2017 IL App (4th) 160722-U

NO. 4-16-0722

FILED
November 6, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from Circuit Court
Plaintiff-Appellee,	)	of Champaign County
v.	)	No. 10CF1831
KEVEN J. McINTOSH,	)	
Defendant-Appellant.	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and DeArmond concurred in the judgment.

ORDER

¶ *1* *Held*: (1) The trial court did not err in finding defendant failed to prove counsel provided ineffective assistance by not moving to dismiss the charges against him on speedy-trial grounds.

(2) The trial court did not err in finding defendant failed to prove counsel provided ineffective assistance when counsel did not file a motion to withdraw the guilty plea and thus did not preserve defendant's right to appeal.

¶ 2 In April 2013, defendant, Keven J. McIntosh, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2012)), asserting, in part, the State violated his right to a speedy trial and he was denied the effective assistance of counsel when counsel failed to raise and preserve the speedy-trial issue. After an evidentiary hearing on an amended petition, the trial court denied the petition. Defendant appeals this third-stage ruling, arguing the court committed manifest error in concluding defendant failed to prove (1) defense

counsel provided ineffective assistance by not seeking dismissal under the speedy-trial statute, or (2) posttrial counsel provided ineffective assistance when he filed a postplea motion in arrest of judgment instead of a motion to withdraw a guilty plea, and so did not preserve defendant's right to direct appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 30, 2010, defendant was arrested on two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) involving two children. Defendant remained in custody. Assistant public defender Scott Schmidt was appointed to represent defendant.

¶ 5 On December 9, 2010, the State moved to admit statements of the two victims, both under age 13, to their mothers under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2010)).

¶ 6 On December 14, 2010, the State filed a motion for continuance under section 114-4 of the Code (725 ILCS 5/114-4 (West 2010)). In the motion, the State alleged sexual-assault kits containing deoxyribonucleic acid (DNA) samples of the victims were obtained on October 30, 2010. A buccal swab of the defendant was obtained that same day. Buccal swabs of the victims were obtained on November 2 and November 9, 2010. The Illinois State Police Springfield Forensic Science Laboratory (Lab) had not completed the DNA analysis of the kits or the swabs that were material evidence to the charges against defendant. The Champaign police department submitted the swabs and kits to the lab on November 12 and 17, 2010. The State asserted it exercised due diligence to obtain DNA analysis and had reasonable grounds to believe the analysis could be obtained before the January 18, 2011, pretrial. Defendant did not object to

the continuance. The trial court granted the motion.

¶ 7 On January 18, 2011, the State filed a second motion to continue under section 114-4 of the Code. In this motion, the State made the same assertions as in the initial motion. At the hearing, the State asserted, "I'd be moving to continue. We're still awaiting lab." Defendant objected, stating "we're ready for trial." The court overruled defendant's objection, holding "this is for DNA."

¶ 8 On February 15, 2011, the State filed a motion to permit destruction of physical evidence for laboratory analysis. In the motion, the State asserted lab forensic scientist Corey Formea advised the swabs were appropriate for analysis, but he said the analysis and comparison would destroy the sample, leaving no part available for testing by the defendant. Defendant agreed to the destruction of the evidence. The trial court granted the motion.

¶ 9 On February 22, 2011, the State moved to continue based on sections 114-4 and 103-5(c) of the Code (725 ILCS 5/114-4, 103-5(c) (West 2010)). The assertions regarding "due diligence" were the same as in the earlier two motions to continue. The State asked the case be set for felony pretrial on March 22, 2011, or the trial court to grant the full additional 120 days permitted by statute. At the hearing, the State reported "still awaiting labs." Defendant objected "[f]or the record." The court granted the continuance.

