

NOTICE
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2017 IL App (5th) 140356-U

NO. 5-14-0356

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,)	Jackson County.
)	
v.)	No. 13-CF-586
)	
WILLIE GASTON,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion concerning the speedy trial period, but committed error in its extended term sentencing.

¶ 2 After a jury trial in the circuit court of Jackson County, defendant, Willie Gaston, was convicted of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)) and sentenced to 14 years in the Department of Corrections to be followed by 4 years of mandatory supervised release. The issues raised in this direct appeal are: (1) whether the trial court abused its discretion in granting an extension of the statutory speedy trial period; and (2) whether defendant's sentence should be reduced to the maximum nonextended sentence of seven years. We affirm in part and modify in part.

¶ 3

FACTS

¶ 4

I. PRETRIAL

¶ 5 On December 9, 2013, defendant was charged by information with aggravated criminal sexual abuse. The alleged victim, E.S., was six years old. The information set forth that on November 5, 2013, defendant pulled down the victim's pants, "touched her back and transmitted semen on her clothing and her person." Defendant was arrested on December 11, 2013. On that same day, the State secured a search warrant for buccal swabs, head hair, and pubic hair standards to be taken from defendant.

¶ 6 On January 24, 2014, the trial court entered an order setting a trial date of March 17, 2014. The order instructed the parties to notify the court of any scheduling problems within 21 days of entry of the order. On February 3, 2014, the State filed notice of intent to seek an extended term sentence due to the minor's age pursuant to section 5-5-3.2(b)(3)(i) of the Unified Code of Corrections. 730 ILCS 5/5-5-3.2(b)(3)(i) (West 2012). On February 5, 2014, the State, pursuant to discovery, stated its intention to call Ms. Fredilu Toms, a nurse at St. Joseph's Hospital in Murphysboro who administered a sexual assault kit on the victim, as a witness.

¶ 7 The record indicates the victim's mother took the victim to the hospital on November 7, 2013, after she suspected something happened to her daughter. On March 5, 2014, the State issued a subpoena for Ms. Toms at St. Joseph's. A receipt of delivery of the subpoena is not included in the record. On March 13, 2014, defense counsel also issued a subpoena for Toms. The record shows that the sheriff attempted to serve Toms on March 14, 2014, but was unable to make contact with her.

¶ 8 The final pretrial conference was set for March 11, 2014, at which time both parties announced ready for trial. On March 14, 2014, the State filed a motion to continue the jury trial. The prosecutor explained that he made personal contact with Ms. Toms the previous day, at which time she told him she would be out of state on the trial date and would not return until March 22, 2014. The State requested the trial be reset for March 31, 2014, prior to the time the speedy trial term would run on April 10, 2014. The trial court granted the State's motion for a continuance.

¶ 9 On March 19, 2014, in a written order, the trial court reset the trial to April 28, 2014, noting it did so over the objection of defendant. The trial court also noted that a necessary witness was unavailable through no fault of the State and that the defense was unwilling to stipulate to the testimony of the witness. The trial court set a final pretrial conference for April 22, 2014.

¶ 10 On March 26, 2014, defendant filed an objection to the jury trial date. He argued *inter alia* that his speedy trial term ended on April 10, 2014, he had not caused any delay, and it was his duty to "affirmatively act" in opposition to a trial date set after 120 days. On April 11, 2014, defendant moved to dismiss on speedy trial grounds.

¶ 11 On April 18, 2014, the trial court held a hearing on defendant's motion to dismiss. The State asserted its motion to continue was inherently a motion to extend the speedy trial term and Ms. Toms was clearly a material witness because she collected the swabs analyzed by the crime lab. The State also pointed out the difficulty in subpoenaing Ms. Toms because of her work schedule, but noted that ultimately the prosecutor was able to

make contact with her. The State further pointed out that the parties discussed other possible trial settings, but the trial court already scheduled two jury trials for the only other possible jury trial date within the 120-day speedy trial term. The State admitted that while the court may not have made a specific finding of due diligence, due diligence was "obviously" met. The prosecutor set forth that he did not learn about Ms. Toms' previously scheduled trip until the Thursday before the trial date and also noted the defense was unwilling to stipulate to Ms. Toms' testimony.

