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2015 IL App (3d) 130216-U

Order filed August 19, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0216 Circuit No. 12 CF 32
KAREEM D. HAYNES,)	The Honorable Stanley B. Steines, Judge, Presiding.
Defendant-Appellant.)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's statutory right to a speedy trial was not violated when trial court continued defendant's trial date outside of the 160-day speedy trial period where defendant acquiesced in the delay by failing to make an oral or written trial demand at the time the continued trial date was set, and where delay caused by defendant's prior waiver of jury trial shortly before the scheduled trial date was attributable to the defendant; and (2) trial counsel was not ineffective for accepting trial court's attribution of delay caused by defendant's waiver of jury trial to the defendant for speedy trial purposes.

¶ 2 Defendant, Kareem D. Haynes, appeals his conviction of one count of unlawful delivery of a controlled substance. He claims that his statutory right to a speedy trial was violated and that his trial counsel was ineffective for acquiescing to the trial court's assignment of delay to the defendant.

¶ 3 FACTS

¶ 4 On January 18, 2012, the defendant was charged by information with one count of unlawful delivery of less than 1 gram of cocaine within 1000 feet of a church (Case No. 12 CF 32). Two days later, defense counsel filed a written demand for a speedy trial. At the time the State filed this charge against the defendant, the defendant was already in custody on a prior charge of unlawful delivery of a controlled substance (case No. 11 CF 313). The defendant was subsequently charged with conspiracy to commit subordination of perjury (Case No. 12 CF 222).

¶ 5 On July 6, 2012, defense counsel filed a "Motion to Assess Delay and Motion to Dismiss-Speedy Trial Violation," arguing that at least one of the charges against the defendant must be tried by July 9, 2012. The trial court denied that motion.

¶ 6 On July 12, 2012, a bench trial was held on the conspiracy to commit subornation of perjury charge (Case No. 12 CF 222). The State's witness, who had been subpoenaed to appear to testify that morning, did not show up. The State rested without presenting any evidence, and the trial court found the defendant not guilty.

¶ 7 A jury trial in Case No. 12 CF 32 was initially scheduled for September 11, 2012. On September 4, 2012, the defendant waived his right to a jury trial in that case and invoked his right to a bench trial. The trial judge admonished the defendant that the matter would be set for a bench trial "during the usual course of business of the Court" and that the trial would take place "at some point in time when the Court has time in its schedule for the bench trial." The trial

judge asked the defendant whether he understood this, and the defendant replied "yes." The trial court then admonished the defendant: "[s]ince you would be causing the delay from your jury trial next week until the bench trial setting on my usual business that any delay would be attributed to you for speedy trial purposes. Do you understand that?" The defendant replied, "yes." The trial court then told the defendant that he had the right to a jury trial on September 11, 2012, "but because it is your action that is taking it off my jury call list, *** the delay would be attributable to you." The court asked the defendant whether he understood this, and the defendant again replied, "yes." The court then asked the defendant: "[k]nowing all that, is that what you still intend to do today, sir?" The defendant replied, "yes."

¶ 8 Immediately thereafter, defense counsel also acknowledged that "certainly from this point forward, of course, this is delay *** to which the Defendant is agreeing and acquiescing." However, counsel noted that the defendant had previously filed a motion to dismiss the charge on speedy trial grounds and that "the fact that we are now acquiescing to delay from this point forward is not meant as any waiver of any argument previously made" as to whether the State had failed to bring the case to trial in a timely fashion. Summarizing and restating his position on this issue, defense counsel then said, "[a]gain, from this point forward till up to the bench trial date, we, of course, are acquiescing that [*sic*] additional delay, but we are not *** waiving any previous argument as to the motion you previously heard." In other words, defense counsel acquiesced to the delay triggered by the defendant's jury waiver but noted that the defense was not waiving prior argument that the speedy trial period had already expired.

¶ 9 The trial court set the bench trial date for December 4, 2012. The trial court asked the defendant if he still wanted a bench trial knowing that it would be set to a later date. The

defendant replied "yes." The trial court found that the defendant had knowingly and voluntarily waived his right to a jury trial.

