

2018 IL App (2d) 151162-U  
No. 2-15-1162  
Order filed June 6, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-383
	)	
DION SPEARS,	)	Honorable
	)	Marmarie J. Kostelny,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's order summarily dismissing defendant's postconviction petition was affirmed where counsel on direct appeal was not arguably ineffective for failing to raise various issues pertaining to defendant's speedy trial rights.

¶ 2 Defendant, Dion Spears, appeals the summary dismissal of a petition that he filed pursuant to the Post-conviction Petition Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)).

For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 During the early morning hours of February 3, 2008, Derrick Bey was shot and killed outside of La Movida banquet hall on Route 31 in Elgin, Illinois. Moments after the shooting, a security guard confiscated the murder weapon, a Colt .32 caliber revolver, from defendant, the alleged shooter. Defendant then attempted to run across Route 31 and was severely injured when he was struck by a car. After loading defendant into an ambulance, paramedics discovered a nine-millimeter handgun on his person. Later, at the hospital, defendant regurgitated a baggie containing cocaine.

¶ 5 On February 13, 2008, the State filed a five-count “complaint for preliminary hearing” against defendant. All charges in that complaint related to defendant’s possession of the cocaine and the nine-millimeter handgun, *not* Bey’s shooting. Specifically, the State charged defendant with: armed violence (720 ILCS 5/33A-2(a) (West 2008)) (count I), aggravated unlawful use of a weapon by a felon (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2008)) (count II), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) (count III), possession of a defaced firearm (720 ILCS 5/24-5(b) (West 2008)) (count IV), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) (count V). Although a warrant in connection with those charges was immediately issued for defendant’s arrest, due to the extent of his injuries, which necessitated a prolonged stay in various medical facilities, he was not served with that warrant for more than a year.

¶ 6 Meanwhile, a proof of service in the record indicates that on January 21, 2009, the State served a copy of “charging documents, criminal history, and police reports” on the Kane County Public Defender’s office. On February 9, 2009, an assistant public defender appeared in court and requested that her office be appointed to represent defendant, even though defendant had not yet been served with the arrest warrant. This assistant public defender also sought a referral to

the Kane County Diagnostic Center to see if defendant was “physically fit.” She indicated that she had no problem with the warrant remaining outstanding, as there was “no real concern that [defendant was] going to be released” from the medical facility where he was residing.

¶ 7 On March 24, 2009, in conjunction with his release from a medical facility, defendant was served with the warrant that had been issued in February 2008 and was taken into police custody.

¶ 8 On April 22, 2009, a grand jury returned a six-count indictment against defendant. Counts I and II of the indictment charged defendant with first-degree murder, under alternative theories, for shooting Bey with a Colt .32 caliber revolver. 720 ILCS 5/9-1(a)(1), (2) (West 2008). Counts III through VI of the indictment pertained to defendant’s possession of the cocaine and the nine-millimeter handgun. Those counts substantially mirrored counts I-III and V of the February 2008 complaint.

¶ 9 Defendant filed a two-part motion to dismiss the first-degree murder charges contained in the indictment. Part one of the motion alleged a statutory speedy trial violation due to the passage of more than 120 days between February 3, 2008 (the date defendant claimed he was taken into custody) and the date he was indicted on the murder charges. Defendant argued that the murder charges arose from the same set of facts that had been the basis for the original February 2008 criminal complaint. Moreover, he claimed, the State knew of the facts alleged in the murder counts of the indictment all along, yet it elected not to include those charges until April 2009. Defendant insisted that he did not agree to any continuances of the murder charges prior to the date of the indictment. He argued that no statutory exceptions tolled the period within which he was to be tried.

¶ 10 In the second part of his motion to dismiss the murder charges, defendant claimed that the pre-indictment delay of 14 months violated his due process rights.

