

NOTICE
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2017 IL App (5th) 140052-U

NO. 5-14-0052

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 12-CF-998
)	
GARFIELD FENTON,)	Honorable
)	Robert B. Haida,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Where on direct appeal the defendant alleges that his defense counsel was ineffective and the record on appeal does not contain necessary supportive facts, we decline to address his claim.

¶ 2 The defendant appeals from his conviction for first-degree murder and attempt first-degree murder entered on September 13, 2013, and from his December 13, 2013, consecutive sentences of 30 years for murder and 10 years for attempt murder. This case involved DNA evidence. Due to unspecified delays in the Illinois State Police Crime Lab, the State sought several continuances to allow the laboratory to complete testing. The defendant's counsel agreed to these continuances. Ultimately, the defendant's case

was tried 428 days after his arrest. On appeal, the defendant contends that his counsel was ineffective for agreeing to these delays which tolled his right to a speedy trial. We find that in this direct appeal the defendant is unable to prove that the State would not have received the requested continuance without the defense counsel's acquiescence; that the State would not have gone to trial without the DNA evidence; or that the defendant would not have been convicted without the DNA evidence. Furthermore, many questions outside of this record remain unanswered regarding trial strategy in plea negotiations, forensic laboratory delays, and defense counsel's advice to the defendant. Therefore, we decline to rule on the defendant's ineffective assistance claim as more fully explained in this order. We affirm the defendant's convictions and sentences.

¶ 3

FACTS

¶ 4

The Charges

¶ 5 On July 12, 2012, the defendant was charged by criminal complaint with one count of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) while committing a forcible felony, and one count of home invasion (720 ILCS 5/12-11 (West 2010)). On August 3, 2012, the St. Clair County grand jury indicted the defendant with two counts of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2010) (1) with intent to kill or do great bodily harm; and (2) while committing the forcible felony of home invasion), one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)), and one count of attempt first-degree murder (720 ILCS 5/8-4(a) (West 2010)). On September 5, 2013, the State's Attorney dismissed two of the four counts against the defendant, and announced that the State would proceed to trial on one count of first-degree murder (720 ILCS 5/9-1(a)(3)

they were still awaiting DNA test results and medical records. Trial was reset for April 22, 2013.

¶ 11 On December 7, 2012, the parties appeared before Judge Baricevic to obtain his approval of the speedy trial delay. At the hearing, in response to Judge Baricevic's questions, the defendant indicated that he understood the process, that he agreed to the delay, and that he had no other questions. In early March 2013, the trial court held a hearing to discuss the DNA testing and the trial setting. The parties had agreed to consumption DNA testing in December, and the State learned that the testing would not be completed until mid-April. Judge Baricevic expressed his great dissatisfaction with the State's Attorney's office regarding the delays in the DNA testing process. Ultimately, at the parties' agreement, the court set a status hearing before the April trial date in order to assess if the evidence testing was complete and whether or not the defendant would need to take further steps regarding the new evidence.

¶ 12 On April 1, 2013, the defendant sought a continuance of the trial setting. The trial court confirmed that the defendant understood that this new trial setting would not count towards his 120-day speedy trial right; granted the motion; and reset the trial for June 3, 2013. On May 24, 2013, the State and the defense counsel appeared in court to make a joint request to continue the trial setting until July 8, 2013. The defendant's counsel informed the court that negotiations with the State were ongoing, and that both sides needed time to go through the negotiation process without the immediacy of the trial setting. Again, before entering the order continuing the trial setting, the court confirmed that the defendant was aware that this delay would not count against the State and that he

agreed to this request. On June 17, 2013, the defendant's counsel requested a continuance on the basis that he was scheduled to be on a prepaid vacation on the July 8, 2013, setting. The court continued the trial setting until September 9, 2013, after confirming that the defendant was not opposed to the delay.

