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No. 3-08-0865

Order filed January 13, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
Plaintiff-Appellee, )	of the 14 <sup>th</sup> Judicial Circuit,
)	Rock Island County, Illinois
v. )	
)	No. 08-CF-97
LARRY D. McQUEEN, )	Honorable
)	Walter D. Braud,
Defendant-Appellant. )	Judge Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

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**ORDER**

*Held:* Defense counsel was not ineffective for failing to file a motion to dismiss prior to trial based upon a violation of defendant's right to a speedy trial because a motion to dismiss would not have been successful as the State tried defendant within 120 days. Defendant's conviction is affirmed.

A jury convicted defendant, Larry D. McQueen, of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2006)) on July 8, 2008, and thereafter, the trial court sentenced defendant to four years in prison. Defendant appeals, arguing that his trial counsel was

ineffective for failing to file a motion to dismiss on speedy trial grounds prior to trial. We affirm defendant's conviction.

## FACTS

On January 22, 2008, the State charged defendant with unlawful possession of cannabis in case No. 08-CF-69. On January 29, 2008, the State charged defendant with an unrelated charge of unlawful delivery of a controlled substance in this case, No. 08-CF-97, and a warrant for defendant's arrest on this charge issued the same date. On January 30, 2008, defendant appeared in court for a first appearance in case No. 08-CF-97, and the arrest warrant was returned as served in case No. 08-CF-97. From the date on which the State charged defendant in case No. 08-CF-69, being January 22, 2008, until the date of his trial in this case on July 7, 2008, defendant remained in custody. Defendant filed demands for a speedy trial in both cases.

The trial court appointed the same counsel to represent defendant in both cases. The trial court conducted a preliminary hearing on February 5, 2008, in both cases and found probable cause. Also on February 5, 2008, the court entered separate pretrial orders scheduling both cases for the same jury trial date of March 17, 2008, and scheduled both cases for further pretrial proceedings.

Just before the scheduled jury trial date, defendant's codefendant in case No. 08-CF-69 filed a motion to suppress evidence on March 5, 2008. On March 11, 2008, defendant appeared in court on both cases, and defense counsel indicated to the court that defendant would also be filing a motion to suppress in case No. 08-CF-69. Consequently, on March 11, 2008, defense counsel requested a continuance. The court allowed defendant's verbal request for a continuance and continued both cases to March 28, 2008, for a hearing on defendant's motion to suppress.

Defendant filed his motion to suppress in case No. 08-CF-69 on March 26, 2008, two days before the scheduled hearing. However, the State claimed that it did not receive a copy of the motion to suppress filed in case No. 08-CF-69. On March 28, 2008, the trial court granted the State a continuance to prepare, and the trial court continued both cases to April 25, 2008, with a suppression hearing to be heard in case No. 08-CF-69. On April 25, 2008, defendant agreed to a continuance of his pending motion to suppress because his codefendant in case No. 08-CF-69 had filed a motion to exclude the prosecutor. Both cases were continued, and then reset for a hearing on the codefendant's motion to exclude the prosecutor on June 6, 2008.

On June 6, 2008, the trial court denied the co-defendant's motion to exclude the prosecutor. The State was unprepared to proceed to hearing on defendant's motion to suppress in case No. 08-CF-69 and requested a continuance, which the trial court granted. At defendant's request, the State elected to first try this case, cause No. 08-CF-97, and the court continued this cause for trial on July 7, 2008.

This cause, case No. 08-CF-97, proceeded to trial on July 7, 2008. A jury found defendant guilty of the offense of unlawful delivery of a controlled substance on July 8, 2008. After trial, but before sentencing in this case, defendant filed a motion to dismiss both cases on the basis of speedy trial violations. In the motion, filed August 4, 2008, defendant acknowledged that he was attributable for delay in case No. 08-CF-69 for the two time periods from March 12, 2008, until March 28, 2008, and again from April 26, 2008, until June 6, 2008.

During the hearing on the motion to dismiss, defense counsel acknowledged that the minute entries in the two cases "shadow each other." Further, he described this case as "tagging along" with case No. 08-CF-69. At one point in the hearing, defense counsel said, "I think

we're there on the 97 case. I think – it's been agreed upon, at least in part, that I took – that the defendant took delays in March, and from April 26<sup>th</sup> to June 6<sup>th</sup>. We admit to that.”

