

2012 IL App (2d) 101325-U
No. 2-10-1325
Order filed September 6, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Du Page County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 02-CF-1501 |
| |) | |
| SOCORRO MAYA, |) | Honorable |
| |) | George J. Bakalis, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment and opinion.

ORDER

Held: We determined that defendant made a substantial showing that (1) his trial counsel was ineffective for failing to properly preserve his speedy-trial right when counsel did not file a new written speedy-trial demand upon his release from custody and (2) appellate counsel was ineffective for failing to raise the matter on appeal. We declined to consider whether the petition was properly verified. We reversed the trial court's judgment and remanded for further proceedings.

¶1 Defendant, Socorro Maya, appeals the trial court's second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he made a substantial showing that his trial counsel was ineffective when counsel made

an oral speedy-trial demand, followed by a written demand while defendant was in custody, and then failed to make a new written demand after defendant was released from custody, resulting in defendant being tried more than 160 days after his previous demands. The State contends that the failure to file a new demand was trial strategy and that defendant failed to show prejudice. In the alternative, the State argues that we should affirm because the petition was not verified by a notarized affidavit as required by section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010)) and because a certification under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) cannot cure the defect. We determine that (1) the State has forfeited its argument that the petition was not properly verified and that (2) defendant has made a substantial showing that counsel was ineffective. Accordingly, we reverse and remand for further proceedings.

¶ 2

I. BACKGROUND

¶ 3 On May 24, 2002, defendant was arrested and charged with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a) (West 2002)). A multi-count indictment was later filed and, on June 10, 2002, defendant appeared with counsel, and the matter was continued for a bond reduction hearing with the time charged to defendant. There was no written speedy-trial demand filed at that time and, over the next six months, there were various continuances in the case, some of which were related to the State's desire to seek to admit extrajudicial statements of the victim under section 115-10 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10 (West 2002)), which necessitated a hearing. On July 9, 2002, after discussion about tolling the speedy-trial period back to June 19, 2002, counsel for defendant stated that he was withdrawing any previous speedy-trial demand.

¶ 4 On January 9, 2003, the hearing under section 115-10 of the Code was continued on the State's motion. Counsel for defendant stated that he wished to assert a speedy-trial demand and that he would file a written demand. The trial court stated that, from that point, defendant was demanding trial, and the court's order noted that a speedy-trial demand was filed. However, the record reflects that the written demand was not filed until January 30, 2003.

¶ 5 On February 7, 2003, and again on March 10, 2003, the section 115-10 hearing was continued. Both times, defendant did not clearly object or specifically agree to the continuance, and a box on the order form for noting that the speedy-trial time was tolled was not checked. The section 115-10 hearing was set for March 24, 2003, and trial was set for April 29, 2003.

¶ 6 On April 15, 2003, the State moved to continue because one of its witnesses was out of the country and would not be available until June 23, 2003, although the State also noted that it had flown the witness in for two cases in the past month. The State said that the witness had examined the victim and would give corroborative evidence that the victim's condition was consistent with sexual trauma. The State observed that there was a speedy-trial issue and suggested that defendant be held in custody until May 30, 2003, and then be released on bond. Defendant objected, noted the previous speedy-trial demand, and noted that the case had been continued many times already due to the State's failure to obtain witnesses for the section 115-10 hearing. The trial court agreed that the previous delays had primarily been because of the State's inability to produce its witnesses. It then granted the motion to continue, but ordered defendant released on bond. The box on the order concerning tolling of the speedy-trial term was not checked.

¶ 7 Defendant's counsel did not file a new written speedy-trial demand. On June 24, 2003, defendant waived his right to a jury, and the trial was continued to August 14, 2003, because

defendant's counsel was ill. On August 14, trial was continued again. The court order for that date left unchecked the box for tolling the speedy-trial term. There is no report of proceedings for that day, though defendant attempted to obtain it. The record on appeal includes a court reporter's affidavit stating that there were no proceedings that day. On a later motion for a new trial, the parties proceeded on the basis that the trial was continued at the request of the State and over defendant's objection, and the State does not dispute that on appeal.

