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2011 IL App (3d) 100044-U

Order filed July 29, 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, McDonough County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-10-0044
)	Circuit No. 08-CF-270
)	
JAMES H. BABBITT,)	Honorable
Defendant-Appellant.)	Richard H. Gambrell, Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* When the State filed an additional charge against the defendant prior to trial but beyond the 160-day speedy trial period for the first charge, the State did not violate defendant's speedy trial and compulsory joinder rights because defendant failed to formally demand a speedy trial. Since defendant completed his sentence for convictions on both counts, any challenge to credit for his presentence incarceration became moot. The DNA analysis fee ordered as part of defendant's sentence is void.

¶ 2 On September 27, 2008, police officers arrested defendant James H. Babbitt for a felony "obstructing justice" charge and a misdemeanor "resisting/obstructing a peace officer" charge. Defendant posted bail and was released from custody. The State initially filed a one-count information for felony obstructing justice, but the court granted the State leave to file an amended information which added Count II alleging the misdemeanor offense of resisting a peace officer.

¶ 3 On appeal, defendant asks that his misdemeanor conviction be reversed because Count II should have been filed with the original charge and before the 160-day speedy trial period expired. Defendant also challenged his sentence on the grounds that he should have been allowed a \$10 credit for time served in custody prior to trial and he should not have been ordered to pay a DNA analysis fee.

¶ 4 The State argues that all issues on appeal are moot because defendant completed his sentence at the time of this appeal. Alternately, the State submits defendant's right to a speedy trial was not violated, defendant was properly ordered to pay a \$200 DNA analysis fee, but concedes defendant was entitled to \$10 credit for presentence time served in custody. We affirm all but the portion of the sentencing order requiring defendant to submit a DNA sample for analysis and pay the DNA analysis fee.

¶ 5 BACKGROUND

¶ 6 On October 15, 2008, the State filed a one-count information alleging defendant James H. Babbitt, on September 27, 2008, committed the Class 4 felony offense of obstructing justice in violation of section 31-4(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/31-4 (West 2008)) in that defendant knowingly furnished false information, specifically a false name, to Officer Eric Lenardt with the intent to prevent his apprehension on an outstanding arrest warrant. The record contains a “bail bond” sheet, filed September 29, 2008, showing defendant was arrested for the combined felony charge of obstructing justice and misdemeanor charge of resisting or obstructing a peace officer with bail set in the amount of \$10,000. Defendant posted \$1,000 cash bond on September 28, 2008, and was released from custody on the charges with a first appearance date of October 29, 2008.

¶ 7 After the State filed the single count information for felony obstructing justice, defendant waived his right to a jury trial on the felony offense and the court set the matter for a bench trial on July 31, 2009. Before the trial, the State filed a motion for leave to file an amended information. On June 24, 2009, the court granted the State leave to file an amended two-count information over defendant's objection.

¶ 8 Count I of the amended information alleged the same felony obstructing justice count that was originally filed by the State on October 15, 2008. Count II alleged defendant also committed the Class A misdemeanor offense of resisting a peace officer, on September 27, 2008, in that defendant ran from Officer Lenardt and refused the officer's verbal command to stop running knowing that Officer Lenardt was a police officer acting in his official capacity.

¶ 9 On October 14, 2009, the court held the bench trial on both counts of the amended information.¹ The testimony of Lieutenant Chris Mason and Sergeant Eric Lenardt from the Macomb Police Department established that, on September 27, 2008, the officers went to the local train station to look for defendant James Babbitt, who was wanted on an outstanding arrest warrant or body attachment. After the officers saw defendant exit a train at the train depot around 11 p.m., Lenardt displayed his police badge to defendant and identified himself and Mason as police officers. Defendant appeared to get "a little skittish" and Lenardt told defendant that he did not want defendant to run from them. At that time, defendant told the officers that his name was Owen Henry and, shortly thereafter, began running away from the police officers. Detective Gass was also in the area at that time and, when defendant ran away, Gass yelled to defendant,

¹ Although the original jury waiver was filed prior to the amended information, on the day of the bench trial, the court noted the earlier jury waiver and defendant advised the court that he was ready to proceed to the bench trial on both counts of the amended information at that time.

“Macomb Police, stop.” Defendant did not stop. Gass continued running after defendant while Mason tried to “intercept” defendant with his squad car. Shortly thereafter, Lenardt and the other officers subdued defendant and placed him under arrest. Defendant immediately apologized for running, but stated that he knew there was an outstanding arrest warrant.