¶ 10 On March 22, 2011, the State filed a motion to continue under sections 114-4 and 103-5(c) of the Code. The State added the assertion on or about January 27, 2011, the lab informed the State further forensic testing was required and such testing would destroy the evidence, and the State obtained an order permitting consumption and forwarded the order to the lab on February 15, 2011. The State again asserted "due diligence to obtain a DNA analysis." At

the hearing, prosecutor Duke Harris asserted he was "covering this for Ms. Weber" and said the State was awaiting DNA results. Harris noted the consumption order and "assume[d] they're in the works." Defendant objected, without further explanation. The trial court noted the objection and granted the continuance.

¶ 11 On April 19, 2011, the State again filed a motion to continue, seeking additional time for DNA analysis. The State included the same earlier assertions, as well as the assertion that on April 14, 2011, forensic scientist Aaron Small informed the State scientific analysis continued and may be completed in 30 to 60 days. At the hearing, defendant objected for the record. The trial court granted the motion.

¶ 12 On April 26, 2011, defendant filed a *pro se* motion to dismiss the case, asserting his right to a speedy trial had been violated.

¶ 13 On May 24, 2011, the State filed another motion for continuance, seeking additional time for DNA testing. The State added no new factual allegations to this motion. At the hearing, prosecutor Joel Fletcher, appearing on Weber's behalf, stated the State had "been awaiting the results of DNA analysis," "received preliminary results," and "further testing is required." Defendant asked to "[s]how my objection." The trial court granted the motion.

¶ 14 On June 13, 2011, a hearing was held on the State's motion to compel taking of hair samples from defendant. The court granted the order.

¶ 15 On July 8, 2011, the State served the DNA results on defendant. Three days later, defendant pleaded guilty to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). In exchange for his plea, the State agreed to dismiss a second count of the same offense against another child to cap its sentence recommendation at 25 years'

imprisonment.

¶ 16 On August 4, 2011, defendant moved *pro se* to withdraw his guilty plea. In his motion, defendant maintained his innocence and alleged Schmidt wanted him to enter the guilty plea. Defendant then dismissed Schmidt as counsel and hired Daniel C. Jackson to represent him.

¶ 17 On August 24, 2011, defendant, represented by Jackson, filed a motion in arrest of judgment, asserting the State failed to bring defendant to trial within the speedy-trial period under section 103-5 of the Code (725 ILCS 5/103-5 (West 2010)). The motion did not assert the State acted without due diligence. Attributing some of the delay to the defendant, the trial court denied defendant's motion. On August 31, 2011, the trial court accepted the State's sentencing recommendation and sentenced defendant to 25 years' imprisonment.

¶ 18 After this denial, defendant mailed two letters to the trial court. In January 2012, defendant mailed a letter to the circuit clerk seeking clarification regarding his *pro se* motion to withdraw his guilty plea. Defendant asked whether Jackson filed the motion. In April 2012, the trial court received a letter from defendant stating defendant had not received a hearing date for his motion. Defendant asserted Jackson was to file a new motion to withdraw the guilty plea on August 24, 2011, but he had not received a copy and counsel had not responded to defendant's attempts at communication with him. In response to the latter letter, the trial court appointed Edwin K. Piraino to represent defendant.

¶ 19 In June 2012, defendant, represented by Piraino, filed a motion to withdraw his guilty plea. A hearing was held on the motion in August 2012. At this hearing, defendant and Schmidt testified. Finding defendant knowingly and voluntarily entered the plea, the trial court denied the motion.

¶ 20 Defendant pursued a direct appeal, but the appeal was ultimately dismissed for lack of jurisdiction. *People v. McIntosh*, No. 4-12-0772 (Nov. 5, 2012) (dismissed on defense counsel's motion where defendant had not complied with Rule 604(d) by filing a motion to withdraw plea).

¶ 21 In April 2013, defendant filed his *pro se* postconviction petition. He alleged the State violated his right to a speedy trial and his trial counsel provided ineffective assistance in failing to raise and preserve the speedy-trial issue. That same month, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. The court concluded defendant could not show prejudice because the court, after defendant filed his *pro se* motion to withdraw his guilty plea, held a hearing on the allegations and denied defendant's request.

