

No. 1-10-3237

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 17631
	)	
WILLIAM HENRY JONES,	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE STEELE delivered the judgment of the court.  
Justices Neville and Salone concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment on defendant's conviction of unlawful use of a weapon by a felon affirmed over claim that trial counsel was ineffective for failing to seek his discharge on speedy trial grounds; defendant forfeited his claim that he was subjected to an improper double enhancement.

¶ 2 Following a bench trial, defendant William Henry Jones was found guilty of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2008)) and aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a) (West 2008)). The court then merged those convictions and sentenced defendant to seven years' imprisonment for UUWF. On appeal, defendant contends that trial counsel was ineffective for failing to seek his discharge on speedy-

trial grounds, and that he was subjected to an improper double enhancement where the same prior felony conviction was used to prove an element of UUWF and also served as the basis for elevating that offense to a Class 2 felony with a harsher sentence.

¶ 3 The record shows, in relevant part, that about 11 p.m. on September 9, 2009, Chicago police officers Shamah and Borucki were parked on the 5700 block of South Loomis Boulevard, in Chicago, when Lamont Brown approached, pointed out defendant running away, and stated, "That person robbed me." The officers radioed for assistance, then gave pursuit and drove to 57th and Throop Streets where Officer Shamah exited the car and proceeded on foot as his partner continued northbound, towards defendant, in the vehicle. When defendant turned towards Officer Shamah, he observed defendant holding his waist area and ordered him to show his hands. At that point, defendant "pitched" an object to the ground, and Officer Shamah heard "a metal object clunking, hitting the ground." He then approached defendant, observed an object on the ground, and took defendant into custody. Meanwhile, a backup officer recovered the object, which was a small, fully-loaded .22 caliber semiautomatic pistol.

¶ 4 Defendant was arrested on September 9, 2009, and subsequently charged with armed robbery, UUWF, and AUUW. At a hearing on November 4, 2009, the public defender of Cook County was appointed to represent defendant, who entered a plea of not guilty, and the case was continued by agreement. On December 29, 2009, the parties were discussing discovery matters when the following exchange occurred:

"THE COURT: He is raising his hand.

Talk to your lawyer.

Mr. Jones, what do you want to say?

MR. JONES [defendant]: I would like a speedy trial.

THE COURT: You have a choice, you can either – you have a constitutional right, you have a right to effective assistance of counsel, or you have the right to speedy trial.

What your lawyer is telling me is he needs more time.

MR. JONES: Right.

THE COURT: If you want to be represented by an attorney, then he needs a continuance.

All right, sir, I have to go by what he tells me. Do you understand that?"

Defendant responded, "Yes," and the proceedings were continued by agreement.

¶ 5 On February 24, 2010, defendant informed the court that he "would like to be appointed another Public Defender because I don't think that he has my best interest at hand," and that "I asked him to demand trial for me." The court responded by explaining, *inter alia*, that counsel "may not have all of the investigation completed," and counsel agreed, stating, "I am not ready to demand today. I need to do some additional investigations." However, counsel stated, "I am going to give Mr. Jones what he wants on the next court date. We will file an answer on the next court date, and we will set it down for trial." At that time, defendant agreed to have counsel continue representing him, and the proceedings were again continued by agreement.

¶ 6 On April 8, 2010, counsel requested another month to file an answer and set the case for trial. The proceedings were continued by agreement to May 7, 2010. On that date, counsel filed his answer, and the following discussion took place:

"MR. LIPINSKI [defense counsel]: Judge, if I were to demand on this what's the first available date I can get?"

THE COURT: I don't know. You have to figure the term. You should have told him ahead of time.

MR. LIPINSKI: That's on insistence of my client.

THE COURT: That's up to you. It's your decision to make. The law says that you're the one that makes those decisions. It's depending upon how whether you feel you're ready to do that.

MR. LIPINSKI: Judge, I'm willing to set it down for bench trial on June 7th.

THE COURT: Well, I have one opening on that date. I can put you as the fourth one. You never know.

MR. SARROS [assistant State's Attorney]: Are you going by agreement?

MR. LIPINSKI: Go by agreement June 7th for a bench."

On June 7, 2010, the defense answered ready and filed a demand for trial. The State asked for a continuance, however, because the victim was a no-show. On July 14, 2010, there was a "paperwork mess-up" which led counsel to think defendant was not in court "because the paperwork shows the case is set for tomorrow." The court noted, "Evidently, the State was ready; but they thought it was going to up [*sic*] tomorrow, so they let their witnesses go." The court then informed defendant that it would hold the matter on the call until the next day.