¶ 13 Evidence Presented at Trial

¶ 14 *Testimony of Zoe Monroe*

¶ 15 Zoe Monroe testified that she knew the victim, Le'Nae, who lived in a house across the street from her house. She knew that Le'Nae had an order of protection preventing the defendant from coming near her. That night, she and her then-fiancé were outside and heard a woman screaming. The screams were coming from Le'Nae's house. Monroe then witnessed a man running from Le'Nae's house with numerous stab wounds. They asked this man if he needed help, and he told them to call the police. Monroe called 9-1-1. She testified that this wounded man came back to the scene, spoke to the police, and was taken away in an ambulance.

¶ 16 *Testimony of Xzavion O'Neal*

¶ 17 Xzavion O'Neal testified that he met Le'Nae through his sister. On the night of the incident, he and Le'Nae were engaged in sexual intercourse on her sofa when he was struck in the back of his head. Until that moment, he heard nothing to warn him that a person was entering or was already in the house. O'Neal testified that the blow to his head made him feel as if he had blacked out. He became aware of blood coming down his face. Someone continued to hit him and pulled him away from Le'Nae. He testified that he then began "tussling" with someone and successfully got away, but then was

immediately grabbed by someone else and then he began "tussling" with that individual. He testified that he knew that there were two men there, but that he could not see either man's face because they were both wearing ski masks. While he was being struck by the second man, he testified that he yelled at Le'Nae to run, and then heard the first man yell, "shut up, bitch," and "I'm gonna kill you." He did not know how many times he was struck during this fight. He never saw a knife during the attack and thought that the initial blow to his head was with a bat of some kind, which he did not see. He looked over at Le'Nae and saw that the first man was repeatedly "swinging" on her, and testified that she was screaming and crying. While struggling with the second man, O'Neal reached up and pulled off the ski mask. This man then bent down to pick up the ski mask, and O'Neal used this opportunity to flee the house. He confirmed that when he got outside, he saw people and told them to call the police. When the police arrived, the officer asked O'Neal if he was okay, and O'Neal told him to go into the house. Later, O'Neal realized that he had been cut several times and was bleeding heavily. O'Neal was transported by ambulance to a local hospital in Belleville, and later transferred to a St. Louis hospital. He learned from his medical care providers that he had been stabbed 17 times and had suffered a punctured lung. He testified that most of the wounds were on his upper back and biceps, with three wounds on his head. He had surgery to repair the collapsed lung and received over 100 stitches. He remained hospitalized for one week.

¶ 18

Officer Jason Davis

¶ 19 Officer Jason Davis of the Belleville police department testified that he responded to the 9-1-1 call in this case. Upon arrival, he saw a man near the residence covered in

blood and only wearing boxer shorts. He testified that the man had cuts all over his torso, shoulders, and head. Officer Davis and three other Belleville officers entered the house with guns drawn and announced their presence. The officers found a woman lying face down on the living room floor in a pool of blood. The officers found an infant and a toddler in the bedroom, and removed them from the house. No one else was in the house.

¶ 20

Detective Aaron Hackleman

¶ 21 Detective Aaron Hackleman of the Belleville police department testified that he also responded to the 9-1-1 call. Patrolman Weilbacher, a probationary officer, was driving the police car. Other officers who were already at the scene had secured the area. As they drove closer to the house, Detective Hackleman instructed Weilbacher to turn off the lights and sirens and to proceed slowly towards the house. He testified that he did this because he wanted to scan the area to see if anyone was heading away from the house. The officers found a black male who was dressed in black clothing and sweating profusely. Hackleman testified that the man's eyes appeared to widen upon recognition that they were in a police car. The man was carrying what appeared to be a red towel. Hackleman testified that patrolman Weilbacher stopped the car, and Hackleman exited and attempted to make contact with the man. The man turned another direction and starting walking at a faster pace. Eventually Hackleman caught up to this man and got him to stop. Hackleman shined his flashlight on the man and noticed that his hands were covered in what appeared to be blood. Hackleman took the man into custody. The red bundle was a shirt or a towel wrapped around a large knife with blood on it. Later the officers determined that the man's name was John Cole.

¶ 22

Detective Mark Heffernan

¶ 23 Detective Mark Heffernan of the Belleville police department testified that he was involved in the investigation of this case. He assisted with obtaining cellular telephone records for historical data and current GPS locations of a cell phone owned by the defendant.

