

No. 1-15-0851

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Appeal from the  
 ) Circuit Court of  
 Plaintiff-Appellee, ) Cook County.  
 )  
 v. ) No. 14 CR 1503  
 )  
 JOSEPH TYNSKI, ) Honorable  
 ) James Michael Obbish,  
 Defendant-Appellant. ) Judge, presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in granting the State’s motion to extend the speedy trial term.

¶ 2 Following a bench trial, defendant Joseph Tynski was convicted of home invasion and sentenced to eight years in prison. On appeal, defendant contends that his conviction must be reversed because the trial court abused its discretion in granting the State’s motion to extend the speedy trial term where the State failed to exercise due diligence in locating the victim for trial.

For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of December 15, 2013, when the victim, Michael Westphal, was attacked and injured in his Chicago home. Defendant and two codefendants were charged with home invasion, residential burglary, attempted robbery, and aggravated battery. All three men were tried jointly, but neither codefendant is party to the instant appeal.

¶ 4 Defendant was taken into custody on December 15, 2013, and arraigned on February 3, 2014. On August 14, 2014, the parties agreed to a bench trial on September 30, 2014. When the parties convened that day, the State indicated it was not ready. The parties agreed to continue the matter until November 18, 2014, and when the State again answered not ready, defendant filed a written demand for trial and the matter was continued to January 7, 2015, on the State's motion. On January 7, 2015, the State asked to continue the case until January 12, 2015, "as one of our main witness[es], an eyewitness who is a detective, he had childcare issues due to schools being closed today unexpectedly." The trial court granted a continuance.

¶ 5 On January 12, 2015, the State again asked to continue the matter. The State explained its request as follows:

"We have diligently tried to serve our victim in this case. We believe that he is still at the home which we tried to serve him. We ask to continue this case until close to the end of term, so the 21st of January in order to make some last efforts to get him in. This is a serious case. He was injured in this case, may feel intimidated by this incident, and so we would ask that you indulge us[.]"

The trial court granted the State's request to continue the case.

¶ 6 On January 21, 2015, which was the 116th day of the speedy trial term, the State indicated it was not ready because the victim, Westphal, was not present. The State explained that a police officer who had been tendered a subpoena for Westphal had learned Westphal was at a bar, but that the officer "was not working and was not able to get to that location." The State reported that the officer had received information from a bartender that Westphal frequented the bar, and asserted that if the speedy trial term were extended, it would be able to send an investigator to the bar to locate him. The trial court denied the State's motion to extend the term and continued the case on the State's motion to January 23, 2015.

¶ 7 On January 23, 2015, the 118th day of the speedy trial term, the State reported that it had obtained personal service on Westphal but, because he was not present in court, requested a rule to show cause and moved to extend the speedy trial term. To support its motion, the State called Cook County State's Attorney investigator Michael Kaufmann, who testified that on January 22, 2015, he went to the bar in question and waited for Westphal. After two and a half hours, he saw a man matching a photo he had obtained from an Illinois driver's license service, approached, and identified himself. Kaufmann said, "Michael, Michael Westfall [*sic*]," and Westphal responded, "I knew you would be coming for me." Kaufmann handed Westphal a subpoena, circled the phone number on it, and told him he must call the State's Attorney's office. When Westphal replied that he did not have a phone, Kaufmann told him to use the bartender's phone and advised him that if he did not appear in court, the judge could issue a warrant for his arrest. Westphal said he understood. After Kaufmann testified, the trial court confirmed that the driver's

license information indicated that Westphal lived at 3654 West 61st Street, which was also the address of the crime.

¶ 8 At the conclusion of Kaufmann's testimony, the trial court issued a warrant for Westphal's arrest with a \$100,000 D bond.

¶ 9 In response to the court's request for defendant's position on extending the speedy trial term, defense counsel asserted that "the first request for subpoena for [Westphal's] presence in court wasn't even made until twenty-two days after the first trial date had been -- had passed" and that Westphal "wasn't subpoenaed until shortly before the second trial date." Based on these assertions, counsel argued the State had not shown diligence in locating Westphal.

