

SECOND DIVISION
March 18 , 2014

No. 1-11-2003

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 18742
)	
MARCEL BROWN,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

HELD: Judgment entered on defendant's conviction of first degree murder affirmed where his claim of ineffective assistance of trial counsel relied on evidence that was not before the trial court; supplemental record containing offending material stricken; mittimus modified.

¶ 1 Following a bench trial, defendant Marcel Brown was found guilty of first degree murder, then sentenced to 35 years' imprisonment. On appeal, defendant contends that his trial

counsel was ineffective for stipulating to a summary of his videotaped statement contained in a police report. In addition, he requests this court to modify his mittimus to reflect additional presentence credit. For the following reasons, we affirm and modify the mittimus.

¶ 2

BACKGROUND

¶ 3 Defendant and co-defendant Renard Branch were tried for the murder of Paris Jackson in simultaneous, severed bench trials. The State established that on the evening of August 30, 2008, Renard's sister Taneisha Branch was involved in an argument with a 12-year-old boy at Amundsen Park, in Chicago. She then made a phone call, and soon thereafter, Renard arrived in a Chevy Malibu driven by defendant. Renard exited the car and walked into the park to speak with his sister. He then pulled out a gun and fired several shots into a group of individuals playing dice, one of which struck and killed Paris Jackson.

¶ 4 At trial, the parties stipulated to a summary of a videotaped interview with defendant, which was contained in a supplementary report prepared by Chicago police detective Mike Mancuso. That summary, which was read into the record by Detective Mancuso, stated:

" 'At approximately 19:30 hours ASA Spizziri arrived at Area Five to review the case and monitor the interviews of Marcel Brown.
*** The RDs continued to interview Brown throughout the evening. And at several times Brown asked to speak with a state's attorney. At 22:37 hours ASA Spizziri enters Room B to speak with Brown. Spizziri explains the Miranda warnings to Brown who states he understands them and will discuss what happened at Amundsen Park.

[]Brown relayed his version of the events from the beginning. This is a summation of that interview and is not considered verbatim. Marcel Brown stated he was at the White Castle Restaurant at North Avenue and Central with Branch and Scott. Brown received a call on his cell phone from his sister Sierra Jackson. His sister told him that some girls were messing with her and her friends and a boy was getting involved. Brown stated that Branch then said 'I'm tired of these nigers [*sic*].' Brown said that he, Branch and Scott entered his gold Chevy Malibu and drove towards Amundsen Park. Brown parked near the fence on Bloomingdale and Branch exited the car. Branch had a gun in his hands when he jumped over a fence and walked toward the playground. Brown related that Scott exited with Branch. Brown exited the car a few minutes later and walked toward the park. Brown walked over to the play lot and saw Branch with a gun in his hand waving it around. Brown stated that no one else had a gun in the park. Brown knew Branch had a gun and he admitted that Branch told him to lie.

[]At 23:45 hours the ASA and the RD left the interview. Shortly thereafter Brown knocks on the door and states that he wants to talk to the state's attorney again. RD and the ASA reenter Room B and speak with Brown. Marcel Brown states that he knew Branch had a gun when he got in his car to go to the park. Brown

stated that when Branch said he was going to go fuck them up he knew Branch meant he was going to go shoot them. Brown said that Branch used that phrase in the car on the way to the park. He said that he knew Branch had the gun when he was in the car. Brown said that Branch said I'm tired of these nigers [*sic*] messing with my sister. They're going to die. This concluded the interview with Marcel Brown.' "

Immediately after this statement was read into the record, trial counsel stated, "I'd stipulate that's what's in his police report and that's what he was reading from and that's accurate." The assistant State's Attorney then said, "That is also what is reflected on the ERI video." And counsel responded, "So Stipulated." The portion of the supplementary report containing the summarized interview of defendant was subsequently entered into evidence without objection. The video of the interview itself, however, was never made an exhibit or entered into evidence.

¶ 5 Following closing argument, the trial court found defendant guilty of first degree murder, noting that defendant "went to that park *** knowing Renard Branch was going to fuck these so-and-so's up, and I find that is evidence that he is accountable for the actions of Renard Branch." The court then sentenced defendant to 20 years, with a 15-year firearm enhancement. This appeal follows.