¶ 10 The court took judicial notice of defendant’s McDonough County case, number 06–TR–3148, and the body attachment that was issued on April 11, 2008, in that case. The defense presented no evidence.

¶ 11 After closing arguments, the court found the State proved that defendant knowingly provided false information, a false name, to the police to prevent his own apprehension based on the outstanding body attachment and found defendant guilty of the offense of obstructing justice. As to count II, the court found defendant guilty of resisting or obstructing a peace officer based upon running from the police after being told to stop.

¶ 12 On December 16, 2009, the court sentenced defendant to one year of conditional discharge. The terms of this sentence included: 30 days in jail with credit for 2 days served; a fine of \$250 plus other fees and penalties, including a \$200 DNA analysis fee. Defendant filed a timely appeal of this sentence.²

¶ 13 ANALYSIS

¶ 14 On appeal, defendant first contends that he received ineffective assistance of counsel because his attorney failed to request dismissal of count II of the amended information filed after the 160-day speedy trial period. Additionally, defendant argues that he is entitled to a \$10

² The record reflects that defendant did not file any pretrial or posttrial motions in this case.

presentence custody credit towards his fines, and also requests this court to vacate the \$200 DNA assessment fee imposed by the court.

¶ 15 Initially, the State argues that all issues raised in defendant's appeal are moot because defendant completed his sentence and paid all of his fines on December 15, 2010. In the alternative, the State argues that defendant was not in custody pending trial, did not file a written speedy trial demand, and, therefore, defense counsel was not ineffective for failing to file a petition to dismiss count II on speedy trial grounds. Finally, the State agrees that if the sentencing issues are not moot, defendant was entitled to a \$10 credit for presentence incarceration, but denies that defendant is entitled to have his DNA analysis fee vacated.

¶ 16 We first address whether this court can consider defendant's challenge to his misdemeanor conviction, since he has completed his sentence for both convictions. Our supreme court has held, "[W]hile the completion of a defendant's sentence renders moot a challenge to the sentence, it does not so render a challenge to the conviction." *People v. Campbell*, 224 Ill. 2d 80, 83 (2006); *In re Christopher K.*, 217 Ill. 2d 348, 359 (2005). Thus we conclude, defendant's challenge to his misdemeanor conviction based on ineffective assistance of counsel may be properly considered by this court.

¶ 17 In this case, defendant alleges he was denied effective assistance of counsel by defense counsel's failure to move to dismiss the misdemeanor offense. Specifically, defendant contends the State's addition of the new misdemeanor offense, more than 160 days after the initiation of the criminal proceedings, violated defendant's statutory right to a speedy trial and the requirements of compulsory joinder.

¶ 18 We apply the two-pronged *Strickland* test (*Strickland v. Washington*, 466 U.S. 668

(1984)) to determine whether defendant’s attorney was ineffective for failing to move to dismiss count II based on a speedy trial violation. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). Our supreme court has held that the failure of counsel to raise a speedy trial violation cannot satisfy either prong of the *Strickland* test if there is no lawful basis for arguing a speedy trial violation. *Cordell*, 223 Ill. 2d at 385. Consequently, we must determine whether there is a lawful basis for arguing a violation of defendant’s speedy trial rights.

¶ 19 A defendant, in Illinois, has both a constitutional and a statutory right to a speedy trial (Ill. Const.1970, art. I, § 8; 725 ILCS 5/103-5 (West 2008)). *People v. Crane*, 195 Ill. 2d 42, 48 (2001). Here, defendant argues the State violated his *statutory* speedy trial rights, under section 103-5(b) of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/103-5(b) (West 2008). Section 103-5(b) of the Code provides:

“(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant. ***

*** Any demand for trial made under this subsection (b) shall be in writing; and in the case of a defendant not in custody, the demand for trial shall include the date of any prior demand made under this provision while the defendant was in custody.” 725 ILCS 5/103-5(b) (West 2008).

¶ 20 As the statute set forth above makes clear, when a defendant is no longer in custody, a *written* demand for a speedy trial to be held within 160 days must be filed by the defense. 725 ILCS 5/1-3-5(b) (West 2008). Here, defendant was released from custody on bail shortly after his arrest, and remained free on bail during the pendency of the proceedings. However, defendant did

not make a written demand for a speedy trial, as required by statute, before or after the State filed the amended charging instrument.

