

NOTICE  
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2012 IL App (4th) 100963-U

Filed 4/19/12

NO. 4-10-0963

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
LEWIS CLARK,	)	No. 09CF3
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

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JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Appleton and Pope concurred in the judgment.

### ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that the defendant (1) did not assert a constitutional speedy-trial claim, and (2) failed to establish ineffective assistance of counsel.

¶ 2 In January 2009, the State charged defendant, Lewis Clark, with two counts of possession of contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2008)). In September 2009, counsel for defendant filed a speedy-trial demand on defendant's behalf, but no action was taken on that demand. Following a January 2010 trial, a jury convicted defendant of both counts. In August 2010, the trial court sentenced defendant on one of the counts to a seven-year prison term, to be served consecutively to state and federal sentences imposed in other cases.

¶ 3 Defendant appeals, arguing that (1) his statutory right to a speedy trial was violated and (2) he was provided ineffective assistance of counsel. We disagree and affirm.

¶ 4

## I. BACKGROUND

¶ 5 On January 5, 2009, the State charged defendant with two counts of unlawful possession of contraband in a penal institution. Count I alleged that defendant possessed a "tool" to defeat security mechanisms (720 ILCS 5/31A-1.1(b) (West 2008)). Count II alleged that defendant possessed a "weapon," a sharpened metal rod (720 ILCS 5/31A-1.1(b) (West 2008)). On February 9, 2009, defendant first appeared before the trial court in the custody of the Illinois Department of Corrections (DOC). At a February 25, 2009, hearing, defendant waived his preliminary hearing. Defendant later pleaded not guilty, and the court scheduled an April 15, 2009, pretrial hearing.

¶ 6 On April 13, 2009—two days before defendant's pretrial hearing in this case was scheduled to begin—defendant appeared in federal district court to face four counts of sending threatening communication (18 U.S.C. § 876(c) (2006)). The federal government sought to detain defendant, and defendant elected to remain in federal custody.

¶ 7 At the pretrial hearing two days later, the State informed the court and defense counsel that defendant was in federal custody. The court rescheduled the hearing for April 29, 2009, but defendant again failed to appear. Defense counsel informed the court that he believed defendant was being held at the Tamms Correctional Center—a state institution. The court noted that it would attempt to "writ" defendant and rescheduled the hearing for June 2009.

¶ 8 At that June 2009 pretrial hearing, defendant again failed to appear. The State represented that defendant was in federal custody outside of Illinois but that he was scheduled to be returned to DOC. Defense counsel did not know where defendant was being held. On this information, the trial court continued the case to July 2009.

¶ 9            Shortly thereafter, defendant's counsel withdrew. Due to the withdrawal of defendant's appointed counsel, and subsequent appointment of new counsel, the trial court continued the July 2009 hearing. On September 21, 2009, defendant's new counsel filed a demand for a speedy trial "pursuant to 725 ILCS 5/103-5." On October 8, 2009, defendant pleaded guilty to all four federal counts. The federal court then scheduled an April 2010 sentencing hearing.

¶ 10           On February 24, 2010, defense counsel filed an affidavit, indicating that pretrial hearings had been scheduled for July 30, August 20, September 3, and November 5, 2009, but defendant did not appear. Counsel's affidavit also stated that the State informed counsel and the court that defendant was in custody but could not be located. In November 2009, defendant sent a letter to the court, inquiring about the status of his case and informing the court that he was in federal custody. Later that month, defendant sent a second letter to the court, which was essentially the same as his November 2009 letter.

¶ 11           In response, the trial court then scheduled a December 2009 jury trial. Defendant again failed to appear. The State informed the court that the United States Marshal Service refused to transport defendant, but it was willing to release him to another authority that would transport him. As the court considered the State's request for another continuance, it acknowledged that defense counsel had made a speedy-trial demand. The State responded that defendant's speedy-trial demand had no effect because defendant's demand did not "comply with any statutory speedy trial provision as it [was] filed." Defense counsel then proceeded to inquire as to what was wrong with defendant's speedy-trial demand, the court responded as follows: "we are not here to argue that point today." Thereafter, the court (1) instructed the State to locate

defendant and (2) continued the case.

¶ 12 At a January 2010 status hearing, defendant again failed to appear. The trial court informed the State and defense counsel that it received a correspondence from the United States Marshal's office concerning the defendant's location. (The court did not discuss the contents of that correspondence, nor was a copy included in the record on appeal.) The State indicated that defendant was being housed at the Henry County jail and was "in the custody of the U. S. Marshals on receipt of him from [DOC] where he [was] serving sentence."