¶ 22 On appeal, this court reversed the dismissal and remanded for further proceedings. *People v. McIntosh*, 2015 IL App (4th) 130311-U, ¶ 26 (May 19, 2015). We observed, at the first stage of postconviction proceedings under the Act, prejudice for purposes of ineffective-assistance claims is presumed when a petitioner asserts trial counsel failed to file a requested motion to withdraw the defendant's guilty plea. *Id.* ¶ 21. We further rejected the State's contention prejudice could not be shown due to the trial court's hearing on the matter, finding the trial court lacked jurisdiction to entertain the untimely filed motion to withdraw his guilty plea. *Id.* ¶ 23.

¶ 23 On remand, counsel was appointed and an amended postconviction petition was filed. In his amended petition, defendant argued trial counsel provided ineffective assistance in not protecting defendant's speedy-trial rights.

¶ 24 On October 5, 2016, the trial court held a third-stage evidentiary hearing . At the

hearing, the State called the prosecutor, both defense trial lawyers, and a forensic scientist from the lab. Stephanie Weber, the felony prosecutor who prosecuted defendant, testified defendant was arrested on October 30, 2010. That night, rape kits were taken on both victims. On November 2, 2010, a buccal swab was collected from one victim. On November 4, the Champaign police department delivered the rape kits to the lab. On either November 9 or 12, a buccal swab was taken of the second victim. It was delivered to the lab on November 17. On December 14, 2010, Weber filed a motion to continue the case because she was waiting for DNA results. She would not have expected DNA results to have returned that quickly. There were many items to be analyzed, including the children's underwear, the rape kits, and the swabs. On January 18, 2011, Weber filed another motion to continue because she was waiting for the DNA results. Before filing the motion, she contacted the lab to confirm testing had not been completed.

¶ 25 According to Weber, she received a lab report from Corey Formea on November 27, 2010. Formea reported the samples would need to be consumed. Weber, who worked with defense counsel to set an agreed order and drafted the order, obtained the necessary order on February 15, 2011. That day, the State faxed the order to Formea.

¶ 26 According to Weber's testimony on February 22, 2011, and on March 22, 2011, the State again moved to continue. Weber's practice, before seeking continuances, was to confirm with the lab by telephone or through the web portal that the testing had not been completed.

¶ 27 On April 14, 2011, Weber had a phone conversation with Aaron Small, a lab analyst. Small reported the testing would likely be completed within 30 to 60 days. On April 19,

2011, Weber filed a motion to continue the case. On May 2, 2011, she received a report from Small on the sexual-assault kits. There were no conclusive results from the STR-PCR testing. The lab found insufficient male DNA for autosomal STR analysis. The lab indicated Y-STR analysis would follow on the vaginal swabs. Upon receiving this report, Weber called the lab and stressed the need to expedite the case. Defendant was in custody and was objecting to the motions to continue.

¶ 28 On May 24, 2011, Weber filed another motion to continue. In early June 2011, she received further results. When Weber informed defense counsel of the results, defense counsel asked about the status of the hair. On June 7, 2011, Weber called the lab to inquire regarding the hair. Defendant objected to providing hair for the test. A hearing was held on June 13, 2011. Defendant submitted the hair on June 15, 2011. The testing revealed the hair found on the victim to be animal hair. On June 14, 2011, Weber received a report indicating additional testing was necessary. Weber talked to the lab about the further testing as they were running close to the speedy-trial deadline. Trial was scheduled for July 11, 2011. On July 8, 2011, the State received conclusive DNA test results. After receiving those results, Weber offered a plea deal to defendant, capping the sentence recommendation at 25 years' imprisonment.

