2016 IL App (2d) 150819-U
No. 2-15-0819
Order filed November 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ANTHONY WILDER, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CF-1985 Honorable Thomas Stanfa, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the case on speedy-trial grounds. Reversed and remanded.

¶ 2 On December 5, 2014, defendant, Anthony Wilder, was arrested for felony domestic battery, misdemeanor domestic battery, and interference with reporting domestic violence. On April 27, 2015, 123 days after he was taken into custody, defendant moved to dismiss the pending charges pursuant to section 103-5(a) of the Code of Criminal Procedure of 1963 (Speedy Trial Act or Act) (725 ILCS 5/103-5(a) (West 2014) (setting forth the 120-day period)). The trial court granted the motion to dismiss and denied the State's subsequent motion to reconsider.

The State appeals. Under the unique facts of this case, we determine that defendant improperly used the Act as a sword to defeat the threat of conviction, and, thus, the trial court erred in dismissing the case. Reversed and remanded.

¶ 3 I. BACKGROUND

¶ 4 Defendant was in custody from December 5, 2014, to April 27, 2015. The trial court would later determine that 123 of those days were attributable to the State.

¶ 5 On December 12, 2014, defendant appeared before Judge James Hallock. Judge Hallock informed defendant that defendant was not brought to the proper courtroom: "This is a matter that was in Room 217 today, and Room 217 is closed." Judge Hallock further informed defendant that he had conferred with Judge Stanfa, who would preside over the case. Judge Hallock then recited the charges and possible penalties defendant faced and asked whether defendant had hired an attorney. Defendant replied: "No, I just want to take this to trial." Judge Hallock asked defendant if he wanted to be appointed a public defender. Defendant answered: "Yes, and I want to take this to a speedy trial." Judge Hallock appointed counsel, who was not "a courtroom 217 attorney" and who would not be representing defendant at trial. However, counsel secured the next court date: "We are asking for the first date available, which I understand is Wednesday [December 17, 2014]." Judge Hallock agreed, concluding: "Here's the appointing order, and we will show that the December 17[, 2014] date is *by agreement*. I guess that's it for today. Go on back with the deputy. You're all set." (Emphasis added.) Defendant answered, "thank you," and the proceedings concluded.

¶ 6 On December 16, 2014, new defense counsel filed a written speedy-trial demand. On December 17, 2014, before Judge Stanfa, defense counsel requested a continuance to January 7, 2015, to obtain discovery. Thus, the speedy-trial term tolled until January 7, 2015. On January

7, 2015, defendant answered ready for trial and reasserted his right to a speedy trial. The trial court set the trial for March 12, 2015. On that date, the State moved to continue trial to locate a material witness. The court continued the matter to April 1, 2015.

¶ 7 On April 1, 2015, the State again moved to continue to locate the same witness. Defense counsel objected to the continuance. Counsel stated: "We would be continuing to answer ready, demanding trial. My client has been in custody upwards of four months at this point awaiting trial." The State asked for the date of April 27, 2015. The court acknowledged that the State had not been dilatory, but it clarified that this continuance was on the State. The court concluded: "April 27[, 2015,] will be the next jury trial date. So, [defendant], your jury trial has now been continued to the 27th of April, at 8:30 in the morning." Defendant did not object to the April 27, 2015, date as being outside the Act's 120-day period, and the hearing concluded. (At some point between April 1, 2015, and April 27, 2015, defense counsel withdrew and new defense counsel was appointed.)

¶ 8 On April 27, 2015, defense counsel moved to dismiss the pending charges based on a violation of the Speedy Trial Act. The State filed no written response and agreed to argue the motion that day.

¶ 9 Defense counsel argued that the period from December 12, 2014, to December 17, 2014 (December period), was attributable to the State, because the continuance was not occasioned by defendant's request or acquiescence. Rather, defendant twice demanded trial. "[T]hrough no fault of defendant, the December 12[, 2014,] hearing was held in the wrong courtroom, in front of the wrong judge, and with the wrong attorneys present." Judge Hallock did not allow the case to proceed to trial that day because courtroom 217, where defendant was set to be tried, was closed. Moreover, according to defense counsel, Judge Hallock initially appointed a public

defender who was not "a courtroom 217 attorney." Defendant's first counsel served only to secure him the next possible date in the correct courtroom. That Judge Hallock concluded the hearing by commenting that the continuance was "by agreement" was merely his "pronouncement" that there was to be a continuance.

