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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellant,)	
)	
v.)	Nos. 13-CM-912
)	14-CF-105
)	
KEVIN O. JOHNSON,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the case on speedy-trial grounds: as defendant's attorney agreed to a continuance, and as defendant did not promptly repudiate that agreement, that delay was attributable to defendant.

¶ 2 The State appeals from the judgment of the circuit court of De Kalb County granting defendant Kevin O. Johnson's motion to discharge for a statutory speedy-trial violation. Because the speedy-trial period had not yet lapsed when defendant filed his motion, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of theft of United States currency having a value exceeding \$500 and not exceeding \$10,000 (720 ILCS 5/16-1(a)(1) (West 2012)).¹

¶ 5 On September 3, 2015, defense counsel, who appeared without defendant, agreed to a continuance to November 3, 2015. On September 9, 2015, defense counsel moved to withdraw as defendant's attorney. On September 17, 2015, the trial court granted counsel's motion to withdraw. The court continued the case to September 22, 2015. On September 22, 2015, the court continued the case to September 29, 2015, for a hearing on defendant's motion to bar discovery.

¶ 6 On September 29, 2015, defendant, *pro se*, moved to withdraw his motion to bar discovery. He also objected to the continuance to November 3, 2015, contending that his counsel agreed to the continuance without his knowledge and approval. The trial court denied defendant's request to strike the November 3, 2015, date, explaining that it was an agreed date and that defendant had not filed a motion to challenge the agreement. The court set a trial date of December 7, 2015. The court's written order stated that the period between November 4, 2015, and December 7, 2015, was attributable to the State.

¶ 7 On November 24, 2015, the trial court granted the State's motion to continue the trial date to February 22, 2016. Defendant objected to the continuance.

¶ 8 On February 18, 2016, new counsel appeared on behalf of defendant. Defendant moved to continue the February 22, 2016, trial date. On defendant's motion, the case was continued to

¹ We note that defendant was originally charged in case No. 13-CM-912 with theft not exceeding \$500 (720 ILCS 5/16-1(a)(1) (West 2012)). Although the record is not entirely clear, it appears that the charge was increased to a felony based on the theft from the same victim of an increased amount of money.

February 24, 2016, before the assigned judge, for setting a new trial date. On February 24, 2016, defendant agreed to continue the case to March 16, 2016, for setting a trial date.

¶ 9 On March 16, 2016, defense counsel appeared without defendant. Defense counsel agreed to continue the case to April 20, 2016, for setting a trial date.

¶ 10 On April 5, 2016, defense counsel moved to withdraw. On April 8, 2016, the trial court granted counsel's motion to withdraw. When the court stated that it would continue the case to April 12, 2016, the State pointed out that there was already a set date of April 20, 2016, which it wanted to keep. Defendant stated that he "would rather go [on April 12]." The court continued the case to April 12, 2016, but kept the April 20, 2016, date for further status. Defendant contended that he never agreed to the April 20, 2016, date. The court responded that it would not decide whether defendant agreed and would allow the assigned judge to decide that issue on April 12.

¶ 11 On April 12, 2016, defendant, *pro se*, stated that he wanted to schedule a trial date. The State responded that there was an issue as to whether defendant agreed to continue the case to April 20, 2016. Defendant stated that he would like to have the April 20 date stricken and have a trial date set. When the State responded that it wanted to keep the April 20 date, the trial court stated that defendant was demanding trial and was no longer agreeing to the April 20 date.

¶ 12 When the State asked for a May 10, 2016, trial date, the trial court suggested that they take a break so that the State could calculate whether that date would be within the 160-day speedy-trial term. See 725 ILCS 5/103-5(b) (West 2012). Following the break, the State asserted that the May 10 date would be within the speedy-trial period. The court set the trial for May 10, 2016, with a final pretrial conference date of May 5, 2016. The court set April 26, 2016, for the filing of any motions.

¶ 13 On April 26, 2016, defendant filed his motion to dismiss for a speedy-trial violation. The trial court set defendant's motion for May 5, 2016.

¶ 14 On May 5, 2016, the parties presented their arguments on defendant's speedy-trial motion. When the trial court asked the State if it had included in its written response an exact count of the days remaining in the speedy-trial period, the State answered that it had not, but that it did have a count. When the court asked the State whether the delay from September 29, 2015, to November 3, 2015, should be attributable to the State, the State answered yes. When the court asked defendant whether the continuance from December 4, 2015, to December 10, 2015, was attributable to him, defendant answered that it was not, because the State had requested a continuance of the December 7, 2015, trial date. The State agreed that the period from December 4 to December 10, 2015, was attributable to the State.