¶ 24

Sergeant Robert Thomason

¶ 25 Sergeant Robert Thomason of the Belleville police department was called to the scene of the crime at about midnight on July 10, 2012. He extended the crime scene boundaries and participated in a canvass of the neighborhood. Sergeant Thomason communicated with the owner of the apartment building to verify who lived in the apartments. From interviewing the owner, Thomason ascertained that John Cole used to live there; that there was an order of protection keeping him from the apartment; and that he had been removed from the lease. Later that morning, Thomason interviewed the defendant. That interview was recorded. During the interview, he and a Detective Ferry were present. Before the interview began, he advised the defendant of his *Miranda* rights and the defendant signed the form.

¶ 26

The Defendant's Interview

¶ 27 The defendant's recorded interview was played for the jury.

¶ 28 During the interview the defendant stated that he lived with his grandmother in East St. Louis, but that more recently he had been living at his girlfriend's apartment. His girlfriend's name was Kaneisha Grant. The night before this interview, the defendant said that he spent the night with his girlfriend, and then on July 10, he left her apartment and

went to his grandmother's house for the day. That evening at about 7 p.m., the defendant called John Cole to ask for a ride back to Belleville.

¶ 29 The remainder of this taped interview explores various versions of events that took place between the evening of July 9 and the morning of July 10, 2012. In between the versions of the events, the two police officers advised him in varying ways that they knew he was withholding information or that other witnesses had already told them vastly different facts.

¶ 30 1. First Factual Version

¶ 31 Initially, the defendant stated that John Cole gave him a ride to Belleville on July 9, and that he was back at his girlfriend's apartment by 8 p.m. where he stayed the night. The next morning at 5 a.m., he received a phone call from a fellow member of his church telling him that John Cole had shot Le'Nae.

¶ 32 2. Second Factual Version

¶ 33 Next, the defendant stated that he took a Metrolink train to the Southwestern Illinois College stop on July 9, 2012. Then, he began walking to Grant's apartment; he saw John Cole driving and he called him over. They got gasoline for Cole's vehicle. He and Cole began driving. Cole was calm, but upset about Le'Nae. The defendant attempted to talk him out of approaching Le'Nae because of the order of protection. When they arrived in Le'Nae's neighborhood, they stopped, and the defendant exited the vehicle. He stated that he did not want to be involved because he knew this would constitute trespassing. The defendant stated that he saw Cole head towards Le'Nae's house.

¶ 34

3. Third Factual Version

¶ 35 In his next version, the defendant admitted that he was at Le'Nae's house, but that he stayed outside. From his vantage point, he said that he heard screaming. He said that he heard someone inside the house repeatedly saying, "oh yeah," and that he thought it was Cole. He stayed outside of the house for 10 minutes, but fled when he heard the sounds of police cars approaching. He told the officers interviewing him that he was scared that night, and that after he left, he returned to his girlfriend's apartment.

¶ 36

4. Fourth Factual Version

¶ 37 In the next version, the defendant admitted to being inside Le'Nae's house. He stated that he saw Cole on top of a man, and he attempted to separate the two. He said that Cole had a knife and that he took the knife away from him. While he was still in Le'Nae's house, the defendant believed that Le'Nae was still alive, and said that Cole was talking to her. He admitted that he had his face covered when he was in Le'Nae's house. He pulled his shirt up over his mouth and nose. When asked why he did this, the defendant simply stated that he was not thinking. He admitted that he had blood on his hands. When the detectives told the defendant that his girlfriend had already told them that he confessed to her that he stabbed a man, he told the officers that she must not have understood. He then said that while they were in Le'Nae's house, Cole handed him a knife and ordered him to stab the man. However, the defendant said that he refused to do so. He said that he saw the male victim run away. He saw Cole punch Le'Nae on the side of her head. He then stood outside waiting for Cole to exit, but he never did before the defendant fled. The next morning he heard that Cole shot Le'Nae.