¶ 11 Following a hearing at which the parties offered argument but no evidence, the court denied without prejudice defendant's motion to dismiss. Defendant filed a "motion to reconsider and reopen proofs." The matter then proceeded to an evidentiary hearing. Detective Brian Gorcowski of the Elgin Police Department was the only witness at the hearing. He testified as follows. In the early morning hours of February 3, 2008, he was assigned to investigate a shooting at the La Movida banquet hall. Defendant was a suspect in that shooting. Gorcowski explained that defendant was hit by a car within seconds of Bey's shooting and was taken by ambulance to Sherman Hospital. Inside the ambulance, emergency personnel discovered that defendant possessed a gun; they also found drugs on defendant around that time.<sup>1</sup>

¶ 12 Gorcowski testified that defendant was "in pretty bad shape" after getting hit by the car and was not expected to live. Defendant was unconscious and on a breathing tube when Gorcowski saw him at the hospital. Defendant remained at Sherman Hospital until February 9 or 10, 2008, when he was sent to a nursing home in Oak Lawn. By that time, there was a warrant for defendant's arrest with respect to the drug and gun charges. Gorcowski considered those to be "separate and aside from the murder that [defendant] had committed." The drug/gun incident was assigned a different police report number than the murder case.

¶ 13 Gorcowski testified that he decided to check on defendant after defendant had been at the Oak Lawn facility for a few months. Gorcowski's purpose in speaking with the staff at the nursing home was to discover whether defendant's status had changed. The staff informed

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<sup>1</sup> Evidence introduced at trial showed that defendant regurgitated the baggie of cocaine at the hospital, not in the ambulance.

Gorcowski that defendant had been transferred to Oak Forest Hospital. Gorcowski then found out that defendant was in critical condition at Oak Forest Hospital. Although defendant was no longer on a breathing tube, he was nonresponsive and could not take care of himself. Gorcowski did not personally see defendant at Oak Forest Hospital, as defendant was transferred shortly thereafter to a rehabilitation facility in Chicago known as South Shore.

¶ 14 Gorcowski testified that he spoke with the administrator of South Shore several times. In August or September of 2008, after defendant had been at South Shore for several months, Gorcowski drove there to see defendant. Gorcowski found him propped up in a chair, drooling, and staring blankly at a television set. This was an improvement from defendant's previous condition. Defendant did not respond when Gorcowski called his name.

¶ 15 Gorcowski explained that defendant underwent a fitness evaluation in late 2008 or early 2009 from a Dr. Brown of the Kane County Diagnostic Center. Asked what led to this evaluation, Gorcowski related that he received half a dozen calls from the administrator of South Shore asking if police were going to arrest defendant. Specifically, the administrator told Gorcowski that defendant was getting better and was grabbing nurses and making offensive comments. Gorcowski then spoke with the Kane County State's Attorney's office, and "it was decided to have a fitness evaluation" of defendant. The evaluation showed that defendant was physically capable of going to trial. After the evaluation, Gorcowski called the State's Attorney's office again, and it was arranged to have defendant served with a warrant on March 24, 2009, and taken to the Kane County jail. Defendant was indicted for murder on April 22, 2009.

¶ 16 Defense counsel questioned Gorcowski about whether he received any additional information leading to the murder charges between the date of the shooting and the date of the

indictment. Gorcowski explained that he attempted to interview witnesses for several months but they did not cooperate.

¶ 17 The trial court denied defendant's motion to dismiss the murder charges. The court agreed with defense counsel that "these really aren't separate incidents" and that "defendant's medical condition doesn't toll anything." But the court disagreed with defense counsel that defendant had been in continuous custody since his arrest on February 3, 2008. According to the court, the evidence actually showed that defendant was not in custody until March 24, 2009, when he was served with the warrant. The court determined that this was when the "clock" started to "tick," and it noted that defendant was indicted less than 30 days later on April 22, 2009.

¶ 18 Later in the course of the pretrial proceedings, the court severed counts IV and V of the indictment from the remaining counts in response to a defense motion that is unrelated to this appeal. The matter proceeded to trial on the charges of first-degree murder, armed violence, and unlawful possession of a controlled substance. Defendant was found guilty of those charges. He received consecutive prison sentences of 57 years for first-degree murder and 16 years for armed violence, and a concurrent prison sentence of 3 years for unlawful possession of a controlled substance. On direct appeal, we vacated defendant's conviction of unlawful possession of a controlled substance but affirmed the judgment in all other respects. *People v. Spears*, 2014 IL App (2d) 120817-U, ¶ 120.

¶ 19 On September 11, 2015, defendant filed a *pro se* postconviction petition alleging, among other claims, ineffective assistance of appellate counsel for failing to raise on direct appeal "plain error against trial court judge, who denied petitioners [*sic*] speedy trial motion in the hearing court." Defendant reasserted virtually *verbatim* the two-part argument that his trial counsel had

advanced in the pretrial motion to dismiss the murder charges. On November 10, 2015, the trial court summarily dismissed defendant's petition. Defendant timely appealed.