¶ 10 The State argued that defendant cannot gain relief based on Judge Hallock's alleged misattribution of the December period: "There was no objection *** to the fact that this is going to be placed on a by-agreement term." Moving forward with the case, the State should be able to rely on the court's statement that the December continuance was by agreement. Thus, "when this case was set for trial [in April], if Defense Counsel believed that it was outside of the speedy trial, they should have specifically objected to the court date that was set. They did not."

¶ 11 The trial court determined that the December period was attributable to the State, and it granted the motion to dismiss. It did not appear to consider the State's argument that, absent defendant's "specific objection" to the April 27, 2015, trial date as outside the 120-day period, the State should have been able to rely on Judge Hallock's earlier pronouncement that the December delay was "by agreement" when the State chose the April 27, 2015, trial date.

¶ 12 On May 11, 2015, the State moved to reconsider the dismissal. It argued *inter alia*:

> "Judge Hallock, being physically present for the court date and able to see physical demeanor and body language, among other things, is in the best position to make a determination as to whether the date was by agreement and his determination was clear and without objection. *** Any review of this common law record and transcript of the December 12 court date that interprets the date as being attributable to the *[State] would put prosecutors in the unworkable position of having to calculate a speedy trial time period based not on the common law record or even the transcript of the Judge's finding,*

but, rather, on a guess of how a different judge in the circuit may interpret the court date despite the sitting judge's clear finding. Calculating an accurate speedy trial period in this way would be impossible." (Emphasis added.)

¶ 13 The trial court denied the State's motion to reconsider:

"I believe that my ruling was correct then, and I still believe it's correct now. I don't—I think that on the date that this occurred, from my reading of the transcript, [defendant] said, 'I wanted a trial, I wanted a trial.' [Defense counsel] stepped up and it was continued and the Judge said, 'It's continued by agreement,' and I don't think anyone [had] enough time to say anything."

Again, the court did not appear to consider the State's argument that, absent defendant's "specific objection" to the April 27, 2015, trial date as outside the 120-day period, the State should have been able to rely on Judge Hallock's earlier pronouncement that the December delay was "by agreement" when the State chose the April 27, 2015, trial date. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The State argues that the trial court erred in dismissing the case on speedy-trial grounds. Generally, a trial court's determination of who is responsible for a delay is entitled to deference and will be affirmed absent an abuse of discretion. *People v. Mayo*, 198 Ill. 2d 530-35 (2002); *People v. Brexton*, 2012 IL App (2d) 110606, ¶ 14 (noting a continuing debate as to how much deference to afford trial courts in speedy-trial cases). Here, less deference is required, because the trial court, under Judge Stanfa, ruled based on the dry transcripts from Judge Hallock's proceeding. Additionally, less deference is required, because our holding ultimately turns on the trial court's legal error. We hold that, even if the December period should have been attributed to the State, defendant was not entitled to have his case dismissed due to the misattribution

where defendant accepted the December dates as tolled when, on April 1, 2015, the parties chose the April 27, 2015, trial date without comment or objection. As will be set forth below, defendant improperly used the Speedy Trial Act as a sword to avoid the threat of conviction, and, thus, the trial court erred in granting his motion to dismiss.

¶ 16 A. The Act and the Case Law

¶ 17 We begin our analysis by setting forth the relevant provisions of the Act. We also discuss the cases upon which the State relies, *People v. Cordell*, 223 Ill. 2d 380 (2006) and *Hampton*, 394 Ill. App. 3d 683.

¶ 18 Section 103-5(a) of the Act provides:

> "Every person in custody in this State for an alleged offense 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, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. *Delay* shall be considered *to be agreed to* by the defendant unless he or she *objects to the delay by making a written demand for trial or an oral demand for trial on the record*." (Emphases added.) 725 ILCS 5/103-5(a) (West 2014).

¶ *19* 1. *Cordell*

¶ 20 In *Cordell*, the *appellate* court relied on outdated law that did not require a defendant to object to a proposed continuance and that permitted a defendant to remain silent or even acquiesce to a proposed continuance without tolling the term. *Cordell*, 223 Ill. 2d at 387-88. Before the *supreme* court, the defendant appeared to concede that the appellate court had relied

on outdated law. *Id*. He had to; there is no question that section 103-5(a) of the Act requires defendants to object to delays in order to toll the speedy-trial term. 725 ILCS 5/103-5(a) (West 2014). However, the defendant creatively argued that section 103-5(a) did not require him to object to *every* delay or continuance, *only* those continuances that postpone an existing trial date. *Id*. at 388-89. In the defendant's view, he was not required to object, because the continuance at issue did not postpone an existing trial date. *Id*.