¶ 38

5. Fifth Factual Version

¶ 39 As the interview continued, the defendant indicated that he may have stabbed the male victim once, but that he does not remember doing so. The defendant said that he had the knife in his hand and the victim was coming towards him, but he denied that he swung at the victim. The defendant also admitted that he struggled with the victim a bit. He said that Cole had a stick covered in tape. The stick was used by Cole to hit the male victim. The defendant stated that he did not touch the stick.

¶ 40

Testimony of Deputy Thomas Peters

¶ 41 St. Clair County sheriff's department Deputy Thomas Peters testified that on July 10, 2012, the day after the homicide, he partnered with the Belleville police department to track the defendant by way of cellular phone pings. With the aid of this technology, Deputy Peters located the defendant walking on an East St. Louis street accompanied by a young woman. Another St. Clair County deputy pulled in front of the defendant, and ordered him to get on the ground. The defendant was then placed in handcuffs. Deputy Peters testified that while the defendant was on the ground, he looked up at the woman with him and stated, "I was with this bitch all night." Deputy Peters testified that the defendant made no attempt to flee and was compliant.

¶ 42

Testimony of Kaneisha Grant

¶ 43 Kaneisha Grant, the defendant's former girlfriend, testified that she began dating him in July 2012. Grant testified that on the morning of July 9, 2012, the defendant was at her Belleville apartment. They had an argument and the defendant told her he was going to his grandmother's house. Grant testified that she maintained contact with the

defendant throughout the day and into the evening by phone calls and text messages. She testified that she next saw the defendant at about 11 p.m. that evening back at her apartment. Grant testified that the defendant was teary-eyed and appeared to be "shook up." She testified that the gray shirt he was wearing that evening was covered in a lot of blood and that the palms of his hands were also covered in blood. While at Grant's apartment, the defendant took a shower and then returned to her bedroom. According to Grant's testimony, that evening the defendant told her that he stabbed a male. At about 5 a.m. the next day, the defendant received a phone call. From what she heard, the phone conversation was about John Cole and Le'Nae. Later that morning, Grant and the defendant left the apartment and traveled to East St. Louis with the intent to make a deposit at the defendant's bank. She testified that at some point that morning, police officers approached them on the street and arrested the defendant. Grant further testified that she continued to associate with the defendant after his arrest and that he told her not to show up at court and also to lie or say that she could not remember what happened on July 9, 2012.

¶ 44

Testimony of Raj Nanduri, M.D.

¶ 45 Dr. Raj Nanduri, a forensic pathologist, testified that she performed the autopsy on Le'Nae Cole. She testified that Le'Nae received more than 30 stab wounds and that she died due to sharp force injuries to the neck and chest.

¶ 46

Testimony of Susan Bolen

¶ 47 Susan Bolen, a forensic scientist with the Illinois State Police, testified about her involvement with fingerprint evidence in this case. She examined a bat and two knives

provided to her. She found no suitable fingerprints on the bat, and explained that the bat was covered in electrical tape and the texture was not conducive to retrieving a fingerprint. Similarly, she found no fingerprints on the knives and theorized that the textured handles precluded suitable fingerprint impressions.

¶ 48 *Testimony of Michael Brown*

¶ 49 Michael Brown, an Illinois State Police forensic scientist, testified at trial that his job entails identifying biological samples that could be useful in DNA analysis. If he finds this type of sample, he preserves it. He examined and preserved samples in this case taken from a black t-shirt, sweatpants, a knife, and a bat.

¶ 50 *Testimony of Donna Rees*

¶ 51 Donna Rees, who is also employed as an Illinois State Police forensic scientist, testified that she was responsible for the DNA tests conducted on the samples collected and preserved by forensic scientist Michael Brown. Based upon the tests she conducted, the DNA samples matched either Le'Nae or O'Neal—the two victims. No samples matched either John Cole or the defendant.

¶ 52 *Verdict and Appeal*

¶ 53 At the conclusion of the trial, the jury found the defendant guilty of both charges. The defendant was sentenced on December 13, 2013, to 30 years for murder and 10 years for attempt murder to run consecutively, followed by 3 years of mandatory supervised release.

