2016 IL App (1st) 133121-U

FOURTH DIVISION
February 18, 2016

No. 1-13-3121

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 37-409-048
	)	
COLIN LONGWORTH,	)	Honorable
	)	Diann Marsalek,
Defendant-Appellee.	)	Cynthia Ramirez,
	)	Deborah Gubin,
	)	Judges Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs in the judgment.

O R D E R

¶ 1 *Held*: Where defendant occasioned most of the one year and eight month delay following his arrest, the trial court erred in granting his motion to dismiss on speedy trial grounds.

¶ 2 Following an October 9, 2011, car accident, defendant, Colin Longworth, was arrested for driving under the influence of alcohol, operating an uninsured motor vehicle, failing to reduce speed, improper lane usage, and leaving the scene of an accident involving property

damage. After a number of continuances, the court dismissed the case on June 11, 2013, for the State's failure to "proceed to trial within the timeframe set by the court and the Speedy Trial Act." The State appeals that dismissal, contending that the trial court erred in granting defendant's motion to dismiss because the State was within the term prescribed by the Illinois Speedy Trial Act and was duly diligent in attempting to bring him to trial, and because defendant's constitutional speedy trial rights were not violated.

¶ 3 The record shows that on October 9, 2011, the arresting officer created a report indicating that defendant left the scene of the accident, and was found a short time later with bloodshot and glassy eyes, and with a strong odor of an alcoholic beverage emanating from his breath. The report also indicated that defendant admitted to both driving and to drinking alcohol, and that he refused all standard field sobriety tests. The citations issued to defendant show that he immediately posted bond on the offenses, and was ordered to appear in court on December 1, 2011.

¶ 4 On the referenced date, defendant's case was called before Judge Hartigan. Defendant informed the court that he had an attorney, but that his attorney had a scheduling conflict and had requested another date. The court instructed defendant to tell his attorney to file his appearance, and the court continued the case to January 10, 2012.

¶ 5 On the following date, all parties appeared in court before Judge MacCarthy. The State tendered some discovery to defense counsel on the record and indicated that the crash report had been ordered. The court asked defense counsel if he was demanding trial at that time, and counsel answered "No" and agreed that he was not ready for trial. The court continued the matter, by agreement, to February 27, 2012, for status.

¶ 6 On February 27, 2012, the parties appeared before Judge Horan. The court questioned the parties about the status of discovery and the State indicated that it had subpoenaed the crash report but had not yet received it. The court asked the parties whether the matter was ready to be set for trial or if it should be "set *** for another date," and defense counsel responded that he thought "the crash report may be germane to this." The matter was continued, by agreement, to March 27, 2012.

¶ 7 On March 27, 2012, the State and defense counsel appeared before Judge Scannicchio, but defendant was not in court. Defense counsel stated that defendant was in a different courtroom on a civil matter. The State informed the court that defendant was required to appear and requested a bond forfeiture warrant (BFW). The court entered and continued a BFW for the next date. Defense counsel requested a trial date, and on defendant's motion, the case was set for trial on June 26, 2012.

¶ 8 On June 26, 2012, the case was called before Judge Schwind and the State informed the court that the complaining witness and the trooper were present in court on the case. Defendant, however, was not present at that time, and the court passed the case. When the case was later recalled with defendant present, the court warned defendant about the need for him to be in court at 9:00 a.m., when his case initially had been called. After defendant apologized, the State told the court that it was "not able to answer ready" because it had "two other cases on demand with the same trooper" and it would not be able to do three trials in one day. The State said that it had previously served defendant with a copy of the crash report in February, but tendered another copy to defense counsel who maintained that he had not received it.

¶ 9 As the parties were discussing a new date, the State indicated that its complaining witness would be available "any time after July 18th" and the officer's next "key date" was September 10,

2012. The court asked if September 10 worked for defendant, and counsel responded, "I can do that." The court then asked if the continuance would be "motion state or by agreement." The State responded "[i]f counsel is filing a written trial demand then it will be motion state; if it's not, then it will be by agreement." Defense counsel told the court that he had filed a written demand for trial on the same day he filed his appearance in the case. The State responded that there had been no written demand for trial and that the case had previously been set by agreement or on defendant's motion. The court stated,

> "Counsel, I can tell you there is no written demand in the file. There is no written—there is no notation on the common record which is the file jacket itself. What counsel just recited is reflected on the file jacket, it's been either by agreement or motion defendant to today's date."

Defense counsel responded, "I can't explain that, Judge. It is what it is." The court indicated that it was going to continue the case by agreement, and the State reiterated that if defendant wanted to "file a written demand for trial today" it would be "fine" and the continuance could be motion State. The trial court asked defense counsel if he had a copy of the written jury demand he allegedly filed, and counsel stated that he did not. The court then continued the case for a jury trial on September 10, 2012.

¶ 10 Sometime later that day, on June 26, 2012, defendant filed a written demand for speedy trial in the clerk's office using a Cook County Public Defender form. The form demand for speedy trial included a section for the dates of previous speedy trial demands, which counsel left blank.

¶ 11 The State received notice of the demand at some point thereafter, and on June 27, 2012, the State filed a motion to advance the case to July 3, 2012, to address the demand and to reset the matter for trial. The State also filed a notice of motion, certifying that defense counsel had been served with the motion via certified mail. On July 3, 2012, the State appeared before Judge Clancy and indicated that at some point after the last court date, defense counsel "left [the written jury demand] on our desk." The State informed the court that it had given defendant notice of the court date and the motion to advance, but neither defendant nor defense counsel were present in court. The court ordered that the "advance and reset" was allowed and continued the case on the State's motion to July 9, 2012.

