

No. 1-10-2487

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 20993
)	
MICHAEL BROOKS,)	Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Epstein and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Trial counsel was not ineffective for failing to move for discharge based on a speedy-trial violation where no such violation occurred. Mittimus corrected.

¶ 2 Following a bench trial, defendant Michael Brooks was convicted of possession of a controlled substance with intent to deliver, possession of cannabis with intent to deliver, and two counts of unlawful use of a weapon by a felon. He was sentenced to six years in prison for possession of a controlled substance with intent to deliver and five years in prison on each of the remaining counts, all terms to run concurrently. On appeal, defendant contends that his conviction was obtained in violation of his right to a speedy trial, requiring outright reversal of

his conviction, and that his trial counsel was ineffective for failing to move for his discharge.

Defendant further contends that the mittimus should be corrected.

¶ 3 For the reasons that follow, we affirm defendant's convictions and sentences and order correction of the mittimus.

¶ 4 Defendant was arrested on October 23, 2009. His trial commenced 243 days later, on June 23, 2010. The parties agree that 78 days during this time period constitute delay not attributable to defendant. The time frame at issue in this appeal is the 46 days between April 9, 2010, and May 25, 2010. Accordingly, our recitation of the facts will focus on those days.

¶ 5 When the parties appeared before the court on April 9, 2010, defense counsel informed the court that an outstanding discovery item had not yet been tendered by the State. Counsel asked the court to set a date for trial and to set a date for the State to tender the outstanding document. The State informed the court that the police officer who had the document was supposed to be in court later that morning and asked whether defense counsel wanted to wait for the document or set a status date. In response, defense counsel asked the trial court if it would consider a status date. The trial court stated that it could "reserve a date for trial" and give defense counsel a status date as well, to which counsel responded, "That's great. Let's do that." Defense counsel thereafter selected May 25, 2010 -- a date within the 120-day speedy trial period -- from the trial dates offered by the court, and then chose May 14, 2010, for status. By agreement, the court continued the case for status.

¶ 6 On May 14, 2010, the State indicated to the court that the police officer had appeared in court with the outstanding discovery document. However, because the document was a sealed original, the State needed to make copies before tendering it to defense counsel. The State asked for a court date "of at least two weeks." Defense counsel indicated that he hoped to get the document earlier and stated, "I know that if I am tendered it on the 25th, I will ask your Honor to

sanction and preclude the State from utilizing that statement in their case in chief. This guy has been in custody for seven months." The trial court responded, "I don't know what they [will] tell you. Make whatever motion you want." The court continued the case by agreement to May 25, 2010, for trial.

¶ 7 On May 25, 2010, the State informed the court that it was not ready for trial. Defense counsel filed a written demand for speedy trial and stated, "Judge, for the first time we will be filing a demand for trial on this case." The trial court thereafter set the case for trial on June 23, 2010, on the State's motion.

¶ 8 Defendant's trial commenced on June 23, 2010. The State produced evidence at trial that on October 23, 2009, a number of Chicago police officers executed a search warrant at defendant's residence. Among other things, the officers recovered cocaine, heroin, cannabis, methadone, narcotics packaging, a digital scale, several hundred dollars, and two loaded handguns. The State also entered into evidence a certified copy of conviction for aggravated unlawful use of a weapon. The trial court found defendant guilty of possession of a controlled substance with intent to deliver, possession of cannabis with intent to deliver, and two counts of unlawful use of a weapon by a felon. Subsequently, the trial court sentenced defendant to six years in prison for possession of a controlled substance with intent to deliver and five years in prison on each of the remaining counts, all terms to run concurrently.

¶ 9 On appeal, defendant contends that his conviction was obtained in violation of his right to a speedy trial, making his trial counsel ineffective for failing to move for his discharge.

¶ 10 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Second, a defendant must establish prejudice by showing "a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. An attorney will be deemed ineffective for failing to seek discharge of his client on speedy trial grounds if a reasonable probability exists that the defendant would have been discharged had a timely motion been made and no justification has been presented for counsel's failure to make such a motion. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008).

