2015 IL App (1st) 132172-U

SECOND DIVISION
May 19, 2015

No. 1-13-2172

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. 12 CR 17931
	)	
TONY WALKER,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Where an amendment to the indictment was not a new and additional charge, we find defendant's right to a speedy trial was not violated and affirm the judgment of the circuit court.

¶ 2 Following a bench trial, defendant Tony Walker was convicted of unlawful use of a weapon by a felon (UUWF) and sentenced to four years and six months' imprisonment. On appeal, defendant contends he was deprived of his right to a speedy trial where the trial court

allowed the State to amend the information, resulting in a new and additional charge over 120 days after he was taken into custody. We affirm.

¶ 3 Defendant was charged by information with six counts of weapons possession, all of which indicated defendant possessed a firearm. Two of the aggravated UUW charges specifically indicated that the firearm was loaded. Count 2, the count at issue, charged defendant with UUWF in that he "knowingly possessed on or about his person any weapon prohibited by section 24-1 of this code, to wit: firearm, after having been previously convicted of the felony offense of robbery *** in violation of [720 ILCS 5/24-1.1(a) (West 2012)]." During trial, the State amended Count 2 to allege that defendant possessed ammunition instead of a firearm.

¶ 4 At trial, Officer Ivan Lopez testified that at about 2:37 a.m. on September 13, 2012, he and his partner were near 4331 West 47th Street in Chicago in an unmarked vehicle. Lopez saw defendant and an unidentified woman standing on the corner of 47th Street and Kolin Avenue. As the unmarked vehicle got closer to defendant, Lopez observed him reach into his waistband, withdraw a blue steel semi-automatic pistol, and place it in the woman's purse. Both officers exited their vehicle, and Lopez's partner detained defendant while Lopez recovered the firearm in the woman's purse. The firearm, which was the same weapon Lopez saw defendant take out of his waistband, had one live bullet in the chamber and three live bullets in the magazine. Defendant was then arrested.

¶ 5 Following Officer Lopez's testimony on direct examination, the State moved to amend Count 2 to reflect that defendant was in possession of ammunition instead of a firearm. Defense counsel objected, and the State explained that the aggravated UUW counts indicated that the

weapon was loaded and counsel was thus aware of the presence of ammunition. The State also indicated that defense counsel was notified of the ammunition during discovery, and told defense counsel before trial that it intended to amend Count 2 to ammunition rather than firearm. Defense counsel conceded that he was notified of the ammunition during discovery and was on notice that the State intended to amend the charge before trial. However, defense counsel told the State before trial that he would object to the amendment, and, since Lopez had been sworn in, "jeopardy's attached." Defense counsel further argued that allowing the State to amend Count 2 would violate defendant's right to a speedy trial. The trial court found:

> "there is no surprise, and because there is no surprise, you answered ready for trial, and there was opening statements that was given that was a substantive opening statement, I don't believe that there is any prejudice that has ennured [*sic*] to the Defense, or anything that would have been done differently had this been made a few minutes earlier.
>
> It is a substantive change. It's not just a formal change. It is a substantive change.
>
> But under these circumstances, because you were actually on notice, I don't find there is any prejudice.
>
> It will be allowed over the Defense objection.
>
> You can amend Count 2[.]"

¶ 6 Officer Lopez testified on cross-examination after the court allowed the State to amend Count 2 to reflect that defendant was charged with UUWF for possession of ammunition. He

stated that he believed if the trigger of the gun in question was pulled, a bullet would be fired from it. Lopez did not note if the weapon had a firing pin, a recoil spring, or a recoil guide.

¶ 7 At the close of the State's case-in-chief, it introduced certified copies of defendant's convictions for delivery of a controlled substance and robbery.

¶ 8 Sergeant Beth Giltmier testified for the defense that she worked in the firearms lab and received the firearm at issue, along with a magazine containing live cartridges. The magazine could not be used with the firearm in question, and the firearm, although appearing to be functional on the surface, was inoperable because it was missing a firing pin, recoil spring, and the recoil guide.

¶ 9 Defendant moved for a directed verdict on the basis that the recovered firearm was inoperable. The trial court granted defendant's motion, except as to Count 2, which charged defendant with unlawful use of a weapon, *i.e.*, ammunition, by a felon. At the conclusion of the trial, the court held the State met its burden of proof beyond a reasonable doubt as to Count 2, and found defendant guilty of UUWF.

¶ 10 On appeal, defendant contends that his conviction under Count 2 must be reversed where the State, after expiration of the 120-day speedy trial period, improperly amended Count 2 of the information. Defendant asserts that because all of the original weapons counts alleged that he possessed a firearm, the amended Count 2 alleging that he possessed ammunition constituted a new and additional charge arising from the same set of facts, and it was not brought within the same statutory limitation period that was applied to the original charges.

¶ 11 We initially note that to the extent defendant argues the speedy trial issue should be reviewed under the plain error doctrine because he did not include it in his motion for a new trial, or because his attorney was ineffective for failing to raise it in a posttrial motion, we must first determine whether defendant's speedy trial right was violated. *People v. Larue*, 2014 IL App (4th) 120595, ¶ 24.

¶ 12 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 or she was taken into custody unless delay is occasioned by the defendant[.]" 725 ILCS 5/103-5(a) (West 2012); *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006). If the statutory time period expires before the defendant is tried, he must be released from custody and have the charges against him dismissed. 725 ILCS 5/103-5(d) (West 2012); *People v. Hunter*, 2013 IL 114100, ¶ 10.

