

2013 IL App (1st) 113214-U

FOURTH DIVISION  
May 2, 2013

No. 1-11-3214

**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).

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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. TP 324 667
	)	
DAVID WASNIEWSKI,	)	Honorable
	)	Kevin W. Horan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE EPSTEIN delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where State asserted that it subpoenaed witness numerous times before trial date, court did not abuse its discretion in extending trial date beyond statutory speedy-trial period; defendant's conviction was affirmed.

¶ 2 Following a jury trial, defendant David Wasniewski was convicted of driving under the influence of alcohol (DUI) and was sentenced to 12 months of supervision. Defendant also was ordered to undergo alcohol treatment, attend a victim impact panel and pay fines and costs of \$1,250. On appeal, defendant seeks reversal of his conviction, contending the court's extension

of the trial date to secure a witness's appearance violated his right to a trial within 160 days of his trial demand pursuant to section 103-5(b) of the Code of Criminal Procedure (the Code) (725 ILCS 5/103-5 (West 2010)). We affirm.

¶ 3 After defendant's vehicle collided with a cab in Chicago on April 6, 2008, defendant was arrested and charged with DUI. Defendant filed a written demand for trial on September 16, 2010. Due to a series of requests by the prosecution, the case was continued to January 24, 2011. On that date, the State answered ready for trial but defendant requested a continuance to March 3. Although defendant was ready for trial on March 3, the State was not ready, and the case was continued to March 31.

¶ 4 On March 31, the defense answered ready for trial. The prosecutor informed the judge that two police officers were present in court but the "complaining witness is not in court." The prosecutor said the witness, Hassan Samatar, who was the cab driver, had "been in court on several occasions" but was out of the country until May 15. The prosecutor requested a continuance to May 21 or later.

¶ 5 The court noted that the defense had answered ready for trial, which it labeled the "159th day" for speedy-trial purposes. The prosecutor responded that on previous dates when Samatar had been in court, the State had not been able to answer ready for trial due to staff shortages.

¶ 6 In reviewing the case's chronology, the court stated it was "not going to go back all the way" and would start at September 2010, a date when the defendant was ready and the State answered not ready. The court also noted Samatar was in court on that date. The court further pointed out defendant had sought the continuance from January 24 to March 3. The court set a May 25 trial date over defense counsel's "strenuous objection."

¶ 7 On May 25, the State answered ready for trial, and Samatar was present in court. Defense counsel filed a motion to dismiss the case based on the lack of a speedy trial.

¶ 8 At the hearing on the motion held that day, defense counsel argued the State failed to show due diligence in having Samatar present for the March 31 trial date. The State responded that over the course of the proceedings, it had sent Samatar 14 subpoenas for various court dates and the witness was present in court on three dates in 2009 and 2010. The prosecutor stated that a subpoena was mailed on December 15, 2010, for the January 24, 2011, court date (at which defendant ultimately requested a continuance), and the prosecutor listed 13 additional subpoenas issued in 2009 and 2010.

¶ 9 As to the March 31 trial date, the prosecutor asserted the State had sent Samatar a subpoena to appear with a phone number to contact one of the state's attorneys, and Samatar was not able to appear on that date because he was attending a family funeral in Africa. The prosecutor listed the dates regarding which Samatar was notified and also stated that Officer Kriv, who was present in court on January 24, 2011, would testify Samatar had notified the State on that date that he would be gone until May 15.

¶ 10 In response, defense counsel argued the State did not present the record of subpoenas on March 31, 2011, which was the last court date before the speedy-trial period expired. Counsel asserted that because the State did not offer that information to the court before it granted the continuance on March 31, those facts could not be used to challenge the motion to dismiss.

¶ 11 In denying defendant's motion to dismiss the case, the judge noted the defense's request for a continuance from January 24 to March 3, 2011, and said that defense request had influenced the court's decision to grant the 56-day extension of the speedy-trial term. The judge further stated "there were numerous times when the defendant was not ready for trial" and observed that Samatar "had been in court on numerous occasions" and was present that day.

¶ 12 After an additional continuance attributable to defendant, a jury trial was held in September 2011. The two police officers who responded to the accident testified for the State.

¶ 13 On appeal, defendant contends the record fails to support the State's diligence in obtaining Samatar's appearance for trial on March 31. Section 103-5(b) of the Code provides, in pertinent part, that a defendant on bail or recognizance (as opposed to being held in custody) "shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant." 725 ILCS 5/103-5(b) (West 2010).

¶ 14 The record reflects that the parties agreed in the trial court, and in their briefs to this court, that March 31, 2011, was the 159th day of the "speedy trial" term. Indeed, our calculation of the elapsed time from September 16, 2010, and January 24, 2011, and from March 3 and March 31 (excluding the continuance requested by defendant from January 24 to March 3) is 159 days. Therefore, as defendant asserts, a continuation of his trial beyond March 31 would have triggered that speedy trial protection, absent other relevant circumstances.

¶ 15 Section 103-5 further states the trial court may extend that time period beyond 160 days by continuing the case for not more than an additional 60 days upon request of the State if "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." 725 ILCS 5/103-5(c) (West 2010). The decision to extend the speedy trial period lies within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v. Exson*, 384 Ill. App. 3d 794, 798 (2008).

¶ 16 Defendant argues that when the State requested on March 31 that the trial date be extended to May, the prosecutor presented no proof of the State's efforts to secure Samatar's appearance but instead simply stated the witness was out of the country and failed to explain the materiality of his testimony. Defendant asserts the State did not provide additional details of its attempts to present the witness until its arguments at the May hearing on the motion to dismiss.

¶ 17 The test of due diligence in this context is whether the State began efforts to locate its witness in sufficient time to secure his presence before the speedy trial term expired. *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 30. Contrary to defendant's assertion to this court that the State made no effort to locate Samatar prior to the March 31, 2011, trial date, the State represented to the trial court that it had sent Samatar numerous subpoenas by that time. Samatar was present in court on several occasions before March 2011 but could not appear in court on March 31 due to a death in the family. The prosecution appeared to be in contact with Samatar throughout the proceedings. Although defendant takes issue with the timing of the State's presentation of this evidence to the trial court, the record before this court establishes the State began to seek the witness's appearance long before the expiration of the speedy-trial term and, indeed, even before defendant made his speedy-trial demand in 2010. Therefore, the trial court acted within its discretion in finding the State exercised due diligence in securing Samatar's appearance at trial prior to March 31.

¶ 18 Defendant's remaining arguments have no merit. Defendant's complaint that the State did not make a written motion to extend the trial date beyond March 31 is of no import because such a motion can be oral and need not follow a rigid format. See *People v. Howard*, 130 Ill. App. 3d 967, 974-75 (1985) (noting allegations of due diligence may be made orally). Similarly, contrary to defendant's argument, no affidavit is required to support the State's motion to extend. See *People v. Foster*, 297 Ill. App. 3d 600, 606 (1998); *People v. Folenga*, 83 Ill. App. 3d 210, 214 (1980). Simple allegations of fact by the State will satisfy its burden of making a showing of diligence absent any denial of those allegations by defendant. See *Folenga*, 83 Ill. App. 3d at 214; see also *People v. Jackson*, 68 Ill. App. 3d 585, 588 (1979). Here, the State alleged that the witness, who had previously appeared in court, was out of the country but would return within 60 days (by May 15). Under these facts, we cannot say the trial court abused its discretion in

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extending the speedy trial period to obtain the presence of Samatar, an eyewitness whose vehicle defendant had allegedly struck during the collision.

¶ 19 Accordingly, the judgment of the trial court is affirmed.

¶ 20 Affirmed.