

NOTICE
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2018 IL App (5th) 140052-UB

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 “agreed to” trial continuances are delays attributable to defendant, they do not give rise to a speedy-trial violation. Where there is no lawful basis for arguing a speedy-trial violation, neither prong of *Strickland v. Washington’s* ineffective assistance of counsel test can be satisfied. Where defendant is unable to establish an ineffective assistance claim on this issue, we affirm the convictions and sentences.

¶ 2 The defendant appeals from his conviction for first-degree murder and attempted 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 attempted 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 originally declined to address defendant's claim on the basis that the evidence in the record was insufficient to determine whether trial counsel was ineffective in this direct appeal. *People v. Fenton*, 2017 IL App (5th) 140052-U. Defendant filed a petition for leave to appeal to the supreme court. The supreme court denied defendant's leave to appeal, but exercised its supervisory authority and directed this court to vacate our judgment. No. 122138, 89 N.E.3d 758 (Ill. Sept. 27, 2017). We vacated the judgment on November 9, 2017. The supreme court directed this court to consider the effect of *People v. Veach*, 2017 IL 120649, 89 N.E.3d 366, on defendant's ineffective assistance of counsel claim and whether his claim could properly be considered on direct appeal. On remand, we consider his claim on direct appeal and affirm the trial court's judgment.

¶ 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 (*id.* § 12-11). On August 3, 2012, the St. Clair County grand jury indicted the defendant with two counts of first-degree murder (*id.* § 9-1(a)(3) (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 (*id.* § 12-11(a)(2)), and one count of attempted first-degree murder (*id.* § 8-4(a)). 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 (*id.* § 9-1(a)(3)) and a count of attempted first-degree murder (*id.* § 8-4(a)).

¶ 6

General Background

¶ 7 The defendant and John Cole were cousins. Cole was estranged from his wife, Le’Nae, with whom he had two children. The relationship between Cole and his wife was described as volatile. Le’Nae obtained an order of protection against Cole because of an incident where he tied her up. Le’Nae took other steps to separate from Cole. She removed his name from her lease, and had the locks changed. However, Cole had a key to the new locks, and continued to exchange text messages with Le’Nae.

¶ 8 On July 9, 2012, two men entered Le’Nae’s house and found her with a man, Xzavion O’Neal. Le’Nae was killed. O’Neal fought with the attackers, sustained numerous stab wounds, escaped from the house, and survived.

¶ 9

The Pretrial Hearings

¶ 10 The defendant’s initial appearance was held on September 7, 2012. On that date, the parties agreed to toll the defendant’s speedy-trial time, and scheduled a pretrial conference for October 4, 2012. On that date, the parties again agreed to toll the defendant’s speedy-trial time because the parties were “still awaiting discovery,” and continued the case until November 13, 2012, for a status conference. On November 13, 2012, the defendant formally made his speedy-trial demand, and the parties agreed to a trial date on December 17, 2012, within the 120 days. Just 16 days later, the defendant withdrew his speedy-trial demand and the parties agreed to toll the time limit because 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. 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

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 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. Discovery was completed and turned over to defense counsel on April 1, 2013. The DNA evidence did not implicate defendant. The case proceeded to trial on September 10, 2013.

¶ 13

Verdict and Appeal

¶ 14 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 attempted murder to run consecutively, followed by 3 years of mandatory supervised release.

¶ 15 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.

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

¶ 17 The defendant appeals to this court arguing that his defense counsel was ineffective where he agreed to continuances that were solely attributable to the State, thereby violating defendant's speedy-trial rights.

¶ 18

LAW AND ANALYSIS

¶ 19 At issue in this case is whether defendant was denied effective assistance of counsel where his counsel agreed to State-requested continuances which delayed his trial beyond the 120-day speedy-trial period. Defendant argues that if counsel had objected to the continuances, the delays would not have been attributed to defendant and the 120-day statutory speedy-trial period would have run before defendant's trial occurred, resulting in a dismissal of his charges.

¶ 20 Section 103-5(a) of the Code of Criminal Procedure of 1963 provides in relevant part:

“Every 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 ***. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record.” 725 ILCS 5/103-5(a) (West 2010).

¶ 21 The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984), developed a two-pronged approach to determine ineffective assistance of counsel. The defendant is required to prove both prongs: (1) that counsel’s performance fell below an objective standard of reasonableness and (2) that defendant’s deficient performance prejudiced defendant such that he was deprived of a fair trial. *Id.* at 687.

