

NOTICE
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NO. 4-09-0800

Order Filed 3/30/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
ANTIWAN D. BRADLEY,)	No. 05CF455
Defendant-Appellant.)	
)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

Held: Even if defense counsel had not made the alleged error that defendant claimed was ineffective assistance, *i.e.*, even if defense counsel had objected to a proposed continuance and demanded a speedy trial, there is no reasonable probability that defendant ultimately would have been discharged on speedy-trial grounds, considering that the trial would have commenced on the final day of the speedy-trial period as extended 21 days pursuant to section 103-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(f) (West 2004)).

Defendant, Antiwan D. Bradley, appeals from the second-stage dismissal of his amended petition for postconviction relief, in which he claims ineffective assistance of counsel. We affirm the trial court's judgment because we find no prejudice from the allegedly deficient performance of defense counsel.

I. BACKGROUND

The police arrested defendant on July 28, 2005, and he thereafter was kept

in custody. The State charged him and his codefendant, Adam Q. Pegues, with aggravated battery with a firearm (720 ILCS 5/12-4.2(a) (West 2004)). (Pegues is not a party to this appeal.)

On November 7, 2005, the trial court called the case for trial. The parties selected a jury but agreed to wait until November 10, 2005, to begin the trial.

On Tuesday, November 8, 2005, the trial court informed the attorneys that the day before, shortly after jury selection was concluded, the bailiff mistakenly let the jurors out of the jury room too soon and consequently some of the jurors, at least three of them, saw the defendants being escorted through the courthouse in handcuffs. After receiving this news, the assistant public defender, William Sohn, conferred with defendants and conveyed to the court their request to discharge the jury and select a new one on the ground that three of the jurors had seen them in handcuffs. Sohn stated: "Hopefully, we can pick it tomorrow and go to trial Thursday. Due to the prejudice of being seen in custody by the jurors, it would not afford them a fair trial."

The State, on the other hand, objected to discharging the jurors and selecting a new jury, because the State took the position that defendants had suffered no prejudice from being shown to the jurors in handcuffs. The trial court found prejudice. See *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("the sight of shackles *** might have a significant effect on the jury's feelings about the defendant").

Nevertheless, because other cases were on the docket for that week, the trial court was unwilling to fulfill Sohn's expressed hope that the selection of a new jury would occur on Wednesday, November 9, 2005, and that the trial would occur on Thursday, November 10, 2005. The court said: "Now, I don't think we're prepared to pick a jury

tomorrow and still go to trial Thursday on this because of everything else that I have scheduled that would have to be canceled out. I think it would be wiser--you've got about 20 days, 15 days, left, I think, with them being in custody."

At that point, the assistant State's Attorney, Larry Mills, reminded the trial court that the discharge of the old jury, the selection of the new jury, and the rescheduling of the trial would all be on defendants' motion and over the State's objection. Sohn resisted the implication, however, that the delay would be attributable to defendants for speedy-trial purposes. He argued: "I don't feel that the fact that this happened, through no fault or lack of control by the Defendants, should be imputed to the Defendants because they wish to assert their right to a fair trial. If we have 15 or 20 days, I believe we can get them tried within that." Thus, Sohn appeared to acquiesce to the court's opinion, or to assume the correctness of the court's opinion, that the expiration of the speedy-trial period was still 15 or 20 days away. See 725 ILCS 5/103-5(a) (West 2004).

Without deciding, as of yet, whether the delay would be attributed to the defense, the trial court granted Sohn's motion to discharge the jury. After asking Mills if there was a week in December 2005 when he was available and receiving the answer "December 19 is the best week," the court rescheduled the trial for December 19, 2005.

On November 9, 2005, the trial court held a hearing, in which defendants were personally present. The court explained to them what had happened the day before. Specifically, the court explained that on Sohn's request and over the State's objection, the court had discharged the jury. The court told defendants that "this would count as a continuance for the Defense based on the Defendants' motion" and that the trial had been rescheduled for December 19, 2005.

Sohn again objected to charging the continuance to the defense, because defendants had done nothing to cause the prejudicial error that necessitated the selection of a new jury and postponement of the trial. The trial court nevertheless persisted in its view that the continuance was chargeable to the defense, noting that the court had granted the continuance over the State's objection.

The morning of December 19, 2005, Sohn made an oral motion for discharge on speedy-trial grounds. The State opposed the motion, arguing that defendants had "caused the break" by asking for a mistrial. The trial court denied defendants' oral motion but granted them permission to file a written motion.

Later, in the afternoon of December 19, 2005, defendants filed a written motion for discharge. The written motion alleged that Bradley had been in continuous custody since July 28, 2005. The trial court denied the written motion, stating, "[I]t's still my position that the delay at that time was attributable to the Defendants."