¶ 21 The supreme court rejected outright the defendant's argument. *Id*. at 390. It determined that a defendant was required to object to *every* continuance in order to avoid tolling the period, not *only* those continuances that moved up an existing trial date. *Id*. Thus, the defendant *was* required to object to the continuance at issue, where, at a status hearing with no existing trial date, the trial court set an initial trial date outside the 120-days. *Id*. at 390-91.

¶ 22 Having determined that the defendant *was* required to object, the supreme court next determined whether the defendant did, indeed, object. *Id*. at 391. The following exchange was at issue:

> "DEFENSE COUNSEL: *** I think at this point we're going to withdraw that [*pro se* discovery] motion and request this be set for jury.
>
> THE COURT: All right. I will give a jury trial date. Let me see, how long do we think this will take? Is it 120 days?
>
> ***
>
> THE COURT: *** Alright. I'll give you a jury trial date. You have either June 12th or June 11th?
>
> DEFENSE COUNSEL: Let me just check that June 11th. ***
>
> ***

THE COURT: June 11th, then, at 10:00 jury trial, sir. Okay." *Id*. at 383.

¶ 23 The *Cordell* court held that the defendant's statements did not constitute an objection under the Act. *Id*. at 392. The court acknowledged that the language of the Act merely stated that a defendant must object "by making a written demand for trial or an oral demand for trial on the record," but it explained that, in some cases, a simple demand for trial was not enough. *Id*. at 391-92 (discussing 725 ILCS 5/103(a) (West 2014)). It stated that, "[t]o allow basic requests for trial, made before any delay was even proposed, to qualify as objections to 'delays' not yet proposed *would provide defendants with another sword to use after the fact to overturn their convictions*." (Emphasis added.) *Id*. at 391-92. This would not comport with the legislature's intention to "plac[e] the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed." *Id*. at 391. Although the defendant made an oral demand for trial, he did not make the demand in response to any proposed or actual continuance. *Id*. The defendant had not requested trial in response to a proposed continuance, and, therefore, his request for a trial could not be construed as a request for a speedy trial. *Id*. (citing *People v. Peco*, 345 Ill. App. 3d 724, 734 (2004) ("while no magic words are required to constitute a speedy-trial demand, there must be some affirmative statement requesting a speedy trial")). The defendant did not object to the continuance, the term tolled, the 120-day term did not expire, and the defendant was not entitled to a dismissal. *Id*.

¶ 24 2. *Hampton*

¶ 25 In *Hampton*, this court considered whether the defendant sufficiently objected to the proposed continuance. *Hampton*, 394 Ill. App. 3d at 689. The following exchange was at issue:

"[DEFENSE COUNSEL]: Judge, we have previously demanded a speedy trial. We would continue in that demand.

THE COURT: It's People's time now. Do you want me to go forward or backwards? Should I go past this date, or do you want me to try to advance the date?

[DEFENSE COUNSEL]: March 31st [*i.e.*, past the date].

[STATE]: March 31st would be fine. [Another state's attorney] says the week before or week after, and court is still unavailable the 17th. Is that an accurate statement?

THE COURT: Yes. All right. Then I shall mark you down for March 31st. People's motion to continue is granted. Final pretrial conference is the Friday before, March 28th." *Id*. at 684.

¶ 26 The *Hampton* court held that the defendant did *not* sufficiently object to the continuance. The court acknowledged that, when the State moved for a continuance, the defendant initially objected and asserted his right to a speedy trial. *Id*. at 689. However, the defendant negated his objection when *he* proposed a date outside of the 120-day term. *Id*. It was possible for the court to grant the State's continuance and still set the trial date within the 120-day term—indeed, the court offered the defendant a date within the 120-day term when it asked the defendant if he would like to move the case "forward or backwards." *Id*. By proposing a date outside the 120-day term where it was possible to set the trial within the 120-day term, the defendant "use[d] section 103-5(a) as a weapon to avoid the threat of a conviction." *Id*. The court concluded that, while the circumstances before it differed from those in *Cordell*, its ruling was consistent with *Cordell*'s directive that section 103-5(a) be used as a shield to protect the right to a speedy trial, not as a sword to defeat the threat of a conviction. *Id*.

¶ 27 B. The Merits of the Instant Case

¶ 28 Here, as in *Cordell* and *Hampton*, defendant has not used section 103-5(a) as a shield to protect the right to a speedy trial but as a sword to defeat the threat of a conviction. The facts of

our case differ in some ways from *Hampton* and *Cordell*; speedy-trial cases do not follow identical scripts. The unique aspect of this case is that we must look at the *interplay* between two separate periods, the December period and the April period, to appreciate defendant's improper use of the Speedy Trial Act as a sword.