¶ 10 During a hearing on November 2, 2012, the prosecutor announced that one of its witnesses, Kathy Shambaugh, would not be available to testify on December 4, 2012. Shambaugh was the former evidence technician who had handled the evidence in the case. Shambaugh was retired and was unavailable to testify during the scheduled bench trial because she was required to appear in a civil matter involving an estate in Texas, and she would not be available for an unspecified number of weeks. The defendant would not stipulate to the chain of custody for the exhibits the State intended to present at trial. The prosecutor indicated that he could not authenticate exhibits and establish the necessary foundation for the exhibit that was the core of the case without Shambaugh's testimony, and argued that the State's ability to prosecute the case would be prejudiced without her testimony. Accordingly, the State sought a continuance of the trial date.

¶ 11 Defense counsel noted that, pursuant to section 103-5(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5(e) (2012)), the State was required to try the defendant on the current charge within 160 days of his acquittal on the prior conspiracy charge. According to defense counsel's calculation, the 160-day deadline expired on December 19, 2012. Defense counsel asserted that the defendant's speedy trial right would be violated if he was not tried by December 19, 2012.

¶ 12 The prosecutor disagreed with the defense's calculation of the 160-day time period. According to the prosecutor, the defendant's waiver of his right to a jury trial on September 4, 2012 and his acquiescence to a December 4, 2012 bench trial date tolled the running of the speedy trial deadline until November 2, 2012, when the prosecutor sought a continuance of the

bench trial date. In other words, the prosecutor argued that any delay of the defendant's trial between September 4, 2012 and November 2, 2012, was attributable to the defendant, not the State. Thus, although the State agreed with the defendant that December 19, 2012, would be 160 calendar days from his acquittal on the conspiracy charge, it did not agree that December 19, 2012, was the last day the State could try the defendant under section 5-103(e).

¶ 13 Neither the prosecutor nor the defense counsel was prepared to argue the speedy trial issue during the November 2, 2012 hearing. The prosecutor stated that he wanted to set the trial before December 19, 2012 to obviate any possible speedy trial issues and that he would attempt to obtain Shambaugh's presence by that date. However, he acknowledged that he did not know whether Shambaugh would be available to testify by that date. The trial judge indicated that he would have to set the bench trial for the next available date on the calendar, and he asked if that was what the attorneys wished to do. The prosecutor stated that he had no other choice and asked for a one-day trial setting. The trial court set a new trial date of January 29, 2013, the first available full day on the court's schedule. Defense counsel did not make a written or oral demand for trial at an earlier date. The trial court informed the defendant that he was required to appear for trial on January 29, 2013, and asked him whether he understood that. The defendant replied, "yes." Before concluding the hearing, the trial court asked the prosecutor and defense counsel whether they had "anything for the record." Each counsel indicated that he had nothing further to say.

¶ 14 On January 28, 2013, the defendant filed another motion to dismiss the case on speedy trial grounds. The following day, after conducting a hearing on the defendant's motion, the trial court denied the motion. The trial court ruled that the speedy trial clock began to run on July 12, 2012, and was tolled from the date the defendant waived his right to a jury trial on September 4,

2012, until November 2, 2012, the date the State requested and was granted a continuance. Thus, the trial court reasoned that, as of January 29, 2013 (the new trial date), a total of 142 days were chargeable to the State (*i.e.*, the days from July 12, 2012 to September 4, 2012, and from November 2, 2012 through January 29, 2013). The court therefore held that the defendant's January 29, 2013, trial fell within the 160-day speedy trial limit prescribed by section 103-5(e).

¶ 15 During the trial, Illinois State Police Forensic Scientist Barbara Schuman testified that she analyzed one of the substances that the defendant sold to a confidential police informant and that her testing indicated the presence of cocaine. Shambaugh did not testify during the trial, and the record does not indicate whether Shambaugh was available to testify at that time. In its brief on appeal, the State argues that there was no reason to call Shambaugh during the trial because the defendant did not challenge the chain of custody during the trial.