On December 20, 2005, before the trial began, the State filed a motion for a continuance on the ground that a witness had failed to appear. Over defendants' objection, the trial court granted the motion.

On December 21, 2005, the trial commenced, and the jury found Bradley guilty of aggravated battery with a firearm. In February 2006, the trial court sentenced him to eight years' imprisonment.

Bradley took a direct appeal, and one of his arguments was that the trial court had erred in denying his motion for discharge. He observed that at the time of his motion for discharge, 144 days had passed while he was in custody awaiting trial. He reasoned that because only 1 of those 144 days was attributable to him--i.e., November 8, 2005, the day

he requested the discharge of the jury--and that because Sohn had properly demanded a speedy trial, the court should have granted the motion for discharge.

In addressing that argument, we noted that according to the record, Bradley had been in custody since July 28, 2005. Counting forward 120 days from that date would have yielded the date of November 25, 2005, the expiration of the speedy-trial period--that is, absent any delay occasioned by Bradley. *People v. Bradley*, No. 4-06-0295, slip order at 16 (September 20, 2007) (unpublished order pursuant to Supreme Court Rule 23), citing 5 ILCS 70/1.11 (West 2004) (time computed by excluding the first day and including the last day) and *People v. Montenegro*, 203 Ill. App. 3d 314, 316 (1990) (the 120-day period commences on the first day after the defendant's arrest). In his argument to us on direct appeal, however, Bradley accepted responsibility for one day of delay, November 8, 2005, the day he requested the discharge of the jury. *Bradley*, slip order at 16. We held that "[w]hen the trial court discharged the jury on November 8, 2005, 16 days remained in the 120-day period (17 days minus the one day of delay attributable to Bradley)." *Id.*

Thus, we held that Bradley's one day of delay had the effect of *shortening* the remaining time within which the State had to bring Bradley to trial. That was incorrect. A delay caused by the defendant has the opposite effect: it *lengthens* the time within which the State must bring the defendant to trial. "Delay occasioned by the defendant shall temporarily suspend for the time of the delay the [120-day] period[,] *** and on the day of expiration of the delay the said period shall continue at the point at which it was suspended." 725 ILCS 5/103-5(f) (West 2004). If Bradley had caused no delay at all, 17 days would have been left as of November 8, 2005 (November 25 is 17 days after November 8). But Bradley accepted responsibility for one day of delay. Consequently, the 17

remaining days become 18 remaining days. Because Bradley's delay of one day (November 8, 2005) suspended the running of the 120-day period for one day, the speedy-trial period would have expired on November 26, 2005, instead of on November 25, 2005.

But the speedy-trial period expired on November 26, 2005, only if Sohn objected to the trial court's proposal to continue the trial until December 19, 2005. Our conclusion on direct appeal was that he did not object. *Bradley*, slip order at 17. By its plain terms, section 103-5(a) (725 ILCS 5/103-5(a) (West 2004)) required the defendant to object to a continuance by demanding a trial. Arguing over which party should be charged with the proposed continuance was not an objection to the continuance and a demand for trial. *Id.* ("Defense counsel did not object to the [proposed] trial date [of December 19, 2005], although he did object to the continuance being chargeable to defendants").

In its judgment dismissing the postconviction petition, the trial court criticized us for requiring Sohn to utter "magic words." Really, though, we did not require any particular formulaic phrase, but we did require a particular content--because that is what section 103-5(a) required. The statute required an objection to the proposed delay, and that objection had to take the form of a demand for trial. "Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2004). One can think of a number of ways in which such an objection might be phrased. For example, when the trial court proposes continuing the trial until December 19, 2005, defense counsel could reply, "I object, Your Honor. My client wants a speedy trial." Or defense counsel could say, "I object to the proposed continuance, Your Honor, and insist

on having a trial right away." Or defense counsel could say, "Your Honor, I disagree with this continuance that you're proposing. My client expects to be tried within the speedy-trial term."

However one expresses the objection, it must be, in substance, an objection to the continuance, coupled with a demand for trial--because that is what section 103-5(a), by its plain terms, requires. The statute lays down a bright-line rule, which is designed to eliminate sandbagging and ambiguity. See *People v. Peco*, 345 Ill. App. 3d 724, 734 (2004). If, instead of objecting outright to a proposed continuance and demanding a speedy trial, the defense counsel merely quibbles over which party should be charged with the continuance, one could suspect defense counsel of being cagey or speaking out of both sides of his mouth. In effect, defense counsel might be saying, "I won't go so far as to object outright to this continuance (because, if the truth were known, I really could use the extra time to prepare), but, on the other hand, I want the continuance to be charged to the State so that I can later use the continuance as the basis for a motion for discharge." In fact, this is just the sort of tactic that the trial court appears to endorse in its judgment order in this case. On direct appeal, however, we prevented the use of such a tactic by holding that Sohn had failed to make the straightforward objection that section 103-5(a) contemplated.