¶ 13 The compulsory joinder statute indicates that the State must prosecute in a single criminal case all known offenses within the jurisdiction of a single court that "'are based on the same act.'" *Hunter*, 2013 IL 114100, ¶ 10 (quoting 720 ILCS 5/3-3(b) (West 2012)). "Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges." (Internal quotation marks omitted.) *Hunter*, 2013 IL 114100, ¶ 10. Where compulsory joinder applies to the initial and subsequent charges, delays ascribed to the defendant on the initial charge are not ascribed to the defendant on the new and additional

charges because these new charges were not before the court when those continuances were granted. *Larue*, 2014 IL App (4th) 120595, ¶ 26 (citing *People v. Phipps*, 238 Ill. 2d 54, 66 (2010) and *People Williams*, 94 Ill. App. 3d 241, 249 (1981)). The purpose of the above rule is prevent a trial by ambush where the State could lull the defendant into conceding to pretrial delays on pending charges while it prepared for trial on a more serious charge that was not yet before the court. *Woodrum*, 223 Ill. 2d at 300.

¶ 14 There is no dispute that the State amended Count 2 more than 120 days after it initiated the new prosecution, so the only issue is whether the amendment constituted a new and additional charge. We review *de novo* whether the UUWF based on defendant's possession of ammunition is new and additional. *Phipps*, 238 Ill. 2d at 67.

¶ 15 Here, Count 2 of the information charged defendant with UUWF in that he possessed a firearm after having been convicted of robbery. The statute criminalizes the possession of "any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition[.]" 720 ILCS 5/24-1.1(a) (West 2012). The amended charge was all but identical, with the exception of changing the weapon "firearm" to "ammunition."

¶ 16 Defendant's primary argument is that the amended charge is new and additional because, as found by the trial court, the amendment was a "substantive change," altering the factual basis for the UUWF charge from the gun to the ammunition found in the gun. Defendant further maintains that because the amendment was granted after trial commenced, he had no time to prepare for the charge, and the new charge arose from the same conduct as the original UUWF count and was thus subject to compulsory joinder. We initially note that we are not bound by the

trial court's statement that the amendment was a "substantive change" where we are reviewing this issue *de novo*. See *People v. Johnson*, 208 Ill. 2d 118, 128 (2003) (stating that the question on review is the correctness of the result reached by the circuit court, and not the correctness of the reasoning upon which that result was reached). More importantly, defendant's contention fails where the difference between the weapon listed in the original and amended charge is not dispositive for the question of whether the charge is subject to compulsory joinder and is therefore "new and additional" for speedy trial purposes. Our supreme court has stated "[t]he critical point for our speedy-trial analysis ***, however, is *** whether the original indictment gave defendant adequate notice to prepare his defense to the subsequent charge." *Phipps*, 238 Ill. 2d at 69.

¶ 17 Despite defendant's contentions to the contrary, he received adequate notice to prepare his defense on the amended charge. The original indictment contained two charges of aggravated UUW that specifically alleged defendant carried on or about his person a loaded firearm. Defendant's claim that he was surprised by the amended charge of UUWF rings hollow where he was already informed through the aggravated UUW charges that the recovered weapon contained ammunition, and, in turn, that the State intended to prove that he possessed a loaded firearm. Additionally, in moving to amend Count 2 to show that defendant possessed ammunition instead of a firearm, the State asserted, and defense counsel conceded, that defendant was notified of the ammunition during discovery, and that the State told defense counsel before trial that he would be amending the count. Therefore, amending Count 2 did not require the State to offer new or different evidence at trial, and we do not see how defendant's preparation for trial might have

changed had he been informed of the unlawful use of ammunition by a felon charge sooner. Moreover, the defense pursued at trial consisted of counsel's attempt to show the firearm and ammunition were inoperable. Regardless of whether defendant was tried on the original or amended Count 2, we cannot see how he would have changed his defense, and defendant has not offered us any persuasive explanation for what he might have done differently in preparing his defense.

¶ 18 In so finding, we note that *People v. Patterson*, 267 Ill. App. 3d 933 (1994), relied on by defendant in his reply brief, is distinguishable from the case at bar. In *Patterson*, the indictment originally charged the defendant with possession of more than 15 grams but less than 100 grams of cocaine with intent to deliver. The State amended the indictment to possession of more than 400 grams but less than 900 grams of cocaine. On appeal, this court ruled that the trial court erred when it permitted the amendment because "in a drug case, the quantity of a controlled substance possessed by a defendant is an essential element of the charge," and thus remanded the matter with instruction to enter judgment on the lesser offense. *Patterson*, 267 Ill. App. 3d at 939. Defendant argues that, similarly to the defendant in *Patterson*, he was surprised by the amendment as it changed the basic element of the UUWF charge against him from possession of a firearm to possession of ammunition, and the fact that he knew about the ammunition was of no consequence. We disagree. Unlike *Patterson*, 267 Ill. App. 3d at 939, where the change in quantity of the drug played a significant role in defining the crime and setting the punishment, the amendment here did nothing of the kind. The mere substitution of ammunition for firearm did not change the basic element of the UUWF charge or set a new sentencing range. Moreover,

in this case, defendant's knowledge before trial that the State was alleging he possessed ammunition was significant because he had the opportunity to prepare an appropriate defense.

¶ 19 Because defendant received adequate notice in order to prepare his defense on the amended charge, there was no speedy trial violation. Therefore, no further plain error analysis is required where defendant cannot establish that any error occurred. See *People v. Piatkowksi*, 225 Ill. 2d 551, 565 (2007) (first step under the plain error doctrine is to determine whether error occurred). Likewise, defendant has failed to establish he was prejudiced by counsel's failure to raise the statutory speedy trial issue in a posttrial motion, and we thus reject defendant's ineffective assistance of counsel claim. *Phipps*, 238 Ill. 2d at 71 (citing *People v. Houston*, 226 Ill. 2d 135, 143 (2007) (stating the defendant must show both deficient performance and prejudice to establish an ineffective assistance of counsel claim)).

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.