¶ 10 Following argument, the trial court granted an extension of 30 days and continued the case to January 27, 2015. In announcing its decision, the court stated that it found reasonable efforts had been made to serve Westphal, who was deliberately trying to avoid service of process. The court found that the State had reason to believe Westphal lived at 3654 West 61st Street, as that was the scene of the alleged home invasion and residential burglary, as well as the address listed on his driver's license, and noted that although an investigator left "information" in the mailbox there and the information had been removed, Westphal continued to avoid service of process.<sup>1</sup> The court explained that it had denied the State's earlier request for an extension not due to a lack of diligence, but rather, because at the time, it seemed no reasonable argument could be made that extending the term would cause Westphal to appear. However, based on Kaufmann's testimony, the court found that the situation had changed, and determined that the

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<sup>1</sup> The trial court appeared to glean the information about an item being left in Westphal's mailbox from the State's written motion for extension, which is not included in the record on appeal.

warrant it had issued for Westphal's arrest "somewhat guaranteed" his presence at trial. The court reiterated its finding that the State's efforts to serve Westphal were reasonable and concluded that in the interest of justice, the State's motion for an extension of the speedy trial term would be granted.

¶ 11 On January 27, 2015, the State indicated that Westphal had not yet been arrested on his warrant. The case was continued on the State's motion to February 3, 2015, when the State answered ready for trial.

¶ 12 At trial, Michael Westphal testified that on the date in question, he was living in a single family home at 3654 West 61st Street. Around midnight, he came home from a night out and entered through the front door. He had walked about 15 feet into the dark house when he was tackled to the ground and hit in the face. As he was being hit, Westphal heard someone say the words "fucking coins." Westphal lost consciousness. He came to briefly and saw a light, but did not regain full consciousness until he was in the back of an ambulance. Westphal's injuries included a black eye and a swollen face, and the back of his head "was like [he] banged it on something." Afterwards, Westphal realized that his wallet, his iPod, and his father's silver coin collection were missing, and that there was damage to the house's back door.

¶ 13 Chicago police detective Anthony Amato testified that around midnight on the date in question, he was on patrol with his partner when he saw a man walking back and forth in the alley of the 3600 block of West 61st Street. The officers stopped, approached the man, and asked him what he was doing. The man, identified in court as codefendant C. J. Felella, first said he was coming from a friend's house, but then stated he was walking around getting exercise. During this conversation, Detective Amato heard a door being slammed and male voices coming

from the rear of the house at 3654 West 61st Street. Leaving Felella in the alley with his partner, Detective Amato walked up to the back door. He shined his flashlight through the window and saw Westphal lying on the floor, bleeding, with three hooded and masked men standing over him. Detective Amato banged on the door, yelled “police,” and ran inside with his gun out. He caught up with the three men at the front door and ordered them to the ground. As Detective Amato started the process of handcuffing the men, who were on their knees, one of them got up and ran out the front door. Detective Amato started to pursue that man, but then decided to focus on handcuffing the two who were still inside the house. In court, Detective Amato identified these two men as defendant and his second codefendant, Anthony Serratt. Defendant, Felella, and Serratt were transported to the police station, and Westphal, who was unconscious when Detective Amato entered the house, was transported to the hospital.

¶ 14 After the State rested, defendant and both codefendants made a motion for a directed finding as to all counts, which the trial court granted as to the charge of aggravated battery. Defendant did not testify or present any evidence.

¶ 15 Following closing arguments, the trial court acquitted Felella, but found defendant and Serratt guilty of home invasion, residential burglary, and attempted robbery, and merged all three counts.

¶ 16 Defendant filed a written motion for a new trial, challenging the sufficiency of the evidence and arguing generically that the trial court erred when it overruled his objections. In orally presenting the motion, defense counsel also raised the speedy trial issue, stating, “I would just reiterate our previously-filed objection to the extension of term for the record, to preserve that issue.” The trial court denied the motion, addressing the speedy trial issue as follows:

“[W]ith respect to the motion for extension of term, it was in fact extended very briefly in this particular case. I believe I stated my reasons at the time. It was only because although there was a lengthy period of time where Mr. Westphal was not available as a witness for the State, shortly before the term would have expired, State’s Attorney’s office through reasonable efforts did in fact locate and serve him with a subpoena to come to court. Which was the basis of my extension of term.”

The court subsequently sentenced defendant to eight years in prison for home invasion.

¶ 17 On appeal, defendant contends that his conviction must be reversed because the trial court abused its discretion in granting the State’s motion to extend the speedy trial term where the State failed to exercise due diligence in locating Westphal. He argues that the State did nothing to attempt to track down Westphal -- who had apparently not responded to a subpoena defendant asserts was issued on October 22, 2014 -- until 83 days later, on January 12, 2015, the 107th day of the speedy trial term. Defendant argues that the State took “no steps” to locate evidence material to its case until the speedy trial term was about to expire, that “months of inaction does not qualify as ‘due diligence’ under the speedy trial statute,” and that the State’s behavior demonstrates it was completely disinterested in ensuring that defendant’s right to a speedy trial was upheld. Therefore, according to defendant, it was an abuse of discretion for the trial court to grant the State’s motion for an extension on January 23, 2015, the 118th day of the speedy trial term.

