant was prejudiced as a result. *State v. McElroy*, 561 A.2d 154, 155-56 (Del. 1989). A showing of prejudice in the traditional sense is not required. *State v. Budd Metal Co.*, 447 A.2d 1186, 1188-89 (Del. 1982). The prejudicial effect upon defendant must be beyond that normally associated with a criminal justice system necessarily strained by a burgeoning case load. *McElroy*, 561 A.2d at 155-56.

The first criterion for dismissal under Rule 48(b) is that the unnecessary delay must be attributable to the State as prosecutor. "If the delay is caused by the prosecution, then the Court should consider whether the prosecution had a valid reason for the delay. As such, the Court will 'consider the extent to which the State is at fault in causing the delay and the amount of control the State has over the event causing the delay.'" *State v. Perkins*, 2005 WL 3194460, at *3 (Del. Super. Ct. 2005). The failure of the State to

produce necessary witnesses for trial is a delay attributable to the State. *State v. Glaindez*, 346 A.2d 156, 157 (Del. 1975).

In the present case, the defendant was arraigned on August 10, 2007, and a case review was scheduled for August 29, 2007. The State certainly should have obtained the correct addresses of its witnesses by the time of the case review. If not then, the State had an additional thirty-three days to obtain the correct addresses of the witnesses prior to trial. The State's initial failure to obtain the correct addresses of its witnesses and its subsequent failure to exercise due diligence and procure their correct addresses was within State's control and, as such, constitutes a delay attributable to the State. Additionally, the State did not have its witnesses present at the scheduled hearing for the consideration of its motion.

The second criterion established by the Delaware Supreme Court, as a condition precedent to a dismissal for unnecessary delay, requires a finding that "the delay has been found to work some definable or measurable prejudice to the defendant." *McElroy*, 561 A.2d at 157. "Prejudice may be any factor which causes or threatens legal harm or detriment to the defendant." *Kozak*, 1999 WL 1846459, at *2. "Scheduled trial dates do have some legal value to the parties involved, and when a trial date is disturbed because one side is not prepared, there is at least some minimal legal prejudice to the other side." *Id.*

When the State's witnesses failed to appear for trial in the instant case, the Court exercised its discretion to dismiss the information pursuant to Criminal Rule 48(b). The defendant had concluded that the matter had come to an end and now the State seeks to reinstate charges that were dismissed over a month ago. I conclude that reviving charges

previously dismissed on the facts of this case does work some definable or measurable prejudice to the defendant. Accordingly, the State's motion to vacate the Rule 48(b) dismissal is denied.

IT IS SO ORDERED.

Merrill C. Trader
Judge