2016 IL App (4th) 150613-U

NO. 4-15-0613

FILED
October 27, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
ANTHONY D. GOODWIN,	)	No. 14CF1126
Defendant-Appellee.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Under Illinois Supreme Court Rule 604(a) (eff. Dec. 11, 2014), this court has jurisdiction over the State's appeal of the trial court's posttrial dismissal of defendant's charges for the State's violation of defendant's statutory right to a speedy trial.

(2) By not asserting the argument before the trial court, the State forfeited its contention the speedy-trial term did not expire because the term was lengthened due to defendant's being in simultaneous custody on unrelated charges in the same county.

(3) The trial court did not abuse its discretion in finding defendant's right to a speedy trial was violated.

¶ 2 In April 2015, defendant, Anthony D. Goodwin, was convicted by a jury of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)). After his trial, defendant alleged defense counsel provided ineffective assistance of counsel. The trial court

agreed with defendant, finding trial counsel ineffective for not challenging the State's use of continuances to acquire deoxyribonucleic acid (DNA) testing results, when trial counsel learned no DNA testing had ever been performed. The court found defendant was denied his right to a speedy trial and dismissed the case.

¶ 3 The State appeals, arguing (1) because defendant was in simultaneous custody on an unrelated charge in the same county, the speedy-trial period expanded and did not terminate before defendant's trial; (2) the trial court erroneously concluded the speedy-trial period expired because the State sought continuances for DNA testing on false pretenses. Defendant argues, in part, this court lacks jurisdiction over the appeal because the posttrial dismissal of his case amounted to an effective acquittal. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On August 14, 2014, Rantoul police officers were dispatched to a report of a home invasion with shots fired. Three men had entered the apartment of Benjamin Bruce. One of the men struck Bruce with a revolver and fired a shot into the floor.

¶ 6 A. Case No. 14-CF-1126

¶ 7 On August 15, 2014, as a result of the events in Bruce's apartment, in Champaign County case No. 14-CF-1126, the State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2) (West 2014)), home invasion (720 ILCS 5/19-6(a)(3) (West 2014)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)). Defendant appeared in custody and was arraigned. Defendant pleaded not guilty and requested a jury trial. Pretrial conference was set for September 16, 2014.

¶ 8 On September 16, 2014, defendant moved for a continuance until October 21,

2014. On October 21, 2014, the State filed an amended motion to continue pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/103-5 (West 2014)). The original motion did not contain the date the items were sent for testing. In the amended motion, the State moved, under section 103-5 "that the *** cause which is now set for October 21, 2014[,] be continued to November 18, 2014 ***" and asserted the following in part:

> "4. As part of the investigation in this cause, officers with the Rantoul Police Department transported items, including a handgun and ammunition to the Illinois State Crime laboratory in Springfield for DNA and gunshot[-] residue testing on September 22, 2014.
>
> 5. Some of this evidence was then transferred to the Chicago Laboratory for additional testing, in compliance with regular protocol, on October 3, 2014.
>
> 6. The State has used due diligence in securing this material evidence and transporting it to the Laboratory.
>
> 7. The result of said comparison is yet to be obtained by the Office of the Champaign County State's Attorney from the Illinois State Crime Lab in Springfield.
>
> 8. The results of said comparison are potentially material to both the State and the Defendant in this matter."

At the end of its motion, the State requested "120 additional days, but presently to Courtroom C Felony Pre-Trial of November 18, 2014 ***." The trial court, presided over by Judge Heidi N.

Ladd, found the evidence material to the case and concluded the State exercised due diligence in obtaining that evidence. The court further found reasonable grounds existed to believe the evidence would be available at a later date. The court granted the motion and continued the case until November 18, 2014, stating: "[t]he State's / defendant's motion to continue is allowed and cause is continued to felony pretrial November 18, 2014 ***."

¶ 9 On November 18, 2014, the State, pursuant to section 114-4 of the Procedure Code (725 ILCS 5/114-4 (West 2014)), moved to continue the case until the next pretrial conference on December 9, 2014. The State asserted the following in part:

> "4. On October 21, 2014, the Court granted the State's Motion to Continue for 120 days, based upon 725 ILCS 5/103-5, finding that the State had exercised due diligence in obtaining evidence[,] including DNA analysis.
>
> 5. The result of said comparisons is still yet to be obtained by the Office of the Champaign County State's Attorney from the Illinois State Crime lab in Springfield.
>
> 6. The results of said comparison are potentially material to both the State and the Defendant in the matter."

The trial court granted the State's motion over defendant's objection.