¶ 11 Under section 103-5(a) of the Code of Criminal Procedure of 1963, every person in custody "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). A "delay" occurs when any action by either party or the trial court moves the trial date outside the 120-day window. *People v. Cordell*, 223 Ill. 2d 380, 390 (2006). Any delay that is caused or contributed to by the defendant tolls the speedy-trial period until the expiration of the delay, at which point the period resumes running. *Murray*, 379 Ill. App. 3d at 158. It is the State's duty to bring a defendant to trial within the 120-day statutory period, but the defendant bears the burden of establishing that any delays were not attributable to his conduct. *Murray*, 379 Ill. App. 3d at 158. A delay is considered to be occasioned by the defendant when his acts caused or contributed to a delay resulting in the postponement of trial. *Murray*, 379 Ill. App. 3d at 158-59. Under the speedy trial statute, "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 2010).

¶ 12 As noted above, the time period in question in the instant case is the 46 days between April 9, 2010, and May 25, 2010. Defendant argues that these 46 days do not constitute delay attributable to him because on April 9, 2010, he participated in setting a trial date -- May 25 -- that fell within the speedy trial period. He further argues that this conclusion is unaffected by the

fact an interim status date was held on May 14, 2010, as the status date did not delay the proceedings or push the scheduled trial date outside of the 120-day speedy-trial period.

¶ 13 Resolution of the instant case is directed by our recent decision in *People v. Wade*, 2013 IL App (1st) 112547. In *Wade*, the defendant contended his trial counsel was ineffective for failing to move to have the charges against him dismissed due to a speedy trial violation. *Wade*, 2013 IL App (1st) 112547, ¶ 10. As here, the defendant in *Wade* argued that the occasions where he agreed to a trial date within the 120-day period, as opposed to when he agreed to a continuance, were not delays attributable to him. *Wade*, 2013 IL App (1st) 112547, ¶ 22. The defendant asserted that there was a crucial difference between a continuance and setting a trial date within the 120-day period. *Wade*, 2013 IL App (1st) 112547, ¶ 23. In making his arguments, the defendant relied upon *People v. Workman*, 368 Ill. App. 3d 778 (2006), for the proposition that agreeing to a trial date within the speedy trial term is different from agreeing to a continuance. *Wade*, 2013 IL App (1st) 112547, ¶ 28.

¶ 14 This court rejected the *Wade* defendant's arguments, finding that an agreed continuance tolls the speedy trial period, whether or not the case has been set for trial. *Wade*, 2013 IL App (1st) 112547, ¶ 26. The *Wade* court found that the defendant's reliance on *Workman* was unpersuasive because *Workman* was based on its specific facts and "cannot be read to generally support the conclusion that an agreed continuance on a trial date should be treated differently than a mere agreed continuance." *Wade*, 2013 IL App (1st) 112547, ¶ 28. We held in *Wade* that it is "of no moment" whether a defendant agrees to a continuance or agrees to a trial date within the 120-day period. *Wade*, 2013 IL App (1st) 112547, ¶ 29. Either way, any resulting delay is attributable to the defendant. *Wade*, 2013 IL App (1st) 112547, ¶ 29.

¶ 15 Here, on April 9, 2010, defendant agreed to a trial date of May 25, 2010, with an interim status date of May 14, 2010. On that status date, the case was continued by agreement to May

25, 2010, for trial. It was not until May 25, 2010, that defendant filed a written demand for speedy trial. Under *Wade*, the 46-day delay between April 9, 2010, and May 25, 2010, is attributable to defendant for purposes of the speedy trial term. As such, there was no speedy trial violation, and trial counsel cannot be held ineffective for failing to claim that one occurred. *Wade*, 2013 IL App (1st) 112547, ¶ 30. Defendant's contention of ineffectiveness fails.

¶ 16 Defendant's second contention on appeal is that the mittimus should be corrected to reflect the offenses of which he was actually convicted, possession of a controlled substance with intent to deliver and possession of cannabis with intent to deliver, as opposed to the offenses listed, manufacturing or delivery of a controlled substance and manufacturing or delivery of cannabis. The State concedes the issue. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to amend the mittimus to accurately reflect the names of defendant's convictions.

¶ 17 For the reasons explained above, we affirm defendant's convictions and sentences and order correction of the mittimus.

¶ 18 Affirmed; mittimus corrected.