¶ 12 On July 9, 2012, the State appeared before Judge Kennedy-Sullivan. Defendant and defense counsel still were not present, and the court and the assistant State's Attorney (ASA) who was in court were confused as to why the case was on the call when it was set for trial on September 10, 2012. The court looked at the file and questioned what the notation "A and R" meant, before saying, "I'm just going to say order of court to 9/10."

¶ 13 On July 16, 2012, the State again filed a motion to advance the case, this time to July 24, 2012, for purposes of addressing the written demand for speedy trial and resetting the matter for trial. On the referenced date, the case appeared on the court call of Judge Kennedy-Sullivan. The State informed the court that it had spoken to defense counsel, and he was not in the building that day. The case was continued, motion State, to July 27, 2012, when defense counsel had indicated that he would be available.

¶ 14 On July 27, 2012, all parties appeared before Judge Marsalek. Defense counsel stated that he was "just going to withdraw my demand and I think we have a previous order entered keeping the September [10, 2012,] date for trial by agreement, we'll stick to that."

¶ 15 On September 10, 2012, Judge Marsalek called the case, and defendant answered ready for trial. The State, however, informed the court that it would be answering not ready for trial, because its civilian witness was not present. Defense counsel responded,

> "Your Honor, my understanding is that the state is missing their complaining witness. Ordinarily, I wouldn't object to reset a trial date but this is more than the first time. Indeed I had a demand for a speedy trial in and then counsel's colleague called me and tried to reset the date to bump it up knowing that I couldn't get my client's physician in on that date and so I withdrew that specifically otherwise I would have run—this is the third time, Your Honor, and I have my client, his physician taking the day off for this and the gentleman he was with that evening, Lance Briggs (phonetic), his roommate, so it's outrageous at this point. You know recollections are going to change, this is not the first time the CW hasn't been here. You know the bills are getting high needlessly so I would ask that Your Honor dismiss with prejudice."

¶ 16 Judge Marsalek stated that she was "going to give it a final continuance over the defendant's objection and then I'm going to mark it on the next date it has to go and if not then it's going to get dismissed." Defendant verbally demanded trial, and the parties discussed the next trial date. Defense counsel asked what time the case would be set for trial so that he could plan when the defendant's physician witness should be there. The ASA told defense counsel that "More than likely we're going to be doing the vior dire all day the first day so I doubt you are going to put on defense's case until the second day." The court agreed and said, "It takes almost a

day to pick a jury." Defense counsel said "All right *** then I'm not going to have my physician on standby because he's got to clear his calendar with patients on the 17th[.]" The court continued the matter on the State's motion to October 17, 2012.

¶ 17 On October 17, 2012, the case appeared before Judge Marsalek for trial, and the State answered not ready. The State explained that "the trooper and complaining witness *** [were] both present in court" but the State had recently discovered that another trooper, who had been listed as a potential witness, would also be needed to proceed. That trooper, however, was on medical leave with a torn meniscus and was unable to walk. The ASA requested that the court pass the case so that she could "calculate where we are at with the term." The court observed that on the last court date, it had ordered that the State must proceed "or if the state [is] not ready on this date the case will be dismissed." The State responded, "we do have 160 days to bring a class A misdemeanor before the court and answer ready for trial. At this point I don't believe we are at day 160."

¶ 18 The court passed the case so that the ASA could speak to her supervisors, and when it was recalled, she explained:

> "after speaking with my supervisors with all due respect, Your Honor, the state is the only body in this position that can dismiss the matter. And we would be asking for a continuance because we do have time left on our term, our only motion would be *** a request for a continuance."

¶ 19 Defense counsel "strenuously object[ed]" and told the judge that "Your Honor has indicated at least on two occasions that this would be final. *** We've had multiple final court dates, my client is extremely prejudiced as a result of this." Although defendant's physician

witness was not actually in court, he argued that the witness had "blocked out the entire day again" and that defendant was "going to have to pay him." He stated that the witness "has actually been in court before, but this is the umpteenth time, Your Honor, so again we respectfully request Your Honor you dismiss this with prejudice."

¶ 20 The court ordered:

> "The case is going to be dismissed. *** [T]hat ruling is going to be based upon starting July 26th of 2012 where the State was not ready for the jury trial. July 7th, 2012 again the state was not ready for the jury trial and that does seem that this case has been lingering for a long time, the defendant has continually been answering ready, he is incurring expenses so that's going to be a reason and on the last order I specifically addressed this issue on September 10th and the state was told that if the case was not going to be ready that it was going to be dismissed on the state so that's going to be the order."

¶ 21 The State then filed a motion to reconsider the dismissal of the case and a motion to advance the next court date for purposes of setting a hearing on the motion to reconsider. On November 27, 2012, the parties appeared before Judge Marsalek, and the State requested additional time to supplement the motion, because it had just received the hearing transcripts. The court allowed the State until December 11, 2012, to file an amendment, and set a briefing schedule on the motion. Because of the holiday, defense counsel requested four weeks to respond. Defendant was granted until January 11, 2013, to respond, and the State was given until

January 18, 2013, to reply. Judge Marsalek set the matter for hearing on January 24, 2013, and filed a judicial notification so that the case would remain on her call.

¶ 22 Thereafter, the State filed their amended motion on December 12, 2012, and defendant failed to file a response prior to the January 24, 2013, hearing date. On that date, the case appeared on the call of Judge Johnson. The clerk indicated that the case was "to follow [Judge] Marsalek" but she was "not in today." Defense counsel informed the court that the State had filed its amended motion to reconsider "after the deadline for the briefing schedule." He stated that he did not "have an issue with" the late filing, but it "jammed [him] up over the holidays" and he was "trying to work out *** a new briefing schedule" with the ASA assigned to the matter, who was in a different courtroom at that time. The case was passed so that defense counsel could attempt to speak with her.