¶ 15 The State then announced that it would "cut this short" and stipulate that, as of the February 22, 2016, trial date, 159 days of the speedy-trial period had run and the State was ready for trial. The State contended that, when defendant agreed on February 18, 2016, to continue the case, that delay was attributable to defendant. Defendant admitted that the time from February 18, 2016, through April 8, 2016, was attributable to him. According to defendant, as of February 18, 2016, 154 days had run. Defendant explained that, because his counsel had moved on February 18, 2016, with his approval, to continue the case beyond the February 22, 2016, trial date, the time was attributable to defendant.

¶ 16 When the trial court asked for the State's position, the State contended that, because defendant failed to appear on March 16, 2016, defendant waived his speedy-trial claim and the 160-day period began to run anew on March 16. Defendant disagreed, contending that his

failure to appear did not act as a waiver, because the State had requested a continuance of the March 16 date.

¶ 17 The trial court then asked the State if it had calculated the number of days remaining in the speedy-trial period in the event that its waiver argument failed. The State responded that it would have to do so. The court asked the State to do so and indicated that the count should begin on September 29, 2015. The State asserted that it believed that the time from March 16, 2016, to April 20, 2016, which defendant's then-counsel agreed to, was attributable to defendant. The court commented that the State had not yet provided a date as to when the speedy-trial period would lapse.

¶ 18 The trial court ruled that the period from December 4, 2015, through December 10, 2015, was attributable to defendant. The court reiterated that it wanted to know the State's position on the number of days that had run in the speedy-trial period. The court set the matter for decision on May 12, 2016. In doing so, it allowed the State until May 12, 2016, to provide in a memorandum its count of the remaining days.

¶ 19 On the next day, May 6, 2016, the parties appeared in court. The trial court noted that it had had a change of schedule and had set the matter on that day for ruling on defendant's motion to dismiss. The court added that it had had an opportunity to "reread all of the cases [the State had] presented" and was prepared to rule. When the court asked the State if it had anything else to say, the State answered no.

¶ 20 In ruling, the trial court began by noting that the State was arguing that defendant waived his speedy-trial demand when he failed to appear on March 16, 2016. In rejecting the State's argument, the court found that defendant's failure to appear caused no delay.

¶ 21 The trial court then discussed its calculation of the speedy-trial days. In doing so, the court changed its previous ruling regarding the time from December 4, 2015, through December 10, 2015, and found that that time was attributable to the State. The court further found that from September 29, 2015, through February 17, 2016, 142 days had elapsed. The court found that, as of April 8, 2016, 143 days had elapsed. Therefore, on April 25, 2016, 160 days had run. Thus, because defendant filed his motion to dismiss on April 26, 2016, the day after the speedy-trial period had expired, the court granted defendant's motion to dismiss.

¶ 22 The State never argued that the trial court's calculation was incorrect. Nor did the State move to reconsider or otherwise present any alternative calculation of the number of days. The State filed a certificate of impairment (see Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016)) and a timely notice of appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, the State contends that the trial court abused its discretion in attributing to the State 12 days of delay (April 8 through April 20, 2016) that defendant's counsel originally agreed to, but to which defendant, who was then *pro se*, later objected, and to 6 days of delay from December 4 through December 10, 2015. Defendant did not file a brief.

¶ 25 We begin with the State's assertion that, although its response in the trial court to defendant's motion to dismiss was "built upon a theory that defendant waived his speedy trial demand by failing to appear on March 16, 2016," it did not agree with the court's determination that the delay in bringing defendant to trial was attributable to the State. Accordingly, the State asserts that the issue it now raises "should not be deemed waived on appeal."

¶ 26 Although the State relied primarily on the waiver argument below, it did assert at the May 5, 2016, hearing that the April 8 through April 20, 2016, delay was attributable to

defendant. Therefore, the State did not forfeit that issue on appeal. Even if it did, defendant forfeited any forfeiture argument by failing to file an appellee's brief. See *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 63 (citing *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003)). We note that, despite the lack of an appellee's brief, we may consider the merits of the appeal and reverse the judgment where "the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). See also *People v. O'Brien*, 227 Ill. App. 3d 302, 305 (1992) (*Talandis* rule applies to criminal cases).