¶ 7 The report of proceedings does not contain transcripts for the date of July 15, 2010, but the memorandum of orders indicates that the State sought leave to file a rule to show cause against the victim. The memorandum of orders also reflects that proceedings were continued on the motion of the State.

¶ 8 On July 28, 2010, a bench trial commenced which ultimately resulted in findings of not guilty on the charge of armed robbery, and guilty on the charges of UUWF and AUUW. The court then merged defendant's convictions and sentenced him to seven years' imprisonment for UUWF. In this appeal from that judgment, defendant first contends that trial counsel was ineffective for failing to pursue his discharge on speedy-trial grounds.

¶ 9 To establish a claim of ineffective assistance of trial counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992). However, because the failure of counsel to argue a speedy-trial violation cannot satisfy either prong of *Strickland* if there is no lawful basis for arguing such a violation, we must initially determine whether defendant's speedy trial rights were violated. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006).

¶ 10 Section 103-5(a) of the Code of Criminal Procedure of 1963 (Speedy Trial Act) (725 ILCS 5/103-5(a) (West 2010)) provides that defendant must be tried within 120 days from the date he was taken into custody. However, any delay occasioned by defendant temporarily suspends the running of the 120-day period until the expiration of such delay. 725 ILCS 5/103-5(a), (f) (West 2010). Defendant occasions delay if he requests a continuance, agrees to a continuance, or his actions otherwise cause or contribute to a delay. *People v. Patterson*, 392 Ill. App. 3d 461, 467 (2009).

¶ 11 In this case, defendant claims that, excluding the delays attributable to him, he was held in custody for 138 days before being brought to trial. The State responds that defendant has improperly calculated his time in custody for speedy-trial purposes by including the period from May 7, 2010, to June 7, 2010, a delay attributable to defendant who set trial for June 7 and continued the case by agreement.

¶ 12 Initially, we clarify that the parties agree that 56 days of delay are attributable to the State for the period between his arrest on September 9, 2009, and the appointment of counsel on November 4, 2009. The parties also agree that 51 days of delay are attributable to the State for the period between the initial trial date scheduled for June 7, 2010, and the commencement of trial on July 28, 2010. The parties dispute the time frame between May 7, 2010, to June 7, 2010, *i.e.*, a 31-day period which began with counsel setting a trial date and ended with the State moving for a continuance because one of its witnesses did not appear.

¶ 13 With respect to this period of time, the record shows that at the status hearing on May 7, 2010, counsel asked the court what the earliest date for trial would be "if I were to demand on this" because defendant was insisting on a speedy trial. The court responded that the decision as to whether the defense was ready for trial belonged to counsel. Counsel then stated that he was "willing to set it down for bench trial on June 7th," and the court scheduled trial for that date. At that point, the State asked counsel, "Are you going by agreement?" Counsel responded, "Go by agreement June 7th for a bench."

¶ 14 Defendant now argues that counsel "agreed to a trial date of June 7, 2010," and that "the parties stated that the June 7 trial date was 'by agreement.'" He also refers to June 7, 2010, as the "agreed-upon trial date," and claims that counsel "merely agreed to a date within the 120-day limit." In making these assertions, defendant has distorted the facts set forth in the record.

¶ 15 The transcript of May 7, 2010, clearly shows that counsel proposed a trial date of June 7, 2010, and the court scheduled that date without giving its own input or seeking input from the State. At the conclusion of the colloquy, the State asked defense counsel if he was "going by agreement," and counsel responded in the affirmative. In that context, appellate counsel's characterization of this exchange as an "agreed-upon trial date" between the parties, or that counsel "merely agreed to a date," is without foundation. Moreover, to interpret the State's question regarding whether the defense was "going by agreement" to mean that the "trial date was 'by agreement' " is illogical since the State would have no reason to question whether counsel agreed with himself on his own proposed trial date.

¶ 16 To the contrary, the record shows that the State sought clarification from counsel as to whether he was acquiescing to the month-long continuance which would precede his proposed trial date in order to maintain an accurate record of the amount of time that could be attributed to it under the Speedy Trial Act. Counsel's response shows that he, too, was cognizant of what the State sought to clarify, as he expressly noted for the record, "Go by agreement June 7th for a bench," thus indicating a continuance by agreement. These circumstances show that defendant occasioned the delay from May 7, 2010, to June 7, 2010. See *Patterson*, 392 Ill. App. 3d at 467. As a result, there was no lawful basis for asserting a speedy-trial violation and his ineffective assistance of counsel claim must fail. See *Cordell*, 223 Ill. 2d at 385.