¶ 10 On December 9, 2014, the State made an oral motion to continue the cause pursuant to section 114-4 of the Procedure Code (725 ILCS 5/114-4 (West 2014)). Defendant objected, stating he was ready for trial. The State's motion was granted. The matter was continued to January 13, 2015. The State was afforded leave to file a written motion later that

day.

¶ 11 On January 13, 2015, defendant requested the case be set for trial. The case was set for February 2, 2015. On January 23, 2015, defendant filed a motion to continue the trial pursuant to section 114-4. Defendant asserted he was awaiting lab results and the denial of the motion would prejudice him. Judge Ladd continued the case on defendant's motion to February 10, 2015. On February 10, 2015, defendant moved to continue the cause until March 10, 2015.

¶ 12 On March 10, 2015, defendant moved to "allot the matter for trial." The trial court granted the motion and set the trial for March 30, 2015. Defendant subpoenaed Robert Berk, a forensic scientist, whose gunshot residue test was negative.

¶ 13 On March 30, 2015, according to the docket sheet, by agreement of the parties, the trial was moved to April 6, 2015. Defendant disputes the conclusion he agreed to the postponement. Trial began on April 7, 2015.

¶ 14 B. Case No. 13-CF-1621

¶ 15 Champaign County case No. 13-CF-1621 is unrelated to the charges herein in No. 14-CF-1126. In case No. 13-CF-1621, defendant was sentenced to a term of probation in January 2014.

¶ 16 On August 15, 2014, at the time defendant appeared in custody on the charges herein in No. 14-CF-1126, defendant appeared in custody on allegations he violated his probation in No. 13-CF-1621. On December 10, 2014, by agreement of the parties, the probation order was terminated as unsuccessful. Defendant was remanded to the sheriff's custody pending the trial in No. 14-CF-1126.

¶ 17 C. Defendant's Trial

¶ 18 Defendant's trial began on April 7, 2015. Judge Jeffrey B. Ford presided. The State presented testimony establishing Bruce was in his apartment at 10 p.m. on August 14, 2014, when he heard a knock at his door. He opened the door and was struck on the left side of his face with a fist. Bruce identified the individual who hit him as defendant. Two other men were with defendant. Defendant held a gun, a rusty "six-shooter pistol." He was the only man with a gun. The men took everything from Bruce's pockets. They told Bruce and the others in the apartment to remove their clothes. Bruce refused. Defendant pointed the gun at Bruce's head. When Bruce attempted to push the gun away, defendant swung the gun, striking Bruce on the left side of his head. The gun flew across the room. One of the other men retrieved the gun and gave it to defendant. Defendant fired the gun into the floor, approximately two feet from defendant. While defendant pointed the gun at Bruce, one of the other assailants ransacked the apartment.

¶ 19 Defendant presented evidence showing the gunshot-residue test was negative. Robert Berk, a trace-evidence analyst with the Illinois State Police in Chicago, Illinois, testified he received the gunshot-residue kit for defendant on February 18, 2015. Berk performed testing on the samples provided and found an insignificant number of consistent particles. Because of the negative testing, defendant's expert opined defendant may not have fired the weapon. Berk further opined if defendant discharged the weapon, the particles were removed by activity, were not deposited, or were not detected during the testing.

¶ 20 The jury found defendant guilty of unlawful possession of a weapon by a felon. The jury could not reach a decision on the charges of home invasion and armed robbery, which both, as charged, required proof defendant personally discharged a firearm. A mistrial was

declared on the home invasion and armed robbery charges.

¶ 21 Four days after his trial concluded, defendant, *pro se*, filed a letter indicating his concern he was denied the effective assistance of trial counsel. In May 2015, the trial court, Judge Ford presiding, conducted a hearing to investigate defendant's claim pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). The court indicated concern trial counsel may have been neglectful in addressing the State's three motions to continue. According to the court, the State mentioned DNA *and* gunshot residue in the first motion, but no mention of gunshot residue appeared in the State's second and third motions. In addition, the court noted no DNA evidence was presented at trial and there was no evidence any samples were sent for DNA testing. The court concluded when counsel did not receive DNA analysis, counsel should have filed a motion alleging a speedy-trial violation and asserting the State was not entitled to the continuances because DNA analysis was not requested. The court appointed new counsel to represent defendant.

¶ 22 Appointed counsel filed two posttrial motions, asserting, in part, defendant's right to a speedy trial was violated. At the hearing on the motion, the State presented no evidence. The State conceded DNA testing was not done, arguing the previous attorney for the State believed such testing had been requested. The State argued, however, the first motion explicitly mentioned the State was waiting for the test results from the gunshot-residue testing. The State maintained the second and third motions referred to other evidence, which includes gunshot-residue testing. The State did not argue proceedings in Case No. 13-CF-1621 affected the speedy-trial time period.