¶ 20

## II. ANALYSIS

¶ 21 Defendant argues that he sufficiently alleged in his postconviction petition that “appellate counsel was ineffective for failing to assert his speedy trial rights.” Specifically, defendant contends,

“the record supports arguable claims that: (1) [his] statutory speedy trial rights were violated because he was in custody for more than 120 days before the State formally indicted him; (2) the murder charge was based on the same act as the five charges filed in February of 2003 [*sic*], and was subject to compulsory joinder with those charges; and (3) [his] constitutional speedy trial rights were violated where the State delayed bringing him to trial because it believed that [his] fitness for trial was for it alone to determine.”

¶ 22 The Act provides a method whereby a person imprisoned in the penitentiary may assert that his or her conviction was the result of a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2016). An action under the Act is a collateral attack on the trial court proceedings rather than an appeal from the judgment of conviction, so “issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited.” *People v. Tate*, 2012 IL 112214, ¶ 8. Nevertheless, the forfeiture rules are relaxed when the defendant alleges ineffectiveness of appellate counsel. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 23 At the first stage of a postconviction proceeding, the trial court independently reviews the petition, taking the allegations as true (*Tate*, 2012 IL 112214, ¶ 9), to determine whether the petition is “frivolous or \*\*\* patently without merit” (725 ILCS 5/122-2.1(a)(2) (West 2016)).

The court may summarily dismiss a petition as frivolous or patently without merit only if it has “no arguable basis either in law or in fact.” *Tate*, 2012 IL 112214, ¶ 9. While the petition must “clearly set forth the respects in which petitioner’s constitutional rights were violated” (725 ILCS 5/122-2 (West 2016)), the threshold for survival at the first stage is low (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)). The defendant must set forth only the “gist” of a constitutional claim, which means that the petition contains “enough facts to make out a claim that is arguably constitutional.” *Hodges*, 234 Ill. 2d at 9.

¶ 24 A defendant’s claim of ineffective assistance of counsel is evaluated in accordance with the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 236 Ill. 2d 175, 185 (2010). The trial court may not summarily dismiss a postconviction petition alleging ineffective assistance if: (1) counsel’s performance arguably fell below an objective standard of reasonableness and (2) the petitioner was arguably prejudiced as a result. *Brown*, 236 Ill. 2d at 185. Our review of the trial court’s first-stage dismissal of a petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 25 A. Statutory Speedy Trial Right

¶ 26 Defendant first asserts a violation of his statutory right to a speedy trial. Section 103-5(a) of the Code of Criminal Procedure of 1963 provides, in relevant portion:

“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 or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court’s determination of the defendant’s physical incapacity for trial, or by an



interlocutory appeal. 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. \*\*\*

The 120-day term must be one continuous period of incarceration. In computing the 120-day term, separate periods of incarceration may not be combined. If a defendant is taken into custody a second (or subsequent) time for the same offense, the term will begin again at day zero.” 725 ILCS 5/103-5(a) (West 2016).

If a defendant does not receive a trial in accordance with this provision, he must be “discharged from custody or released from the obligations of his bail or recognizance.” 725 ILCS 5/103-5(d) (West 2016).

¶ 27 Defendant maintains that he remained in continuous custody from the night of the shooting until trial. The dispositive issue is whether defendant was in custody during the 14-month period that he spent in various medical facilities recovering from the injuries he sustained after being hit by a car. Our supreme court considered the meaning of the word “custody” for purposes of the speedy trial statute in *People v. Campa*, 217 Ill. 2d 243 (2005). Noting the absence of any statutory definition, the court looked to guidance in dictionaries:

“Webster’s Third New International Dictionary defines ‘custody’ as ‘judicial or penal safekeeping: control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it: imprisonment or durance of persons or charge of things.’ Webster’s Third New International Dictionary 559 (1993). Black’s Law Dictionary defines ‘custody’ in general as ‘[t]he care and control of a thing or person for inspection, preservation, or security.’ Black’s Law Dictionary 412 (8th ed. 2004). Black’s Law Dictionary further defines and distinguishes between the

terms ‘physical custody’ and ‘constructive custody.’ The term ‘physical custody’ is defined as ‘[c]ustody of a person (such as an arrestee) whose freedom is directly controlled and limited.’ Black’s Law Dictionary 1183 (8th ed. 2004). The term ‘constructive custody’ is defined as ‘[c]ustody of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control.’ Black’s Law Dictionary 412 (8th ed. 2004).” *Campa*, 217 Ill. 2d at 253-54.

