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2013 IL App (3d) 110390-U

Order filed March 25, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-11-0390
)	Circuit No. 10-CF-979
)	
MARVIN WOLFE,)	Honorable
)	Glenn H. Collier,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court
Justice McDade concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Defendant's right to a speedy trial was violated when the trial court abused its discretion in granting the State an extension of the statutory speedy trial term to permit DNA testing without the State demonstrating its due diligence in obtaining DNA test results or the materiality of the DNA evidence being tested. As a result, defendant's counsel was ineffective for failing to move for discharge based on a speedy trial violation.
- ¶ 2 Following a jury trial, defendant, Marvin Wolfe, was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2010)). Defendant was sentenced to 10 years of

imprisonment. On appeal, defendant argues, among other issues, that he received ineffective assistance of counsel because his attorney failed to move for a discharge based on speedy trial grounds. Defendant contends that a motion for discharge would have been successful because the trial court abused its discretion in granting the State a continuance beyond the statutory speedy trial period where the State made an insufficient showing of due diligence in completing deoxyribonucleic acid (DNA) testing within the original 120-day speedy trial term. We reverse.

¶ 3

FACTS

¶ 4 Defendant was taken into custody on September 18, 2010, and remained in custody through the time of his trial on March 28, 2011. On January 3, 2011, two weeks prior to the expiration of the 120-day speedy trial deadline, the State orally requested a continuance of defendant's trial. In making the oral motion, the prosecutor stated:

"Judge, last week I received a phone call from Kevin Zeeb of the Morton Crime Lab, who told me that he had—he's not yet done with DNA testing on this case, that he believes he'll be done in approximately two months, so I'm asking to—and I believe the DNA testing and the results thereof would be extremely important to this case, so I'm moving to continue.

*** I would move to continue per that section of the statute that would allow for an extra 120, although I really don't think I'll need an entire 120."

¶ 5 The defendant's attorney objected and stated, "we're ready for trial." Defendant's attorney argued that it was "up to the State" to prepare matters and the fact that the State did not "get around to it until the Friday before trial *** is simply offensive to the system." Defendant's attorney argued that defendant was "being held in custody, and we object very strenuously." In

response the court stated, "[or] there's some other reason like maybe they have pressing matters, but I think that's the purpose of the statute is to grant *** up to 120 days, not that it can't be done, so that's already covered by the law." The trial court noted defendant's objection and continued the trial until March 7, 2011.

¶ 6 Thereafter, on January 6, 2011, the State filed a written motion for disclosure of defendant's DNA. The trial court granted the motion.

¶ 7 On March 7, 2011, the State moved for a three-week continuance because the crime lab had not submitted standardized disclosures as required by Supreme Court Rule 417 (eff. March 1, 2001). Defendant's trial was continued to March 28, 2011.

¶ 8 On March 28, 2011, defendant's jury trial commenced, with the following evidence introduced: 22-year-old L.F. testified that on September 18, 2010, she was living with her fiancé, her stepson (age 11), and her two daughters (ages 3 and 7 months). That evening she and her fiancé had people over for a party. Her stepson had a sleep over in his bedroom with other children. The guests included defendant and his child, who were L.F.'s neighbors.

¶ 9 L.F. drank alcohol and fell asleep on the couch before midnight. She awoke when everyone was leaving and went to bed upstairs. Defendant was the last person to leave. L.F.'s fiancé was asleep downstairs. L.F. awoke to defendant performing oral sex on her. Upon L.F. awakening, defendant left briskly. L.F. immediately told her fiancé about the incident. L.F.'s fiancé went to defendant's home to confront him, but defendant denied returning to L.F.'s home. In speaking with investigating officer Anthony Allen that evening, defendant admitted to performing oral sex on L.F. Defendant gave Allen varying versions of events, at times indicating L.F. was passed out and at other times indicating she consented to the act.

¶ 10 On the same evening of September 18, 2010, L.F. went to the emergency room. A nurse at the hospital collected evidence from L.F. into a sexual assault collection kit. The kit was given to police the same night. Three days later, on September 21, 2010, police delivered the kit to Kevin Zeeb, a forensic scientist with the Morton Forensic Science Laboratory of the Illinois State Police (crime lab). The kit contained L.F.'s blood standards, labial swab, and rectal swab. After Zeeb examined the evidence, he turned the items from the sexual assault collection kit over to forensic scientist Debra Minton.