¶ 23 The trial court found the State did not ask for gunshot-residue testing, but listed

only DNA testing, in its November 18, 2014, motion. The court concluded though the motions for DNA testing were made, no DNA was submitted to the lab for analysis. The court found the State acquired continuances outside the speedy-trial term based on false pretenses and "[w]e are now in a situation where but for motions to continue that told the court that the [S]tate was entitled to a continuance for reasons they did not have for continuance." The court concluded all three continuances were based on DNA ("[t]he first one was based on DNA also") and the continuances should not have been granted. The court concluded if the State did not have the results from the gunshot-residue tests at the time it filed its motion, the State would have specifically mentioned that test in its motions, instead of saying, "well, now, you know, we meant that too." The court concluded because defendant had been held longer than 120 days, but was not released from custody until after the trial, the State could not proceed on charges against him. The court ordered defendant released.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Appellate Jurisdiction

¶ 27 We begin with defendant's argument this court lacks jurisdiction to consider the State's appeal. Defendant maintains the unusual timing of the trial court's dismissal resulted in an effective acquittal. Defendant acknowledges Illinois Supreme Court Rule 604(a)(1) (eff. Dec. 11, 2014) allows the State to appeal "an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963 ***." However, according to defendant, section 114-1 of the Code authorizes defendants to move for a dismissal and permits the trial court to dismiss the "the

indictment, information or complaint" based on a violation of the speedy-trial statute "prior to trial" (725 ILCS 5/114-1(a)(1) (West 2014)). Defendant alleges because there had been a trial in the case, with jeopardy attaching, the effect of granting *Krankel* counsel's motion was not the same as if a pretrial motion to dismiss were granted. Specifically, defendant points to the following language of the trial court: "I do not believe that the remedy is to release him and say, okay, you can stand trial on this matter again. He has had his trial but he had his trial after he should have been released or after the matter was dismissed." Defendant maintains this thus amounts to an acquittal that cannot be appealed under Rule 604(a).

¶ 28 Supreme Court Rule 604(a)(1) (eff. Dec. 11, 2014) allows the State to appeal dismissals occurring pursuant to section 114-1(a)(1) of the Procedure Code. This court has held Rule 604(a) permits review of section 114-1(a)(1) dismissals even when the dismissals after the pretrial period expired. See *People v. Murray*, 306 Ill. App. 3d 280, 282, 713 N.E.2d 814, 816 (1999). Thus, jurisdiction under Rule 604(a) is afforded if the order has "the effect of dismissing the charges against the defendant." *Id.*

¶ 29 If, however, the dismissal is an acquittal, we lack jurisdiction over the appeal. Our constitution prevents the State from appealing judgments of acquittal after a trial on the merits. *Id.* (quoting Ill. Const. 1970, art. VI, § 6).

¶ 30 Here, the question of this court's jurisdiction turns on whether the trial court's order dismissing defendant's case "is more like an acquittal or a dismissal of a charge." *People v. Marty*, 241 Ill. App. 3d 266, 270, 608 N.E.2d 1326, 1329 (1993). An acquittal occurs "when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged'." *United*

States v. Scott, 437 U.S. 82, 97 (1978) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). In contrast, a dismissal may represent a legal determination a defendant, though criminally culpable, may not be punished because of the State's failure to comply with the rules. See generally, *Scott*, 437 U.S. at 98.

¶ 31 In this case, the trial court's determination resembles a dismissal of a charge, not an acquittal. The trial court did not find the State's evidence inadequate on any of the factual elements alleged. Instead, the court concluded the State failed to comply with the statutory requirement for a speedy trial and this failure, coupled with trial counsel's failure to raise the issue at trial, necessitated the dismissal. This court has jurisdiction over the State's appeal.

¶ 32 Defendant's cases are distinguishable. Both *People v. Laxton*, 139 Ill. App. 3d 904, 488 N.E.2d 303 (1986), and *People v. Bean*, 135 Ill. App. 3d 336, 481 N.E.2d 888 (1985), involve trial court determinations the State's evidence was insufficient to prove the defendants guilty of the charged offenses. For example, in *Laxton*, the defendant was charged with driving under the influence and two other traffic citations issued in Cook County. *Laxton*, 139 Ill. App. 3d at 905, 488 N.E.2d at 303 (1986). At trial, however, the State presented evidence defendant committed the offenses in Will County. *Id.* After the trial court expressly acquitted defendant of the charges, the State appealed, asking the Third District to find the trial court improperly dismissed the complaints. *Id.* at 906, 488 N.e.2d at 304. The Third District refused, finding the trial court's order to be "an effective acquittal." *Id.* at 907, 488 N.E.2d at 304. In *Bean*, after the jury had been impaneled and sworn and opening statements made, the trial court dismissed the case for "want of prosecution" after the State's witnesses failed to appear. *Bean*, 135 Ill. App. 3d at 338-39, 481 N.E.2d at 889-90. The First District equated the order of dismissal as an

acquittal, concluding the order effectively found the State failed to prove the defendant guilty of the offense charged. *Id.*