¶ 6 ANALYSIS

¶ 7 Defendant first contends that trial counsel was ineffective for stipulating to the summary of his videotaped statement contained in Detective Mancuso's police report. He claims that Detective Mancuso's report was "inaccurate and grossly misleading hearsay." In support of this claim, he has supplemented the record with the video footage of defendant's interrogation.

¶ 8 The State responds that we should not address the merits of defendant's claim because it relies on video footage that was not introduced into evidence or discussed at trial. According to the State, Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006) does not contemplate new evidence being introduced into the record and therefore the video footage cannot be considered on review.

¶ 9 Rule 329 sets forth the guidelines for supplementing the record on appeal. It provides, *inter alia*, that "[m]aterial omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court, or by the reviewing court or a judge thereof." Ill. S. Ct. R. 329. It further provides that "[i]f the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant." Ill. S. Ct. R. 329. These provisions notwithstanding, the supreme court has noted that "Rule 329 is not a vehicle through which a party may supplement a record with evidence that was not presented in the lower court." *People v. Patterson*, 192 Ill. 2d 93, 127 (2000).

¶ 10 Here, there is no dispute that the video footage of defendant's interrogation was neither introduced as an exhibit at trial, nor received into evidence. Defendant, nonetheless, claims that evidence that was not part of the trial proceedings may be introduced into the record, citing *People v. Guest*, 115 Ill. 2d 72 (1986).

¶ 11 In *Guest*, the defendant was convicted of multiple offenses, including intentional murder, attempted murder, and two counts of unlawful use of weapons. *Guest*, 115 Ill. 2d at 80. The court sentenced him to death for murder; to 30 years for attempted murder, with his sentence to run consecutively to two sentences in the State of Tennessee and two sentences of 35 years and life imprisonment in the State of Missouri; and to 360 days on each count of unlawful use of weapons, with those sentences to run concurrently with his attempted murder sentence, but

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consecutively to the sentences in Tennessee and Missouri. *Guest*, 115 Ill. 2d at 80. The defendant subsequently filed two motions to supplement the record on appeal. *Guest*, 115 Ill. 2d at 113. The first motion sought to supplement the record with the defendant's "Agreement on Detainers" with the State of Illinois and his "Agreement on Detainers" with the State of California. *Guest*, 115 Ill. 2d at 113. The second motion sought to supplement the record with his "Request for Disposition of Indictments in Illinois and California, and copies of Acceptance by those jurisdictions, obtained from Missouri State Penitentiary officials on December 7, 1983.'" *Guest*, 115 Ill. 2d at 113. The defendant claimed that these agreements provided for his return to Missouri to serve out his prison sentence after his sentence was imposed in Illinois, and that the failure to comply with his request violated his due process and equal protection rights. *Guest*, 115 Ill. 2d at 113. The State objected to the defendant's motions, claiming that he failed to demonstrate that the documents were part of the proceedings at trial. *Guest*, 115 Ill. 2d at 113-14. The supreme court held:

"We cannot agree with the State that it is necessary for the defendant to demonstrate that these documents were part of the trial proceedings under our Rule 329. We also do not agree that these documents are unrelated or extrinsic. Rule 329 provides that '[i]f the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant.' [Citation.] These documents are pertinent to an issue the defendant has raised both in the trial court and on appeal before this court. These documents will aid us in our

disposition of this issue. Therefore, we allow both of defendant's motions to supplement the record." *Guest*, 115 Ill. 2d at 114.

¶ 12 This court subsequently distinguished *Guest* in *People v. Williams*, 200 Ill. App. 3d 503 (1990), a case far more factually similar to the one at bar. In *Williams*, defendant was convicted of possession with intent to deliver after police discovered two clear plastic bags of white powder in the kitchen of the apartment where he was arrested. *Williams*, 200 Ill. App. 3d at 505-07. The parties stipulated at trial that a chemist for the Chicago police department would have testified that "[t]he white powder was received by [him] in two plastic bags, each containing 50 plastic packets of white powder, and an additional two plastic packets, for a total of 102 packets." *Williams*, 200 Ill. App. 3d at 508. They further stipulated that all of the powder weighed 48.7 grams and that it was the chemist's opinion that the substance was cocaine. *Williams*, 200 Ill. App. 3d at 508. On appeal, defendant filed a motion to supplement the record with a laboratory report that "appear[ed] to indicate that six packets of white powder, weighing 2.93 grams, out of a total of 102 packets, weighing 48.7 grams, were tested, and that the results were positive for cocaine." *Williams*, 200 Ill. App. 3d at 510. He claimed that, in light of this report, the State failed to prove beyond a reasonable doubt that the entire 48.7 grams of white powder recovered from him was cocaine, as the chemist tested only six packets containing 2.93 grams. *Williams*, 200 Ill. App. 3d at 511. There was no dispute that the laboratory report was not part of the trial record "either as an exhibit offered or received into evidence, or as a document used or referred to for any purpose whatsoever by either party or by the court." *Williams*, 200 Ill. App. 3d at 510.