¶ 8 Trial began on October 7, 2003. On October 8, 2003, a motion to discharge on speedy-trial grounds was denied. The order is in the record, but the motion is not. On May 12, 2004, the court found defendant guilty of nine counts of predatory criminal sexual assault. Defense counsel filed a motion for a new trial, alleging in part that the court erred in denying the motion to discharge. The motion was denied, and defendant was sentenced to an aggregate prison term of 54 years.

¶ 9 Defendant appealed, and his counsel did not raise a speedy-trial issue. We affirmed. *People v. Maya*, No. 2-04-0976 (2007) (unpublished order under Supreme Court Rule 23). On April 2, 2010, defendant filed a *pro se* postconviction petition, alleging in part that his trial counsel was ineffective for failing to renew his speedy-trial demand after he was released from custody and that appellate counsel was ineffective for failing to raise the matter on appeal. We note that the petition and accompanying affidavit are not notarized. However, it appears that defendant sought to verify the petition under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)). Counsel was appointed, who filed an amended petition that incorporated the speedy-trial arguments made in the *pro se* petition. We further note that the amended petition was not notarized or accompanied by notarized affidavits.

¶ 10 After a nonevidentiary hearing, the trial court dismissed the speedy-trial claims. During the hearing, the parties discussed whether the State could have obtained an extension of 60 days based on the absence of the witness for the April 2003 trial date. The defense argued that the court could not assume that an extension would have been granted and referred to the State's admission that it had flown in the witness twice for two different cases. The court stated that it found the State's argument speculative and would not assume that an extension would have been granted. However, the court ultimately dismissed the speedy-trial claims. It did not discuss the effect of the speedy-trial demand made while defendant was in custody. Defendant appeals.

¶ 11 Prior to reaching the merits of the appeal, we need to address an open motion. Defendant filed a motion seeking leave to cite *People v. Kirkpatrick*, 2012 IL App (2d) 100898, as additional authority. We have reviewed defendant's motion, and we allow it.

¶ 12

II. ANALYSIS

¶ 13 Defendant argues that he made a substantial showing that his trial counsel was ineffective for failing to properly preserve his speedy-trial right when counsel did not file a new written speedy-trial demand upon his release from custody. The State does not provide any calculation to dispute that defendant was not brought to trial within 160 days. Rather, the State argues that the failure to file a new demand could have been trial strategy and that defendant could not show prejudice because the State would have been able to receive a 60-day extension based on the unavailability of its witness. In the alternative, the State argues that, if counsel had properly filed a written demand, it would have brought defendant to trial within the statutory period.

¶ 14 The Act provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). The Act provides

a three-stage mechanism for a defendant who alleges a substantial deprivation of his or her constitutional rights at trial. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant, if necessary (725 ILCS 5/122-4 (West 2010)), and the State may file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2010)).

¶ 15 At the second stage of the proceedings, “[i]f the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage.” *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)). At this stage, to survive dismissal, the petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The trial court is foreclosed from engaging in any fact finding, because all well-pleaded facts are to be taken as true at the second stage of the proceedings. *Wheeler*, 392 Ill. App. 3d at 308 (citing *Coleman*, 183 Ill. 2d at 380-81). The propriety of a dismissal at the second stage is a question of law that we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001).

¶ 16 “A claim of ineffective assistance of counsel is judged according to the two-prong, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668 [(1984)].” *People v. Boyd*, 363 Ill. App. 3d 1027, 1034 (2006). “To obtain relief under *Strickland*, a defendant must prove that defense counsel’s performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel’s errors, the trial result would have been different.” *Id.*

¶ 17 “The right to a speedy trial is guaranteed by the Federal and Illinois Constitutions (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8).” *People v. Staten*, 159 Ill. 2d 419, 426 (1994). A criminal defendant in Illinois also has a statutory right to a speedy trial. 725 ILCS 5/103-5 (West 2010). The speedy-trial statute enforces the constitutional right to a speedy trial, and its protections are to be liberally construed in favor of the defendant. *People v. Buford*, 374 Ill. App. 3d 369, 372 (2007). “[T]he statutory right to a speedy trial is not the precise equivalent of the constitutional right.” *Staten*, 159 Ill. 2d at 426. “Proof of a violation of the statutory right requires only that the defendant has not been tried within the period set by statute and that defendant has not caused or contributed to the delays.” *Id.*

¶ 18 “[A] defendant is subject to whatever speedy-trial statute applies at the time he or she makes a speedy-trial demand.” *People v. Wooddell*, 219 Ill. 2d 166, 177 (2006). Under section 103-5(a) of the Code, “[e]very 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 was taken into custody unless delay is occasioned by the defendant [.]” 725 ILCS 5/103-5(a) (West 2010). However, section 103-5(b) provides that “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.” 735 ILCS 5/103-5(b) (West 2010).