¶ 12 Defense counsel responded that the week of March 31st was a trial week, two other trials were held during that week, and she was defense counsel in one of those two trials. She pointed out that the defendant in that case was free on bond and, therefore, not subject to the speedy trial requirements. She argued there were other options available to the court and neither she nor her client had any obligation to stipulate to evidence. Defense counsel said it was "inaccurate" to categorize the State's motion to continue as an application for an extension of speedy trial time, as that motion clearly stated the speedy trial time ran on April 10, 2014. Defense counsel admitted the trial court "has discretion and controls its own docket," but argued the trial court could not on its own motion "extend the speedy trial time without the state's request."

¶ 13 In denying defendant's motion to dismiss, the trial court admitted "the documentation in the docket sheet is not what it should be," but pointed out that "there was a discussion between the state and defense counsel with regard to a problem that came up concerning this particular witness and the witness' unavailability on the date of trial." The trial court noted that once the material witness was unavailable, it took a look

at the circumstances and made different arrangements, but could not penalize the State because of the unavailability of the witness through no fault of its own. The trial court specifically stated, "So it was the order of the Court that the motion to continue the trial setting was granted over the objection of the defendant and the speedy trial period was extended by 60 days." The case then proceeded to trial.

¶ 14

II. TRIAL

¶ 15 At trial, the victim's mother, LaQuinta, age 27, testified the incident occurred when she was at her house with the victim and defendant, who was a friend of her father. She stepped outside for approximately 10 minutes to talk to the victim's father on the phone. She did not want the victim to hear the conversation as she and the victim's father were discussing money. The victim was in her bedroom watching a movie. LaQuinta testified she locked the bedroom door and told her daughter not to open it.

¶ 16 When LaQuinta returned from making the phone call, she told defendant he needed to leave. Defendant left immediately. When she went to the bedroom, she noticed the door was cracked. The victim told her defendant made her open the door. The victim told her defendant came in and sat on the bed and would not leave when she asked him. She said defendant got on top of her and "peed" on her.

¶ 17 LaQuinta felt the victim's clothes and they were damp. LaQuinta removed the victim's clothes and placed them in a bag. She later gave the bagged clothes to the police. LaQuinta accompanied the victim when a sexual assault kit was prepared and to a forensic interview.

¶ 18 The victim testified that defendant sat on the bed with her and peed on her pants. The victim was unable to identify defendant in the courtroom.

¶ 19 Fredilu Toms, who administered the sexual assault kit of the victim, testified the victim told her a man got on top of her, rocked back and forth, and then peed on her. Toms testified about the specifics of administering the sexual assault kit.

¶ 20 Law enforcement officials established a chain of custody for the sexual assault kit and the bag containing the victim's damp clothes. The sexual assault kit included swabs taken from the victim's back and hip. One swab showed the presence of semen; the other contained a sperm cell. The victim's forensic interview was played for the jury.

¶ 21 Defendant moved for a directed verdict at the close of the State's case. The trial court denied the motion. Defendant testified in his own defense.

¶ 22 Defendant testified he was 43 years of age and had sex with the victim's mother one time at the end of October 2013 in her bedroom. He said after they had sex, LaQuinta gave him some clothing, and he wiped himself off with it and laid it on the floor. He denied any physical contact with the victim.

¶ 23 On redirect, Detective Laughland testified he interviewed defendant on December 11, 2013. At that time, defendant told him he had sex with the victim's mother five to seven months earlier.