In light of these dictionary definitions, the court in *Campa* concluded that the legislature intended for the term “custody” to “have a broad meaning,” to “encompass lesser forms of restraint than confinement,” and to “evolve with the changing programs in our correctional institutions.” *Campa*, 217 Ill. 2d at 254. The court thus determined that a defendant who had been required to participate in a Day Reporting Center program run by the Cook County sheriff’s office pending trial had been in “custody” for purposes of the speedy trial statute. *Campa*, 217 Ill. 2d at 255.

¶ 28 Defendant relies on *Campa* as well as our supreme court’s subsequent decision in *People v. Beachem*, 229 Ill. 2d 237 (2008), which likewise involved the Cook County sheriff’s Day Reporting Center program. Defendant proposes that, even though he remained in various medical facilities from February 3, 2008, until March 24, 2009, he was nevertheless in “custody” given that “he had significant restraints on his liberty and \*\*\* the State had legal power of imprisonment over him.”

¶ 29 Gorcowski’s unrebutted testimony at the hearing on defendant’s motion to dismiss the murder charges established that defendant was not in custody during this time period. Gorcowski explained that, in the immediate aftermath of defendant’s February 2008 accident,

defendant was on a breathing tube and was not expected to live. As late as August or September 2008, defendant still could not respond to his own name, and he spent his days propped up in a chair, drooling, and staring at a television with a blank face. Although Gorcowski checked on defendant's condition from time-to-time, there was never any consistent police presence at the medical facilities. To the contrary, it appears from Gorcowski's testimony that he sometimes went months at a time without so much as inquiring as to the condition of defendant's health. Defendant's contention that he was in continuous custody is further belied by the fact that on one occasion Gorcowski was not notified before defendant was transferred between facilities. Additionally, once defendant's medical condition improved, the administrator of South Shore had to call the police half a dozen times before any action was taken to coordinate a plan for defendant's evaluation and eventual arrest. In his brief, defendant overstates the control that the State had over him during the period when he was recovering from his injuries. In reality, the only real "restraints" defendant encountered were the medical limitations that resulted from his own decision to attempt to cross Route 31 on foot.

¶ 30 Neither *Campa* nor *Beachem* support defendant's argument that he was in continuous custody prior to March 24, 2009. In *Beachem*, the court explained that the sheriff's Day Reporting Center program was an "intensive supervision program" designed to reduce overcrowding in the Cook County jail. *Beachem*, 229 Ill. 2d at 240. Specifically, after an eight-day orientation, participants in that program were required to engage in three-to-nine hours of daily activities and submit to drug testing. *Beachem*, 229 Ill. 2d at 240-41. Participants were subject to re-incarceration if they failed to comply with the program's rules, and the sheriff's office maintained a fugitive unit tasked with locating and re-incarcerating "AWOL" participants. *Beachem*, 229 Ill. 2d at 241. Unlike the participants in the program that was at issue in *Campa*

and *Beacham*, defendant here spent his days at private medical facilities, not in a program run by the sheriff. The State did not control defendant's activities in any way during his extended course of medical treatment.

¶ 31 As defendant was not in continuous custody from February 3, 2008, through March 24, 2009, there was no violation of his statutory right to a speedy trial. The underlying issue that defendant presents lacks merit, so defendant suffered no arguable prejudice from his appellate counsel's failure to raise the issue on direct appeal. See *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) ("A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. [Citation.] If the underlying issue is nonmeritorious, the defendant has suffered no prejudice.").

¶ 32 B. Compulsory Joinder

¶ 33 Defendant next contends that "[r]easonable appellate counsel would also have raised a compulsory joinder issue on direct appeal." According to defendant:

"The record on appeal made clear that the original charges of armed violence, and the related gun and drug possession charges, stemmed from the same act which gave rise to the murder charges filed 14 months later. In addition, a reasonable attorney would have recognized that the State had 'commenc[ed] prosecution' of Spears when it filed the initial charges, despite styling those charges as a 'Complaint,' where the record shows the State treated those charges as formal charges, even using them to initiate discovery and fitness proceedings, for 14 months after it filed them."