¶ 19 “[T]he speedy-trial provision of section 103-5(b) does not come into play unless a defendant demands trial.” *People v. Garrett*, 136 Ill. 2d 318, 329 (1990). Thus, the court in *Garrett* held that a defendant who was previously in custody under section 103-5(a) must file a speedy-trial demand upon release from custody to start the 160-day period under section 103-5(b). *Id.* at 329-31; see also *Wooddell*, 219 Ill. 2d at 175-76 (discussing *Garrett*). The *Garrett* court explained:

“The evident purpose of that requirement is to notify the prosecution of the out-of-custody defendant’s interest in obtaining an expeditious resolution of the charges pending against him. For those in custody, however, such an interest is assumed by the statute. Thus, the speedy-trial period specified by section 103-5(a), applicable to persons in custody, begins to run automatically, and no demand for trial is required under that provision. In contrast, the speedy-trial period specified by section 103-5(b), available to those released on bail or recognizance, does not begin running until a demand for trial is made. Section 103-5(b) states, “ ‘Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial ***.’ ” We believe that the language of that provision contemplates that a speedy-trial demand will be made by a defendant who is on bail or recognizance at the time the demand is made. Under the statutory scheme, a demand made by an accused in custody is premature, and we do not discern an intent by the legislature that such a demand should have any effect.” *Garrett*, 136 Ill. 2d at 329-30.

¶ 20 After *Garrett* was decided, the legislature amended section 103-5(b) to address a problem identified in *Garrett*, where a defendant who was released from custody before trial would not receive credit for previous time spent in custody despite the filing of a speedy-trial demand while in custody. See *Wooddell*, 219 Ill. 2d at 180-81. Thus, Public Act 87-281 (eff. Jan. 1, 1992) added the following to section 103-5(b):

“For purposes of computing the 160 day period under this subsection (b), every person who was in custody for an alleged offense and demanded trial and is subsequently released on bail or recognizance and demands trial, shall be given credit for time spent in custody following the making of the demand while in custody. 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 2002).

¶ 21 Thus, under *Garrett* and section 103-5(b) as amended, when a defendant is released on bond, a written speedy-trial demand must be made to trigger the running of the speedy-trial term. But, upon that demand, the defendant will receive credit in the calculation for the time spent in custody following the demand made while in custody.

¶ 22 Here, although the State argues that the failure to file a new demand was trial strategy, the record does not support that conclusion. It is clear that counsel repeatedly raised the speedy-trial issue and sought discharge on speedy-trial grounds, so we find no support for the view that the failure to file a new demand was trial strategy. Instead, it appears that counsel was unaware of the need to file a new demand. Therefore, defendant made a substantial showing that counsel’s performance fell below an objective standard of reasonableness.

¶ 23 In evaluating prejudice, we first note that defendant was tried outside the statutory period. Defendant sets forth various time calculations based on the time between January 9 or 30, 2003, and October 7, 2003, and notes instances where the record is uncertain whether his counsel agreed to delays. The State does not specifically dispute any of defendant’s calculations by providing its own calculation. In any event, other than a period in which defendant sought a continuance based on his counsel’s illness, the remainder of the time following defendant’s oral and written demands were attributable to the State.