¶ 29 Scott Schmidt, a public defender, testified he was appointed to represent defendant in November 2010. Schmidt testified he did not object to the initial request for a continuance as he believed he needed more time to prepare the defense. Schmidt consistently objected on the record to all other continuances sought by the State. Schmidt did not, on the record, inquire as to the State's due diligence at each of the hearings on motions to continue. He had been in regular contact with Weber pretrial and had no reason to believe the State was not

showing due diligence in seeking DNA testing. Schmidt testified the DNA test results were significant because "in the context of the case and the defense that we had been preparing over the months *** it was corroborative of the girls' account and not as we had hoped exculpatory." Schmidt hoped the DNA results would bolster the defense theory of innocence, but they did not.

¶ 30 According to Schmidt, he had discussed the speedy-trial issue with an intern in his office based on conversations with defendant. In May 2011, Schmidt asked the intern to research the issue. Schmidt did not believe a speedy-trial violation occurred, because he believed the State exercised due diligence.

¶ 31 Dana Pitchford, a forensic scientist specialized in the area of forensic biology and DNA analysis at the Illinois State Police Crime Laboratory, testified she was the DNA analyst that conducted the Y-STR analysis in defendant's case. Pitchford briefly explained the process of DNA testing at the lab. When evidence entered the lab, it was screened by Corey Formea for biological components that may contain DNA. Formea preserved samples found and delivered those samples to Aaron Small. In this case, Small conducted DNA analysis on the swabs from both victims, one pair of underwear, and on the standard from defendant. During Small's analysis, he determined the amount of DNA present in the samples and would ascertain how much of the DNA was male. Small did not feel confident he had a sufficient sample to "get an Identifiler Plus autosomal result." He preserved the samples for Pitchford's Y-STR analysis.

¶ 32 Pitchford testified the timeline for the test results in this case spanned approximately eight months. According to Pitchford, at the time of her testimony, it typically took seven months for evidence to be screened in sexual-assault cases. At the time defendant's evidence was submitted, the lab transitioned to new technology and the analysts were undergoing

training. This transition slowed the analysis process.

¶ 33 Pitchford testified she was in regular contact with Weber in defendant's case. Because of this communication, defendant's case was placed in the project using the newer technology and it was "fast-tracked." The results would not have been achieved as quickly had Weber not maintained regular contact with the lab. Pitchford testified to the following:

"This was definitely very fast-tracked. Typically, we – we report to any detective or any attorney that we need 60 to 90 days to do initial screening, an additional 60 to 90 days to do Identifiler Plus, an additional 60 to 90 days to have a Y-STR profile. All of this happened in much quicker terms."

¶ 34 Daniel Jackson, a criminal defense attorney, testified he was hired to represent defendant in some postplea motions. Jackson was aware defendant filed a *pro se* motion to withdraw his guilty plea. Jackson decided to replace the motion with a motion "in arrest of judgment." Jackson knew the plea agreement had a cap of 25 years and defendant had faced a natural-life prison sentence absent the plea. Jackson and defendant discussed the risks of seeking withdrawal of his guilty plea. They decided to file a motion in arrest of judgment to find a way to raise the speedy-trial issue without sacrificing the 25-year cap of the plea agreement:

> "A. Well, the risks were that he had a plea agreement with a cap of 25 years possible, and a case where the possible sentence was natural life.
>
> Q. And did you discuss those risks with him?
>
> A. Yes.
>
> Q. You ultimately decided to file this motion in arrest of

judgment instead of a motion to withdraw guilty plea. Why?

A. We were trying to find a way to bring up the issue of speedy trial without sacrificing the 25-year cap that was part of the plea agreement that was in existence then. That's what we were trying to do.

Q. *** That was in response to your client's concerns about losing the cap; is that correct?

A. Yes. We discussed that."

¶ 35 According to Jackson, he had no recollection of defendant asking him to file a motion to withdraw the guilty plea after sentencing. Any such request would have been a change in defendant's position after the earlier conversation not to risk losing the 25-year cap.

