2013 IL App (1st) 111269-U

FIRST DIVISION
September 16, 2013

No. 1-11-1269

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 3088
	)	
ANDRE WHITTINGTON,	)	Honorable
	)	Raymond Myles,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** Where the defendant was brought to trial within the statutory speedy trial period, trial counsel was not ineffective for not moving to dismiss on speedy trial grounds. The evidence was sufficient to establish that defendant committed the offense of being an armed habitual criminal beyond a reasonable doubt.

¶ 2 Following a January 1, 2010 shooting incident at an apartment building porch at 3606 West Huron Street in Chicago, defendant Andre Whittington was found guilty of being an armed habitual criminal, of two counts of aggravated unlawful use of a weapon, and of one count of reckless discharge of a firearm. He was sentenced to eight years in prison for his armed habitual criminal

conviction and the trial court merged the remaining counts into that sentence.

¶ 3 A codefendant, Anthony Lewis, was tried simultaneously in the same bench trial. He was found guilty of two counts of unlawful use of a weapon by a felon and one count of reckless discharge of a firearm. He was sentenced to three years in prison on the unlawful use of a weapon count. Lewis appealed, and we affirmed the trial court's judgment. *People v. Lewis*, 2013 IL App (1st) 111800-U. In that appeal, Lewis raised two basic issues: (1) his trial counsel was ineffective for failing to move for dismissal of the prosecution based on a violation of Lewis's right to a speedy trial; and (2) the State failed to prove him guilty beyond a reasonable doubt.

¶ 4 Ideally, the two appeals stemming from the same trial should have been consolidated and decided simultaneously. However, the parties did not bring the relatedness of the two cases to our attention, and it was not noted internally until after we had issued *Lewis*. This case has now been assigned to the same panel as *Lewis*. Defendant Whittington raises the same two basic issues which we decided in *Lewis*, but we revisit them here anew in light of the specific arguments made by Whittington's counsel, and the facts applicable to Whittington. Those facts are only slightly different than those at issue in *Lewis.* Because *Lewis* was an unpublished order under Ill. Sup. Ct. R. 23, it has no precedential value. Nonetheless, we will presume that the reader is familiar with *Lewis*, and for the sake of judicial efficiency, we specifically incorporate the *Lewis* order herein by reference. We repeat the facts only as necessary to provide sufficient context for our analysis. Despite the small distinctions between the two cases, for the reasons set forth below, we find no reason to depart from our earlier ruling in *Lewis.*

¶ 5 Defendant Whittington contends that his conviction must be reversed because his statutory

right to a speedy trial was violated when the State caused a 175-day delay in bringing his case to trial. The parties agree there were eight different periods of delay; their dispute centers around only three periods of delay. Defendant Whittington admits that his counsel caused a 158-day delay from February 26, 2010 to June 24, 2010 (pre-trial continuances), and from July 29, 2010 to September 7, 2010 (scheduling conflict). The State admits that it caused 90 days of delay from January 1, 2010 to February 26, 2010 (date of arrest to arraignment), and from October 27, 2010 to November 30, 2010 (State's witnesses not available). The periods of delay regarding which the parties disagree are from June 24, 2010 to July 29, 2010 (35 days), September 7, 2010 to September 14, 2010 (7 days), and September 14, 2010 to October 27, 2010 (43 days). Lewis, unlike Whittington here, relied only the first two delays to support his unsuccessful speedy trial argument.

¶ 6 In *Lewis*, we found the two periods of delay from June 24, 2010 to July 29, 2010 and from September 7, 2010 to September 14, 2010 were attributable to Lewis because his trial counsel agreed to continue the trial and his trial counsel did not make a demand for trial on either June 24, 2010 or September 7, 2010. We further found that, even if Lewis had not agreed to the two trial delays, these periods would have still been attributable to him because his counsel failed to make a demand trial. Here, as in *Lewis*, defendant Whittington's counsel agreed to continue the trial on June 24, 2010 and September 7, 2010, and his counsel did not make a demand for trial on either of these days. We see no reason to depart from our ruling in *Lewis* regarding the first two delays.

¶ 7 Defendant Whittington also contends, however, that an additional 43-day delay for the period from September 14, 2010 to October 27, 2010 is attributable to the State. On September 14, the State informed the trial court that only one of its police officer witnesses was present for trial. The

trial court indicated it wished to begin the trial on that date and stated: "We'll do something today. * * * [W]e are going to proceed today." The trial court and defendant Whittington's counsel then had the following exchange:

> "Counsel: I had two civilian witnesses that have been here every single day this was set for trial. The one actually changed her flight from Las Vegas so she could be here for that.
>
> Court: You ready?
>
> Counsel: Yes."

However, after questioning the State about its failure to have all of its witnesses in court, the trial court determined the case should not proceed to trial that day and proposed a two-week continuance. Defendant Whittington's counsel indicated she probably could begin the trial in two weeks, with the understanding that the trial be continued to allow for the presence of an out-of-state defense witness. The trial court then determined that a longer continuance was required so that the State could get its witnesses to court and to coordinate the schedules for counsel for three defendants. At the conclusion of the discussion regarding the new trial date, trial counsel for codefendant Lewis stated: "By agreement, 10-27." Defendant Whittington's counsel did not object to the proposed delay, did not dispute the agreed date, and made no trial demand.