¶ 23 When the case was recalled, defense counsel indicated that he had not been able to speak to the ASA. He requested that the case be continued to "a long date, maybe 60 days out" so that Judge Marsalek could be available and the State could file a reply. Judge Johnson declined the request for such a long date because Judge Marsalek had been there "pretty long" and could get "transferred out of here." Instead the court suggested a date during the last week of February or first week of March. Defendant requested March 7, 2013, and the court agreed. Another ASA who was in the courtroom noted that defendant had not yet filed a response to the motion to reconsider, and asked whether the response would be filed prior to the March 7, 2013, date. Defense counsel stated that he "absolutely" would file a response prior to that date.

¶ 24 On March 7, 2013, the case appeared on Judge Gallagher's call. Defense counsel told the court that he had "attempted to reach [the ASA] multiple times with respect to their reply to my response" and had not received a return phone call. However, defense counsel discovered that his

response was "not even in" the file, "which probably explains why [the ASA] didn't return the call." Counsel stated that he could file his response "instanter today" and hand-deliver it to the State. The ASA stated that she needed to "at least look at" defendant's response, but that she "may not need to file [a reply], I'm pretty sure the case law that I have included [in the motion] is pretty cohesive of the issues." The court continued the case to March 29, 2013, for hearing before Judge Marsalek.

¶ 25 Defendant filed his response to the State's motion to reconsider the next day, March 8, 2013, arguing that the court had properly dismissed the case because his constitutional speedy trial rights had been violated. In that response, defendant blamed the State for a number of "errors and omissions" in their motion to reconsider, including, among other things, that he had filed a demand for speedy trial on January 10, 2012, but that it "mysteriously disappeared from the Clerk's file on some date subsequent." He additionally contended that he had been in attendance on March 27, 2012, the day the BFW was entered, but he was ill and was in the hallway "due to frequent trips to the restroom." He alleged that he had told the ASA he was sick and the ASA told him he would be excused, but then later his "absence was unfairly made an issue before the court by the People in seeking a BFW." Defendant further contended that on June 26, 2012, he was "not late at all, but was instead early" and counsel had spoken to the ASA after he arrived and indicated that he would be in another courtroom. The ASA agreed to have the case passed until he returned, but "failed to bring to the Court's attention that Defendant and counsel previously checked in and also failed to request the case be passed as agreed."

¶ 26 On March 29, 2013, the case appeared before Judge Kennedy-Sullivan. The State indicated that it was not ready for the hearing as a result of short-staffing and because defendant made some personal allegations against a number of specific ASAs in his response. Those ASAs

wished to be present to be heard regarding those allegations, and one of them was not available that day due to a sudden childcare issue. Although defendant contended that he would not argue those portions of his response and that they were merely "incidental *** factual background," the ASA observed that counsel brought up something "about a trial demand and whether or not it was in the file and that is actually more or less part and parcel to the legal argument." The case was continued, motion State, to April 2, 2013.

¶ 27 On April 2, 2013, Judge Marsalek conducted a hearing on the State's motion to reconsider and heard argument from both parties. The court found that the case had been ongoing since the October 9, 2011, arrest, and that "there has not been due diligence on the part of the state." The court stated that the finding was based on the two court dates when defendant answered ready but the State was not ready. Nonetheless, the court stated that it had "review[ed] the criminal code *** on section 51144 and *** [the] Ralston (phonetic) case and it does appear that I am required to vacate the dismissal." The court reset the case for "an absolute final day. If the case is not ready on that date the case will be dismissed." The case was continued for trial to May 3, 2013.

¶ 28 On April 30, 2013, defendant filed a 22-page motion to dismiss the case and supporting memorandum, along with 84 pages of supporting exhibits. In the memorandum, defendant maintained that his right to a speedy trial had been violated under "both the U.S. Constitution and [the] Constitution of the State of Illinois." Defendant did not contest that there was time remaining in the term pursuant to the Illinois Speedy Trial statute (725 ILCS 5/103-5 (West 2010)), but argued that the term provided by the statute was inferior to "the superior Constitutional rights to a speedy trial." He noticed his motion for May 2, 2013.

¶ 29 On the referenced date, the parties appeared before Judge Gallagher. The ASA informed the court that defense counsel had "handed [her] a rather large motion this morning," and requested that the court pass the case so she could review it. Defense counsel explained that his motion was based on Judge Marsalek "restrict[ing] her ruling to the Speedy Trial Act" when defendant was "looking for a ruling under the 6th Amendment and Article I, section 8 of the Illinois Constitution." The ASA indicated that the case "is set for trial tomorrow, I will plan on answering ready on the motion tomorrow. I would ask that Judge Marsalek be notified so that she can come down and hopefully hear the motion." Defense counsel stated that he was not "sure if Judge Marsalek will actually try this case with her schedule." The court responded, "I don't think she'll try it, but for the motion to reconsider [*sic*] I think she should be the judge on your motion." The court then continued the case to the next day.

¶ 30 On May 3, 2013, the case appeared before Judge Ramirez. The judge informed the parties that Judge Marsalek had instructed her to ask whether the State was ready for trial. The State answered ready, and the case was passed. When it was later recalled, the court stated that "we need to give this a date so we can set it for jury." The State responded, "Judge, it is at term, the state is answering ready." The court then stated, "Well, then I don't know what the jury room is today so let's find out. It's already 10:15, I don't know if we're going to be able to wrangle somebody." Defense counsel notified the court that he was "still waiting on Judge Marsalek to rule on my motion [to dismiss]." The case was passed to see if Judge Marsalek could address the motion.