¶ 13 On January 19, 2010, the State filed a petition for writ of *habeas corpus ad prosequendum*, requesting that the trial court issue an order commanding the Henry County sheriff to produce defendant for trial six days later. The Henry County sheriff refused, noting that he required approval from the United States Marshal's office because defendant was in federal custody. The court suggested moving the trial to Henry County, but the State objected. The court stated that "[t]he problem from my point of view is that a speedy trial has been demanded," and the court anticipated that it would "be dealing with the speedy trial problem down the road."

¶ 14 On January 26, 2010, the trial court issued a second order of *habeas corpus ad prosequendum* for defendant's appearance on January 28 through 29, 2010. Defendant appeared for jury trial on January 28, 2010, and defendant did not file a motion to dismiss on speedy-trial grounds at that time. The jury later found defendant guilty on both counts of possession of a controlled substance in a penal institution. In February 2010, defense counsel filed a motion for a new trial, alleging that defendant had been tried in violation of the anti-shuffling provision of the Interstate Agreement on Detainers Act (Interstate Act) (730 ILCS 5/3-8-9 (West 2010)).

Following an August 2010 hearing, the court denied defendant's motion. The court then sentenced defendant to seven years in prison on count II, to be served consecutively to state and federal sentences imposed in other cases.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that (1) his statutory right to a speedy trial was violated and (2) he was provided ineffective assistance of counsel.

¶ 18 A. Forfeiture

¶ 19 Initially, we note that the State asserts that defendant has forfeited any argument that he was denied his statutory right to a speedy trial under section 103-5 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/103-5) (West 2008)) because he failed to preserve the issue in a posttrial motion. We disagree.

¶ 20 Our supreme court has held that "where the trial court clearly ha[s] an opportunity to review the same essential claim that [i]s later raised on appeal," failure to include the claim in a posttrial motion will not result in forfeiture. *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008); see also *People v. Patterson*, 392 Ill. App. 3d 461, 464, 912 N.E.2d 244, 247 (2009) (finding that where "the speedy-trial issue was fully considered by the trial court," defendant's failure to assert the issue in a posttrial motion did not result in forfeiture).

¶ 21 Although defendant did not specifically include a claim regarding section 103-5 in his posttrial motion, defendant did cite in his "motion for a new trial," the Interstate Act (730 ILCS 5/3-8-9 (West 2010)). The State, in its response to defendant's motion, thoroughly addressed defendant's claim for a speedy trial under the Interstate Act and acknowledged that

defendant had made a speedy-trial demand pursuant to section 103-5, and asserted that defendant's demand was not properly brought under section 103-5. During the hearing on defendant's motion for a new trial, the trial court considered the arguments set forth by both parties and denied the motion. Further, the record shows that the court and the State were aware of defendant's demand for a speedy trial pursuant to section 103-5, as the issue was discussed at several hearings prior to defendant's jury trial.

¶ 22 Accordingly, the trial court had the opportunity to hear the same essential claim—namely, that defendant was deprived of his statutory right to a speedy trial—that is now being argued on appeal. Therefore, we conclude that defendant has not forfeited the issue.

¶ 23 **B. Speedy-Trial Statutes**

¶ 24 As previously stated, defendant argues that his statutory right to a speedy trial was violated. Defendant bases his speedy-trial claim on section 103-5(a) of the Criminal Procedure Code (725 ILCS 103-5(a) (West 2008)). Specifically, defendant contends that neither (1) the Intrastate Detainers Act (Intrastate Act) (730 ILCS 5/3-8-10 (West 2008)), (2) the Interstate Act (730 ILCS 5/3-8-9 (West 2008)), nor (3) section 103-5(b) of the Speedy Trial Act (725 ILCS 103-5(b) (West 2008)) applies; and therefore, section 103-5(a) is the only statutory basis upon which he can assert his statutory right to a speedy trial. Alternatively, defendant contends that even if his speedy-trial demand was not brought under the proper statute, it was still sufficient to put the State and the trial court on notice. Finally, defendant contends that, if he was required to make a speedy-trial demand pursuant to the Intrastate Act or the Interstate Act, his counsel was ineffective for failing to do so. We address defendant's arguments in turn. In so doing, we turn first to the speedy-trial statutes at issue in this case.

