2017 IL App (4th) 150902-U

NO. 4-15-0902

FILED
March 3, 2017
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.	)	Vermilion County
YURI LILLARD and MARCUS BURKE,	)	No. 15CF182
Defendants-Appellees.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's decision dismissing the charges against defendants for failure to try defendants within 160 days, as mandated by section 103-5(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(b) (West 2014)).

¶ 2 In April 2015, defendants, Yuri Lillard and Marcus Burke, were arrested and charged with aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)). That same month, both defendants demanded trial. The trial court scheduled a trial for July 2015.

¶ 3 In July 2015, both defendants appeared and answered ready for trial. On the State's motion, the trial court continued the trial until August over the objection of each defendant. At a hearing in August, the State again moved to continue the trial. The State also requested that defendants be released on their own recognizance to avoid violating the 120-day speedy trial period provided by section 103-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(a) (West 2014)). The trial court continued the trial until October 2015 and released de-

fendants on their own recognizance. Once released, defendants each filed a written demand for trial.

¶ 4 In October 2015, defendants each filed a motion to dismiss the charging information, alleging that their statutory right to be tried within 160 days pursuant to section 103-5(b) of the Code (725 ILCS 5/103-5(b) (West 2014)) had been violated. The trial court granted each defendant's motion.

¶ 5 The State appeals, raising several arguments that the trial court erred by granting defendants' motions to dismiss. We disagree with those arguments and therefore affirm.

¶ 6 I. BACKGROUND

¶ 7 The facts underlying this appeal are not in dispute.

¶ 8 On April 8, 2015, Burke was arrested and taken into custody. On April 9, 2015, both Burke and Lillard were charged with one count of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)). On April 19, 2015, Lillard was arrested on that charge and taken into custody.

¶ 9 At the April 30, 2015, preliminary hearing, both defendants—through defense counsel—asked the court to "show our demand for jury trial." The court acknowledged "your demands for trial by jury." The court scheduled the jury trial for July 6, 2015.

¶ 10 On June 1, 2015, Lillard filed a motion to sever defendants' cases, pursuant to section 114-8(a) of the Code (725 ICLS 5/114-8(a) (West 2014)). On June 10, 2015, the trial court conducted a hearing on Lillard's motion to sever. However, before the court could address that motion, the State moved for a continuance, explaining that the prosecutor assigned to defendants' cases was unavailable that day. The State asked to continue the hearing to a date before July 6, 2015. Lillard responded that, "[a]s long as we can get it heard before the jury trial date

that's fine." The court continued the hearing until June 23, 2015, explaining that the continuance was "on the State's motion, with no objection." (The record does not contain any indication that a hearing was held on June 23, 2015.)

¶ 11 At the July 6, 2015, hearing, defendants answered ready for trial. The State noted that the trial court had not yet ruled on Lillard's motion to sever and argued that conducting the trial would be inappropriate while the motion remained pending. In response, Lillard withdrew his motion to sever. Instead of proceeding to trial that day, the State moved to continue the trial until August. The court granted the State's motion to continue, "over the objection of both defendants." The court continued the trial until August 3, 2015, explaining that the delay was "attributable to the State."

¶ 12 At the August 3, 2015, hearing, the State again moved to continue, explaining that the State had been unable to contact an out-of-town witness. In addition, the State requested that defendants be released on their own recognizance. The trial court granted the State's motion to release defendants. In response, both defendants filed a written "out-of-custody" speedy trial demand pursuant to section 103-5(b) of the Code (725 ILCS 5/103-5(b) (West 2014)). In addition, both defendants requested a trial date before the 160-day period described in section 103-5(b), which Burke estimated would end on October 6, 2015. The State disagreed with defendants' reading of the statute and asserted that the State had 160 days from the date defendants were released from custody—August 3, 2015—to try defendants. The court continued the trial until October 26, 2015, over defendants' objections.

¶ 13 On October 16, 2015, Lillard filed a motion to dismiss the information charging him. On October 19, 2015, Burke filed a similar motion. Both defendants' motions argued that the charging instruments should be dismissed because the State had failed to try defendants with-

in the 160 days provided by section 103-5(b) of the Code *id*.

¶ 14 On October 10, 2015, the trial court conducted a hearing on defendants' motions to dismiss. Defendants argued that the 160 days contemplated by section 103-5(b) began to run on April 30, 2015, when defendants made their initial demand for trial, instead of beginning to run when defendants were released from custody on August 3, 2015. The State argued that the 160-day time frame of section 103-5(b) did not begin to run until defendants were released from custody and made their August 3, 2015, trial demand. The court granted defendants' motions to dismiss.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 The State argues that the trial court erred by granting defendants' motions to dismiss their charges pursuant to section 103-5(b) of the Code *id*. We disagree.