The prosecutor stated to the court that initially she advised defense counsel that she intended to first try case No. 08–CF–69 and then try case No. 08–CF–97. The prosecutor also advised the court that on June 6, 2008, defense counsel asked her to first try case No. 08–CF–97 and set the cause for trial. When asked by the court if that was true, defense counsel said “I gotta do something.” Further, defense counsel agreed that he acquiesced in the continuance on April 25, 2008, so that defendant's motion to suppress could be tried with the co-defendant's motion in cause No. 08–CF–69.

The trial court determined that the delays from January 29, 2008, to March 11, 2008, and from June 6, 2008, to July 7, 2008, were attributable to the State. The trial court found that defendant was responsible for the delay from March 11, 2008, until March 28, 2008, because on March 11, 2008, defense counsel requested a continuance in order to file a motion to suppress in case No. 08–CF–69. Although the minute entry indicated that the delay from March 28, 2008, until April 25, 2008, was attributable to the State and the State requested a continuance on March 28, 2008, the trial court found the delay was attributable to defendant. The trial court found that the prosecutor did not receive a copy of defendant's motion to suppress prior to the scheduled hearing on March 28, 2008, and therefore, the State was entitled to a continuance to prepare for the hearing on the motion to suppress.

The court found that since defense counsel requested a continuance on April 25, 2008, to conduct a joint hearing on the motion to suppress with the co-defendant in case No. 08–CF–69, the delay was attributable to defendant. As a result, both cases were continued to June 6, 2008.

The court concluded that this delay was attributable to defendant.

After assessing the delays in the cases, the trial court stated that “the motion to dismiss for speedy trial is denied.” The trial court directed the prosecutor to prepare an order. The prosecutor then stated to the court, “Your Honor, for the Record as well, I just want to point out to the Court Mr. Durbin [defense counsel] filed his motion to dismiss in the 97 case.” The prosecutor went on to say that the relevant statutory provisions required the motion to dismiss to be filed prior to trial and therefore, defendant had waived any motion to dismiss in case No. 08–CF–97. Defense counsel said that the issue “really doesn’t matter if your Honor was going to rule the way you ruled on the 69 case because then the time-frames don’t add up.”

The court said that the prosecutor was attempting to “dot her t’s and cross her i’s.” The court then stated that relief was denied and that the motion to dismiss was not timely filed. Thereafter, the trial court sentenced defendant to four years imprisonment in this case, and defendant appealed.

#### ANALYSIS

On appeal, defendant argues that his trial counsel was ineffective because his counsel failed to protect and preserve his statutory right to a speedy trial. Specifically, defendant asserts that he spent more than 150 days in custody prior to being brought to trial in this case, No. 08–CF–97, and that defendant did not cause any delay. Defendant further asserts that despite spending more than the statutory allowable time in custody prior to being brought to trial in this case, defense counsel failed to file a motion to dismiss on speedy trial grounds prior to trial, and as a result, the trial court denied his motion to dismiss as untimely.

The State emphasizes that the pretrial proceedings in both case No. 08–CF–69 and this

case No. 08–CF–97 were scheduled together, and that the parties recognized that delays caused by pending defense motions in case No. 08–CF–69 would result in agreed delays in both cases. According to the State, these agreed delays were attributable to defendant in case No. 08–CF–97. Consequently, the State responds that defense counsel was not ineffective because defendant was tried in case No. 08–CF–97 within the statutory 120 days, and therefore, the trial court would have denied defendant’s motion to dismiss even if defense counsel had filed the motion prior to defendant’s trial.

To prevail on a claim for ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's representation prejudiced defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). A defendant cannot establish either prong of an ineffective assistance claim if there is no lawful basis for raising a speedy trial objection. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010). Accordingly, we consider whether there is any basis for a speedy trial objection in this case.

Defendant was in custody on two separate and unrelated offenses in this case. Section 103–5(e) of the Code of Criminal Procedure of 1963 provides, in relevant part:

"If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried \*\*\* upon at least one such charge before expiration relative to any of such pending charges of

the period prescribed by subsections (a) and (b) of this Section."

