SECOND DIVISION
February 18, 2014

No. 1-12-0591

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. 10 CR 19794
	)	
RICHARD IRVING,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel was not ineffective for failing to move for dismissal of charges based on an alleged speedy trial violation where defendant was not denied a speedy trial. We modify defendant's fines and fees order to accurately reflect his assessments.

¶ 2 Following a bench trial, defendant Richard Irving was convicted of possession of a controlled substance with intent to deliver and sentenced, as a Class X offender, to 10 years' imprisonment. On appeal, defendant contends that his conviction was obtained in violation of his statutory right to a speedy trial, requiring outright reversal of his conviction, and that his trial

counsel was ineffective for failing to move for his discharge. Defendant also contends that he was improperly assessed several fines and fees. We affirm as modified.

¶ 3 On October 15, 2010, defendant was arrested for possessing and selling heroin. He remained in custody until he was arraigned and appointed a public defender by the trial court on November 23, 2010. The case proceeded by agreement for several dates for discovery and other pretrial issues. On April 6, 2011, defense counsel indicated that she wanted to set the matter for a bench trial. Both parties agreed on a trial date of May 18, 2011. On May 18, the State indicated that it was not ready for trial because one of its witnesses was not in court, and the parties ultimately agreed to continue the bench trial to June 21.

¶ 4 On June 21, 2011, a discovery issue arose, and the case was continued for resolution of that issue for several court dates. On October 4, 2011, the court stated that it was presiding over an unrelated jury trial, could not hear the case at bar, and rescheduled the bench trial for November 16, 2011. When the court made this announcement, defendant stated that he did not want any more continuances by agreement. The court responded that defendant needed to talk to his attorney, and then the proceedings ended. On November 16, the State could not proceed to trial because the forensic chemist was not available. The State suggested that trial be set for December 13, 2011, and defense counsel agreed.

¶ 5 On December 13 the trial commenced, and defendant was ultimately convicted of possession of a controlled substance with intent to deliver and delivery of a controlled substance on evidence showing that he sold less than one gram of heroin to an undercover police officer at 4715 South Drexel Boulevard in Chicago on October 15, 2010. The evidence also showed that

police recovered more than 1 gram but less than 15 grams of heroin from defendant during a custodial search. At sentencing on February 7, 2012, the trial court merged the delivery of a controlled substance conviction into the conviction for possession of a controlled substance with intent to deliver, and sentenced defendant to 10 years in prison. This appeal follows.

¶ 6 On appeal, defendant contends that his conviction must be reversed where it was obtained in violation of his statutory right to a speedy trial because his trial counsel was ineffective for failing to move for dismissal of the charges based on the speedy trial violation.

¶ 7 A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing both that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced defendant such that he was deprived of a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). An attorney will be deemed ineffective for failing to seek discharge of his client on speedy trial grounds if a reasonable probability exists that the defendant would have been discharged had a timely motion been made and no justification has been presented for counsel's failure to make such a motion. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). In turn, "[t]he failure of counsel to argue a speedy-trial violation cannot satisfy either prong of *Strickland* where there is no lawful basis for arguing a speedy-trial violation." *Cordell*, 223 Ill. 2d at 385.

¶ 8 An accused has both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5 (West 2010); *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). Under section 103-5(a) of the Code of Criminal Procedure of 1963 (Code), every person in custody "shall be tried by the court having

jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant[.]" 725 ILCS 5/103-5(a) (West 2010). A "delay" occurs when any action by either party or the trial court moves the trial date outside the 120-day window. *Cordell*, 223 Ill. 2d at 390. Any delay that is caused or contributed to by the defendant tolls the speedy trial period until the expiration of the delay, at which point the period resumes running. *Murray*, 379 Ill. App. 3d at 158. It is the State's duty to bring a defendant to trial within the 120-day statutory period, but the defendant bears the burden of establishing that any delays were not attributable to his conduct. *Murray*, 379 Ill. App. 3d at 158. A delay is considered to be occasioned by the defendant when his acts caused or contributed to a delay resulting in the postponement of trial. *Murray*, 379 Ill. App. 3d at 158-59. Under the speedy trial statute, "[d]elay 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." 725 ILCS 5/103-5(a) (West 2010).

¶ 9 Defendant was in continuous custody from his arrest on October 15, 2010, until the commencement of his trial on December 13, 2011. He asserts that he was denied his right to a speedy trial where 160 days of that period were not attributable to delay by him. The parties agree that the period of the delay from defendant's arrest on October 15 to his arraignment on November 23 was not attributable to defendant. If a defendant remains in custody, the 120-day statutory period beings to run automatically, and a formal demand for trial is not required. *Woodrum*, 223 Ill. 2d at 299. Consequently, on November 23, the speedy-trial clock stood at 39 days, not 40 as defendant maintains. See 5 ILCS 70/1.11 (West 2010) (the calculation of days in custody excludes the first day and includes the last day). The parties also agree that the speedy-

trial clock stopped between November 24, 2010, and April 6, 2011, during pretrial matters and thus remained at 39 days.

¶ 10 Defendant contends that the clock ran again from April 6, 2011, to May 18, 2011, and then from May 18 to June 21, 2011, a continuance of 76 days which caused the clock to stand at 115 days. Defendant argues that these 76 days do not constitute delay attributable to him because on April 6 and May 18, he participated in setting trial dates that fell within the speedy trial period.