¶ 18 A. Statutory Language

¶ 19 Because the statutory language plays such a crucial role in this case, we set out the entirety of subsections (a) and (b) of section 103-5 of the Code (725 ILCS 5/103-5(a), (b) (West 2014)) as follows:

> "(a) 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 ***. 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. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, af-

tercare release, or mandatory supervised release for another offense.

The 120-day term must be one continuous period of incarceration. In computing the 120-day term, separate periods of incarceration may not be combined. If a defendant is taken into custody a second (or subsequent) time for the same offense, the term will begin again at day zero.

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of the 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. The defendant's failure to appear for any court date set by the court operates to waive the defendant's demand for trial made under this subsection.

For purposes of computing the 160[-]day period under this subsection (b), every person who was in custody for an alleged offense and demanded trial and is subsequently released on bail or recognizance and demands trial, shall be given credit for time spent in custody following the making of the demand while in custody. Any demand for trial made under this subsection (b) shall be in writing; and in the case of a defendant not in custody, the demand for trial shall include the date of any prior demand made under this provision while the defendant was in custody." (Emphasis added.)

¶ 20 B. Case Law and Statutory History

¶ 21 1. *People v. Garrett*

¶ 22 In *People v. Garrett*, 136 Ill. 2d 318, 555 N.E.2d 353 (1990), the supreme court analyzed whether a demand for trial made while a defendant is still in custody is sufficient to trigger the 160-day time period provided by section 103-5(b) of the Code.

¶ 23 At the time of the *Garrett* decision, section 103-5(b) did not yet include a second paragraph. Instead, it contained only the first paragraph, which read the same then as it does now:

> "(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of the 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. The defendant's failure to appear for any court date set by the court operates to waive the defendant's demand for trial made under this subsection." Ill. Rev. Stat. 1987, ch. 38, ¶ 103-5(b).

¶ 24 Interpreting the above-quoted language, the *Garrett* court held that a demand for trial made by a defendant while in custody did not trigger the 160-day period provided by section 103-5(b). *Garrett*, 136 Ill. 2d at 329-31, 555 N.E.2d at 358-59. Instead, the court held that the 160-day period was triggered only if and when the defendant made a demand for trial after being released on bail or recognizance. *Id.*

¶ 25 2. *The 1992 Amendment to Section 103-5(b)*

¶ 26 After the *Garrett* decision, the General Assembly enacted Public Act 87-281 (eff. Jan. 1, 1992), which added the following language to section 103-5(b) of the Code:

> "For purposes of computing the 160[-]day period under this subsection (b), every person who was in custody for an alleged offense and demanded trial and is subsequently released on bail or recognizance and demands trial, shall be given credit for time spent in custody following the making of the demand while in custody. Any demand for trial made under this provision shall be in writing; and in the case of a defendant not in custody, the demand for trial shall include the date of any prior demand made under this provision while the defendant was in custody."

¶ 27 3. *Interpreting the Amended Section 103-5(b)*

¶ 28 When interpreting a statute, our primary objective is to give effect to the intent of the legislature. *Merritt v. Department of State Police*, 2016 IL App (4th) 150661, ¶ 20, 56 N.E.3d 593. The most reliable indicator of the legislature's intent is the language of the statute, given its plain, ordinary, and popularly understood meaning. *Id.* When statutory language is unambiguous, we apply the language as written, without resorting to the tools of statutory construction. *Id.* Issues of statutory interpretation are reviewed *de novo*. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6, 919 N.E.2d 300, 303 (2009).

¶ 29 The amendment contained in Public Act 87-281 (eff. Jan. 1, 1992) superseded the holding of *Garrett* that the 160-day period of section 103-5(b) starts to run only upon an out-of-custody speedy trial demand. To the contrary, section 103-5(b) now expressly provides that a defendant is given credit toward the 160-day period for time he spent in custody after making an

in-custody trial demand, so long as the defendant also makes a trial demand once released on bail or recognizance.

¶ 30 In *People v. Wooddell*, 219 Ill. 2d 166, 180, 847 N.E.2d 117, 125 (2006), the supreme court—although under factual circumstances distinguishable from the present case—explained that, by passing Public Act 87-281, "the General Assembly amended the speedy-trial act to fix the problem identified in *Garrett*." The court went on to note that "the amendment is strong evidence that the General Assembly never intended for statutory speedy-trial periods to be stacked." *Id.* at 181, 847 N.E.2d at 125.