¶ 36 Defendant testified on his own behalf. Defendant met with Jackson in the county jail. Jackson stated he would file a motion to withdraw the guilty plea on defendant's behalf. Defendant believed he was denied the right to a speedy trial and his previous counsel was ineffective for not seeking dismissal on that ground. Defendant further believed the time between when the DNA results were reached and the day of the scheduled trial and his plea were insufficient for him to prepare adequately. Defendant denied asking Jackson not to file the motion to withdraw his guilty plea.

¶ 37 At the conclusion of the hearing, the trial court found, based on Weber's and Pitchford's testimony, the State exercised due diligence. The court found defendant's "belief that somehow his speedy-trial rights were denied and somehow that there's somebody he talked to that would say that the lab results were inconclusive preposterous." The court denied defendant's

postconviction petition.

¶ 38 This appeal followed.

¶ 39 II. ANALYSIS

¶ 40 Defendant argues the trial court erred by concluding defendant failed to prove Schmidt provided ineffective assistance of counsel by not seeking dismissal based on the speedy-trial statute. Defendant begins this argument by asserting the State had not met its burden of establishing it acted with due diligence in obtaining DNA test results. Defendant asserts the State's allegation it acted with due diligence, without providing facts to establish said diligence, was insufficient. The motions to continue under section 103-5(c) (725 ILCS 5/103-5(c) (West 2010)) were thus improperly granted and the 120 days in which to bring defendant to trial under section 103-5(a) of the Code (725 ILCS 5/103-5(a) (West 2010)) expired on April 11, 2011. Defendant concludes the failure to seek a dismissal at this point amounts to ineffective assistance of counsel.

¶ 41 In contrast, the State argues the trial court properly found Schmidt provided effective assistance in not filing a motion to dismiss. The State urges this court to reject defendant's claim the assertions of due diligence were insufficient because defendant, when the motions were made, did not challenge the veracity of those assertions. The State emphasizes Schmidt researched the issue and believed the State exercised due diligence and the evidence adduced at the evidentiary hearing shows the State timely submitted DNA evidence,

¶ 42 Defendant filed his claim under the Post-Conviction Hearing Act, which creates a three-stage process by which one may obtain review of a postconviction claim, a substantial denial of a constitutional right resulted upon his conviction. *People v. Dopson*, 2011 IL App.

(4th) 100014, ¶17, 958 N.E.2d 367, 372 (2011). At the third stage of proceedings, a defendant carries the burden of "making a substantial showing of a constitutional violation" (*People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006)) and may present evidence supporting his postconviction claims (*People v. Andrews*, 403 Ill. App. 3d 654, 659, 936 N.E.2d 648, 653 (2010)).

¶ 43 This appeal follows a third-stage evidentiary hearing, after which the trial court denied defendant's petition. This court will not overturn a trial court's decision after an evidentiary hearing unless the decision is manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). Manifest error is "error that is 'clearly evident, plain, and indisputable.' " *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)).

¶ 44 Defendant's first constitutional claim is he was denied the effective assistance of counsel when Schmidt failed to seek a dismissal for violation of his right to a speedy trial. To prove his ineffective-assistance-of-counsel claim, defendant must make a substantial showing (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. See *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009) (providing the two prongs of the effectiveness-of-counsel test); *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008 (stating defendant has the burden of making a substantial showing a constitutional violation occurred). To establish the second prong, defendant must have shown a reasonable probability the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Moore*, 189 Ill. 2d 521, 535, 727 N.E.2d 348, 355-56 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 693, 698, 104 S. Ct. 2052,

2064, 2068 (1984)).