¶ 33 B. Standard of Review

¶ 34 The right to a speedy trial is both constitutional and statutory. *People v. Larue*, 2014 IL App (4th) 120595, ¶ 25, 10 N.E.3d 959. In this case, defendant alleges the State violated his statutory right to a speedy trial. Under section 103-5(a) of the Procedure Code (725 ILCS 5/103-5(a) (West 2014)), Illinois's speedy-trial statute, the State must bring a defendant to trial within 120 days of the day he or she was taken into custody. The speedy-trial statute provides this time period may be extended in certain circumstances. For example, the time period is tolled when the defendant occasions the delay. *Id.* In addition, the State may seek up to 60 additional days when it exercised due diligence to obtain evidence material to the case and the court finds reasonable grounds to believe the evidence may be obtained at a later date. 725 ILCS 5/103-5(c) (West 2014). This time period may also be extended up to 120 days under specific circumstances when the evidence sought are results of DNA testing. *Id.*

¶ 35 Because the speedy-trial provisions were enacted to prevent the infringement of a defendant's constitutional right to a speedy trial, we interpret those provisions liberally in defendant's favor. *People v. Kohler*, 2012 IL App (2d) 100513, ¶ 23, 968 N.E.2d 1132 (2012). Factual determinations by the trial court in statutory speedy-trial cases shall be upheld on review unless those determinations are against the manifest weight of the evidence. *People v. Crane*, 195 Ill. 2d 42, 51, 743 N.E.2d 555, 562 (2001). The trial court's decision as to whom to hold accountable for delays in bringing a defendant to trial will not be overturned absent a clear abuse of discretion. *People v. Reimolds*, 92 Ill. 2d 101, 107, 440 N.E.2d 872, 875 (1982).

¶ 36 C. Simultaneous Custody and the Speedy-Trial Statute

¶ 37 The State first argues the trial court abused its discretion in dismissing the charges because defendant was in simultaneous custody in case No. 13-CF-1621 from August 15, 2014, to December 10, 2014. The State maintains the speedy-trial statute provides if a person is in simultaneous custody for more than one charge pending against him in the same county, that person must be tried on the remaining charges within 160 days of when judgment is rendered on the first charge prosecuted (725 ILCS 5/103-5(e) (West 2014)). The State argues the trial in this case concluded well within the 160-day window.

¶ 38 Defendant argues the State forfeited this argument by not raising it before the trial court. Defendant further maintains the simultaneous-custody provision should not apply to these circumstances. Defendant emphasizes Case No. 13-CF-1621 involved a petition to revoke probation that was not prosecuted and the case concluded with an agreed termination of defendant's probation.

¶ 39 We agree the State forfeited this argument. The State did not raise this argument before the trial court when it considered defendant's speedy-trial challenge. At no point did the State give that court the opportunity to consider or address this argument. Arguments not made before the trial court are forfeited on appeal. See *People v. Singleton*, 367 Ill. App. 3d 182, 192, 854 N.E.2d 326, 335 (2006). The rule of forfeiture applies to the State. See *People v. McKown*, 236 Ill. 2d 278, 308, 924 N.E.2d 941, 957-58 (2010).

¶ 40 Despite its forfeiture, the State urges this court to consider the argument regardless. We decline the invitation. The simultaneous-custody provision "preserves a defendant's right to a speedy trial and also mitigates the State's burden of preparing more than

one charge for trial against a single incarcerated defendant." *People v. Kliner*, 185 Ill. 2d 81, 123, 705 N.E.2d 850, 873 (1998). If the State had been so burdened by Case No. 13-CF-1621, it seems the State would have been prepared to argue as much before the trial court. In addition, such an argument is unlikely, given the parties agreed to terminate defendant's probation and no trial on the revocation probation was held.

¶ 41 D. The Speedy-Trial Period

¶ 42 According to defendant, 164 days of delay are attributable to the State and his statutory right to a speedy trial was violated. The State does not dispute this number, but contends it had 180 days to try defendant and thus the speedy-trial statute was not violated.