¶ 54 The defendant was represented through all pretrial proceedings, trial, and sentencing by his appointed attorney, Thomas Q. Keefe, III. On December 2, 2013, the

defendant filed a motion for a new trial which raised previous trial objections, allegedly improper introduction of hearsay evidence, and prosecutorial misconduct. The trial court denied the motion on December 13, 2013. Thereafter, on December 23, 2013, the defendant filed a motion seeking a reduction in his sentence, which the trial court denied on January 23, 2014. The defendant filed his notice of appeal that same date.

¶ 55 In the trial court, the defendant did not allege that his defense counsel was ineffective.

¶ 56 The defendant appeals to this court arguing that his defense counsel was ineffective for agreeing to continue his case when the only reason for doing so involved obtaining the much-delayed DNA test results.

¶ 57 LAW AND ANALYSIS

¶ 58 The Supreme Court case of *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984), provides a two-element approach to a claim of ineffective assistance of counsel. The defendant is required to prove both elements. *Id.* Constitutionally competent legal assistance is measured by whether the defendant received "reasonably effective assistance." *Id.* at 687. Defense attorneys presumptively pursue sound trial strategies. See *id.* at 689. An unsound strategy is one that no reasonably effective criminal defense attorney facing similar circumstances would pursue. *People v. Faulkner*, 292 Ill. App. 3d 391, 394, 686 N.E.2d 379, 382 (1997).

¶ 59 In addition to proving that defense counsel was ineffective, a defendant must also establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Lefler*, 294 Ill.

App. 3d 305, 311, 689 N.E.2d 1209, 1214 (1998) (citing *Strickland*, 466 U.S. at 694). "Reasonable probability" is defined as "a probability sufficient to undermine confidence in trial's outcome." *Id.* at 311-12, 689 N.E.2d at 1214 (citing *Strickland*, 466 U.S. at 687). Legal assistance errors without resulting prejudice do not undermine the outcome of the trial. We must determine whether the defendant received a fair trial despite those legal errors. *Id.* at 312, 689 N.E.2d at 1214.

¶ 60 On appeal, the defendant contends that his trial counsel provided ineffective assistance when he agreed to continuances to allow the State's completion of DNA testing. Generally, decisions made by trial counsel are construed as the product of strategy as opposed to incompetence. When reviewing an ineffective assistance of counsel claim, the United States Supreme Court advises courts that they " 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Woods v. Donald*, 575 U.S. ___, ___, 135 S. Ct. 1372, 1375 (2015) (quoting *Strickland*, 466 U.S. at 689). Additionally, our supreme court advises courts of review to be "highly deferential *** on matters of trial strategy" and to make "every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007).

¶ 61 Every defendant in Illinois has a constitutional and statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2010). The constitutional right to a speedy trial depends on certain factors including the length of and reasons for the delay, whether the defendant asserted his rights, and

whether the defendant was prejudiced. *People v. Staten*, 159 Ill. 2d 419, 426, 639 N.E.2d 550, 554 (1994) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). A statutory right to a speedy trial is different in that a violation occurs if the defendant is not tried within the statutory 120 days and the defendant did not delay or otherwise add to the delay. *Id.* (citing *People v. Richards*, 81 Ill. 2d 454, 459, 410 N.E.2d 833, 836 (1980)). A statutory violation does not require prejudice. *Id.* at 426-27, 639 N.E.2d at 554. Here, the defendant only raises the statutory right to a speedy trial in the context of his ineffective assistance claim.

¶ 62 The defendant argues that 266 of the 428 days he waited for trial were caused by State delays resulting from scheduling conflicts or the failure to actively pursue test results from the forensic laboratory. The defendant was arrested in July 2012. We agree with the defendant's statement that the record establishes that subsequent to his July 2012 arrest, the State did not have contact with the laboratory until late October 12. However, the defendant's claim that 266 days were attributable to the State is misleading. The defendant was arrested on July 10, 2012, and made an initial appearance in court on September 6, 2012—a total of 62 days attributable to the State. The case was continued by agreement from September 6 to September 7; from September 7 to October 4; and from October 4 to November 13. On November 13, 2012, the defendant formally asserted his speedy trial rights, but later withdrew them 16 days later on November 29, 2012. And so, those 16 days were also attributable to the State—a total of 78 days attributable to the State. All subsequent continuances were by agreement or at the request of the defendant's counsel.