¶ 24 “Section 103-5(f) provides that ‘[d]elay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried.’ ” *People v.*

Patterson, 392 Ill. App. 3d 461, 467 (2009) (quoting 725 ILCS 5/103-5(f) (West 2004)). Thus, a defendant waives the right to a speedy trial under section 103-5(b), where, by his or her affirmative act, he or she contributes to an actual delay of the trial or expressly agrees to the continuance on the record. *People v. Cunningham*, 77 Ill. App. 3d 949, 952 (1979). “ ‘A defendant is considered to have occasioned a delay when he requests a continuance, agrees to a continuance, or when his actions otherwise cause or contribute to the delay.’ ” *Patterson*, 392 Ill. App. 3d at 467 (quoting *People v. Hatch*, 110 Ill. App. 3d 531, 537 (1982)). “ ‘[I]n seeking a discharge, the defendant bears the burden of showing that his right to a speedy trial has been violated.’ ” *Id.* (quoting *People v. Boyce*, 51 Ill. App. 3d 549, 554 (1977)). “ ‘This burden includes a demonstration that he caused no delay, which fact must be affirmatively established by the record.’ ” *Id.* (quoting *Boyce*, 51 Ill. App. 3d at 554).

¶ 25 “Under section 103-5(b), mere acquiescence to a date suggested by the trial court is not a delay attributable to the defendant.” *People v. Zeleny*, 396 Ill. App. 3d 917, 921 (2009). “Also, although the defendant carries the burden of proving a violation of section 103-5(b), where the record is silent or the defendant fails to object to a delay requested by the State, the delay cannot be attributed to the defendant.” *Id.* In calculating the length of a delay, the first day is excluded and the last day is included. *People v. Murray*, 879 Ill. App. 3d 153, 158 (2008).

¶ 26 Here, the only time between January 9, 2003, and October 7, 2003, for which the record shows that defendant occasioned a delay is the period between June 24, 2003, and August 14, 2003. All other dates indicate that the time was on the State. To the extent the record is silent or uncertain, a silent record is not attributed to the defendant, and those dates are attributable to the State, something it has not disputed.

¶ 27 We conclude that 220 days attributable to the State passed between the time of the oral demand while defendant was in custody and the start of trial, while 199 days passed between the date of the written demand and the start of trial. Our calculations are based on the following: 96 days from January 9 (date of the oral demand) to April 15, 2003, or 75 days from January 30 (date of the written demand) to April 15, 2003; 70 days from April 15 to June 24, 2003; and 54 days from August 14 to October 7, 2003.

¶ 28 Thus, regardless of whether the demand made in custody must be written or whether an oral demand is sufficient, an issue we need not decide, defendant was brought to trial later than 160 days. However, the State argues that defendant cannot show prejudice under *Strickland* because the State would have been entitled to a 60-day extension between April 15 and June 24, 2003, because it was unable to obtain a witness. If the State were to succeed on that point, then it would have had to bring defendant to trial within 220 days, and it did so under either scenario – whether the demand must be written or whether an oral demand is sufficient.¹ Defendant argues that a third-stage evidentiary hearing is needed to make this determination.

¶ 29 Section 5-103(c) provides that “[i]f the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.” 725 ILCS 5/103-5(c) (West 2010). “Whether the State has exercised due diligence is a question that must be determined on a

¹The statute requires that parties be brought to trial “within” the number of days allotted. 725 ILCS 5/103-5(f) (West 2010). Thus, 160 days with 60 days added would be 220 and, since trial started on either day 199 or day 220, it would be “within” that number of days.

case-by-case basis after careful review of the particular circumstances presented.” See *People v. Spears*, 395 Ill. App. 3d 889, 893 (2009) (quoting *People v. Swanson*, 322 Ill. App. 3d 339, 342, (2001)) (applying due diligence as it related to DNA testing). “ ‘The State bears the burden of proof on the question of due diligence.’ ” *Id.* Belated efforts to locate essential witnesses or determine their vacation schedules and availability for trial may constitute a lack of due diligence on the part of the State. See *People v. Shannon*, 34 Ill. App. 3d 185, 187 (1975). The number of days extended can be less than 60. For example, the extension may consist of only the time the State needs to obtain the evidence. See *People v. Bonds*, 401 Ill. App. 3d 668, 676 (2010) (applying this concept to an extension to obtain DNA evidence).