¶ 24 After deliberations, the jury returned a guilty verdict. Defendant filed a motion for a new trial, arguing *inter alia* that he was denied his right to a speedy trial. The trial court denied the motion for a new trial. After a sentencing hearing, the trial court

sentenced defendant to 14 years in the Department of Corrections, the maximum extended term. Defendant filed a timely notice of appeal.

¶ 25

ISSUES

¶ 26

I. SPEEDY TRIAL

¶ 27 The first issue on appeal is whether the trial court abused its discretion in granting an extension of the statutory speedy trial period. Defendant argues the trial court erred in extending the speedy trial term where the State waited until the 93rd day of the term to request a new trial date because it failed to exercise due diligence by failing to contact the nurse who administered the sexual assault kit earlier. The State replies that the trial court's decision to grant a 60-day extension of the statutory speedy trial period was not an abuse of discretion. We agree with the State.

¶ 28 In Illinois, the right to a speedy trial found in both the constitution of the United States (U.S. Const., amend. VI) and of Illinois (Ill. Const. 1970, art. I, § 8) is implemented through section 103-5(a) of the Code of Criminal Procedure of 1963 (Code), which provides that an incarcerated defendant must be tried within 120 days from the date he or she was taken into custody except in circumstances not present here. 725 ILCS 5/103-5(a) (West 2012). If not, the court must release the defendant from custody and dismiss the charges against him or her. 725 ILCS 5/103-5(d) (West 2012). However, the period in which the defendant must be tried may be extended by up to 60 days under the following circumstances:

"If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days." 725 ILCS 5/103-5(c) (West 2012).

The decision to extend the speedy trial period beyond 120 days lies within the sound discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. *People v. Richards*, 81 Ill. 2d 454, 458, 410 N.E.2d 833, 835 (1980). An abuse of discretion occurs when a ruling is arbitrary, unreasonable, fanciful, or when no reasonable person would take the view adopted by the trial court. *People v. Ward*, 2011 IL 108690, ¶ 21, 952 N.E.2d 601.

¶ 29 The test of due diligence is whether the State began efforts to locate its witness in sufficient time to secure his or her presence before the speedy trial term expired. *People v. Gray*, 326 Ill. App. 3d 906, 910, 761 N.E.2d 1237, 1240 (2001). Defendant does not deny the materiality of Ms. Toms' testimony nor the fact that Ms. Toms could not be present on the scheduled trial date of March 17, 2014. Defendant complains, however, that no hearing was held when the speedy trial term was extended, and the trial court failed to make a proper finding of diligence. He argues the State failed to exercise due diligence in attempting to locate Toms until March 5, 2014.

¶ 30 The record before us shows the prosecutor first sent a subpoena to Ms. Toms at St. Joseph's Hospital on March 5, 2014. This was almost two weeks prior to the scheduled trial date of March 17, 2014, and 36 days prior to the expiration of the speedy trial period.

Second, the prosecutor personally met with Ms. Toms at approximately 5 p.m. on March 13, 2014, at the hospital in which she worked. At that time, the prosecutor learned Ms. Toms was going to be out of the state on the date of trial and would not return until March 22, 2014. Accordingly, the State filed a motion to continue on the following day, March 14, 2014.

¶ 31 The motion to continue alleged the State would be "severely prejudiced" without Ms. Toms' presence at trial. The motion also set forth that the State attempted to get defense counsel to stipulate to Ms. Toms' testimony, but defense counsel was unwilling to do so. We also point out that on March 13, 2014, only three days before the scheduled trial, defense counsel issued its own subpoena for Ms. Toms. The record indicates the sheriff was unable to serve the subpoena.

¶ 32 On March 19, 2014, the trial court entered an order granting the motion to continue over the objection of defendant and reset the jury trial for April 28, 2014. The trial court specifically found that a necessary witness for the State was unavailable through no fault of the State and that defendant was unwilling to stipulate to the testimony of the unavailable witness. On March 26, 2014, defendant filed an objection to the new trial date, arguing that his speedy trial term ended on April 10, 2014, and he had not caused any delay. On April 11, 2014, defendant moved to dismiss on speedy trial grounds.