¶ 63 What transpired during these time delays predominantly involved the backlog of scientific testing at the state laboratory. Ultimately, the lab results were finalized, and there was no DNA evidence implicating the defendant. The defendant argues that his trial counsel should not have agreed to these continuances which were almost exclusively tied to the State's failure to obtain the test results in less time.

¶ 64 The defendant's ineffective assistance argument seems to be alternatively based on hypothetical theories that the State would not have been granted a statutorily-allowed extra 120 days if it had made such a request (725 ILCS 5/103-5(c) (West 2010)) or that the DNA evidence was crucial to bringing the defendant to trial.

¶ 65 With DNA testing, the speedy trial statute provides a procedural vehicle by which the State can obtain an extra 120 days by court order in which to bring the defendant to trial. Approval of the State's request for extra time for DNA testing is contingent upon the State exercising due diligence to obtain the results initially. 725 ILCS 5/103-5(c) (West 2010). Whether or not the State used due diligence has not been fully determined, other than a few questions posed by the trial court judge and answers provided by the State's Attorney. Furthermore, as the State never filed a motion seeking an additional 120 days, analysis of this issue is theoretical and we will not address it.

¶ 66 Similarly with the defendant's alternate argument, there is no basis in the facts to establish that the State could not have brought the defendant to trial without the DNA evidence. No DNA evidence implicated the defendant in any way, and therefore there is no logical argument that the lack of evidence had any bearing on the jury's conclusion that the defendant was guilty. In fact, the lack of DNA evidence placing the defendant at

the scene of the crime could be deemed helpful to the defense. Additionally, the jury was able to watch and hear the defendant's recorded interrogation. While there is no question that the defendant appeared frightened during this interview, the defendant began by denying any involvement, but then changed his story several times. Towards the end of the interview, the defendant conceded that he was present at the scene; that he used his shirt to conceal his face; that he grappled with O'Neal; that he took Cole's knife away from him; and that he possibly stabbed O'Neal. He stated that he noticed blood on his hands after he fled the scene. Additionally, the defendant's girlfriend, Kaneisha Grant, testified that when the defendant returned to her apartment on the night of the crimes, his hands and shirt were covered in blood. After taking a shower, he returned to her room and told her that he stabbed a man. Additionally, Grant told the jury that the defendant asked her to lie, pretend to lack recall of the events, and not show up for court. Given the strength of this incriminating evidence, we find that the State could have brought the defendant's case to trial without the DNA evidence.

¶ 67 The defendant cites to two cases in general support of his claim that his counsel was ineffective by agreeing to continuances instead of insisting that his speedy trial rights be honored. We find that both cases are distinguishable.

¶ 68 In *People v. Alcazar*, 173 Ill. App. 3d 344, 346-47, 527 N.E.2d 325, 327 (1988), the defendant was originally charged with murder (and later found guilty of voluntary manslaughter). More than 120 days after he was in custody, the State elected to add a charge for unlawful use of a weapon. *Id.* There was no speedy trial issue with respect to the murder charge because the defendant agreed to several continuances. *Id.* at 354, 527

N.E.2d at 331. The defendant argued that because none of his agreed-to continuances involved the weapons charge, adding the charge after the passage of 120 days violated his speedy trial rights. *Id.* The appellate court agreed with the defendant's argument and held that defense counsel's performance was "sufficiently grave to prejudice [the] defendant's defense on the unlawful use of a weapon charge." *Id.* at 354-55, 527 N.E.2d at 332. As the State in *Alcazar* added a new charge more than 120 days after the defendant was taken into custody and his trial attorney did not object, the basis for concluding that the attorney was ineffective was not based upon continuances. Therefore, we find that this case is not analogous.