725 ILCS 5/103-5(e) (West 2008).

Since case No. 08-CF-97 was the first case tried and is the only case involved in this appeal, we must consider whether there was sufficient delay attributable to defendant to preclude a claim of a speedy trial violation. Although the trial court ruled that defendant's motion to dismiss was not timely filed, the trial court also ruled upon the merits of the motion. Defendant's motion was filed in both this case and case No. 08-CF-69. The court heard arguments from counsel on the issue of delay, and the trial court made findings as to which party was attributable for each of the delays. The trial court did not distinguish its factual findings based upon the two different cases. Only after finding that there was no speedy trial violation, did the prosecutor raise the issue of waiver. The court then ruled in this case that the motion was untimely filed. Therefore, we will consider the trial court's findings in addressing whether defense counsel was ineffective in this case.

A trial court's determination that a delay is attributable to a defendant should be sustained absent a clear showing that the trial court abused its discretion. *People v. Hall*, 194 Ill. 2d 305, 327 (2000). A delay is " 'occasioned by the defendant' " when a "defendant's acts caused or contributed to a delay resulting in the postponement of trial." *People v. Hall*, 194 Ill. 2d at 327 (quoting *People v. Kliner*, 185 Ill. 2d 81, 114 (1998)). Further, a defendant bears the burden of affirmatively establishing facts which demonstrate a violation of the speedy trial statute, and defendant must show that the delay was not attributable to his or her conduct. *People v. Kliner*, 185 Ill. 2d at 114.

To determine whether there was a speedy trial violation, we begin with the date that defendant was first taken into custody in case No. 08–CF–97. Giving defendant the benefit of the doubt that he was taken into custody on the date the warrant was issued, as opposed to being returned, the speedy trial time period began on January 29, 2008. Defendant was brought to trial on July 7, 2008. For speedy trial purposes, 160 days passed. See *People v. LaFaire*, 374 Ill. App. 3d 461, (2007) (speedy trial term is computed by excluding the first day and including the last day).<sup>1</sup> After carefully reviewing the record, we conclude that the trial court did not abuse its discretion in attributing the delays from March 11 until June 6, 2008, for a total of 87 days, to defendant.

Defense counsel represented defendant in both cases. Until June 6, 2008, defendant appeared simultaneously on both cases. Defense counsel specifically requested a continuance with the court on March 11, 2008, in order to file a motion to suppress in cause No. 08–CF–69. As a result, both cases were continued thereby causing the delay until March 28, 2008. Moreover, the trial court found that the State was not served with a copy of the motion to suppress prior to the March 28, 2008, court appearance, and the delay until April 25, 2008, was directly attributable to this omission resulting in additional delay anticipated by both sides pending the outcome of defendant’s motion in case No. 08–CF–69. On April 25, 2008,

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<sup>1</sup> At the trial level, defense counsel argued in his motion to dismiss and at the hearing on the motion to dismiss that 188 days passed before defendant was brought to trial. The State points out on appeal that defense counsel erroneously began the speedy trial time period on January 21, 2008, the date of defendant’s arrest in case No. 08–CF–69, and ended the time period on the date of the jury’s verdict, not the date on which defendant’s trial began. Further, defense counsel counted the time period from July 1, 2008, until July 8, 2008, as 28 days. Appellate counsel for defendant acknowledges that the speedy trial time period began on either January 29 or 30, 2008, and ended on July 7, 2008, for a total of either 159 or 160 days in custody.

defendant's counsel again agreed to a continuance to June 6, 2008, so that the court could conduct a joint hearing on defendant's motion to suppress with the co-defendant in case No. 08-CF-69. Again, both cases were continued due to defense counsel's request.

It is clear from this record that defendant and the prosecutor initially agreed to continue this case pending the outcome of the motion to suppress and possible trial in case No. 08-CF-69. When defense counsel made his motions to continue, he appeared not only in case No. 08-CF-69, but in this case as well. Defense counsel did not make any distinction between the two cases until he requested that the State try defendant in this cause on June 6, 2008, despite the fact that the other case was not yet resolved. Based upon this record, we do not believe the trial court abused its discretion in finding certain delays in this case attributable to defendant. We also do not believe that defendant has affirmatively established facts which demonstrate a violation of the speedy trial statute. See *People v. Kliner*, 185 Ill. 2d at 114.

Finally, we note that even if the time period from March 28, 2008, until April 25, 2008, was attributable to the State as originally docketed by the court, we conclude that, at the most, the State was responsible for 101 days of delay prior to July 7, 2008, and consequently there was no speedy trial violation in this case. Therefore, defendant's claim of ineffective assistance of trial counsel fails because the defendant received a speedy trial in case No. 08-CF-97 .

#### CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

Affirmed.