¶ 34 We note that, on direct appeal, defendant argued that the first-degree murder charges should have been severed from the remaining charges because "the charges were not part of the

‘same comprehensive transaction.’ ” *Spears*, 2014 IL App (2d) 120817-U, ¶ 64. Raising the issue of compulsory joinder on direct appeal would have required counsel to advance a position on defendant’s behalf that would have been perceived as inconsistent with defendant’s severance argument. For example, to argue compulsory joinder, defendant would have had to argue (as he does here) that the murder charges were “based on the same act” as the original gun and drug charges. Such argument would have been in obvious tension with defendant’s other argument on direct appeal: that the charges should have been severed because they were not part of the “same comprehensive transaction.” It thus seems certain that appellate counsel made a strategic decision to pursue the severance issue instead of the compulsory joinder issue. We would be hard-pressed to deem such strategy “objectively unreasonable” (*Rogers*, 197 Ill. 2d at 223), given that we *agreed with* defendant’s position on direct appeal that the charges were not part of the same comprehensive transaction. See *Spears*, 2014 IL App (2d) 120817-U, ¶ 78.

¶ 35 Aside from the fact that counsel likely made a strategic decision not to raise the issue of compulsory joinder in defendant’s direct appeal, the murder charges plainly were not subject to compulsory joinder with the original gun and drug charges that were filed in February 2008. Section 3-3 of the Criminal Code of 2012 provides as follows:

“(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), *if they are based on the same act.*

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately.” (Emphasis added.) 720 ILCS 5/3-3 (West 2016).

The purpose of the compulsory joinder statute is “to prevent the prosecution of multiple offenses in a piecemeal fashion and to forestall, in effect, abuse of the prosecutorial process.” *People v. Quigley*, 183 Ill. 2d 1, 7 (1998).

¶ 36 We will focus on the “same-act” requirement, as it is dispositive of the issue that defendant raises. “The ‘same-act’ requirement applies primarily to two situations: (1) where several persons are affected by one act, and (2) where several different statutes are violated by one act.” *Quigley*, 183 Ill. 2d at 10. Although “joinder is not required where multiple offenses arise from a series of closely related acts,” the same-act requirement “cannot be given a hypertechnical interpretation to create multiple acts based on discrete moments in time.” *Quigley*, 183 Ill. 2d at 8, 11.

¶ 37 On February 3, 2008, defendant allegedly shot and killed Bey with a Colt .32 caliber revolver before a security guard confiscated that weapon from defendant. Defendant then attempted to cross Route 31 on foot and was struck by a car. Sometime later, as he was receiving medical attention in an ambulance for his injuries, defendant was found to have a nine-millimeter handgun on his person. Later yet at the hospital, he regurgitated a baggie containing cocaine. On February 13, 2008, defendant was charged by criminal complaint in connection with his possession of the cocaine and the nine-millimeter handgun. He was not indicted for murder until April 22, 2009.

¶ 38 As we noted in defendant’s direct appeal, “because the 9-millimeter handgun and cocaine were recovered from defendant after he was rendered unconscious while fleeing the scene of the

shooting, it is practically indisputable that he possessed the firearm and drugs at the same time and in the same location that the shooting occurred.” *Spears*, 2014 IL App (2d) 120817-U, ¶ 71. However, that does not necessarily mean that the murder charges and the gun/drug charges were “based on the same act.”

¶ 39 *People v. Gooden*, 189 Ill. 2d 209 (2000), is instructive. In *Gooden*, the original criminal information charged the defendant with one count of home invasion for knowingly entering his ex-wife’s dwelling without authority and intentionally injuring her by striking her in the head with a gun. *Gooden*, 189 Ill. 2d at 212. At the preliminary hearing in connection with that charge, an investigator testified that, in the course of the home invasion, the defendant told his ex-wife to remove her clothes and he engaged in intercourse with her. *Gooden*, 189 Ill. 2d at 213. The State later filed an amended criminal information in which it re-alleged the home invasion charge and added five charges of aggravated criminal sexual assault. *Gooden*, 189 Ill. 2d at 214. The trial court denied the defendant’s motion to dismiss the aggravated criminal sexual assault charges on speedy-trial grounds. *Gooden*, 189 Ill. 2d at 214-15. Following a bench trial with stipulated evidence, the defendant was convicted of home invasion and one count of aggravated criminal sexual assault. *Gooden*, 189 Ill. 2d at 215.