¶ 31 C. This Case

¶ 32 1. *Application of the 160-Day Period*

¶ 33 The speedy trial term is calculated by excluding the first day and including the last, unless the last day is a Sunday or holiday. *People v. LaFaire*, 374 Ill. App. 3d 461, 463, 870 N.E.2d 862, 864 (2007). In this case, both defendants made an in-custody demand for trial on April 30, 2015. They remained in custody through August 3, 2015. Therefore, they were entitled to a "credit" of 95 days to be counted toward the 160-day limit of section 103-5(b). Also on August 3, 2015, both defendants filed an out-of-custody demand for trial, as required by section 103-5(b). They remained out of custody from August 3, 2015, through October 21, 2015, when their motions to dismiss the charges were granted, accounting for an additional 79 days to be counted toward the 160-day limit. Defendants therefore waited 174 days to be tried, in excess of the 160-day period contemplated by section 103-5(b). The trial court did not err by granting defendants' motions to dismiss the charges against them for violation of section 103-5(b) of the Code.

¶ 34 2. *The State's Arguments*

¶ 35 The State makes two general arguments in support of its claim that the trial court erred by dismissing the charges against defendants. Neither argument is persuasive.

¶ 36 a. Whether the April 30 Request for Trial Was a Sufficient Demand for Trial Pursuant to Section 103-5(b) of the Code

¶ 37 The State argues that defendants' April 30 in-custody demands for trial were not sufficient to trigger defendants' receiving in-custody credit under section 103-5(b) because those demands did not specifically request a "speedy" trial.

¶ 38 The State has forfeited this argument by failing to raise it in the trial court. Generally, issues not raised in the trial court are forfeited on appeal. *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 47, 12 N.E.3d 179. The forfeiture rule applies to the State as well as to criminal defendants. *Id.* In the trial court, the State did not raise the argument that defendants' in-custody demands for trial were insufficient for failing to use the word "speedy." The State therefore forfeited that argument, and we will not consider it on appeal. We decline to apply any of the exceptions to the forfeiture rule proposed by the State.

¶ 39 Even if the State had not forfeited this argument, it would fail on the merits. Although section 103-5 is titled "Speedy trial," the word "speedy" appears nowhere in the body of that section. Further, we have explained before our reluctance to elevate certain words or phrases to the level of "magical incantations" that allow form to trump substance. See, *e.g.*, *People v. Shaw*, 2015 IL App (4th) 140106, ¶ 61, 44 N.E.3d 665. We decline to do so in the present context and hold that use of the word "speedy" is not required to make a sufficient in-custody demand for trial so as to trigger the running of credit under section 103-5(b) of the Code.

¶ 40 The State relies on *People v. Phipps*, 238 Ill. 2d 54, 933 N.E.2d 1186 (2010), in support of its argument that a trial demand must included the word "speedy." In *Phipps*, the supreme court explained that "[t]he statute does not mandate any 'magic words' constituting a de-

mand for trial, but it requires some affirmative statement in the record requesting a *speedy* trial." (Emphasis in original.) *Id.* at 66, 933 N.E.2d 1186. But *Phipps* was discussing the requirement of a defendant to object to proposed trial delays under section 103-5(a) after the 120-day clock had already begun to run. The language from *Phipps* therefore does not establish that an initial, in-custody demand for trial under section 103-5(b) must specify that the trial being requested is a "speedy" one.

¶ 41 b. Whether Any of the Trial Delay Was Attributable to Defendants

¶ 42 The State argues that the time period from June 1, 2015, through August 3, 2015, was attributable to defendants and therefore should not count as credit toward the 160-day period of section 103-5(b) of the Code.

¶ 43 The State is precluded from raising this argument on appeal because it forfeited that argument and, most likely, affirmatively consented in the trial court that no delay was attributable to defendants. At the October 21, 2015, hearing, the parties discussed the proper interpretation and application of section 103-5(b) to this case. During that discussion, the trial court stated, "I haven't heard any argument at all that the delay is not attributable to the State." In response, the State did not challenge the court's evaluation of the State's arguments. Instead, the State continued arguing about whether defendants had sufficiently demanded trial while in custody. The State's reaction to the court's statement constituted agreement with the court's position. Therefore, because the State agreed in the trial court that it was not alleging that any delay was attributable to defendants, the State is estopped from making that argument on appeal.

¶ 44 We are exceptionally reluctant to reverse a trial court's decision based on an argument raised on appeal that the trial court never heard below. See, *e.g.*, *Jackson v. Alvarez*, 358 Ill. App. 3d 555, 564, 831 N.E.2d 1159, 1166-67 (2005) (expressing our "great reluctance" to

reverse a trial court's decision under such circumstances). Neither of the two arguments made by the State on appeal was raised in the trial court. As a result, we do not reach the merits of those arguments on appeal.

¶ 45 Because we conclude that the trial court did not err by dismissing defendants' charges on statutory speedy trial grounds, we need not and do not address whether defendants' *constitutional* right to a speedy trial was violated.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the trial court's judgment.

¶ 48 Affirmed.