¶ 13 Defendant argued that *Guest* provided "authority for considering the laboratory report in deciding the issues raised on appeal," but we found *Guest* distinguishable in two respects.

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Williams, 200 Ill. App. 3d at 511-12. We first noted that the documents in *Guest* were "pertinent to an issue that had been raised in the trial court as well as on appeal," whereas the defendant did not raise any issue at trial regarding the amount of cocaine tested or weighed. *Williams*, 200 Ill. App. 3d at 512. We then noted:

"[T]he context in which the 'supplemental documents' were considered in *Guest* differs significantly from the context in which the report would be considered here. In *Guest*, the court was presented with a situation where it had upheld a defendant's death sentence and would, in the usual course, be expected to either set a date for his execution or stay that execution for stated reasons. There were, however, agreements in force, involving foreign jurisdictions, which directed the return of the defendant to serve out prison terms in those jurisdictions. These documents could not be ignored, and were essential to the procedural disposition of the case. Here, the laboratory report has been submitted in support of issues going directly to the guilt or innocence of defendant, *i.e.*, to whether he was proved guilty beyond a reasonable doubt of specific charges and whether the sentences imposed must be reduced." *Williams*, 200 Ill. App. 3d at 512-13.

Having found *Guest* distinguishable, we relied on *People v. Carroll*, where the court stated:

"In our opinion, [Supreme Court Rule 329] applies to supplementation of the record before this court with additional portions of the record *which were before the trial court*. To hold

otherwise would transmute the rule into an authorization for a trial de novo in the reviewing court. *** ' " (Emphasis in original.) *Williams*, 200 Ill. App. 3d at 513 (quoting *People v. Carroll*, 49 Ill. App. 3d 387, 396 (1977)).

We similarly found that "our consideration of the police laboratory report, for the first time on appellate review of defendant's case, would amount to a trial *de novo* on an essential element of the charges relating to the cocaine." *Williams*, 200 Ill. App. 3d at 513. Thus, while this court had initially granted defendant's motion to supplement the record with the laboratory report, we ultimately granted the State's motion to strike the supplemental record. *Williams*, 200 Ill. App. 3d at 510, 513.

¶ 14 Here, we find no real distinction between *Williams* and the case at bar. The issue in both is whether this court should consider the underlying evidence that served as the basis for a stipulation at trial even when that evidence was not introduced as an exhibit or received into evidence. We agree with *Williams* that such evidence should not be considered under Rule 329 and that *Guest* is distinguishable. We therefore strike the supplemental record containing the video footage of defendant's interrogation. *Williams*, 200 Ill. App. 3d at 512-13. Because defendant's ineffective assistance of trial counsel claim relies on the stricken evidence, we are unable to reach the merits of his claim and therefore affirm his conviction.

¶ 15 Defendant next contends that he is entitled to an additional 19 days of credit for time served in presentence custody. The State responds that defendant's mittimus should be corrected to reflect 1009 days of credit. The record shows that defendant was arrested on September 3, 2008, and sentenced on June 9, 2011. Excluding the date of sentencing (*People v. Williams*, 239 Ill. 2d 503, 510 (2011)), defendant spent 1009 days in presentence custody for which he is

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entitled to credit (730 ILCS 5/5-4.5-100(b) (West 2010)). Pursuant to Illinois Supreme Court Rule 615(b), we order the clerk to modify defendant's mittimus to reflect 1009 days of presentence credit.

¶ 16 For the reasons stated, we affirm the judgment of the circuit court of Cook County, strike the supplemental record containing the video footage of defendant's interrogation, and order the clerk to modify defendant's mittimus, as indicated.

¶ 17 Affirmed; mittimus modified.