¶ 30 Here, we decline to speculate whether the trial court would have granted an extension to the State had the State filed a motion. The State did not make an application for an extension and, although it explained that a witness was out of the country, it did not provide information about when it began work to secure the witness or if it could have made special arrangements to bring the witness in earlier. The State told the court that it had previously flown the witness to Illinois to testify. When defendant was released from custody, 17 days from May 24 to June 10, 2002, had run against the State, along with 96 days from January 9 to April 15, 2004, for a total of 113 of the 120 days that the State would have had under section 103-5(a) to bring defendant to trial.² Thus, the State’s continuance was at the end of the speedy-trial term had defendant remained in custody, giving the appearance of a belated effort to obtain the witness. Further, though the court dismissed

²Section 103-5(a) of the speedy-trial statute provides an automatic 120-day speedy-trial right for a person held in custody on the pending charge and does not require such a person to file a demand to exercise that right. *Id.* at 671.

defendant's petition, it refused to assume that an extension would have been granted. Because the trial court made no ruling, a third-stage evidentiary hearing is necessary to determine the matter.

¶ 31 The State argues that, under *Murray*, 379 Ill. App. 3d at 162, counsel cannot be found ineffective when there was a motion by the State to continue because of an unavailable witness and there was no argument that the State was not exercising due diligence, even when neither the motion nor the court made reference to section 103-5(c) of the Code. However, the proposition as it was stated in *Murray* was *dicta*, as it was not necessary to the determination of the case. Further, in *Murray*, the court granted the State's motion to continue without any objection that focused on the State's failure to timely bring witnesses before the court. The defendant then remained in custody during the delay caused by that continuance. Here, defendant objected to the delay and specifically noted the State's previous failures to obtain witnesses. The trial court agreed and then, instead of granting any sort of continuance that would extend the speedy-trial time under section 103-5(c), the court ordered defendant released because of the speedy-trial issue, thus subjecting him to section 103-5(b). Thus, *Murray*, where the continuance could be viewed as one under section 103-5(c), is distinguishable from here, where the court clearly noted issues with the State's failures to obtain witnesses and reacted by ordering that defendant be released instead of giving an extension of time while defendant remained in custody.

¶ 32 Citing to *People v. Willis*, 235 Ill. App. 3d 1060 (1992), the State also contends that defendant cannot show prejudice because, had counsel made a proper speedy-trial demand, it would have then brought defendant to trial within the proper time frame. However, *Willis* is distinguishable and does not support the State's argument, at least without a third-stage evidentiary hearing.

¶ 33 In *Willis*, the defendant's counsel failed to make a proper speedy-trial demand. The State stipulated that there was no reason that prevented the case from being brought to trial within the statutory period. Instead, it was not tried in that period solely because a proper demand necessary to commence the running of the period had not been made. The Fourth District determined that counsel intended to demand trial, but did so incorrectly, resulting in deficient performance. *Id.* at 1067. However, the court also concluded that the defendant could not show prejudice because it was not reasonably probable that the outcome of the proceeding would have been different. *Id.* While the court did not condone the State's actions in delaying the case, the record did not support the conclusion that, had counsel filed a proper demand, the State would not have brought the defendant to trial within the statutory period. Thus, the defendant could not show that he was prejudiced by his counsel's failure.

¶ 34 Here, it is unknown whether the State would have brought defendant to trial within the speedy-trial term had a proper demand been made. Unlike in *Willis*, where there was specific evidence that the State delayed the case only because of the improper demand, there was no such evidence here. Instead, the State had delayed matters on multiple occasions because of difficulties obtaining witnesses and, in arguing that it was entitled to an extension of time, it seems to specifically admit that it could not bring defendant to trial within the statutory period. Without specific facts showing that the State would have brought defendant to trial in time, defendant has made a substantial showing that his counsel was ineffective in failing to make a proper speedy-trial demand. A third-stage evidentiary hearing is needed to reach any final determination about the State's argument on this issue.

¶ 35 Finally, the State claims that we should affirm on other grounds, because defendant failed to verify his petition with a notarized affidavit. Consistent with our decisions in *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 27-28, and *People v. Turner*, 2012 IL App (2d) 100819, ¶¶ 43-44, we decline to resolve this matter based on a procedural defect that was not addressed by the lower court prior to appellate review.

¶ 36 III. CONCLUSION

¶ 37 Defendant has made a substantial showing of ineffective assistance of trial counsel and that appellate counsel was ineffective for failing to raise the matter on appeal. Accordingly, we reverse and remand for further proceedings.

¶ 38 Reversed and remanded.