¶ 27 Although it is the State's duty to ensure that a defendant is tried within the statutory period (*People v. Mayo*, 198 Ill. 2d 530, 536 (2002)), the defendant bears the burden of affirmatively establishing a speedy-trial violation (*People v. Kliner*, 185 Ill. 2d 81, 114 (1998)). If a defendant is not brought to trial within the statutory time frame, he must be discharged from custody and the charges must be dismissed. 725 ILCS 5/103-5(d) (West 2012); *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006). The trial court's decision regarding which party is responsible for a particular delay is entitled to deference and will not be overturned on appeal absent an abuse of discretion. *Mayo*, 198 Ill. 2d at 535. An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, when no reasonable person would take the trial court's view (*People v. Rivera*, 2013 IL 112467, ¶ 37), or when the ruling rests on an error of law (*People v. Olsen*, 2015 IL App. (2d) 140267, ¶ 11). Although abuse of discretion is the most deferential standard of review, it is not a rubber stamp. *People v. Jacobs*, 2016 IL App (1st) 133881, ¶ 77.

¶ 28 A defendant on bail or recognizance must be tried within 160 days of demanding trial, unless, among other things, a delay is occasioned by the defendant. 725 ILCS 5/103-5(b) (West 2012). A delay is occasioned by the defendant when his acts caused or contributed to a delay resulting in postponement of the trial. *People v. Hall*, 194 Ill. 2d 305, 326-27 (2000). A delay includes any action that moves the trial date outside of the speedy-trial term. *People v. Cordell*, 223 Ill. 2d 380, 390 (2006). Any delay found to be occasioned by the defendant tolls the applicable speedy-trial period. 725 ILCS 5/103-5(f) (West 2012). Although a defendant is permitted to employ section 103-5 as a shield against any attempt to place his trial date outside of the applicable period, he may not use it as a sword after the fact to defeat a conviction. *Cordell*, 223 Ill. 2d at 390.

¶ 29 We initially decide whether the trial court abused its discretion in attributing the delay from April 8, 2016, through April 20, 2016, to the State. If it did, and that period of time was attributable to defendant, the speedy-trial term would not have lapsed until May 2, 2016, after defendant filed his April 26, 2016, motion to dismiss.

¶ 30 The issue is controlled by *People v. Bowman*, 138 Ill. 2d 131 (1990). In that case, the trial court allowed the defendant, whose attorney had agreed to a continuance, to repudiate the agreement and have his case dismissed for a speedy-trial violation. In reversing, our supreme court applied the general rule that a client is bound by the acts or omissions of his attorney. *Bowman*, 138 Ill. 2d at 141. Because the affirmative act of counsel cannot be separated from the defendant's own act, a defendant who does not promptly repudiate an attorney's act upon learning of it has effectively ratified the act. *Bowman*, 138 Ill. 2d at 141. Further, when an attorney requests or agrees to a continuance, the record need not show that he consulted with and received the advice of the defendant, as such a requirement would intolerably burden the courts.

Bowman, 138 Ill. 2d at 142. Where a defendant has not overcome the presumption that his attorney continued a case pursuant to the defendant's authority, the defendant cannot claim that his action did not contribute to the delay caused by his attorney's agreement to the continuance.

Bowman, 138 Ill. 2d at 143. To hold otherwise would force a trial court to inquire into every chargeable delay to determine whether the defendant personally agreed to a continuance.

Bowman, 138 Ill. 2d at 144. Likewise, it would allow every defendant, whose attorney's action caused a delay in a trial, to escape trial and conviction through a questionable application of the speedy-trial statute. *Bowman*, 138 Ill. 2d at 144.

¶ 31 In this case, on March 16, 2016, defendant's attorney agreed to continue the case to April 20, 2016. Although defendant was not present, it is presumed that he authorized that agreement. More importantly, defendant never made any showing to overcome the presumption that he had authorized his attorney to agree to the continuance. Nor did he promptly repudiate counsel's agreement. Instead, it was not until April 8, 2016, that defendant obtained a discharge of his attorney and claimed that he never agreed to the continuance. Waiting nearly a month to object to his attorney's action did not constitute prompt repudiation. Thus, defendant effectively ratified his attorney's action and was bound by the agreement to continue the case to April 20, 2016.

¶ 32 That being the case, the State's argument—that the delay from April 8, 2016, through April 20, 2016, was attributable to defendant—is supported by the record and demonstrates *prima facie* error. Thus, the trial court abused its discretion in attributing the delay to the State. Because the 12-day delay was attributable to defendant, the State had until May 2, 2016, to begin trial. Therefore, defendant's motion to discharge for a speedy-trial violation, which was filed on April 26, 2016, was premature and should have been denied.

¶ 33 Having so decided, we need not decide whether the trial court abused its discretion in attributing the delay from December 4 through December 10, 2015, to the State.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we reverse the judgment of the circuit court of De Kalb County and remand for further proceedings.

¶ 36 Reversed and remanded.