¶ 40 On appeal to our supreme court, the defendant argued that the State violated his statutory right to a speedy trial by delaying charging him with aggravated criminal sexual assault. *Gooden*, 189 Ill. 2d at 216. One of the issues for the court to decide was whether the aggravated criminal sexual assault charges were subject to compulsory joinder with the original home invasion charge. The court explained as follows:

“[T]he fact that multiple offenses arise from distinct, but related, acts in the course of [a] single incident is irrelevant for purposes of compulsory joinder. [Citation.] Indeed, this

court has acknowledged that there is no requirement of joinder where multiple offenses arise from a series of related acts. [Citation.] This is so because the compulsory joinder provision was not intended to cover the situation in which several offenses—either repeated violations of the same statutory provision or violations of different provisions—arise from a series of acts which are closely related with respect to the offender’s single purpose or plan. [Citations.] Thus, independent, overt acts that constitute different offenses are not required to be joined because they are not offenses based on the same act.” (Internal quotation marks omitted.) *Gooden*, 189 Ill. 2d at 219-20.

According to the court, “because the home invasion and sexual assault charges in this case were based on separate acts, the compulsory joinder statute did not require the State to prosecute both offenses in the same proceeding.” *Gooden*, 189 Ill. 2d at 220.

¶ 41 In the present case, defendant’s act of shooting Bey with a Colt .32 revolver was an independent, overt act that constituted a different offense from his act of possessing the cocaine and the nine-millimeter handgun. As illustrated by *Gooden*, even if defendant’s course of conduct here could be considered to constitute a single incident, he plainly engaged in distinct criminal acts in the course of that incident. For these reasons, the murder charges were not subject to compulsory joinder with the charges that were originally filed.

¶ 42 Defendant directs our attention to *People v. Hunter*, 2013 IL 114100, and *People v. Smith*, 2017 IL App (1st) 161231. In *Hunter*, when the police arrested the defendant on suspicion that he was selling narcotics out of a building where they were conducting surveillance, they recovered cannabis and two handguns near where he had been standing. *Hunter*, 2013 IL 114100, ¶ 3. The defendant was originally charged only with possession of cannabis, though the charge was amended shortly thereafter to include intent to deliver. *Hunter*,



2013 IL 114100, ¶¶ 4-5. One hundred seventy-five days after defendant demanded a speedy trial on that charge, a grand jury returned an indictment consisting of six counts: possession of cannabis with intent to deliver, one count of being an armed habitual criminal, and four counts of unlawful use of a weapon by a felon. *Hunter*, 2013 IL 114100, ¶ 6. The trial court granted the defendant's motion to dismiss the five new gun-related counts based on the speedy-trial statute, agreeing with the defendant that those charges were subject to compulsory joinder with the original drug charge. *Hunter*, 2013 IL 114100, ¶ 7. In the course of affirming the decision to dismiss the gun charges, our supreme court reasoned that the defendant had "engaged in a single act of simultaneous, constructive possession of the cannabis and the handguns." *Hunter*, 2013 IL 114100, ¶ 19. The court noted that the State conceded that all the contraband was "discovered during the same search, at the same place, and at the same time." *Hunter*, 2013 IL 114100, ¶ 20. The court distinguished the matter from *Gooden*, which the court described as a case involving "multiple offenses that [arose] from a series of closely related acts." *Hunter*, 2013 IL 114100, ¶ 23.