¶ 25

1. *The Intrastate Detainers Act*

¶ 26

The Intrastate Act provides:

"Except for persons sentenced to death, subsection (b), (c), and (e) of [s]ection 103-5 of the [Criminal Procedure Code] shall also apply to persons committed to any institution or facility or program of the Illinois Department of Corrections who have untried complaints, charges or indictments pending in any county of this State." 730 ILCS 5/3-8-10 (West 2008).

Under the Intrastate Act, subsection (b) of the Speedy Trial Act is applied to "persons already incarcerated on unrelated charges." *People v. Wooddell*, 219 Ill. 2d 166, 175, 847 N.E.2d 117, 122 (2006). Subsection (b) of the Speedy Trial Act provides for a 160-day speedy-trial right for persons released on bond or recognizance. 725 ILCS 5/103-5(b) (West 2008). Because persons already incarcerated on unrelated charges do not suffer a loss of liberty while awaiting trial, they are treated as persons released on bond or recognizance, and the 160-day speedy-trial provision applies to them. *Wooddell*, 219 Ill. 2d at 175, 847 N.E.2d at 122.

¶ 27

Defendant contends that the Intrastate Act does not apply to him because he was not committed to DOC as required by the statute at the time he made his speedy-trial demand, given that he was in federal custody awaiting federal sentencing. The State responds that the Intrastate Act does apply to defendant because he was committed to DOC in January 2009 when the State first brought the charges in this case. We agree with defendant.

¶ 28

The supreme court has made it clear that "a defendant is subject to whatever speedy-trial statute applies at the time he or she *makes* a speedy trial demand." *Wooddell*, 219 Ill.

2d at 177, 847 N.E.2d at 123-24. (Emphasis added.) In September 2009, when defendant made his speedy-trial demand, he was not committed to DOC. Rather, defendant was being held by federal authorities awaiting sentencing, and thus, the Intrastate Act did not apply to defendant at that time. See *Patterson*, 392 Ill. App. 3d at 466, 912 N.E.2d at 249 (the Intrastate Act is a particular enactment that applies only to persons committed to the custody of DOC).

¶ 29 *2. The Interstate Agreement on Detainers*

¶ 30 The Interstate Act is an agreement entered into by the United States, 48 states, and the District of Columbia. *People v. Davis*, 356 Ill. App. 3d 940, 942, 827 N.E.2d 518, 519 (2005). It establishes a procedure between the parties that resolves one state's outstanding charges against a prisoner of another state. *Davis*, 356 Ill. App. 3d at 942, 827 N.E.2d at 519.

The Interstate Act provides:

"Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days." 725 ILCS 5/3-8-9(a) (West 2008).

¶ 31 Defendant contends that the Interstate Act does not apply to him because at the time he made his speedy-trial demand, he was in temporary federal custody awaiting sentencing. The Interstate Act applies to persons who have "entered upon a term of imprisonment in a penal or correctional institution of a party state." 725 ILCS 5/3-8-9(a) (West 2008). Defendant had not

entered a "term of imprisonment" as he was being held in temporary federal custody and had not yet been sentenced at the time he made his speedy-trial demand. See *People v. Daily*, 46 Ill. App. 3d 195, 201, 360 N.E.2d 1131, 1136 (1977) (where the defendant had not yet been sentenced, the Interstate Act did not apply because he had not entered into a term of imprisonment as required by the statute).

¶ 32 The State suggests that the Interstate Act is "arguably inapplicable" because the State never lodged a detainer against defendant. In order for the Interstate Act to apply to a defendant, the State must first lodge a detainer against the defendant, and once a detainer has been lodged, the defendant may file a request for the final disposition of the charges. *Davis*, 356 Ill. App. 3d at 942, 827 N.E.2d at 519.

¶ 33 Here, the trial court never lodged a detainer against defendant. The court entered an order of *habeas corpus ad prosequendum*, but that is not considered a detainer. See *People v. Carter*, 193 Ill. App. 3d 353, 356, 549 N.E.2d 763, 765 (1989) (holding that an order of *habeas corpus ad prosequendum* is not the equivalent of lodging a detainer for purposes of the Interstate Act).

¶ 34 Thus, we conclude that the Interstate Act was inapplicable to defendant at the time he made his speedy-trial demand because defendant was not serving a term of imprisonment and a detainer had not been lodged against him.

¶ 35 *3. Section 103-5(b)*

¶ 36 Section 103-5(b) of the Criminal Procedure Code provides that "[e]very person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial." 725 ILCS 5/103-5(b) (2008). Defendant claims that section 103-5(b)

does not apply to him because he was not released on bail or recognizance. The State does not refute this contention. We agree.