¶ 31 When the case was later recalled, Judge Ramirez stated,

> "Just letting everybody know, Counsel, it seems that you were aware that there are no juries in this building on Friday so that's the

> first issue. I believe that was made aware [*sic*] to the parties yesterday, I wasn't the person here but if you were not made aware, there are no juries in this building on Friday. Secondly, Judge Marsalek *** has been called to come down and we'll see if she can come down and address your motion. You are not on the book so your option is either, A, wait for Judge Marsalek to see when she is going to be able to come down to address your motion or, B, you can get a date for her to come down and address it. Because you are not in the book I'm not going to address it, we have other matters that we have to attend to that take priority so if you want a moment to speak to your client and see what you would like to do."

¶ 32 Defense counsel responded, "I already know, we would like to have the matter in front of Judge Marsalek to have it go on this motion." The court then passed the case to see if Judge Marsalek was available.

¶ 33 When the case was later recalled, Judge Ramirez stated:

> "Counsel, I've just be [*sic*] advised that Judge Marsalek is engaged in her courtroom, she will not be able to be here, it's also my understanding that this was set for hearing on your motion for June 16th so your options at this point are for me to set this for a jury trial or you can keep the June date ***. [Y]ou are not on the book today, there are other matters that are on the book that will be heard today, this matter was not one of them."

¶ 34 Defense counsel responded that the case was not set for June 16, that the matter was marked final, and that at the previous day's court appearance, Judge Gallagher "specifically said we're going to trial today." The court stated, "Counsel, we don't have juries on Friday, I don't know why Judge Gallagher would ever tell you to hold it on call for today for a jury trial when there are no juries on Friday." The court asked defense counsel if he "want[ed] to come back on Monday for a jury trial," and he responded "I can't do it, Judge, I have to now reschedule my witnesses again."

¶ 35 As the parties were choosing a new date, defense counsel stated, "Judge, it's not motion defendant, it's not a continuance, this is apparently by court order." The court responded, "It is, it's order of court." The State then replied,

> "Actually it—if I can be clear the state also has time to respond to the defendant's motion certainly, the motion was filed yesterday, the state needs time to respond to those—certainly that's a delay occasioned by the defendant, the ruling and hearing of motions filed by the defendant and the judge to rule on them those are delays occasioned by the defendant. So based on the defendant's filing of a motion yesterday and the court needing to rule on it those are delays occasioned by the defendant, it should go motion defendant *** — ".

¶ 36 The Court interrupted, "I'm not going to get into battle at this point, go find out when you're available for your jury." The case was passed and later recalled, at which time the matter was continued to June 11, 2013.

¶ 37 On June 11, 2013, the parties appeared before Judge Gubin. The ASA informed the court that the State "anticipate[d] answering *** ready for a jury trial today," and was waiting for one of its witnesses to arrive. The court responded that the case was not listed "in the trial book." After both parties indicated that they would be prepared to go to trial by 9:30 a.m., the case was passed.

¶ 38 When the case was recalled, the court observed that all of the State's witnesses were present in court. The court then stated that it was "looking at a transcript of April 2nd in which it was set for trial and in front of Judge Marsalek, it was given the date of May 3rd and Judge Marsalek says that's the final date, May 3rd, if this case does not proceed to this final trial date this case will be dismissed. *** [W]hy didn't it go to trial on May 2nd or May 3rd?"

¶ 39 The ASA responded that defendant had filed a "quite lengthy" motion to dismiss and, "based on the length of the motion" the State had asked for time to review it until the next day, May 3, 2013. The ASA stated that her understanding was that "it was given a date for Judge Marsalek to rule on the defendant's motion [to dismiss]," but nonetheless, the State answered ready for trial on May 3, 2013. The ASA explained that it was not her understanding that defendant was demanding a jury trial, and she believed that defendant's motion needed to be ruled on before the case proceeded to trial. Defense counsel argued that "any answer of ready [by the State] would have been moot" because no jury trials are held on Fridays.

¶ 40 The court stated,

> "I'm going to make several rulings here. *** There has been game playing of which—with these dates of which I am offended beyond belief by both sides. And there is a misunderstanding of the law, a motion to dismiss is not the same thing as a motion to quash arrest

> or a petition for summary suspension that is a delay occasioned by the defendant. It is something that is heard just before the trial starts as to whether or not it's going to proceed. *** I am also going to rule that the state wasn't ready on May 2nd or May 3rd. *** I am following the ruling of Judge Marsalek on April 12th [*sic*]. It did not go forward in May, we're now in the middle of June. I am dismissing this matter because you did not proceed to trial within the timeframe set by the court and the Speedy Trial Act because that's what her ruling was in relationship to that."

¶ 41 The court further stated that the ASA's argument that the motion to dismiss was "a big motion, *** [was] not a defense to speedy trial." The court concluded that there "ha[d] been a violation of the Speedy Trial Act" and granted defendant's motion to dismiss "as no trial on May 3rd per order of April *** 2, 2013." In dismissing the case, however, the court also observed that "both sides have dirty hands" and that "the way [defense counsel] filed motions and handled it has not helped matters."

¶ 42 The State subsequently filed a motion to reconsider the dismissal, and the hearing on that motion was conducted by Judge Gubin. The court acknowledged that the State answered ready on May 3, 2013, and observed that there was a "misapprehension by Judge Ramirez that she couldn’t get a jury" on that day. The court stated that it was "the practice to not do juries on Fridays" but the court "could have forced the issue and gotten a jury." Nonetheless, the court stated that it was "concerned that the state so knowingly set it for a day that there couldn’t be a jury" and denied the State's motion for reconsideration.