¶ 8 Defendant Whittington argues that his trial counsel's answer that she was ready for trial on September 14 is tantamount to an oral demand for trial sufficient to satisfy the requirements of the Speedy Trial Act. Defendant Whittington points out that his trial counsel answered that she was ready for trial after she was aware that the State's witnesses had once again failed to appear. But

Whittington overlooks the requirement of section 103-5(a) of the Code of Criminal Procedure of 1963 (hereinafter the Speedy Trial Act) (725 ILCS 5/103-5 (West 2008)) that an objection in the form of a written or oral demand for trial is required to avoid the delay that was agreed to by defendant's counsel on September 14. The statement by Whittington's counsel that she was ready for trial before any delay was contemplated was not a sufficient objection in the form as required by section 103-5(a). In *People v. Cordell*, 223 Ill. 2d 380 (2006), a defendant made demands for a speedy trial, but those demands occurred before the trial court had proposed any trial dates. *Cordell*, 223 Ill. 2d at 391. Our supreme court stated:

> "A simple request for trial, before any 'delay' is proposed, is not equivalent to an objection for purposes of section 103-5(a). [Citation] As amended, section 103-5 places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed. To 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. This does not comport with the intention of section 103-5(a)." *Id.* at 391-92.

Accordingly, because defendant Whittington's counsel impliedly agreed to the continuance and did not make a demand for trial, there was no speedy trial violation for the 43 days between September 14, 2010 and October 27, 2010. As in *Lewis*, since defendant's counsel had no legal basis to move to discharge defendant or to dismiss the charges against him, his ineffective assistance of counsel

claim must also fail.

¶ 9 Defendant Whittington next argues that there was insufficient evidence to support his conviction. He was convicted and sentenced on the count of being an armed habitual offender in violation of section 24-1.7 of the Criminal Code of 1961, 720 ILCS 5/24-1.7 (West 2010). A person commits that offense if he possesses any firearm after having been convicted two or more times of any combination of triggering offenses specified in the statute. At trial, the court received certified copies of defendant's convictions of two such triggering felony offenses, including aggravated vehicular hijacking and delivery of a controlled substance, into evidence. On appeal, defendant does not contest the sufficiency of the triggering evidence, but rather asserts only that the State's evidence was insufficient to provide his possession of a firearm where that proof consisted solely of one witness, police officer Daniel Markus, who viewed the incident from a distance in the dark and described no identifying characteristics of him. Defendant contends that no physical evidence was linked to him and that the weapon he allegedly fired was recovered from an apartment other than the one where he was detained. Defendant relies strongly on two defense witnesses who testified that he never left Lasondia Chester's apartment from late on December 31, 2009 to early January 1, 2010.

¶ 10 As we noted in *Lewis*, the trial court found that Markus was a credible witness and that he was able to observe the January 1, 2010 shooting incident that occurred on the porch of the apartment building at 3606 West Huron. Markus testified that the porch was well-lit and the artificial lighting was enhanced by the powerful flashlight attached to his own rifle. Under the good lighting conditions, he was able to observe Willie Charman, a codefendant, fire an assault rifle several times and pass it on to another person before fleeing from the porch into the second-story

apartment. Markus was able to describe the weapons he observed, including the assault rifle discharged by defendant, in great detail. His observations were corroborated by the empty shell casings recovered at the scene and by the assault rifle and other weapons discovered in the first floor apartment where the offenders fled. Markus also testified to an incriminating statement made by defendant, who told police officers that when he saw codefendant Willie Charman discharge the weapon, he thought it was "cool" and wanted to fire it for himself.

¶ 11 In contrast, the trial court found that the defense witnesses, including Margaret James, were not credible. James testified that when she heard the loud gunshots, she saw defendant standing in the living room of the apartment. Her testimony conflicted with that of Lasondia Chester, who testified that when the shots were fired, she saw defendant sitting on the couch. Chester contradicted herself as to when the shots were fired, testifying initially that she heard them at 12:42 or 12:43 a.m. and later stating she heard them at 11:59 a.m. or 12:00 p.m. She also testified she heard only three or four gunshots, not a long series of shots. This was inconsistent with Markus's testimony that he heard a large number of shots. He initially heard gunshots before he ran to the apartment building, and observed Charman fire several shots from the porch and then saw defendant fire several shots. It was also inconsistent with the fact that dozens of empty shell casings were recovered from the scene.

¶ 12 As we determined in *Lewis*, the evidence was sufficient to support trial court's finding that defendant is guilty of being an armed habitual criminal beyond a reasonable doubt. Because Officer Markus testified that he saw defendant Whittington in possession of an assault rifle and firing the rifle, the trial court properly concluded that there was sufficient evidence to find defendant

Whittington guilty beyond a reasonable doubt on every element of being an armed habitual criminal. See *People v. Stanley*, 397 Ill. App. 3d 598, 611 (2009) ("[P]ositive testimony from a single, credible witness is sufficient to support a conviction").

¶ 13 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 14 Affirmed.