¶ 45 A defendant's statutory right to a speedy trial is set forth in section 103-5 of the Code. 725 ILCS 5/103-5 (West 2010). Section 103-5(a) mandates an accused be brought to trial within 120 days of the date the accused was taken into custody, unless defendant occasions the delay. 725 ILCS 5/103-5(a) (West 2010). Section 103-5(c) allows an extension of this 120-day period up to an additional 120 days if the court finds "the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day." 725 ILCS 5/103-5(c) (West 2010). When the State seeks an extension under section 103-5(c), it is the State's burden to establish due diligence. *People v. Colson*, 339 Ill. App. 3d 1039, 1047, 791 N.E.2d 650, 656 (2003). However, in establishing speedy-trial violation, the defendant bears the burden of establishing the delay was not attributable to his own conduct. *People v. Castillo*, 372 Ill. App. 3d 11, 16, 865 N.E.2d 208, 214 (2007). "Any action by either party or the trial court that moves the trial date outside of that 120-day window qualifies as a delay for purposes of the section." *People v. Cordell*, 223 Ill. 2d 380, 390, 860 N.E.2d 323, 330 (2006).

¶ 46 The record shows no reasonable probability the outcome of the proceeding would have been different had Schmidt filed a motion to dismiss based on the speedy-trial claim, as the delay was attributable to defendant's own conduct. As the State emphasizes, while defendant entered a simple and general objection to the State's motion to continue on section 103-5(c), defendant did not contest the veracity of the State's assertion it had exercised due diligence. Defendant's simple "objection" could not be interpreted as having done so. See generally *People v. Gamble*, 41 Ill. App. 3d 394, 400, 353 N.E.2d 136, 141-42 (1976) (finding no abuse of

discretion when the trial court granted an extension based on an allegation of "due diligence" when the defendant did not challenge the veracity of the State's allegation). Indeed, the "objection," in light of Schmidt's testimony he believed the State exercised due diligence and the speedy-trial statute, was intended to keep the speedy-trial clock running and not to challenge the State's assertion. Defendant thus contributed to the extension of the speedy-trial clock to obtain DNA evidence and thus to the delay.

¶ 47 To find otherwise and accept defendant's argument on appeal would effectively allow defendants to hide behind a generic objection, while the State urges and the court enters a finding of "due diligence" and permit those defendants to later successfully raise speedy-trial claims on the insufficiency of the State's unchallenged diligence claim. Such a holding would contravene the purpose of the speedy-trial statute, creating a procedural loophole that defense counsel could unconscionably use to obstruct the ends of justice. See *Cordell*, 223 Ill. 2d at 390, 860 N.E.2d at 330.

¶ 48 Moreover, the record establishes no reasonable probability the outcome of the proceeding would have been different as defendant has not met his burden of showing the trial court committed manifest error in finding the State acted with due diligence. At the evidentiary hearing, defendant carried the burden of establishing his constitutional claim. See *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. While he argues the only evidence the trial court and this court should consider is the evidence available at the time of the hearing on the State's continuance motions, defendant cites only cases involving direct appeals of "due diligence" findings and not appeals following an evidentiary hearing on the question of whether trial counsel provided effective assistance. See, *e.g.*, *People v. Exson*, 384 Ill. App. 3d 794, 796, 896

N.E.2d 844, 846 (2008); *People v. Hughes*, 274 Ill. App. 3d 107, 108, 653 N.E.2d 818, 820 (1995); *People v. Durham*, 193 Ill. App. 3d 545, 546, 550 N.E.2d 259, 260 (1990). We will not limit our review of the record to only matters of record at the time the continuances were granted. As a whole, the record establishes the State provided the lab with the materials and orders necessary for DNA testing. The State maintained regular contact with defense counsel, who believed the State was acting with due diligence. Pitchford's testimony establishes the State maintained contact with the lab and successfully expedited the testing. While defendant notes the eight-month period fell within the lab's usual six-to-nine-month span from receiving specimens to issuance of a lab report, defendant ignores Pitchford's testimony the lab was experiencing delay due to updated equipment and a learning curve when the State submitted defendant's samples. Notably, defendant, who had the burden of proof, did not elicit testimony or submit evidence showing the State could have received results earlier had it made a timelier request testing be expedited.