¶ 11 Our decision in *People v. Wade*, 2013 IL App (1st) 112547, resolved this issue. In *Wade*, as here, the defendant argued that the occasions where he agreed to a trial date within the 120-day period, as opposed to when he agreed to a continuance, were not delays attributable to him. *Id*., at ¶¶ 23-24. Instead, the defendant asserted that there was a crucial difference between a continuance and setting a trial date within the 120-day period. *Id*., at ¶ 23. In making his argument, the defendant in *Wade*, similarly to defendant in the case at bar, relied upon *People v. Workman*, 368 Ill. App. 3d 778 (2006), for the proposition that agreeing to a trial date within the speedy trial term is different from agreeing to a continuance. *Wade*, at ¶ 28.

¶ 12 We rejected the *Wade* defendant's argument, finding that an agreed continuance tolls the speedy trial period, whether or not the case has been set for trial. *Id*., at ¶ 26. The court found that the defendant's reliance on *Workman* was unpersuasive because *Workman* was based on its specific facts and "cannot be read to generally support the conclusion that an agreed continuance on a trial date should be treated differently than a mere agreed continuance." *Id*., at ¶ 28. We held that it is "of no moment" whether a defendant agrees to a continuance or agrees to a trial

date within the 120-day period. *Id*., at ¶ 29. Either way, any resulting delay is attributable to the defendant. *Id*. In the case at bar, the parties agreed to continue the matter for trial on April 6 and May 18, 2011. Accordingly, under *Wade*, the 76-day delay from April 6 through June 21, 2011, when a subsequent continuance was agreed upon, is attributable to defendant for purposes of the speedy trial term, and the speedy-trial clock remained at 39 days.

¶ 13 In reaching this conclusion, we note that defendant here overreaches in his interpretation of *People v. Cordell*, 223 Ill. 2d 380, 390 (2006), which determined that the word "delay," as used in section 103-5(a) of the Code, refers to any action by either party or the trial court that moves the trial date beyond the 120-day period. Despite defendant's contentions to the contrary, *Cordell* did not limit the requirement that a defendant object to an action that postpones trial to those instances where the trial date is beyond the 120-day term. We further note that defendant's reliance on *People v. LaFaire*, 374 Ill. App. 3d 461 (2007), is misplaced where the defendant in that case was on bail, and thus section 103-5(b) of the Code applied, rather than section 103-5(a), as in the case at bar. See *Wade*, at ¶ 28 (distinguishing *LaFaire* on similar grounds).

¶ 14 The parties agree that the speedy trial clock did not advance from June 21 to October 4, 2011, where the case was continued by agreement.

¶ 15 Defendant argues that the continuance from October 4 to November 16, 2011 was not attributable to him because he orally demanded trial. The record shows that the following conversation occurred on October 4:

> "MS. HANUS [assistant State's Attorney]: This matter was set for bench trial. We have officers present however based on your Honor's calendar and what's going on in our courtroom, I

> believe we agreed on a continuance date of November 16 for that bench trial.
>
> THE COURT: I have a jury trial going on. I can't hear this case. 11/16 then for trial bench indicated. I will see you back here then.
>
> THE DEFENDANT: Can I ask a question?
>
> THE COURT: Yes, as long as it's not about the case.
>
> THE DEFENDANT: I don't want no more continuances by agreement. I'm ready to get this over with.
>
> THE COURT: Here. You need to talk to your attorney.
>
> THE DEFENDANT: I want to ask you how long do they have to continue.
>
> THE COURT: Why don't you talk to your attorney about that. I told you I can't answer any questions related to the case."

After this discussion, the October 4 proceedings ended.

¶ 16 Even assuming that defendant's statement that he did not want any more continuances by agreement and that he wanted to "get this over with" was sufficient to orally demand trial, he still fails to establish a violation of his speedy trial rights. The time between October 4 and November 16, 2011, is 43 days. Adding these 43 days to his initial 39 days only totals 82 days towards defendant's speedy trial term, an amount clearly within the 120-day term. Thus, defendant fails to show any violation.

¶ 17 The parties agree that the speedy trial clock did not advance from November 16 to December 13, 2011, when they continued the case by agreement.

¶ 18 As such, there was no speedy trial violation, and trial counsel cannot be held ineffective for failing to claim that one occurred. *Wade*, at ¶ 30. Accordingly, defendant's contention of ineffectiveness fails.

¶ 19 Defendant next contends, and the State concedes, that the $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), should be vacated. We agree that the $200 DNA analysis fee cannot be imposed because defendant was assessed the fee upon a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). We thus vacate that fee.

¶ 20 Defendant further contends, and the State correctly agrees, that he was erroneously assessed a $20 preliminary hearing fee because no preliminary hearing took place. See 55 ILCS 5/4-2002.1(a) (West 2010). Where, as here, no preliminary hearing takes place, a defendant need not pay the $20 preliminary examination fee. See *People v. Smith*, 236 Ill. 2d 162, 174 (2010) (holding that where the defendant did not receive a probable cause hearing, he cannot be assessed a preliminary examination fee).

¶ 20 Finally, both parties correctly agree that although the trial court's fines and fees order indicated that defendant owed a total of $1,710, an examination of the various fines, fees, and costs show the total to be $2,710. After subtracting the improper $220 in fees detailed above, the proper total amount of fines and fees is $2,490. Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to order the mittimus to reflect a total assessment of $2,490.

¶ 21 For the foregoing reasons, we vacate the $200 DNA analysis fee and $20 preliminary hearing fee; correct defendant's mittimus to accurately reflect a total assessment of $2,490; and affirm his conviction in all other respects.

¶ 22 Affirmed as modified.