¶ 11 On January 6, 2011, a buccal swab was collected from defendant. On January 7, 2011, Minton received defendant's buccal swab from police. On January 25, 2011, a buccal swab was taken from L.F.'s fiancé. On January 26, 2011, Minton received the buccal swab from L.F.'s fiancé from the State's Attorney's Office.

¶ 12 After Minton conducted DNA testing, she concluded that L.F.'s fiancé could be included and defendant could be excluded as possible contributors to the DNA profile of the sperm found on the labial swab from L.F. Minton turned the evidence from the kit over to forensic scientist Stacie Speith. Speith's DNA testing on the labial swab revealed a mixture of DNA from two males, with the predominant profile matching the DNA profile of the defendant. The profile matching defendant would be expected to occur in 1 in 160 unrelated African-American males, 1 in 990 unrelated Hispanic males, and 1 in 1,800 unrelated Caucasian males. The other profile matched that of L.F.'s fiancé.

¶ 13 Defendant testified that on the evening of the incident, L.F. performed oral sex on him and he performed oral sex on her. According to defendant, L.F. was not passed out and never told him to stop.

¶ 14 The jury found defendant guilty. The trial court denied defendant's motion for new trial and sentenced him to 10 years of imprisonment.

¶ 15 Defendant's counsel did not move to discharge defendant based upon a violation of the speedy trial statute before trial. He also did not raise the issue in a posttrial motion.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues that he received ineffective assistance of counsel because his attorney failed to move to discharge him from custody based on statutory speedy trial grounds.

¶ 18 Both the sixth amendment to the United States Constitution and article I, section 8, of the Illinois Constitution of 1970 confer the right to a speedy trial upon a defendant. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The constitutional right to a speedy trial is implemented by statute pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5 (West 2010)). The speedy trial statute provides, in part, "Every person in custody in this State for an alleged offense shall be tried *** within 120 days from the date he was taken into custody unless delay is occasioned by defendant." 725 ILCS 5/103-5(a) (West 2010).

¶ 19 A defendant is entitled to be discharged from custody if he is not brought to trial within the speedy trial period. 725 ILCS 5/103-5(d) (West 2010). Failure of defendant's counsel to seek discharge on speedy trial grounds generally will be deemed ineffective assistance of counsel if there is a reasonable probability that defendant would have been discharged had a timely motion been made. *People v. Boyd*, 363 Ill. App. 3d 1027 (2006).

¶ 20 A. Continuance for DNA Testing

¶ 21 Extensions of the usual 120-day speedy trial period for delays in genetic testing may be permitted under the speedy trial statute. Specifically, the statute provides, "If the court

determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103-5(c) (West 2008).

¶ 22 Legal questions involving the interpretation of the speedy trial statute are reviewed *de novo*. *People v. Campa*, 217 Ill. 2d 243 (2005). However, a trial court's ruling on whether the State has exercised due diligence in discovering and processing DNA will not be overturned on appeal "unless it amounts to a clear abuse of discretion." *People v. Swanson*, 322 Ill. App. 3d 339, 342 (2001). The State carries the burden of proof on the question of whether the State exercised due diligence, and the trial court must make a determination "on a case-by-case basis after careful review of the particular circumstances presented." *Swanson*, 322 Ill. App. 3d 339, 342. Whether the State has shown due diligence is determined on the particular circumstance presented by the record as it existed at the time of the motion for continuance. *Swanson*, 322 Ill. App. 3d 339.

¶ 23 Here, in determining whether the continuance for DNA testing was an abuse of discretion by the court, we must initially determine whether the State made a sufficient showing that it exercised due diligence in its attempt to accomplish DNA testing within the 120-day speedy trial term. At the hearing on January 3, 2011, the State made an oral motion to continue without providing any specifics about the materiality of the evidence or due diligence performed by the State to obtain the DNA results. The prosecutor simply informed the court that he received a call the week prior indicating that the crime lab had not completed DNA testing and the results would be "extremely important to this case[.]"

