STATE OF TENNESSEE
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Opinion No. 11-4

Retired Misdemeanor Cases

QUESTIONS

1. When the State retires a misdemeanor charge in general sessions court and takes no further action in the following eleven months and twenty-nine days, does the defendant have the right to request a final disposition of the charge?

2. Is it proper for the general sessions court to dismiss the charge if the State has taken no further action on the retired charge after a period of eleven months and twenty-nine days?

3. Can the general sessions court dispose of the case in any other way except for dismissal of the charges as a result of the running of the statute of limitations?

OPINIONS

1. Yes, but the trial court may not dismiss the charge unless the court finds that the State has unnecessarily delayed in pursuing the prosecution or the defendant can demonstrate a speedy trial violation.

2. Yes, but only if the trial court finds either that the State has unnecessarily delayed pursuing the prosecution or that the defendant's speedy trial right has been violated.

3. Yes. As answered above, the general sessions court may dismiss the retired charges under Rule 48(b) of the Tennessee Rules of Criminal Procedure or for a speedy trial violation. A dismissal for the expiration of the statute of limitations would be improper because, once the State commences prosecution, the running of the statute of limitations is tolled.

ANALYSIS

1. As a general rule, every criminal defendant is ultimately entitled to resolution of pending criminal charges. See U.S. Const. amend VI (guaranteeing a defendant the right to a speedy trial); Tenn. Const. art. I, § 9 (same). But the law has long allowed prosecutors to reach informal agreements with misdemeanants, in which the State suspends and ultimately dismisses the prosecution, so long as the individual does not reoffend for a specified period of time. See, e.g., State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983) (noting the positive aspects of a prosecutor's authority to informally divert a prosecution pending good behavior, citing State v.

Leonardis, 363 A.2d 321, 327 (N.J. 1976)). Unless under such an informal agreement the defendant waived the right to seek reinstatement of the retired charge, the defendant may always request that the case be restored to the court's docket for disposition. The court, however, could not dismiss the prosecution absent a finding that the State has unnecessarily delayed further prosecution or that the defendant's speedy trial right has been violated. U.S. Const. amend VI; Tenn. Const. art. I, § 9; Tenn. R. Crim. P. 48(b). The court should consider any agreement reached between the parties before determining the appropriate disposition of the charge.

2. The general sessions court may not dismiss a misdemeanor charge solely because the State has failed to take any action after passage of eleven months and twenty-nine days. If the prosecution and defense reached an agreement for informal diversion, the parties should inform the trial court of that agreement, including whether the defendant agreed to waive his right to a speedy trial and the timeline for ultimate disposition of the charge.

If there is no agreement between the parties, the trial court may *sua sponte* dismiss the charge if it finds unnecessary delay on the part of the prosecution under Rule 48(b) of the Tennessee Rules of Criminal Procedure. The trial court, however, must conduct an inquiry into several factors before it may dismiss a charge. If there has been no constitutional violation, the court must consider the length of the delay, the reasons for the delay, the prejudice to the defendant, and waiver by the defendant. *State v. Benn*, 713 S.W.2d 308, 310 (Tenn. 1986). If the court dismisses a charge pursuant to Rule 48(b), the dismissal can be with or without prejudice. *Id*. A dismissal pursuant to Rule 48(b) on a non-constitutional ground is normally without prejudice to a subsequent reindictment and prosecution. *Id*. "Dismissal with prejudice for want of prosecution, not arising from a constitutional violation should be utilized with caution and only after a forewarning to prosecutors of the consequences." *Id*. (citing *United States v. Simmons*, 536 F.2d 827 (9th Cir. 1976)). The trial court, of course, may also dismiss a case if it finds a speedy trial violation under the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972).

3. As stated above, the trial court may dismiss a charge if there has been a violation of the right to a speedy trial, or if the trial court finds unnecessary delay in presenting the charge to a grand jury or unnecessary delay in bringing the defendant to trial. It would be improper for the court to dismiss the charge on the ground that the statute of limitations had run if the State timely commenced the prosecution against the defendant. The State commences prosecution of a misdemeanor offense if the State issued a warrant on the charge within twelve months of the date of the offense, or if the defendant appeared in general sessions court "for any purpose involving the offense." Tenn. Code Ann. § 40-2-104; *see also State v. Ferrante*, 269 S.W.3d 908 (Tenn. 2008) (defining when the State commences prosecution for misdemeanor offenses). The statute of limitations for misdemeanor offenses provides that all prosecutions for misdemeanors must be commenced within the twelve months after the offense has been committed. Tenn. Code Ann. § 40-2-102(a). The statute of limitations applies to the period elapsing between the commission of the offense and the date that prosecution commences. *Ferrante*, 269 S.W.3d at 911. If the State commenced prosecution on the misdemeanor offense within twelve months after the offense had

been committed, the trial court may not dismiss the charge on the ground that the statute of limitations had expired.

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