¶ 18 As an initial matter, we note that defendant did not include this issue in his written posttrial motion. In general, such a failure would result in forfeiture. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial” (emphases in original)). However, in this case, we find that the issue was preserved for appellate review because the trial court reviewed the claim and ruled on it. See *People v. Heider*, 231 Ill. 2d 1, 18 (2008). In *Heider*, our supreme court declined to apply the forfeiture rule where the trial court had the full opportunity to review the defendant’s claim of error, and where the defendant did not assert on appeal a completely different objection from the one he raised before the trial court. *Id.* Here, defense counsel vigorously argued against an extension of the speedy trial term at the time the State made its request, and then renewed the objection at the hearing on the motion for a new trial, stating, “I would just reiterate our previously-filed objection to the extension of term for the record, to preserve that issue.” In denying the posttrial motion, the trial court specifically addressed and rejected defendant’s speedy trial argument, ruling that the State had made reasonable efforts to locate and serve Westphal. We find that the trial court reviewed defendant’s claim and that defendant is not now asserting a completely different objection than the one he raised below. In these circumstances, we hold that the issue is not forfeited and we will consider the merits of defendant’s claim. See *id.*; *People v. Patterson*, 392 Ill. App. 3d 461, 464 (2009) (although the defendant did not include a speedy trial issue in his written posttrial motion, the claim was addressed on appeal because it was fully considered by the trial court, both at a hearing on the initial motion to dismiss and at a hearing on a motion to reconsider before trial began).



¶ 19 Section 103-5 of the Code of Criminal Procedure of 1963 provides, in relevant part, that “[e]very person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant.” 725 ILCS 5/103-5(a) (West 2014). A trial court may grant an extension to the speedy trial term of up to an additional 60 days if it determines that the State has exercised due diligence to obtain evidence material to the case and that reasonable grounds exist to believe that such evidence may be obtained at a later day. 725 ILCS 5/103-5(c) (West 2014). “The test of due diligence is whether the State began efforts to locate its witness in sufficient time to secure [his] presence before the speedy trial term expired.” *People v. Exson*, 384 Ill. App. 3d 794, 799 (2008). Whether the State has exercised due diligence is determined on a case-by-case basis after careful review of the particular circumstances presented. *People v. Spears*, 395 Ill. App. 3d 889, 893 (2009). On appeal, we will not disturb a trial court’s decision to grant an extension absent an abuse of discretion. *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 30. An abuse of discretion will be found only where the trial court’s decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Spears*, 395 Ill. App. 3d at 893.

¶ 20 We find that the trial court did not abuse its discretion in granting the State a 30-day extension of time beyond the speedy trial term. The record indicates that on January 12, 2015, the 107th day of the speedy trial term, the State reported to the trial court that it had “diligently” tried to serve Westphal at his home. Nine days later, on January 21, 2015, the 116th day of the speedy trial term, the State reported that a police officer had learned Westphal frequented a particular bar and that it planned to send an investigator there to locate him. At this point, the

trial court denied the State's request to extend the speedy trial term because "it seemed \*\*\* there was no reasonable argument that could be made at that time that extending the term would in fact produce the desire[d] result that the witness would appear." The next day, January 22, 2015, the 117th day of the speedy trial term, the investigator went to the bar and, after waiting for two and a half hours, spotted Westphal, served him with a subpoena, and directed him to call the State's Attorney's office. The following day, January 23, 2015, the 118th day of the speedy trial term, Westphal failed to appear in court. Due to Westphal's absence, the State requested a rule to show cause and made another motion to extend the speedy trial term. After the trial court heard the investigator's testimony regarding serving Westphal at the bar, it issued a warrant for Westphal's arrest and granted a 30-day extension of the speedy trial term.

¶ 21 We cannot say that the trial court's decision was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. Rather, the record reflects that the trial court carefully considered the particular circumstances of the case before granting an extension: the court reviewed the steps taken by the State; determined that Westphal was deliberately trying to avoid service of process at the address that was listed on his driver's license and where the home invasion took place; and concluded that with the issuance of an arrest warrant, the likelihood of Westphal appearing in court had increased exponentially. Based on the totality of the evidence in the record, we conclude that the trial court did not abuse its discretion in finding that the State exercised due diligence in its efforts to locate Westphal prior to the expiration of the speedy trial term, in determining that its issuance of an arrest warrant changed "the playing field" and "somewhat guaranteed" Westphal would appear in

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court, and therefore, in granting a 30-day extension of time for the State to secure his presence.

Defendant's arguments fail.

¶ 22 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 23 Affirmed.