¶ 43 *Smith* involved a factual scenario that was similar to *Hunter*. In that case, authorities executed a search of the defendant's home and found marijuana, counterfeit currency, and machinery and tools related to the counterfeit currency. *Smith*, 2017 IL App (1st) 161231, ¶ 3. That day, the defendant also gave a statement to authorities admitting that he had used the machinery and tools for the past three months to make counterfeit currency. *Smith*, 2017 IL App (1st) 161231, ¶ 3. The defendant was originally charged only with possessing marijuana. *Smith*, 2017 IL App (1st) 161231, ¶ 4. More than a year after the defendant pleaded guilty to that charge, a grand jury indicted him on a charge of manufacturing counterfeit currency. *Smith*, 2017 IL App (1st) 161231, ¶ 4. The trial court granted the defendant's motion to dismiss this

new charge based on the compulsory joinder statute. *Smith*, 2017 IL App (1st) 161231, ¶ 5. The appellate court affirmed the dismissal order, rejecting the State’s argument that it was legally significant for purposes of the compulsory joinder statute that the defendant was charged with “making” counterfeit money as opposed to “possession” of such money. *Smith*, 2017 IL App (1st) 161231, ¶ 14. The court did “not believe the General Assembly intended to reward prosecutors for piecemeal litigation that harasses a defendant, as long as the State artfully pleads offenses discovered at the same time as separate acts committed at separate times.” *Smith*, 2017 IL App (1st) 161231, ¶ 15.

¶ 44 *Hunter* stands for the proposition that constructive possession of multiple items of contraband may constitute a single act for purposes of the compulsory joinder statute if those items are discovered during the same search. *Smith* added that prosecutors may not avoid that rule through artful pleading. *Hunter* and *Smith* certainly support the State’s decision in the present case to charge defendant with possession of both items of contraband (the cocaine and the nine-millimeter handgun) in the same charging instrument, given that he possessed both items simultaneously and they were discovered in close proximity in time. However, these cases do not support defendant’s position that the murder charges were based on the same act as the possession charges. The murder was committed with a different weapon, one which was not in defendant’s possession when the nine-millimeter handgun and the cocaine were discovered. Under any reasonable interpretation of the case law, the murder was a distinct overt act that constituted a completely different criminal offense. The murder charges were not subject to compulsory joinder, so defendant was not arguably prejudiced by his counsel’s failure to raise the issue on direct appeal. See *Rogers*, 197 Ill. 2d at 223.

¶ 45

C. Constitutional Speedy Trial Rights

¶ 46 Defendant finally contends that his counsel on direct appeal was arguably unreasonable for failing to assert a constitutional speedy trial violation.

¶ 47 In his *pro se* postconviction petition, one of defendant's arguments was that the pre-indictment delay violated his due process rights. He separately claimed a violation of his statutory right to a speedy trial. Defendant *did not* allege in his postconviction petition that his constitutional right to a speedy trial was violated. The statutory right to a speedy trial is not coextensive with the constitutional right to a speedy trial. *Hunter*, 2013 IL 114100, ¶ 9. Indeed, the analysis proceeds quite differently where a defendant invokes his constitutional right to a speedy trial as opposed to his statutory right. See *Campa*, 217 Ill. 2d at 250-51.

¶ 48 On appeal from the dismissal of his postconviction petition, defendant abandons his due process claim based on pre-indictment delay. He raises a new argument regarding a violation of his constitutional right to a speedy trial. Our supreme court has made it clear that a claim that is not raised in the postconviction petition may not be argued for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). In its brief, however, the State does not object to defendant raising a new issue on appeal. By failing to raise such objection, the State has forfeited its potential forfeiture argument. See *People v. Holman*, 2017 IL 120655, ¶¶ 27-28.

¶ 49 Both the Federal Constitution and the State Constitution provide for the right to a speedy trial. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8. This constitutional right has been described as “a more vague concept than other procedural rights.” *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Accordingly, “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.” *Barker*, 407 U.S. at 522. This demands a balancing test, in which the court weighs the conduct of the State against the conduct of the defendant. *Barker*, 407 U.S. at 530. Specifically, the court must

consider four factors: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Barker*, 407 U.S. 530.

¶ 50 Defendant argues that his constitutional right to a speedy trial was triggered when he was “officially accused” by virtue of his “arrest” on February 3, 2008, the day of the shooting. In further support of his contention that he was officially accused as of that date, he emphasizes that the State filed drug and gun charges against him in February 2008. He also argues that he was in custody during the entire course of his medical treatment. Applying the *Barker* factors, defendant maintains that the 14-month delay between the time he was officially accused and the time he was indicted for murder was presumptively prejudicial. Moreover, defendant claims, the State exhibited negligence, or even reckless disregard for his rights, by “believ[ing] that it had the power to unilaterally determine [his] fitness for trial.” Defendant insists that he cannot be faulted for failing to immediately assert his speedy trial rights, given that he was unconscious and unrepresented by counsel for much of the time preceding the indictment. With respect to prejudice, defendant urges us to consider the State’s “particularly odious reason for the delay”—*i.e.*, the “callous disregard” for his speedy trial rights as demonstrated by the State’s “decision to take on the roles of both parties, as well as the role of the court, in determining whether [he] was fit for trial.” Defendant further argues that he was prejudiced by being deprived of the ability to investigate the case and interview witnesses during the 14-month period immediately following Bey’s murder. He suggests that the delay allowed the State to bypass the required judicial processes attendant to both obtaining his medical records and assessing his fitness for trial.