¶ 37 Defendant was in DOC's custody when the State charged him in January 2009. Defendant was later taken into temporary federal custody in April 2009, and remained there until his trial in this case in January 2010. Section 103-5(b) does not apply because defendant was not released on bail or recognizance when he made his speedy-trial demand in September 2009.

¶ 38 4. *Section 103-5(a)*

¶ 39 Under section 103-5(a), a defendant "in custody in this State for an alleged offense shall be tried \*\*\* within 120 days from the date he was taken into custody." 725 ILCS 5/103(a) (West 2008). This 120-day period automatically begins when a defendant is taken into custody and the defendant need not make a speedy-trial demand to invoke his or her rights under the statute. *People v. Moore*, 263 Ill. App. 3d 1, 3, 635 N.E.2d 507, 509 (1994). However, in order to be discharged under section 103-5(a), the defendant must have been in custody in connection with the charges for which he or she was subsequently tried. *Moore*, 263 Ill. App. 3d at 3, 635 N.E.2d at 510.

¶ 40 The State asserts that the automatic 120-day term of section 103-5(a) does not apply to defendant because he was in DOC custody, rather than county custody. The State's argument assumes that defendant was subject to whatever speedy-trial statute applied at the time he was charged. (When defendant was charged, he was in DOC custody.) We agree that section 103-5(a) does not apply, but not for the reasons the State asserts.

¶ 41 As previously stated, defendant was subject to the speedy-trial statute that applied at the time he made his speedy-trial demand. See *Wooddell*, 219 Ill. 2d at 177, 847 N.E.2d at

123-24. At the time defendant made his demand, he was being held by federal authorities awaiting sentencing on federal charges. Therefore, defendant was not "in custody in this state" for the purposes of section 103-5(a) because he was not in custody in connection with the charges for which he was subsequently tried—two counts of unlawful possession of contraband in a penal institution.

¶ 42 Defendant contends that section 103-5(a) applies to him because none of the alternatives for invoking defendant's speedy-trial rights are applicable to him. However, defendant cites no authority in support of this assertion. Where none of the alternatives for invoking defendant's statutory right to a speedy trial are applicable, defendant is left to argue a constitutional violation of his speedy-trial rights (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8). Defendant, however, has not made such an argument, and this court will not raise it on his behalf. See *People v. Williams*, 385 Ill. App. 3d 359, 368, 895 N.E.2d 961, 968 (2008) (the burden of argument and research is on the parties, and it is not the function of the reviewing court to act as an advocate).

¶ 43 C. Defendant's September 2009 Speedy-Trial Demand

¶ 44 Defendant next contends that even if his September 2009 speedy-trial demand was not properly made or he invoked the wrong statute, it was still "valid" because it was sufficient to put the State on notice of defendant's demand. For this proposition, defendant cites *People v. Huff*, 195 Ill. 2d 87, 744 N.E.2d 841 (2001). *Huff*, however, is distinguishable from this case.

¶ 45 In *Huff*, the defendant filed a speedy-trial demand but failed to specifically cite section 103-5(b) as the applicable statute. *Huff*, 195 Ill. 2d at 94, 744 N.E.2d at 844. The supreme court found the demand to be adequate and effective because it was titled "Demand for

Speedy Trial," the body of the form specifically demanded trial within 160 days, the document was not calculated to camouflage the defendant's demand, and the prosecution never argued it was unaware of the demand. *Huff*, 195 Ill. 2d at 93-94, 744 N.E.2d at 844. The defendant in *Huff* had posted his driver's license in lieu of bond. Thus, it was not in dispute that the defendant made his speedy-trial demand under section 103-5(b)—the section applying to those who have been released on bond or recognizance. Moreover, there was no confusion that the State was to bring the defendant to trial within 160 days. Accordingly, the fact that the defendant failed to specifically cite section 103-5(b) was not detrimental to his demand.

¶ 46 Unlike the defendant in *Huff*, defendant did cite the speedy-trial statute but without reference to section (a) or (b). Defendant's demand stated in part, "[d]efendant , \*\*\* pursuant to 725 ILCS 5/103-5, enters this written demand for speedy trial." However, defendant's demand did not indicate whether defendant was requesting trial within 120 days or 160 days, and it is unclear from the unique facts of this case whether a 120-day, 160-day, or possibly a 180-day term applied to defendant, as we have concluded that defendant does not appear to fall within any of the speedy-trial statutes. Because none of the speedy-trial statutes are applicable to defendant's circumstances, it would be inappropriate to assume that the State was on notice of a demand when the State did not know how much time it had to bring defendant to trial.