¶ 43 The State appeals, and in this court maintains that the trial court erred in dismissing the case against defendant because the State was still within the term prescribed by the Illinois Speedy Trial Act when the case was dismissed, and the trial court lacked authority to dismiss the case. The State further argues that the trial court erred in dismissing the case because it had exercised due diligence in bringing defendant to trial, and defendant's speedy trial rights under the Illinois and federal constitutions were not violated.

¶ 44 Initially we must note a few irregularities about the procedural history of this appeal. Our records show that the record in this case was initially filed in the clerk's office on December 4, 2013. It was checked out to the State's Attorney's Office on February 24, 2014, who filed their appellate brief on March 26, 2014, and checked the record back into the clerk's office on the same day. On April 10, 2014, the record was released to defense counsel, whose printed name, signature, and address appear on a clerk's office document acknowledging that release. Defendant subsequently filed three motions—on June 4, 2014; July 17, 2014; and August 26, 2014—requesting extensions of time to file his appellee's brief. This court granted those motions, and a final extension was granted to defendant to and including October 10, 2014.

¶ 45 Meanwhile, at some point after the record was released to defense counsel, the record was lost. Our records show that defense counsel denied having the record, and, as a result, the State's Attorney's Office was required to reconstruct it. On October 20, 2015, this court accepted the reconstructed record as the record on appeal in this case.

¶ 46 Although defendant was granted multiple extensions over several months to file his appellee's brief, he still failed to do so. This court entered an order on September 24, 2015, finding that defendant failed to file his brief within the time prescribed by Illinois Supreme Court Rule 343(a) (eff. July 1, 2008), and, accordingly, we took this matter on the record and the

State's brief only. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) ("if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed.")

¶ 47 Generally, we review a trial court's decision on a speedy-trial challenge for an abuse of discretion. *People v. Buford*, 374 Ill. App. 3d 369, 372 (2007). The State, however, contends that this matter should be reviewed under a *de novo* standard, as it involves questions of statutory interpretation. *People v. Cordell*, 223 Ill. 2d 380, 385-86 (2006). We conclude that we need not decide whether our review will proceed under an abuse of discretion standard or the *de novo* standard, because under either standard of review our result would be the same. *People v. Kohler*, 2012 IL App (2d) 100513, ¶ 16.

¶ 48 In Illinois, a defendant has both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103–5 (West 2010); see *People v. Crane*, 195 Ill. 2d 42, 48 (2001). Although the constitutional and statutory provisions "address similar concerns * * *, the rights established by each are not necessarily coextensive." *People v. Hall*, 194 Ill. 2d 305, 326 (2000) (citing *People v. Kliner*, 185 Ill. 2d 81, 114 (1998), and *People v. Jones*, 104 Ill. 2d 268, 286 (1984)).

¶ 49 Under the constitutional provisions, "whether a defendant's right to a speedy trial has been violated depends on such factors as the length of the delay in trial, the reasons for the delay, the defendant's assertion of the speedy-trial right, and prejudice to the defendant caused by such

delay." *People v. Staten*, 159 Ill. 2d 419, 426 (1994), citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

¶ 50 Relatedly, the Speedy Trial Act (725 ILCS 5/103–5 (West 2010)) sets out specific time periods within which a criminal defendant must be brought to trial. Specifically, section 103–5(b) provides that a defendant who has been released on bond shall be tried within 160 days from the date he files a written demand for trial. 725 ILCS 5/103–5(b) (West 2010). Our supreme court has recognized that section 103–5 was "designed to implement" the constitutional right to a speedy trial (*People v. Gooden*, 189 Ill. 2d 209, 217 (2000)), and:

> "as a practical matter the statute operates to prevent the constitutional question from arising except in cases involving prolonged delay or unusual circumstances. In other words, the constitution protects only against arbitrary and oppressive delays, and so long as a defendant is tried within [the statutory term] he has not been deprived of his right to a speedy trial" (*People v. Baskin*, 38 Ill. 2d 141, 144 (1967)).

¶ 51 With this context in mind, we first turn to the question of whether defendant's statutory right to a speedy trial was violated under the Speedy Trial Act (725 ILCS 5/103–5 (West 2010)). The 160-day speedy trial period for a person released on bond or recognizance begins to run only when he files a written speedy trial demand. 725 ILCS 5/103–5(b) (West 2010). It is the State's duty to bring a defendant to trial within the statutory period, but, on a motion to dismiss, the defendant bears the burden of affirmatively establishing a speedy trial violation, and must show that the delay was not attributable to his own conduct. See *Jones*, 104 Ill. 2d at 280; *People v. Vasquez*, 311 Ill. App. 3d 291 (2000).

¶ 52 For purposes of computing the 160-day period, any delay occasioned by defendant will temporarily suspend the running of the statutory term until the expiration of the delay, at which time the term shall recommence. 725 ILCS 5/103–5(f) (West 2010). A delay is occasioned by the defendant and charged to the defendant when the defendant's acts caused or contributed to a delay resulting in the postponement of trial. See *People v. McDonald*, 168 Ill. 2d 420, 438 (1995); *People v. Turner*, 128 Ill. 2d 540, 550 (1989); *People v. Reimolds*, 92 Ill. 2d 101, 106 (1982). A defense counsel's express agreement to a continuance may be considered an affirmative act contributing to a delay which is attributable to the defendant. See *Reimolds*, 92 Ill. 2d at 106. Defendant is bound by acts of counsel, and any delays occasioned by defense counsel are attributed to the defendant. *People v. Clay*, 98 Ill. App. 3d 534, 541 (1981). Delay caused by defendant's filing of motions, and the time naturally associated with their processing, is ordinarily chargeable to defendant for speedy trial purposes. *Jones*, 104 Ill. 2d at 280; *McDonald*, 168 Ill. 2d at 440 (abrogated on other grounds by *People v. Clemons*, 2012 IL 107821). Additionally, defendant's failure to appear for any date set by the court operates to waive any previously filed demand. 725 ILCS 5/103-5 (West 2010); *People v. Minor*, 2011 IL App (1st) 101097, ¶ 15.