¶ 24 As of the date the State requested the continuance, there was no indication in the record when the State delivered the evidence to the crime lab for DNA testing. In fact, the State did not request a DNA sample from defendant for comparison until three days after the court had granted the continuance under section 103-5(c). Also, the State did not obtain a sample from L.F.'s fiancé for comparison until after the expiration of the original 120 days. Although the police had delivered the sexual assault collection kit to the crime lab within three days of defendant's arrest, the court did not have that information before it at the time of its ruling to grant the continuance. There was no indication that the crime lab was backlogged or that the State took any affirmative action to obtain the results prior to the expiration of the original speedy trial deadline. See *Swanson*, 332 Ill. App. 3d 339. Therefore, the State failed to show its due diligence in obtaining the DNA test results.

¶ 25 Furthermore, there was no indication that DNA results of the testing were material to defendant's case. In arguing for the continuance, the prosecutor indicated, "I believe the DNA testing and the results thereof would be extremely important to this case," with no further explanation. At the time of the request for the continuance, the State must have known that defendant admitted to police that he had performed oral sex on L.F. In light of defendant's admission, it is not clear how the DNA results were "extremely important" in this case. The mere assertion of materiality by a prosecutor "does not *per se*" establish materiality. See *People v. Durham*, 193 Ill. App. 3d 545, 547 (1990) ("The mere assertions of due diligence by a prosecutor do not *per se* establish due diligence").

¶ 26 This case is similar to *People v. Battles*, 311 Ill. App. 3d 991 (2000), where the State did not meet its burden under section 103-5(c) for a continuance of trial beyond the original speedy

trial deadline. In *Battles*, the trial court granted the State's section 103-5(c) motion to continue without making any factual findings. On appeal, the Fifth District of the Appellate Court found that the State did not meet its burden of showing due diligence to obtain the DNA results, noting that the State: (1) took 72 days to decide whether to perform DNA testing; (2) sent the sample to the wrong lab; (3) never followed up with the lab; and (4) never expedited the testing. The court found that the trial court's grant of the continuance was an abuse of discretion because the prosecution was simply seeking refuge from an approaching deadline by requesting the continuance.

¶ 27 The State cites *Swanson*, 322 Ill. App. 3d 339, in support of its argument, but *Swanson* is distinguishable. In *Swanson*, a blood sample was taken from defendant on the day he was taken into custody. A few weeks later, the evidence was sent to the crime lab to determine if DNA was present for testing. Due to a backlog, the lab did not perform tests until two months later. The State immediately requested DNA testing as soon as the crime lab personnel confirmed that the evidence contained material suitable for testing, with the State requesting placement on the "ASAP list." The trial court granted the State's motion to continue. On appeal, this court affirmed, noting that the State immediately requested expedited DNA testing after being informed there was DNA evidence available for DNA testing.

¶ 28 In this case, because the State did not make any showing of materiality or due diligence, the trial court could not have made a finding on those factors, as required by the statute. Consequently, the trial court abused its discretion by granting the continuance as, essentially, a matter of right. *People v. Colson*, 339 Ill. App. 3d 1039, 1048 (2003) ("The provision for DNA testing was not meant to provide an automatic continuance in every trial that involve[s] DNA

testing because the statute requires that the State must exercise without success due diligence to obtain results of DNA testing."). Therefore, defendant was not tried in accordance with the speedy trial statute in this case.

¶ 29 B. Ineffective Assistance of Counsel

¶ 30 Defendant waived review of the speedy trial issue because he failed to make a motion for discharge before trial and file a written posttrial motion on the issue. See *People v. Foster*, 297 Ill. App. 3d 600 (1998) (failure to file a motion for discharge prior to trial and raise the issue in a posttrial motion is a waiver of the right to discharge under the speedy trial act). Defendant contends that because his attorney failed to seek discharge, thereby waiving the speedy trial issue, defendant was denied effective assistance of counsel. Accordingly, we must determine whether there was a reasonable probability that defendant would have been discharged had a timely motion for discharge been made by defendant's attorney.