¶ 49 In his brief, defendant further urges this court to "adopt a more robust analytical framework for speedy[-]trial issues like the one" adopted in the Fifth District decision of *People v. Battles*, 311 Ill. App. 3d 991, 724 N.E.2d 997 (2000). As defendant notes, this court in *People v. Colson*, 339 Ill. App. 3d 1039, 1047, 791 N.E.2d 650, 656 (2003), declined a similar invitation to adopt *Battles*'s "delineated series of steps that a prosecutor must go through before getting a continuance for DNA testing." See also *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 55 (noting the conflict). In *Colson*, we agreed with the holding in *Battles* the State must exercise due diligence in obtaining DNA analysis, but we chose "to stick with the established rule *** due diligence is to be determined on a case-by-case basis." *Colson*, 339 Ill. App. 3d at 1047-48, 791

N.E.2d at 656. Defendant contends, however, the "case-by-case basis" is consistent with "a delineated set of steps" and asks this court to reconsider its position.

¶ 50 We decline defendant's invitation to reexamine *Colson* at this time. Such consideration is more appropriate for a direct appeal involving a continuance under section 103-5(c), when the State's conduct and the trial court's ruling may be examined under an abuse-of-discretion standard, rather than on appeal from a proceeding under the Act in which defense counsel's conduct is considered based on defendant's ability to make a substantial showing he was denied the effective assistance of counsel.

¶ 51 Defendant next argues defense counsel Jackson provided ineffective assistance by filing a motion in arrest of judgment instead of a motion to withdraw the guilty plea, thereby failing to preserve defendant's right to appeal the speedy-trial violation. Defendant contends Jackson's decision to file a motion in arrest of judgment amounts to ineffective assistance because it shows his ignorance of the law. According to defendant, Jackson did not understand he could file a motion under section 103-5(d) of the Code (725 ILCS 5/103-5(d) (West 2010)) and have the issue resolved without placing the guilty plea at risk. In addition, defendant argues, Jackson's motion in arrest of judgment is limited by statute to challenging charging papers or subject-matter jurisdiction (725 ILCS 5/116-2(b)(1) (West 2010)), neither of which would provide him the relief he sought. In his reply brief, defendant stresses ineffective assistance of counsel is shown because he was denied his right to appeal based on defense counsel's conduct.

¶ 52 Defendant has not shown the trial court committed manifest error in denying his claim Jackson provided ineffective assistance of counsel. The record establishes defendant filed his *pro se* motion to withdraw his guilty plea on August 4, 2011, maintaining his innocence and

alleging Schmidt urged the guilty plea. After hiring Jackson to represent him, defendant, on August 24, 2011, filed the motion in arrest of judgment, asserting the State violated the speedy-trial statute. The trial court then considered defendant's speedy-trial claim and denied it. At the evidentiary hearing herein, the court heard testimony from Jackson and defendant regarding the decision to pursue a motion to withdraw the guilty plea and the decision to file a motion in arrest of judgment. Jackson's testimony established he discussed the matter with defendant and "we" determined not to file a motion to withdraw the guilty plea. Defendant testified to the contrary. Given the two sides, there is no "indisputable" or manifest error in the decision to deny this claim as the record supports a finding defendant chose to protect the 25-year cap and not seek to withdraw his guilty plea. No evidence on the record suggests defendant did not know, as he was admonished at his plea hearing, to preserve his right to appeal he must withdraw his guilty plea.

¶ 53 We acknowledge the motion in arrest of judgment was not the proper means by which to raise a challenge under the speedy-trial statute. See 725 ILCS 5/116-2 (West 2010). Defendant, however, suffered no prejudice as a result of this filing. Defense counsel and defendant achieved their goal of having his speedy-trial issue considered by the trial court while preserving the 25-year sentence cap.

¶ 54 III. CONCLUSION

¶ 55 We affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 56 Affirmed.