¶ 16 At the conclusion of the trial, the trial court found the defendant guilty of the lesser included offense of unlawful delivery of a controlled substance because it concluded that the State had not shown beyond a reasonable doubt that the location of the drug transaction (which took place in a carwash parking lot) was within 1000 feet of a nearby church. The defendant moved for a new trial arguing, *inter alia*, that the court had erred in finding no speedy trial violation. The trial court denied the defendant's motion and sentenced the defendant to seven years in prison.¹ This appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, the defendant argues that his conviction for unlawful delivery of a controlled substance must be reversed because: (1) the State violated his statutory right to a speedy trial by

¹The State voluntarily dismissed the sole remaining charge against the defendant, *i.e.*, one count of unlawful delivery of a controlled substance (Case No. 11 CF 313).

failing to bring the case to trial within 160 days of his acquittal on an earlier charge, as mandated by section 103-5 of the Code; and (2) his trial counsel provided ineffective assistance of counsel by accepting the trial court's attribution of delay to the defendant when the defendant waived his right to a jury trial and requested a bench trial one week prior to the scheduled jury trial and three months prior to the expiration of the speedy trial deadline. We will address these arguments in turn.

¶ 19

1. Speedy Trial

¶ 20

The right to a speedy trial is guaranteed to a defendant under both the sixth amendment and the due process clauses of the federal constitution (*Klopfer v. North Carolina*, 386 U.S. 213 (1967)), and by article I, section 8, of the Illinois constitution (Ill. Const.1970, art. I, § 8). *People v. Van Schoyck*, 232 Ill. 2d 330, 335 (2009). In addition, section 103–5 of the Code creates a statutory right to a speedy trial and prescribes specific periods of time within which an accused must be brought to trial. 725 ILCS 5/103–5 (West 2012); *Van Schoyck*, 232 Ill. 2d at 335. At the time the defendant was charged in the instant case (Case No. 12 CF 32), section 103–5(e) provided that, when a defendant who is in custody for more than one offense has invoked his right to a speedy trial and one of the charges against him has been adjudicated, "[s]uch person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first charge thus prosecuted is rendered." 725 ILCS 5/103-5(e) (West 2012). Section 103-5(e) further stated that,

“if *** such period of 160 days expires without the commencement of trial of, or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of

prosecution *unless delay is occasioned by the defendant.*" (Emphasis added.) 725 ILCS 5/103-5(e) (West 2012).

¶ 21 The defendant argues that the State violated his right to a speedy trial under section 103-5(e) by failing to bring him to trial in the instant case within 160 days following his acquittal in Case No. 12 CF 222. "[T]he provisions of section 103–5 are to be liberally construed in favor of the defendant, and *** the State cannot improperly manipulate criminal proceedings or purposefully evade the operation of the section's provisions." *Van Schoyck*, 232 Ill. 2d at 335; *People v. Woolsey*, 139 Ill. 2d 157, 169 (1990). However, "[t]he defendant bears the burden of affirmatively establishing a speedy-trial violation, and in making his proof, the defendant must show that the delay was not attributable to his own conduct." *People v. Kliner*, 185 Ill. 2d 81, 114 (1998); see also *People v. Jones*, 104 Ill. 2d 268, 280 (1984); *People v. Castillo*, 372 Ill. App. 3d 11, 16 (2007).

¶ 22 Any period of delay occasioned by the defendant temporarily suspends the running of the speedy-trial period until the expiration of the delay, at which point the statute shall recommence to run. *Kliner*, 185 Ill. 2d at 115. A delay is occasioned by the defendant and charged to the defendant "when the defendant's acts caused or contributed to a delay resulting in the postponement of trial." *Id.*; see also *People v. Murray*, 379 Ill. App. 3d 153, 158-59 (2008). Moreover, Section 103–5(a) provides that "[d]elay shall be considered to be agreed to by the defendant *unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record.*" (Emphasis added.) 725 ILCS 5/103–5(a) (West 2012). When a trial court sets a date for trial outside of the 160-day speedy trial deadline, it is "delaying" the trial, and the defendant is "obligated to object in order to prevent the speedy trial clock from tolling." *People v. Cordell*, 223 Ill. 2d 380, 390-91 (2006); see also *People v. Brexton*, 2012 IL

App (2d) 110606, ¶ 24. To avoid such tolling (*i.e.*, to prevent a delay from being attributed to the defendant), the defendant must affirmatively object at the time the delay is proposed, even if the defendant had made a speedy trial demand earlier in the proceedings. *Brexton*, 2012 IL App (2d) 110606, ¶ 25; *People v. Hampton*, 394 Ill. App. 3d 683, 689 (2009). "A defense counsel's express agreement to a continuance may be considered an affirmative act contributing to a delay which is attributable to the defendant." *Kliner*, 185 Ill. 2d at 115; see also *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006).