¶ 29 The State noted the interplay between the two periods at the hearing on the motion to dismiss and again, more persuasively, in its motion to reconsider:

> "Any review of [the] transcript of the December 12 court date that [declares] the date as being attributable to the [State] would put prosecutors in the unworkable position of having to calculate a speedy trial time period based not on the common law record or even the transcript of the Judge's finding, but, rather, on a guess of how a different judge in the circuit may interpret the court date despite the sitting judge's clear finding. Calculating an accurate speedy trial period in this way [when choosing the April trial date] would be impossible."

¶ 30 In granting the motion to dismiss, the trial court looked at the December period in isolation, and it did not consider the interplay between Judge Hallock's "by agreement" attribution and the parties' subsequent task of choosing a trial date within the 120-day term. As we will explain, even if we accept for the purposes of this analysis only that Judge Hallock improperly labeled the December 12, 2014, continuance as "by agreement" when the five-day delay to appear in the proper court room should have been attributed to the State, defendant's actions from December 2014 through April 2015 preclude him from obtaining relief.

¶ 31 At the end of the December hearing, Judge Hallock pronounced that the five-day delay would be "by agreement." When defendant appeared in the proper courtroom, his new counsel never sought to correct the record concerning the December attribution. On April 1, 2015, the

court granted the State's continuance over defendant's objection that he had already been in custody four months (a small portion of which had already been attributed to him). The court noted that the time between April 1, 2015, and the new trial date would be attributed to the State. The State, relying on Judge Hallock's December "by agreement" attribution, believed that a trial date of April 27, 2015, fell within the 120-day term. When the State chose the April 27, 2015, trial date, defendant remained silent. Then, on April 27, 2015, defendant moved to dismiss the case, arguing that the trial court misattributed the December delay, and, thus, the April 27, 2015, trial date fell outside the 120-day term.

¶ 32 Defendant's April 1, 2015, reminder that he already had been in custody four months invoked the 120-day period. Both parties and the trial court should have had the 120-day period in mind as they chose the April 27, 2015 trial date. By never asking the trial court to correct the December "by agreement" attribution, defendant invited the State to count the December days as tolled when it chose the April 27, 2015, date. Defendant's silence on April 1, 2015, after the State suggested the April 27, 2015, date was both: (1) an implicit agreement that the April 27, 2015, date narrowly met the 120-day deadline; and (2) an implicit acceptance of the December "by agreement" attribution.

¶ 33 We understand that, on April 1, 2015, defendant generally objected to the proposed continuance, demanded trial, and noted that he had been in custody four months. However, in effect, defendant lay in wait, allowing the State to choose the April 27, 2015, trial date, only to later object to that date as outside the 120 days. By waiting until April 27, 2015, to challenge the December attribution, defendant left the State with no opportunity to go back and choose a date within the term. Defendant accepted the December attribution at a time when it was still possible to correct the December attribution *and* grant the State's April continuance *and* set a

date inside the 120 days. See *Hampton*, 394 Ill. App. 3d at 689. To allow defendant to challenge the December attribution now that it is too late to assign an earlier trial date would be to allow defendant to use section 103-5(a) as a weapon "after the fact" to avoid the threat of conviction. See *Cordell*, 223 Ill. 2d at 390. Accordingly, we hold that the trial court erred in granting defendant's motion to dismiss.

¶ 34 Based on our ruling, we do not address the State's remaining arguments. However, we wish to correct a misunderstanding of *Cordell* exhibited in both parties' briefs. The parties focus in isolation on the following sentence from *Cordell*: "Any action by either party or the trial court that moves the trial date outside of that 120-day window qualifies as a delay for purposes of the section." *Cordell*, 223 Ill. 2d at 390. Defendant asserts, and the State appears to acknowledge the possibility, that this sentence means that a defendant's agreement to a continuance does not toll the 120-day period, unless the continuance results in a trial date outside the 120-day window.

¶ 35 The parties' reading of *Cordell* accepts the very proposition that the *Cordell* court rejected; the *Cordell* court rejected the defendant's argument that he need only object to a specific subset of delays or continuances, those that postpone previously set trial dates. *Id*. *Cordell* did not change the well-established rule that a defendant tolls the 120-day period whenever he or she agrees to a proposed continuance, regardless of whether the continuance pushes a previously set trial date outside the 120-day period. See *Mayo*, 198 Ill. 2d at 537 (2002).

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the trial court's dismissal of the case and remand for further proceedings.

¶ 38 Reversed and remanded.