¶ 31 In reviewing the trial court's grant of the continuance of trial beyond the original speedy trial term, we must examine the record as it existed at the time of the motion. For the reasons previously indicated, when the trial court granted the continuance on January 3, 2011, the record did not show that the State "exercised without success due diligence to obtain evidence material to the case" as required by section 103-4 of the Code. Consequently, defendant has shown that he would have been entitled to a discharge had his counsel filed a discharge motion. We conclude, therefore, defense counsel rendered ineffective assistance of counsel for failing to seek a discharge for the speedy trial violation, and reverse defendant's conviction. See *Boyd*, 363 Ill. App. 3d 1027 (citing *People v. Williams*, 204 Ill. 2d 191 (violation of speedy trial statute requires reversal of conviction)).

¶ 32 Because defendant's conviction is reversed on the first issue, we do not reach the remaining issues raised on appeal.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed.

¶ 35 Reversed.

¶ 36 JUSTICE SCHMIDT, dissenting.

¶ 37 I disagree with the majority's conclusions that the trial court abused its discretion when finding that the State met its burden of showing due diligence in attempting to obtain the DNA testing and that "there was no indication that DNA results of the testing were material to defendant's case." *Supra* ¶ 25.

¶ 38 As the majority acknowledges, the record reveals the State delivered the sexual assault kit to the crime lab within three days of defendant's arrest. *Supra* ¶ 24. Moreover, the State communicated with the lab regarding the progress in testing and promptly requested the continuance upon learning that additional time was needed to complete the testing. The trial judge found these actions evinced due diligence. I disagree with the majority's assertion that the trial court abused its discretion when making that finding. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). "Our mere disagreement with the court's decision would not make the decision an abuse of discretion." *People v. Fisher*, 407 Ill. App. 3d 585, 589 (2011). When reviewing a matter under the abuse of discretion standard, we must "allow room for a reasonable difference of opinion." *People v. Wear*, 371 Ill. App. 3d 517, 529 (2007). The majority finds delivering the sexual assault kit to the lab within three days of arrest, following up via telephone within the

speedy-trial period, then requesting a continuance upon being informed the testing could not be completed within the speedy-trial period does not equate to due diligence. While the majority's view is not unreasonable, the trial court's finding to the contrary is also reasonable and certainly neither arbitrary nor fanciful. As such, I find the trial court did not abuse its discretion in finding due diligence. As a result, I also would find that trial counsel was not ineffective for failing to request dismissal on speedy-trial grounds.

¶ 39 Moreover, the DNA testing and results were most certainly material to defendant's case. While the majority claims that testing was irrelevant since defendant made a statement to the police admitting to having oral sex with the victim (*supra* ¶ 25), the defendant also made statements denying ever having oral sex with the victim. The victim's fiancé, Courtney Johnson, testified that defendant denied being at the victim's house when Johnson originally confronted him about the incident. On cross-examination, defendant admitted that he denied ever having oral sex with the victim when originally confronted by Johnson. While Officer Allen testified that defendant admitted that he did, in fact, perform oral sex on the victim, the officer also testified that defendant provided many different versions of the events of that night. DNA evidence of defendant's saliva on the victim's vagina was most certainly material to the defendant's case regardless of prior admissions. We also cannot assume that defendant's trial testimony would have been the same had he known that the State would not be offering DNA evidence.

¶ 40 Also, addressing other issues left unaddressed by the majority, I find that defendant's argument that his trial counsel operated under a *per se* conflict of interest is without merit.

People v. Fields, 2012 IL 112438.

¶ 41 Defendant also argues that trial counsel was constitutionally ineffective for failing to object to defendant's prior convictions coming into evidence without first insisting that a *Montgomery* balancing test be conducted. Addressing only the prejudice prong of *Strickland*, it is clear that defendant cannot prevail on this argument. He must prove that but for the alleged error, there is a reasonable probability the result would have been different. *People v. Evans*, 186 Ill. 2d 83 (1999). Defendant does not even argue that had the trial court conducted a *Montgomery* hearing, the evidence would not have been admitted. The issue is forfeited. *People v. Patel*, 366 Ill. App. 3d 255 (2006). Even had it not been waived, there is no reason to believe that the trial court would have disallowed evidence of defendant's two prior burglary convictions, or that had the court disallowed the evidence, the result at trial would have been different.

¶ 42 I would affirm defendant's conviction and therefore respectfully dissent.