¶ 53 While defendant claimed that he filed a speedy trial demand on January 10, 2012, we find nothing in the record to support that claim. There is no speedy trial demand from that date in the common law record, and there is no notation that such a demand was filed on the clerk's record. Moreover, and even more importantly, defense counsel appeared in open court on that date and explicitly stated on the record that he was not demanding trial and was not ready for trial at that time. Thus, even if the alleged demand existed, defense counsel's explicit disavowal of such a demand on the record would operate to waive it. See *People v. Stingley*, 277 Ill. App. 3d 239,

242 (1995) ("Where the report of proceedings conflicts with the common law record, the report of proceedings will prevail"). Instead, defendant agreed to a continuance to February 27, 2012, and, thereafter to March 27, 2012. See *Reimolds*, 92 Ill. 2d at 106. On March 27, defendant failed to appear, and a bond forfeiture warrant was entered and continued for June 26, 2012. Even if any speedy trial demand existed at that point, defendant's failure to appear would have waived the first demand, and required him to file another. 725 ILCS 5/103-5 (West 2010); see also *Minor*, 2011 IL App (1st) 101097, ¶ 15 (holding that the defendant's failure to appear operated to waive her previously filed speedy trial demand, and a new speedy trial term began upon the filing of her second demand).

¶ 54 The record is clear that defendant initially filed a written speedy trial demand on June 26, 2012, and we will begin computing the statutory term on that date. 725 ILCS 5/103–5(b) (West 2010). However, earlier on that date, the State indicated that both their witnesses were in court, but defendant was not present. By the time defendant arrived later, the State indicated that they were no longer ready as the trooper witness was needed on two other cases. The State twice told the court and counsel that it would be "fine" if defendant wanted to file a written speedy trial demand, and if he did so, the continuance would be "motion State." Although defendant was given multiple opportunities to demand trial or indicate that he would be filing a written demand, he did not do so. Instead, defendant acquiesced to the September 10, 2012, by agreement trial date, misleading the State and the court into believing that he was not demanding trial. While the statutory speedy trial term begins when defendant files a written speedy trial demand (725 ILCS 5/103–5(b) (West 2010)), we question whether, under these circumstances, defendant could properly leave the courtroom and file a speedy trial demand when earlier that day, he was late to court and not ready for trial (see *People v. Galloway*, 2014 IL App (1st) 123004, ¶ 31 (holding

that the defendant's late arrival operates to waive a speedy trial demand)), and had acquiesced to a continuance (*Reimolds*, 92 Ill. 2d at 106). If nothing else, such behavior appears to be disingenuous, and aimed to circumvent the previous agreement so that the resulting time period would count as part of the statutory term. In this case, defendant's later filing required the State to scramble to ensure that his demand was addressed through two motions to advance, and three court appearances which defendant and his counsel did not attend. Under the facts here, we would conclude that the resulting delay from the time of defendant's demand until he reappeared in court on July 27, 2012, was attributable to defendant.

¶ 55 Thereafter, defendant reappeared on July 27, 2012, explicitly withdrew his demand for trial, and informed the court that he was going to "stick to" the September 10, 2012, by-agreement date. As such, the resulting delay was attributable to defendant (*Id.*), and the statutory period was tolled until the agreed-upon date.

¶ 56 The statutory period then recommenced on September 10, 2012, when the State answered not ready and defendant demanded trial on the record. Although this was really the first time that the delay had not been either agreed to or occasioned by defendant, defendant objected to the State's request for a continuance calling it "outrageous," and misled the court into believing that this was "the third time." It does not appear from the record that the court had the benefit of the complete transcripts that this court has, when it ordered that the continuance would be "final" over defendant's objection, and that if the case did not proceed to trial on the next date, "it's going to get dismissed." The matter was continued, motion State, to October 17, 2012, and the 37-day period between September 10 and October 17 was attributable to the State.

¶ 57 On October 17, 2012, the State answered not ready. Defendant "strenuously objected" and counsel told the court that it had previously indicated "at least on two occasions that this

would be final." Although counsel had said at the last date that he would not have his physician witness on standby based on the court's and the State's representations that the witness would not be necessary until day two of trial, counsel argued that the witness had "blocked out the entire day again," that defendant was "going to have to pay him," and that this was "the umpteenth time." The court appears to have relied on counsel's misrepresentations, and its prior, mistaken, order, to dismiss the case, even though it was only on day 37 of the 160-day term. We conclude that the resulting period after the case was dismissed until it was reinstated was occasioned by defendant, on whose motion the matter had been dismisse*d. McDonald*, 168 Ill. 2d at 440; see also *People v. Garcia*, 65 Ill. App. 3d 472, 476 (1978) ("the [speedy trial] period runs only when a charge is pending against the accused.").

¶ 58 In dismissing the case, the court specifically relied on two dates—July 7, 2012, and July 26, 2012—on which the court said that defendant answered ready and the State answered not ready. In our review of the record, the case was not up on either of those two dates, and the four dates that the case was up in July 2012 (July 3, 9, 24, and 27) were not trial dates. Instead, all four dates were related to addressing defendant's demand, and on three of the dates, defendant and his counsel did not appear. Additionally, to the extent that the court was referring to the June 26, 2012, date, defendant had not filed a speedy trial demand prior to that appearance, and further, the State initially had both of its witnesses in court, but defendant appeared late and thus was not ready for trial himself. *Galloway*, 2014 IL App (1st) 123004, ¶ 31.