¶ 69 The defendant also cites *People v. Staten* as support for his claim. In *Staten*, the supreme court concluded that even in the face of a defective speedy trial demand, and even if defense counsel had moved for discharge before trial, the outcome would not be any different because defense counsel's agreement to a continuance did not establish that counsel was ineffective. *Staten*, 159 Ill. 2d at 433-35, 639 N.E.2d at 558. Therefore, the *Staten* opinion fails to support the defendant's theory that agreeing to continuances amounts to ineffective assistance of counsel. As the court stated, "[a] defense counsel's agreement to a continuance, appearing of record, may be considered a delay attributable to [the] defendant." *Id.* at 433, 639 N.E.2d at 557.

¶ 70 We note that a difficulty for the defendant to prove that his counsel was ineffective results from so many aspects of his claim being outside of the record on appeal. Historically, it is very difficult for a defendant to raise an ineffective assistance of counsel claim on direct appeal. In *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550

N.E.2d 284, 296 (1990), the appellate court stated that where "consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief." Many courts followed what became known as the *Kunze* doctrine.

¶ 71 Recently in *People v. Veach*, 2016 IL App (4th) 130888, ¶ 72, 50 N.E.3d 87, the court set forth three categories of ineffective assistance cases on direct appeal. The first category involves direct appeals where the record on appeal is inadequate to address the defendant's claim. *Id.* ¶ 74. As the court explained, this category is where most of these cases belong, as most of these types of claims raise the following types of questions about defense counsel's actions or inactions:

"(1) What did defense counsel tell the defendant and what specific suggestions or questions did counsel raise?; (2) What concerns did the defendant express to his counsel?; (3) If the defendant made specific requests of his counsel regarding the handling of the case, such as witnesses who could be contacted and called, how specific was [the] defendant and what information in support of these suggestions did he provide to counsel?; (4) How did counsel respond to any of the suggestions he received from his client?; (5) If counsel took no action in response to such suggestions, why not?; and (6) What overall strategy did defense counsel have for the case, and what tactics did he employ (and why) pursuant to that strategy?" *Id.*

The second category involves issues that the appellate court may address because they are clearly without merit. *Id.* ¶ 72. The third category involves issues that the appellate court may address because the defense counsel's errors were particularly egregious. *Id.*

¶ 72 Here, the defendant claims that his counsel was ineffective because he agreed to continuances that prevented his case from going to trial within 120 days and thus his speedy trial rights were violated. The defendant properly demanded a speedy trial, but very shortly thereafter, he dropped the demand. The defendant's rationale for making and then dropping the claim is not in the record. Similarly, we have no way of knowing what his counsel's bases were for agreeing to all of the continuances. In part, defense counsel argued to the trial court that if the DNA test results turned up something implicating his client, he would need extra time to analyze and possibly hire his own DNA expert. That explanation begs further questions and requires insights into his reasoning as to why he agreed to the continuances. However, that, too, is not in the record. The record contains no information regarding the negotiations between the defendant's counsel and the State's Attorney. Additionally, the reason why the state forensic laboratory was so far behind on testing is not in the record on appeal. In short, we find that there is no way to determine on the facts contained in this record whether or not the defendant's counsel provided ineffective assistance in agreeing to the delays. Therefore, we decline to address the defendant's ineffective assistance claim in this appeal. As paraphrased in *People v. Veach*, the supreme court made the following relevant comments in *People v. Bew*:

"[E]ven though we find that [the] defendant has, on this record, failed to prove ineffective assistance of counsel, we note that [the] defendant may raise [this

issue] under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2002)). This disposition allows both [the] defendant and the State an opportunity to develop a factual record bearing precisely on the issue." (Internal quotation marks omitted.) *People v. Bew*, 228 Ill. 2d 122, 135, 886 N.E.2d 1002, 1009-10 (2008).

¶ 73

CONCLUSION

¶ 74 For the foregoing reasons, the defendant's ineffective assistance claim cannot be resolved currently on direct appeal as the record is inadequate. Accordingly, we affirm the convictions and sentences of the St. Clair County circuit court.

¶ 75 Affirmed.