¶ 47 D. Ineffective Assistance of Counsel

¶ 48 Finally, defendant argues that (1) if he was required to file a demand pursuant to the Intrastate Act or Interstate Act, his counsel was ineffective for failing to do so; and alternatively, (2) if demand was properly made pursuant section 103-5, defense counsel was

ineffective for failing to move to dismiss the charges against defendant. We disagree.

¶ 49 To prevail on a claim of ineffective assistance of counsel, defendant must show that defense counsel's performance was deficient and that the deficient performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). In establishing that counsel was deficient, defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. Defendant must establish prejudice by showing that but for counsel's unprofessional error, the result of the proceedings would have been different. *People v. Willis*, 235 Ill. App. 3d 1060, 1066, 601 N.E.2d 1307, 1310 (1992).

¶ 50 During the pendency of these proceedings, three different public defenders represented defendant. In January 2009, the court appointed the Public Defender. The record shows counsel represented defendant until April 2009, when he made a final appearance on defendant's behalf. Nothing in the record shows that defendant was requesting a speedy trial at that time.

¶ 51 A second public defender appeared on defendant's behalf at a June 2009 status hearing. Five days after that appearance, counsel wrote the trial court, explaining that he could not represent defendant due to a conflict of interest. The court granted counsel's motion to withdraw later that month. The record does not show that defendant was demanding a speedy trial at that time.

¶ 52 Any argument defendant maintains in relation to ineffective assistance of counsel by his first two public defenders is better left to a postconviction petition, where a record can be made of when, if ever, defendant urged his counsel to pursue a speedy-trial claim. See *People v.*

*Holloman*, 304 Ill. App. 3d 177, 186, 709 N.E.2d 969, 975 (1999) ("adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made").

¶ 53 Defendant's third attorney was appointed to represent defendant in June 2009 and filed a speedy-trial demand in September 2009.

¶ 54 In a February 2010 affidavit, to which defense counsel attached to his motion for a new trial, counsel averred as follows: (1) that on August 3, 2009, counsel attempted to contact defendant at Tamms, where defendant was located according to the DOC website; the letter, however, was returned and indicated that defendant could be found at Pontiac Correctional Center; (2) that counsel attempted to contact defendant by mail on September 21, 2009, but that letter was also returned; (3) that counsel directed his staff to try to reach defendant by arranging a telephone conference, but that defendant could not be located in the DOC system; (4) that pretrial hearings were scheduled for July 30, August 20, September 3, and November 5, 2009, but defendant did not appear and counsel was informed that defendant was in custody but could not be found; (5) counsel was informed for the first time on January 14, 2010, that defendant was in federal custody in Henry County, Illinois; and (6) that trial was scheduled for January 25, 2010, but defendant did not appear.

¶ 55 Thus, the record indicates that counsel did not know of defendant's whereabouts for the majority of the time he represented him. When counsel appeared on defendant's behalf on December 9, 2009, the State informed the trial court and defense counsel that defendant was in federal custody. Counsel informed the court as follows: "I have not been in any contact with my client. Nobody will tell me where he is. I send letters. I call. I get the [']Springfield two-

step.[']" The record also shows that counsel asked for clarification when the State indicated that counsel's demand was "of no effect" because it did not "comply with any statutory speedy trial provision as it [was] filed." The court responded, "we are not here to argue that point today."

¶ 56 On this record, we conclude that counsel was not ineffective for making a speedy-trial demand pursuant to section 103-5 because counsel did not know whether defendant was in State custody or federal custody and thus, could not have known with certainty which statute, if any, applied to defendant. Such knowledge is a prerequisite to any potential prejudice. See *Willis*, 235 Ill. App. 3d at 1067, 601 N.E.2d at 1311 (defense counsel was ineffective for filing a speedy-trial demand under section 103-5 when counsel knew the defendant was in DOC custody, and thus, should have known that the Intrastate Act applied). Although, generally, we note that it is counsel's responsibility to know where his client is housed, we also recognize that the unique circumstances of this case made it difficult for counsel to do so. Moreover, counsel tried to resolve any issues with the speedy-trial demand during the December 2009 hearing, but the trial court elected in its discretion not to resolve the matter at that time.

¶ 57 III. CONCLUSION

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

¶ 59 Affirmed.