¶ 17 In reaching this conclusion, we have examined *People v. LaFaire*, 374 Ill. App. 3d 461 (2007) and *People v. Zeleny*, 396 Ill. App. 3d 917 (2009), cited by defendant, and find that they do not call for a contrary result. In *LaFaire*, 374 Ill. App. 3d at 464, the appellate court found that the trial court did not abuse its discretion in declining to toll the speedy trial period specified under section 103-5(b) of the Speedy Trial Act (725 ILCS 5/103-5(b) (West 2010)) where defendant did not agree to "a mere continuance," but rather, "participated in scheduling a

mutually agreeable trial date that fell within the 160-day speedy trial period." Similarly, in *Zeleny*, 396 Ill. App. 3d at 922, which also involved section 103-5(b) of the Speedy Trial Act, the appellate court rejected the State's argument that "any agreed trial date, whether before or after the 160-day period has run, is an agreed delay attributable to the defendant," and found that there was no "delay" where trial was set within the prescribed 160-day period.

¶ 18 Unlike *LaFaire* and *Zeleny*, the record here shows that the proposed trial date of June 7, 2010, was offered unilaterally by counsel at defendant's insistence. The record also affirmatively shows that counsel agreed to the delay occasioned for the disputed time period. Lastly, in contrast to section 103-5(b) of the Speedy Trial Act, which was applicable in *LaFaire* and *Zeleny*, section 103-5(a) of the Speedy Trial Act provides that defendant is considered to have agreed to any delay unless he objects by making an oral or written demand for trial on the record. 725 ILCS 5/103-5(a) (West 2010). Thus, had defendant not specifically agreed to a continuance in the case at bar, the contested delay could still be attributed to him because he did not demand trial until June 7, 2010. We therefore find defendant's reliance on *LaFaire* and *Zeleny* misplaced.

¶ 19 Defendant next contends that he was subjected to an improper double enhancement because his prior felony conviction was an element of the offense for which he was convicted and also the basis for elevating his offense from a Class 3 felony to a Class 2 felony with a harsher sentence. He maintains that a sentence that does not conform to statutory requirements is void and may be corrected at any time; therefore, that his claim should not be forfeited error although he failed to raise it in the trial court. He also asserts that his claim is reviewable under the plain error doctrine.

¶ 20 The record clearly shows that defendant did not raise his double enhancement claim in the trial court as required (*People v. Reed*, 177 Ill. 2d 389, 394 (1997)), and has thus forfeited the issue for review. Defendant first seeks to avoid that result by asserting that "whether a sentence

is void is a question of law subject to *de novo* review," and that "[a] sentence that does not conform to statutory requirements is void and may be corrected at any time." This "claim," however, is without merit. Defendant's seven-year sentence fell within the statutory sentencing range for either a Class 2 or Class 3 felony conviction of UUWF (720 ILCS 5/24-1.1(e) (West 2010)), and, therefore, constitutes an authorized sentence (*People v. Hillier*, 237 Ill. 2d 539, 547 (2010)).

¶ 21 Defendant also maintains that his claim can be reviewed for plain error. We observe that the plain error rule is a narrow exception to the waiver rule. To obtain plain error relief in the sentencing context, defendant must show that the evidence at sentencing was closely balanced or the error was so serious as to deny him a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. If defendant fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 22 In this case, defendant has not asserted that the evidence at sentencing was closely balanced or that the alleged error deprived him of a fair sentencing hearing. Rather, defendant has made a one-sentence argument for plain error review, stating, "[T]his claim is reviewable under the plain error doctrine because a court's determination that a defendant is eligible for an enhanced sentence affects his substantial rights." Defendant then explains why the sentence imposed by the trial court was error, not plain error. He also fails to argue that the evidence was closely balanced or to explain why the error was so severe that it must be remedied to preserve the integrity of the judicial process.

¶ 23 Our supreme court has cautioned that a defendant's failure to present argument on how either of the two prongs of the plain error doctrine is satisfied results in forfeiture of plain error review. *Hillier*, 237 Ill. 2d at 545-46. Under circumstances indistinguishable from those at bar,

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reviewing courts have found that defendants who failed to present such argument forfeited plain error review. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000); see also *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004); *People v. Rathbone*, 345 Ill. App. 3d 305, 311-12 (2003). We reach the same conclusion in this case and honor defendant's procedural default of the issue. *Hillier*, 237 Ill. 2d at 545-47.

¶ 24 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.