¶ 59 Thereafter on April 2, 2013, the court reconsidered the dismissal, and acknowledged on the record that it had not had the authority to dismiss the case under the circumstances. The court vacated the previous dismissal, and continued the matter for another "final" trial date of May 3, 2013, for a total of 31 days. However, on April 30, 2013, defendant filed a 22-page motion and

memorandum in support of his motion to dismiss the case, as well as 84 pages of supporting exhibits. He noticed his motion for May 2, 2013, the day before the matter was set to go to trial, and appeared before Judge Gallagher. The State indicated that it would be prepared to argue defendant's motion the next day before Judge Marsalek, whom the case was following. Defense counsel expressed his doubt that Judge Marsalek would actually be able to conduct the trial the next day because of "her schedule," and Judge Gallagher agreed, but stated that he believed that she "should be the judge on [defendant's] motion." The court then continued the case to the next day.

¶ 60 On May 3, 2013—day 68 of the 160-day term—the State answered ready for trial. Defense counsel informed the court that "we're still waiting on Judge Marsalek to rule on [his] motion [to dismiss]" and insisted that he "would like to have the matter in front of Judge Marsalek to have it go on this motion." When the court indicated that Judge Marsalek was not available and that the matter would not be going to trial that day, defense counsel protested that Judge Gallagher "specifically said we're going to trial today"—when, in actuality, both Judge Gallagher and counsel himself had expressed doubt that it would proceed to trial. Defendant's simultaneous insistence that his motion to dismiss be heard by Judge Marsalek, as well as that the matter "go to trial today," appears to this court to reveal gamesmanship on his part—to delay the proceedings so that the matter could not be tried on the date previously ordered. See *People v. Fosdick*, 36 Ill. 2d 524, 529 (1967), citing *People v. Bagato*, 27 Ill. 2d 165, 169-70 (1963) (noting that a court must "carefully examine[] the facts to prevent a ‘mockery of justice’ either by technical evasion of the right to speedy trial by the State, or by a discharge of a defendant by a delay in fact caused by him.").

¶ 61 The court then continued the matter to June 11, 2013, and we find that the resulting delay was occasioned by defendant, who filed a lengthy motion to dismiss days before the matter was ordered to go to trial. See *People v. Kucala*, 7 Ill. App. 3d 1029 (1972) (holding that where defendant filed three motions, including a motion to dismiss the indictment on grounds of unnecessary delay, two days before the running of the 120-day period, the motions "occasioned delays within the meaning of the statute"); *People v. Lendabarker*, 215 Ill. App. 3d 540, 553 (1991).

¶ 62 Thereafter, the trial court dismissed the matter on June 11, 2013, finding that there "ha[d] been a violation of the Speedy Trial Act," despite that the case was only on day 68 of the 160-day term, and that the State had answered ready for trial on both May 3, and June 11, 2013. This dismissal was erroneous. Although the court indicated that its decision to dismiss the case was based on a violation of "the Speedy Trial Act," the court made no inquiry into, or analysis of, the statutory term as would be required for such a dismissal. As described above, an analysis of the statutory term would have resulted in the determination that the matter was still well within the 160-day period. We thus conclude that the trial court abused its discretion. See *Jones*, 104 Ill. 2d at 286 (where the 352 days of delay attributable to defendants was subtracted from the total delay of 465 days, the result was within the 160-day statutory term and defendants' speedy trial rights were not violated).

¶ 63 Next we will consider whether there was any constitutional violation of defendant's speedy trial rights which could otherwise justify the dismissal. As stated previously, our supreme court has instructed that if an accused is brought to trial before the expiration of the statutory term, "the constitutional question" does not arise and "he has not been deprived of his right to a speedy trial." *Baskin*, 38 Ill. 2d at 144 (1967). Because we have held that defendant's statutory

right to a speedy trial was not violated, we could also conclude that defendant's constitutional speedy trial rights were, likewise, not infringed. *Id*. Nonetheless, even if we were to apply the constitutional speedy trial analysis, we would reach the same conclusion.

¶ 64 The question of whether a defendant's constitutional right to a speedy trial has been violated depends upon the surrounding circumstances of each case. *People v. Beyah*, 67 Ill. 2d 423 (1977). The United States Supreme Court has identified four factors to be considered when determining whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right; and (4) the prejudice to the defendant as a result of the delay (*Barker*, 407 U.S. at 530), and the Illinois Supreme Court has adopted these same factors (*People v. Bazzell*, 68 Ill. 2d 177, 182 (1977)). Any factual determinations made by the trial court are upheld unless they are against the manifest weight of the evidence, but the ultimate determination of whether a defendant's constitutional speedy trial rights have been violated is reviewed *de novo*. *Crane*, 195 Ill. 2d at 51-52.

¶ 65 Courts have recognized that the first factor—the length of the delay—serves a type of triggering function. *Barker*, 407 U.S. at 530. If the length of the delay is "presumptively prejudicial," the court goes on to balance the remaining three factors. *People v. Belcher*, 186 Ill. App. 3d 202, 205–06 (1989). If the length of delay is not "presumptively prejudicial," there is no constitutional violation and the court need not conduct the remainder of the analysis. *People v. Makes*, 103 Ill. App. 3d 232, 236 (1981); *Belcher*, 186 Ill. App. 3d at 206. Delays of one year are generally thought to cross the threshold dividing an ordinary delay from a presumptively prejudicial delay. *People v. Lock*, 266 Ill. App. 3d 185, 191 (1994). The delay in this case—calculated between defendant's initial arrest and the ultimate dismissal—was approximately one

year and eight months. As such, the delay is presumptively prejudicial, and requires an analysis of the other three *Barker* factors.