¶ 51 Given that we have already held that the murder charges were not subject to compulsory joinder with the original gun and drug charges, defendant’s argument rests on the assumption that he was arrested for murder on February 3, 2008, and that he was in continuous custody

thereafter. Until such time as a defendant is arrested or charged with an offense, any harm occasioned by pre-indictment delay must be addressed via a due process challenge, not a speedy trial challenge. See *United States v. MacDonald*, 456 U.S. 1, 7 (1982) (“Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment [citation], or to a claim under any applicable statute of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.”).

¶ 52 The parties have not thoroughly briefed the issue of whether defendant was arrested for murder on the day of the incident.<sup>2</sup> Even assuming that defendant was arrested at that time, as explained above, the record flatly contradicts his claim that he was in continuous custody during his extended course of medical treatment.

¶ 53 The record likewise does not support defendant’s contention that the State improperly circumvented the fitness statutes. Given that the murder charges were not subject to compulsory joinder, the State was under no obligation to charge defendant with murder earlier than it did. There was thus nothing improper about the State’s decision to defer pursuing murder charges until it had reason to suspect that defendant’s condition had improved. Moreover, the State did not unilaterally assess defendant’s fitness. In actuality, it was an assistant public defender who

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<sup>2</sup> Testimony at trial showed that defendant was briefly handcuffed by police on February 3, 2008, as he lay in the street after being hit by a car. A police officer then removed the handcuffs from defendant at the request of medical personnel. In the ambulance, paramedics discovered the nine-millimeter handgun. A police officer accompanied defendant to the hospital in the ambulance and stayed with him in the emergency room that morning. Police tested defendant’s hands for gunshot residue and collected items of clothing from him. At the hospital, defendant regurgitated a baggie of cocaine.

petitioned the court in February 2009 for a referral to the Kane County Diagnostic Center to assess defendant's fitness for trial. Defendant's assertion that the State exhibited "callous disregard" for his speedy trial rights is unfounded. Quite to the contrary, it is evident that the State cooperated with the public defender's office to ensure that defendant was represented by counsel and that his fitness could be formally assessed through the proper channels.

¶ 54 Defendant's claim of prejudice by being deprived of his ability to interview witnesses in the 14 months after the murder is also purely speculative. The only witness defendant mentions is Randy Clark, who professed a total lack of memory at trial when questioned by the State. Clark had previously made statements to the police that were damaging to defendant. There is no indication in the record that defense counsel would have been able to elicit more favorable testimony from Clark at trial had the defense been able to interview him in the first 14 months after Bey's murder.

¶ 55 Defendant also complains that his mother gave permission for a hospital to release his medical information to the police. However, defendant does not actually argue that his mother lacked authority to grant the police such access; he merely states that she "may not have had" such authority.

¶ 56 Conspicuously absent from defendant's brief is any suggestion that he would have been physically capable of facing trial at any point in the first 14 months after he got hit by the car. To the contrary, Gorcowski's unrebutted testimony at the hearing on the motion to dismiss the murder charges established that defendant was in an essentially vegetative state throughout much of that time period. The record reflects that the State pursued murder charges promptly once it received notice that defendant's condition had improved. This is not a case where the State can be faulted for failing to act diligently.

¶ 57 Ultimately, defendant's claim to a constitutional speedy trial violation is based on contentions which are refuted by the record or which are otherwise speculative and unpersuasive. Defendant has not presented an arguable claim of a constitutional speedy trial violation under the *Barker* factors.

¶ 58

### III. CONCLUSION

¶ 59 For the reasons stated, the judgment of the circuit court of Kane County summarily dismissing defendant's postconviction petition is affirmed.

¶ 60 Affirmed.