¶ 33 On April 18, 2014, the trial court heard arguments on the motion to dismiss. Defense counsel specifically acknowledged the trial court had discretion under section 103-5(c) of the Code to grant a 60-day extension of the 120-day speedy trial term, but

asserted the court could only do so if the State specifically applied for an extension. Ultimately, the trial court entered an order finding that defendant's jury trial date of April 28, 2014, was not beyond the time allotted for a speedy trial, pointing out that the State filed a motion to continue the jury trial set for March 17, 2014, and that the parties and the court explored ways to keep the date, but they were unsuccessful. The trial court noted that because a necessary witness was unavailable through no fault of the State, "the speedy trial period was extended by 60 days." Under these circumstances, we cannot say the trial court abused its discretion in extending the speedy trial period.

¶ 34 Defendant relies on *People v. Shannon*, 34 Ill. App. 3d 185, 340 N.E.2d 129 (1975), in support of his argument that the trial court abused its discretion in extending the speedy trial period an additional 60 days under section 103-5(c) of the Code. However, in *Shannon*, the State filed a motion for an extension under section 103-5(c) on the last day of the term because two police officers were on furlough. *Shannon*, 34 Ill. App. 3d at 186, 340 N.E.2d at 130. The motion stated that the State began its attempts to locate those two officers only six days before the expiration of the term. *Id.* In actuality, the record showed that no effort was made to ascertain the availability of the two police eyewitnesses until the afternoon four days before trial. *Id.* at 187, 340 N.E.2d at 131. Our colleagues in the First District specifically stated such "belated efforts to locate these essential witnesses were not sufficient to constitute due diligence on the part of the State." *Id.* at 187-88, 340 N.E.2d at 131.

¶ 35 In the instant case, the State began its efforts to locate Ms. Toms 36 days before the term would have expired, and filed a motion to continue on March 14, 2014, the day

after the prosecutor learned Ms. Toms would be unavailable for trial on March 17, 2014. The State was aware that defendant's speedy trial term expired on April 10, 2014, and tried to secure a trial date before its expiration, specifically asking for a trial date of March 31, 2014, which was unavailable due to other jury trial settings. Ultimately, the trial court extended the speedy trial period by 60 days.

¶ 36 "The prerequisites for an extension of the 120-day period for trying an accused in custody are showings by the State that it has diligently sought, without success, to obtain material evidence *within the term* and that such evidence will be available at a later day." (Emphasis added.) *People v. Garcia*, 251 Ill. App. 3d 473, 481, 621 N.E.2d 1035, 1041 (1993). Here, we find the State acted with sufficient diligence in attempting to secure the presence of Ms. Toms within the term to warrant the trial court's grant of a 60-day extension pursuant to section 103-5(c). After careful consideration, we cannot say the trial court abused its discretion in extending the speedy trial period an additional 60 days.

¶ 37

II. SENTENCE

¶ 38 The only other issue raised in this appeal is whether defendant's sentence should be reduced to the maximum nonextended sentence of seven years. Our supreme court has held that the age of the victim cannot be considered as the basis for the imposition of an extended term sentence where the age of the victim was an element of the offense. *People v. Ferguson*, 132 Ill. 2d 86, 98, 547 N.E.2d 429, 434 (1989). The State concedes that pursuant to *Ferguson* defendant's sentence was based on an impermissible double enhancement and acknowledges we should reduce defendant's sentence to the maximum nonextended term of seven years pursuant to the power granted to us under Illinois

Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967). Accordingly, we hereby reduce defendant's sentence to the maximum nonextended term of seven years followed by the requisite period of mandatory supervised release.

¶ 39

CONCLUSION

¶ 40 For the foregoing reasons, we affirm defendant's conviction, but reduce his sentence to the nonextended maximum of seven years.

¶ 41 Affirmed in part and modified in part.