¶ 23 The waiver of a jury trial after the case has been set for trial may constitute delay attributable to the defendant, particularly where the waiver occurs late in the speedy-trial period. See, *e.g.*, *People v. Johnson*, 122 Ill. App. 3d 636, 638 (1984) (holding that the rescheduling of the trial which previously had been set well within the 120-day period was delay attributable to the defendant because "defendant moved to waive a jury two days before the jury trial was to commence").

¶ 24 A trial court's determination as to whether a delay is attributable to the defendant is "entitled to much deference and should be sustained absent a clear showing that the trial court abused its discretion." (Internal quotation marks omitted.) *People v. Mayo*, 198 Ill. 2d 530, 535 (2002); see also *People v. Klein*, 393 Ill. App. 3d 536, 545 (2009) ("Generally, a trial court's calculations of the number of days accruing against the State following a defendant's speedy trial demand involves a question of fact and our standard of review is abuse of discretion.").

¶ 25 In this case, section 103-5(e) mandated that defendant be tried within 160 days from July 12, 2012, the date he was acquitted in Case No. 12 CF 222. The parties agree that the delay from July 13, 2012 through September 4, 2012 (the date the defendant waived a jury trial and requested a bench trial) is attributable to the State. The parties also agree that the delay from

November 2, 2012 (the date the State sought a continuance due to Shambaugh's unavailability) until the January 29, 2013 trial is also attributable to the State. However, the parties dispute whether the delay from September 4, 2012 through November 2, 2012 is attributable to the defendant. If that delay is attributable to the defendant, then the total delay attributable to the State is less than 160 days, and the defendant's trial was timely under section 103-5(e). However, if that delay is attributable to the State, the defendant's trial was outside of the statutory 160-day period, and therefore untimely. In that event, the defendant's conviction in this case must be reversed and the charge against him must be dismissed.

¶ 26 The defendant argues that the delay from September 4, 2012 through November 2, 2012 is not attributable to him because, when he waived his right to a jury trial on September 4, 2012, he merely requested a bench trial (as was his right) to be scheduled within the 160-day speedy trial period. At the time he waived his right to a jury trial, more than three months remained until the expiration of the speedy trial deadline, and the bench trial was initially scheduled for December 4, 2012, a date that fell within the speedy trial period. Thus, according to the defendant, the only reason he was not tried within the speedy trial limit was because the State sought an extension of the bench trial.

¶ 27 In response, the State argues that the defendant's waiver of a jury trial one week before the jury trial was set to commence constituted delay attributable to the defendant. The State also maintains that the defendant acquiesced in the continuance of the bench trial to January 29, 2013 (a date outside of the 160-day speedy trial period) by not objecting when the trial court granted that continuance.

¶ 28 The State is correct. Section 103-5(a) places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed by objecting on the record to any

delays proposed by the State. *Cordell*, 223 Ill. 2d at 391-92. A delay proposed by the State “shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record.” 725 ILCS 5/103-5(a) (West 2012); see also *Brexton*, 2012 IL App (2d) 110606, ¶ 13. Here, when the trial court continued the trial date to January 29, 2013 (which was outside of the 160-day speedy trial deadline), the defendant did object in the manner required by section 103-5(a). Although defense counsel suggested that the proposed continuance might violate the defendant's speedy trial rights, he did not make a written or oral demand for trial on the record at the time the continuance was entered, as required by section 103-5(a). Instead, counsel indicated that he was not prepared to argue the issue and agreed to argue it at a later time, after the trial court ordered the trial continued to January 29, 2013. Accordingly, the defendant acquiesced in that continuance and may not obtain a reversal of his conviction on speedy trial grounds based upon the January 29, 2013 trial date. *Cordell*, 223 Ill. 2d 380, 390-91 (2006); *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 26, 29; *Brexton*, 2012 IL App (2d) 110606, ¶¶ 24-25.