¶ 66 The second factor—the reasons for the delay—weighs heavily in favor of finding no violation. As illustrated above, the majority of the delays in this case were occasioned by defendant. For over eight months, defendant either requested or agreed to the continuances in his case. See *Reimolds,* 92 Ill. 2d at 106. Defendant also failed to appear on March 27, 2012, and arrived late on June 26, 2012, which inhibited the State from advancing the case to trial. Thereafter, when he filed his speedy trial demand later on June 26, 2012, the State tried multiple times to advance the case to address his demand and reset the matter for trial. After three court appearances in a row with defendant absent, he returned, withdrew his demand, and agreed to the previously-set trial date.

¶ 67 We also note that there was a period of five and one-half months during which the case against defendant was dismissed and the State was pursuing a motion to reconsider. Defendant also occasioned delay during this time. When the State filed its amended motion one day late, defendant did not object to the late filing, but used it as an excuse to file his response nearly two months late. Defendant's failure to timely file the response required the hearing date to be postponed twice for a period exceeding two months, from January 24, 2013, to March 29, 2013. By contrast, the State's delay in moving to continue the matter due to short-staffing and defense counsel's allegations against certain ASAs, delayed the matter four days—from March 29, 2013, until April 2, 2013.

¶ 68 Moreover, on the two occasions when the State answered not ready for trial, it provided reasons that are generally accepted as justifying a reasonable delay. The court in *Barker* explained that:

> "different weights should be assigned to different reasons [justifying a delay]. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531.

¶ 69 Here, the State answered not ready for trial on September 10, 2012, and on October 17, 2012. There is no indication in the record that the delays were intentional, or intended to hamper the defense. Instead, on both occasions, the reasons justifying the delays were related to the availability of the State's witnesses. On September 10, 2012, the complaining witness was missing from court, and on October 17, 2012, another witness was unavailable because he was on medical leave and unable to walk. In our view, these two delays cannot justify the drastic remedy granted to defendant in this case. *Id*.

¶ 70 Our conclusion on this factor is not altered by the fact that the State requested a trial date on a Friday, upon which the trial court placed great weight. We note that the record shows that the State answered ready for trial on the set date, and it was the court and defendant, who insisted on having Judge Marsalek hear his recently filed motion to dismiss, preventing the matter from proceeding to trial on that date. Moreover, the record also shows that the judge was incorrect, and that a jury could have been made available on that day.

¶ 71 Regarding the third factor, defendant's assertion of his speedy trial right, we note that while defendant demanded trial on a number of occasions, he made no such demand until eight and one-half months into the proceedings, and the delay following his demand and when the case was ultimately dismissed was less than one year. Additionally, during that one year period, defendant went back and forth between asserting his right to a speedy trial and agreeing to or occasioning delays in the proceedings. Under the circumstances of this case, we do not find this factor to weigh in defendant's favor.

¶ 72 Finally, the fourth factor—the prejudice to defendant as a result of the delay—is minimal and weighs in favor of finding no constitutional violation. In assessing prejudice to the accused, the court must consider the interests sought to be protected by the speedy-trial right: (1) the prevention of oppressive pretrial incarceration; (2) the minimization of the anxiety and concern of the accused; and (3) the limitation of the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532; *People v. O'Quinn*, 339 Ill. App. 3d 347, 356 (2003). In this case, the significance to be given to the first two interests is minimal, given that defendant was released on bond during the pendency of the proceedings, and there is no indication that he suffered any unusual anxiety or concern. See *People v. Kaczmerak*, 207 Ill. 2d 288, 300 (2003) ("We note that [anxiety and concern] is present to some extent in every case and absent some unusual showing, this inconvenience alone is of slight import."). Additionally, defendant offered no particularized showing that his defense was impaired by the delay. There is no claim that any of his witnesses died or otherwise became unavailable based on the delay. *Barker*, 407 U.S. at 534. While defendant summarily argued in his motion to dismiss that "memories fail," he did not contend that his witness, a physician, would be testifying from memory rather than from a written report.

In these circumstances, we find that the fourth factor weighs in favor of ruling that no speedy trial violation occurred.

¶ 73 When weighing these factors, we find that the one year and eight month delay between in this case was justified and did not violate defendant's constitutional rights to a speedy trial. We thus conclude that the dismissal cannot be upheld on this ground.

¶ 74 Finally, we observe that the record on appeal clearly demonstrates defense counsel's lack of candor to the court, which led to much of the confusion at the trial level. As the facts above illustrate, defense counsel repeatedly exaggerated to the court, or misrepresented the court's previous statements. Moreover, twice at trial, counsel claimed to have filed something that was not in the file, and, during this appeal, counsel claimed not to have the record which our clerk's office had documentation that he had signed out. Specifically, on the first occasion, defendant claimed to have filed a speedy trial demand on January 10, 2012, when he explicitly stated on the record that he was not demanding trial on that date. Although the obvious inference would be that counsel neglected to file the documents or lost the record, counsel insinuated instead that their absences were due to nefariousness or negligence by the State's Attorney's Office or the court. Mistakes like the ones counsel claimed occurred in this case are rare indeed, and it strains credulity that such mistakes would have occurred three times to one party during the course of one case.

¶ 75 For the aforementioned reasons, neither defendant's constitutional nor statutory speedy trial rights have been violated, and the trial court erred in granting his motion to dismiss. The judgment of the circuit court of Cook County is reversed and remanded for further proceedings consistent with this opinion.

¶ 76 Reversed and remanded.