Indeed, in his direct appeal, Bradley anticipated the possibility of that holding, because he argued, in the alternative, that Sohn had rendered ineffective assistance on November 8, 2005, by failing to make an objection pursuant to section 103-5(a). *Bradley*, slip order at 20. We responded, however, that the record on direct appeal did not disclose why Sohn had failed to object (maybe the extra preparation time was welcome). *Id.* Consequently, we concluded that Bradley's claim of ineffective assistance was "more

properly adjudicated in a postconviction petition where a complete record [could] be made." *Id.*

Consequently, on March 17, 2009, through appointed counsel, Bradley filed an amended petition for postconviction relief, in which he alleged that Sohn had rendered ineffective assistance by failing to demand a speedy trial. Bradley alleged that "if Mr. Sohn had properly objected as required under §103-5a [*sic*] of the Speedy Trial Act to the December 19th date, he would have prevailed on his motion of December 19th to discharge for failure to bring the defendant to trial in a timely manner."

The trial court granted the State's motion to dismiss the amended petition. The court's stated reason for the dismissal was that Bradley had failed to allege that he had suffered any prejudice from Sohn's failure to make an objection pursuant to section 103-5(a). The trial court reasoned that even if Sohn had "used the magic words required by the Appellate Court," the trial court's ruling would have been the same: the court "would have overruled the objection and held the delay against the Defendant, as it did." Accordingly, the trial court dismissed the amended petition for postconviction relief.

This appeal followed.

II. ANALYSIS

In the State's view, the claim of ineffective assistance fails because Bradley has not established a reasonable probability that the outcome of the case would have been different had Sohn objected to the continuance and demanded a speedy trial. See *Strickland v. Washington*, 466 U.S. 668, 687, 694. The State observes that by Bradley's own admission on direct appeal, he was responsible for one day of delay: November 8, 2005. The State reasons that the "defense delay on November 8, 2005, would have left 18

days in the speedy trial term ***. Given that such delay occurred within 21 days of the end of the period, the prosecution could have obtained a 21-day extension of the speedy trial term by motion. See 725 ILCS 5/103-5(f) (West 2004)."

Section 103-5(f) provides in part: "Where such delay [occasioned by the defendant] occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subsections (a), (b), or (e)." 725 ILCS 5/103-5(f) (West 2004). Subsection (a) is the subsection containing the 120-day requirement: the requirement that "[e]very person in custody in this State for an alleged offense *** be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2004). Thus, when we apply subsection (f) to the present case, the day of delay for which Bradley accepts responsibility, November 8, 2005, occurred within 21 days before what would have otherwise been the end of the 120-day period, *i.e.*, within 21 days before November 25, 2005. Therefore, under subsection (f), the trial court could have granted the State's motion to continue the case for "an additional 21 days beyond the period prescribed by subsection[] (a)." Owing to Bradley's one day of delay, which, under subsection (a), suspended the 120-day period for one day, "the period prescribed by subsection (a)" ended on November 26, 2005. That is, his one day of delay changed the end of the speedy-trial term from November 25, 2005, to November 26, 2005. Adding an additional 21 days to the speedy-trial term yields an ending date of Saturday, December 17, 2005 (December 17, 2005, is 21 days after November 26, 2005). The end of the speedy-trial term could not have fallen on either Saturday, December

17, 2005, or Sunday, December 18, 2005. See 5 ILCS 70/1.11 (West 2004); *People v. Miles*, 176 Ill. App. 3d 758, 775 (1988). Instead, the end date would have been moved ahead to Monday, December 19, 2005, which was in fact the day that selection of the new jury began. Thus, even if Sohn had made a proper objection on November 8, 2005, thereby causing the delay from November 8 to December 19, 2005, to be attributable to the State, December 19, 2005, would have been within the speedy-trial term (the very tail end of the term) as extended pursuant to section 103-5(f). See *People v. Crawford Distributing Co.*, 78 Ill. 2d 70, 81 (1979) ("the speedy trial act is satisfied by beginning the process of selecting the jury for the trial of the case"). And because the State was ready to try the case on November 8, 2005, and because it was neither the State's nor defendant's fault that the jurors saw the defendants in handcuffs, the trial court surely would have granted the 21-day extension.

Hence, we conclude, in our *de novo* review, that the amended petition, supported by the record and accompanying documents, fails to demonstrate a substantial showing of a constitutional violation. See *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005); *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Specifically, Bradley has failed to show prejudice from Sohn's allegedly deficient performance in failing to object to the continuance and to demand a speedy trial.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.