¶ 29 However, assuming *arguendo* that the defendant did not acquiesce in the continuance, he would still be unable to establish a violation of his speedy trial rights under section 103-5(e). The defendant waived his jury trial right on September 4, 2012, only one week before the jury trial was scheduled to commence. As our appellate court held in *Johnson*, when a defendant waives his jury trial shortly before the scheduled trial date, any resulting delay in scheduling a bench trial is attributable to the defendant for speedy trial purposes. See *Johnson*, 122 Ill. App. 3d at 638. The defendant argues that *Johnson* does not apply here because it was decided before our supreme court held that a defendant has a constitutional right to waive a jury trial and to request a bench trial. See *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 222 (1988). However,

Joyce's holding does not alter the fact that the delay caused by a jury waiver should be attributed to the defendant, especially where the waiver occurs shortly before the jury trial was scheduled to begin. Moreover, in this case, both the defendant and his counsel explicitly and repeatedly acknowledged that the resulting delay would be attributed to the defendant for speedy trial purposes.

¶ 30 Accordingly, the 59-day delay resulting from the defendant jury trial waiver (which ran from September 4, 2012 through November 1, 2012), was attributable to the defendant and tolled the speedy trial period. *Kliner*, 185 Ill. 2d at 115; *Murray*, 379 Ill. App. 3d at 158-59; *Johnson*, 122 Ill. App. 3d at 638; *Wade*, 2013 IL App (1st) 112547, ¶ 26. When those 59 days are attributed to the defendant, the defendant was tried 143 days after his acquittal in the prior case, which is within the 160-day speedy trial period.

¶ 31 On appeal, the defendant argues that his waiver of a jury trial on September 4, 2012 did not cause any delay attributable to him because the bench trial date that he agreed to on that date fell well within the speedy trial period. Our appellate court rejected a similar argument in *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 24-27. In *Wade*, the defendant argued that an agreed continuance within the statutory speedy trial time limit was not attributable to him and did not toll the running of the statutory time period. Our appellate court disagreed, ruling that "[n]othing in the plain language of section 103-5 supports defendant's interpretation." Citing our supreme court's ruling in *Cordell*, the appellate court ruled that the statute "places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed." *Wade*, 2013 IL App (1st) 112547, ¶ 26 (citing *Cordell*, 223 Ill. 2d at 391). Our appellate court ruled that, "[t]o invoke speedy trial rights, the statute requires a clear objection and demand for trial from defendant," and that "[t]here is no language in the statute suggesting this requirement does not

apply when the case has been set for trial." Accordingly, the court held that "[a]n agreed continuance tolls the speedy trial period, whether or not the case has been set for trial." The same reasoning should apply here. The defendant's decision to waive his right to a jury trial that had been scheduled for September 11, 2012, and his agreement to the next available bench trial date (December 4, 2012), caused a delay in his trial that was attributable to the defendant, not the State, even though the December 2012 bench trial date fell within the speedy trial deadline.²

¶ 32 2. Ineffective Assistance of Trial Counsel

¶ 33 The defendant also argues that his trial counsel rendered ineffective assistance by accepting the trial court's attribution of the delay caused by the defendant's September 4, 2012 jury trial waiver to the defendant. To establish ineffective assistance, the defendant must show that his counsel's performance was deficient, *i.e.*, that his representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defense counsel is not required to make legally groundless objections in order to provide effective legal assistance. See *People v. Moore*, 2012 IL App (1st) 100857, ¶ 45. Here, relevant case law establishes that any delay occasioned by the defendant's canceling of the jury trial on September 4, 2012 would be attributable to the defendant. See, *e.g.*, *Wade*, 2013 IL App (1st) 112547, ¶¶ 24-27; *Johnson*, 122 Ill. App. 3d at 638. The defendant cites no cases refuting this view. Thus, it was not objectively unreasonable for trial counsel to agree that this delay would be attributable to the defendant. Because the defendant cannot establish a speedy trial violation, his claim for ineffective assistance of counsel also fails. See, *e.g.*, *Wade*, 2013 IL App (1st) 112547, ¶ 30

² Because we hold that the defendant's trial was brought within the speedy trial period, we do not address the State's alternative argument that the trial court implicitly granted the State a continuance beyond the speedy trial period to obtain material evidence under section 103-5(e).

(ruling that a defendant "cannot base a claim of ineffective assistance of counsel on his attorney's failure to claim a speedy trial violation where no violation of defendant's rights occurred and, therefore, raising the issue would have been futile"); see also *Cordell*, 223 Ill. 2d at 392–93.

¶ 34

CONCLUSION

¶ 35

For the foregoing reasons, we affirm the judgment of the circuit court of Whiteside County.

¶ 36

Affirmed.