¶ 22 However, before we determine whether counsel was ineffective, we first must determine whether defendant’s speedy-trial rights were violated. Determining this is necessary because an ineffective assistance of counsel claim must be based on a viable legal premise. This issue was thoroughly fleshed out by our supreme court in *People v. Cordell*, wherein the court stated: “The failure of counsel to argue a speedy-trial violation cannot satisfy on either prong of *Strickland* where there is no lawful basis for arguing a speedy-trial violation.” *People v. Cordell*, 223 Ill. 2d 380, 385, 860 N.E.2d 323, 327 (2006). In *Cordell*, the trial court set a trial date beyond the 120-day limit of the speedy-trial statute, and defense counsel did not object to the date. *Id.* at 383. Defendant was subsequently convicted. *Id.* at 383-84. Defendant argued posttrial, *pro se*, that his counsel was ineffective for failing to file a dismissal based on the State’s violation of the speedy-trial statute. *Id.* at 384; 725 ILCS 5/103-5(a) (West 2002). The trial court found that the continuances were attributable to the defense and consequently defense counsel was not ineffective for failing to file a motion to dismiss, because there was no violation of section 103-5(a). *Cordell*, 223 Ill. 2d at 384. The appellate court reversed, finding defendant’s speedy-trial rights were violated. *Id.* at 384-85. The court held that because defense counsel did

not affirmatively request or agree to continuing the case on each trial date the court set, the defense did not contribute to the delay in bringing the case to trial. *Id.*

¶ 23 On appeal before the supreme court, the State contended that the appellate court applied an outdated analysis, relying on case law decided before the amendment of section 103-5(a). *Id.* 388-89. The State argued that the court had ignored the second sentence of section 103-5(a) as amended, which attributes all delays to defendant as “agreed to” unless the defendant objects in writing or orally on the record.¹ *Id.* at 388.

¶ 24 Our supreme court in *Cordell* agreed with the State’s reasoning and reversed the appellate court. The *Cordell* court stated that reliance on *Vasquez* by the appellate court was misplaced. *Id.* at 392. In its analysis, the court first considered the proper construction of the word “delay” as used in section 103-5(a) and determined that “[a]ny 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.” *Id.* at 390. The court noted that to hold otherwise would allow defendant to use section 103-5(a) as a sword after the fact to defeat a conviction. *Id.* at 390-91. The court concluded that because defendant did not object to any of the delays, the delays were considered “agreed to” under the statute and his claim of ineffective assistance of counsel must fail as there was no basis for a motion for reversal on speedy-trial grounds. *Id.* at 392-93.

¹The amendment became effective January 1, 1999. *Id.* Prior to 1999, section 103-5(a) did not contain the final sentence requiring a defendant to make a written or oral objection to any delay. *Id.* at 386. The case law relied on by the appellate court in *Cordell* was *People v. Vasquez*, 311 Ill. App. 3d 291, 724 N.E.2d 984 (2000), which never addressed the amended statute that had been in effect more than a year before *Vasquez* was decided. *Cordell*, 223 Ill. 2d at 392. Furthermore, the *Vasquez* statute at issue was section 103-5(b) involving the 160-day time period for persons on bail or recognizance. *Id.* The *Vasquez* court relied in part on *People v. Healy*, 293 Ill. App. 3d 684, 688 N.E.2d 786 (1997). In *Healy*, decided two years before the amendment, the court followed long-held preamendment principles and reversed a murder conviction on the basis that defense counsel acquiesced rather than affirmatively agreed to continuances requested by the State. *Healy*, 293 Ill. App. 3d at 694.

¶ 25 Applying the principles and holding in *Cordell* to the case before us, we find that defendant is attempting to do precisely that—to use section 103-5(a) as a sword rather than as a shield; to defeat his conviction after the fact. As in *Cordell*, defendant voiced no objection to any trial delays. Furthermore, here the results of the DNA testing, which had caused the delays, were beneficial to defendant.

¶ 26 What we are faced with then is a novel theory unsupported by the law. Defendant’s theory is based on a faulty legal premise which amounts to a logical fallacy. Defendant has not cited any case law, nor are we aware of any, that supports his theory that counsel is ineffective for agreeing to continuances which could have been solely attributable to the State if properly objected to by the defendant. See also *People v. Rice*, 2017 IL App (4th) 141081-U. Additionally, defendant states in his brief that, “Case law makes clear that joint continuances toll the speedy trial period.” Brief and Argument for defendant-appellant at 14 (citing *People v. Hall*, 194 Ill. 2d 305, 328, 743 N.E.2d 521, 535 (2000)). Defendant cites to other cases in support of his claim, but none of these involve the issues before us and thus we do not discuss them.

¶ 27 Because defendant did not object to any trial delays, those delays are considered “agreed to” delays and attributable to defendant. Because there is no legal basis for defendant’s claim of a speedy-trial violation, defendant’s claim of ineffective assistance of counsel must fail.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the convictions and sentences of the St. Clair County circuit court.

¶ 30 Affirmed.