¶ 43 In making its argument, the State initially contends the trial court erred in concluding the November and December motions to continue were based on false pretenses. The State reasons the record does not show the State intended to deceive anyone in an effort to extend the speedy-trial period. In support, the State argues only in the original October motion did it request under section 103-5(c) the speedy-trial period be expanded. The State maintains in the November and December motions it did not seek additional delay, as those motions were filed under section 114-4, which does not affect the speedy-trial deadline.

¶ 44 We need not determine whether the trial court's usage of the term "false pretenses" was proper. The question of whether the incorrect information that served as the bases for the State's motions resulted from an innocent mistake or the intent to deceive is irrelevant. We need only determine whether the trial court properly concluded the delay was attributable to the State because the continuances should not have been granted.

¶ 45 The State argues the trial court's findings ignore the State's mention of gunshot-

residue evidence in the October motion for a continuance and the reference to other evidence in the November and December motions. According to the State, when the trial court granted the continuance in October 2014, the motion "was good for at least 60 days" for the material evidence of the gunshot-residue. The State relies, in part, on defendant's trial counsel's statement at the *Krankel* hearing that Judge Ladd's October 2014 continuance allowed the State at least 60 days.

¶ 46 We find no error in Judge Ford's conclusion this time is attributable to the State. Despite the fact the initial motion to continue mentions "gunshot residue" and the latter motions refer to other evidence, the trial court found these motions were made and granted based on the State's repeated assertions DNA testing was ongoing and results were forthcoming. The trial court's conclusion is not against the manifest weight of the evidence. While the October 2014 amended motion for continuance mentioned the Rantoul Police Department transported items, "including a handgun and ammunition *** for DNA and gunshot residue testing," the language of the motion supports the finding it was a primarily motion for DNA testing. No mention was made of a gunshot-residue kit having been sent. The State twice referred to "comparisons," which is a term used in DNA analysis and testing. See generally, *People v. Williams*, 238 Ill. 2d 125, 144-45, 939 N.E.2d 268, 279 (2010); *People v. Miles*, 217 Ill. App. 3d 393, 400-01, 577 N.E.2d 477, 481-82 (1991). In addition, the State asked for an additional 120 days to obtain that evidence, the maximum amount offered by section 103-5(c) for DNA test results, not other "material evidence." Further supporting Judge Ford's decision the State used DNA testing to obtain a continuance is that the November and December motions did not specifically reference gunshot-residue evidence, but only DNA testing, comparisons, and brief reference to other

evidence. The bases for these requests were DNA testing was ongoing, as asserted by the State who specified dates the materials were sent, when no such evidence was delivered. The handgun and ammunition were not sent.

¶ 47 We disagree with the State's contention because material evidence was sent for gunshot-residue testing, the State received an extension of at least 60 days when the October continuance was granted. First, as stated above, Judge Ford concluded the crux of the motions to continue, including the original October motion, was the delay in receiving DNA comparison results. Second, the State did not request 60 days for gunshot-residue test results. The only mention of a specific time period in the motion is "120 days." While the time period of 60 days falls within 120 days, we cannot conclude from the record the State was awarded 120 days. Section 103-5(c) allows the trial court to extend the speedy-trial period a maximum of 120 days. 725 ILCS 5/103-5(c) (West 2014). In the October 2014 amended motion for continuance, the State began its motion by asking the trial court, under section 103-5, that the matter "set for October 21, 2014[,] be continued to November 18, 2014 ***." At the end of the order, the State asked "for 120 additional days, but presently to the Courtroom C Felony Pre-Trial of November 18, 2014 ***." The court order granting the State's motion states the following: "The State's / defendant's motion to continue is allowed and cause is continued to felony pretrial November 18, 2014 ***."

¶ 48 We acknowledge the record is messy. We find the trial court did not abuse its discretion in attributing this mess to the State. The State could have raised and addressed this matter at any point had it exercised the due diligence required by section 103-5(c) in obtaining the testing results and learned of the failure of the police department to send evidence for DNA

testing. These matters were within the State's control.

¶ 49 The State, in its reply brief, asserts a new challenge to the trial court's order, arguing defendant was accountable for more delays such that the speedy trial time limit was not exceeded. In its opening brief, however, the State assumed correct defendant's attribution of 164 days to the State and maintained the State did not violate the speedy-trial statute. The State's new argument, raised for the first time in its reply brief, is forfeited on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief ***.").

¶ 50 III. CONCLUSION

¶ 51 We affirm the trial court's judgment.

¶ 52 Affirmed.