¶ 21 Our supreme court has clearly stated, “To invoke the 160-day period of this subsection, defendants who are on bail or recognizance must serve the State with a formal demand.” *People v. Staten*, 159 Ill. 2d 419, 421 (1994). Therefore, we conclude defendant did not invoke his statutory speedy trial rights, thus the State did not violate those rights in this case and counsel cannot be found ineffective for failing to raise this claim before the trial court. See *Cordell*, 223 Ill. 2d at 385.

¶ 22 We conclude the cases relied on by the defense do not require a different outcome. Defendant mistakenly relies on cases involving defendants who remained in custody prior to trial or cases where a defendant released on bail had, in fact, filed a written demand for speedy trial as required by statute. See: *People v. Cordell*, 223 Ill. 2d 380; *People v. Woodrum*, 223 Ill. 2d 286 (2006); *People v. Williams*, 204 Ill. 2d 191 (2003); *People v. Turner*, 128 Ill. 2d 540 (1989); *People v. Van Schoyck*, 232 Ill. 2d 330 (2009); *People v. Klein*, 393 Ill. App. 3d 536 (2009). In the instant case, defendant neither remained in custody pending trial, nor did defendant file a written speedy trial demand or a motion for discharge due to a speedy trial violation in the trial court.³

¶ 23 Next, defendant argues defense counsel was ineffective for failing to file a motion to dismiss based on the compulsory joinder statute because the State did not initially file all of defendant’s charges at the same time. The applicable statute provides:

³ Since defendant did not file a motion for discharge due to a speedy trial violation, the circuit court did not address this issue prior to appeal.

“§ 3-3. Multiple Prosecutions for Same Act. (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. 720 ILCS 5/3-3 (West 2008).

This court has held that “the purpose of section 3-3 is to prevent successive prosecutions for multiple offenses arising from a single act of the accused rather than multiple offenses arising from a series of related acts.” *People v. Davis*, 328 Ill. App. 3d 411, 415 (2002). Thus, by adding a second count prior to trial, the State was not initiating successive prosecutions but simply ensuring that all charges arising from defendant's conduct would be tried in a single prosecution initiated by the State.

¶ 24 Finally, defendant challenges certain monetary penalties imposed by the trial court as a part of defendant's sentence. Specifically, defendant requests a \$10 monetary credit for pretrial detention as allowed by statute. Once defendant completed his sentence, we agree with the State's contention that the issue regarding the \$10 monetary credit has been rendered moot.

¶ 25 In addition, defendant challenges the DNA assessment fee applicable only to his felony conviction on count I. 730 ILCS 5/5–4–3(j) (West 2008). Recently, our supreme court clarified that an offender cannot be ordered to submit to an additional DNA analysis and pay the fee when the offender has already submitted a DNA sample into the database. *People v. Marshall*, No. 110765, slip. op. at 14 (Ill. May 19, 2011). In the instant case, while it is true defendant did not

raise this issue in a postsentencing motion, and also completed his sentence for the felony offense on December 15, 2010, the *Marshall* court held:

“[W]e reject the State’s argument that defendant herein forfeited this issue by failing to raise it in a postsentencing motion. Defendant’s contention on appeal is that the trial court exceeded its statutory authority in ordering him to pay the DNA analysis fee and that therefore the order is void. A challenge to an alleged void order is not subject to forfeiture. *Rigsby*, 405 Ill. App. 3d 916, 920 (2010) (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)) (a sentence which does not conform to a statutory requirement is void and a reviewing court has the authority to correct it at any time).”
People v. Marshall, No. 110765, slip. op. at 14 (Ill. May 19, 2011).

The *Marshall* court then vacated the portion of defendant’s sentencing order requiring him to submit to the DNA analysis fee.

¶ 26 Since defendant's appeal was pending at the time our supreme court clarified the DNA analysis fee issue, and the court did not restrict its decision to prospective application only, we elect to exercise our discretion, pursuant to Supreme Court Rule 615(b) (Ill. S. Ct. R 615(b) (eff. Aug. 27, 1999)), under the guidelines of *Marshall* (No. 110765, slip. op. at 14 (Ill. May 19, 2011)), and vacate that portion of the trial court’s order requiring defendant to submit an additional DNA sample and requiring him to pay the \$200 DNA analysis fee. See also *Marshall*, No. 110765, slip. op. at 14 (Ill. May 19, 2011) (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)).

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm defendant’s conviction for resisting a peace officer alleged in count II of the amended information and affirm in part and vacate in part the judgment of

the McDonough County circuit court.

¶ 29 Affirmed in part and vacated in part.