FOURTH DIVISION
March 20, 2014

No. 1-13-1719

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 035876361
	)	
SAMUEL AMIRANTE,	)	Honorable
	)	Susan G. Ramos,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting defendant's motion to dismiss pursuant to the Speedy Trial Act is reversed as the trial court applied the wrong standard in determining whether the delay on November 4, 2009 was attributable to defendant or the State. The case is remanded to determine whether any other delays were attributable to the State, thus resulting in a violation of the Speedy Trial Act.

¶ 2 Following defendant Samuel Amirante's conviction of driving under the influence and

following too closely, defendant filed a motion for a new trial and a motion to dismiss pursuant to section 103-5(b) of the Code of Criminal Procedure (the Speedy Trial Act). 725 ILCS 5/103-5(b) (West 2008). The trial court granted both motions and dismissed the charges against defendant finding that he had not been brought to trial within 160 days as required by the Speedy Trial Act. The State now appeals the trial court's order dismissing the case claiming that defendant was brought to trial within 160 days as required by the Speedy Trial Act. For the reasons that follow, we reverse the trial court's ruling and remand the case for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 On September 19, 2009, defendant was arrested and charged with driving under the influence, driving too closely, failure to possess a driver's license, and operating an uninsured vehicle. Defendant was issued a $100 bond and was released from custody on the day of his arrest.

¶ 5 Defendant's trial commenced on November 29, 2011. The State elected to proceed only on the driving under the influence and the following too closely charges. The defendant was found guilty of both charges.

¶ 6 After his trial, defendant filed a motion to dismiss and a motion in arrest of judgment alleging that his rights to a speedy trial under the Speedy Trial Act had been violated because his trial did not commence within 160 days after he made his demand for a speedy trial. See 725 ILCS 5/103-5(b) (West 2008).

¶ 7 It is undisputed that defendant filed a written demand for a speedy trial on June 23, 2011. It is further undisputed that defendant's trial commenced November 29, 2011, which is the 159th day after the June 23, 2011 demand was filed by defendant. Both parties concede that the delays

between these dates were attributable to the State. However, defendant argued in his motion to dismiss that his Speedy Trial Act rights were violated because he made a speedy trial demand prior to June 23, 2011, on November 4, 2009. Specifically, defendant argued that at his court appearance on November 4, 2009, defendant demanded a speedy trial at the outset of the hearing and the delay that resulted subsequent to that demand was attributable to the State. By adding the 159 days to the delay that occurred after November 4, 2009, defendant argued that the State was responsible for a more than 160-day delay in bringing him to trial and, as a result, the charges against him had to be dismissed pursuant to the Speedy Trial Act. Following a hearing on the motion, the trial court made a finding that defendant demanded a speedy trial on November 4, 2009, and the delay in trial subsequent to that date was attributable to the State. Therefore, the court ruled that since at least 159 days elapsed between the June 23, 2011 demand and the November 29, 2011 trial, the additional delay following the November 4, 2009 hearing amounted to more than 160 days of delay that were attributable to the State, and the court dismissed the charges.

¶ 8 Important to our disposition of this case is the issue of whether defendant made a demand for a speedy trial on November 4, 2009. Our examination of the record shows that after defendant's September 19, 2009 arrest, October 1, 2009 was the first date he appeared in court. The defendant, represented by counsel, appeared in court on that date and filed a petition to rescind the summary suspension of his driver's license, which was set by order of the court for November 4, 2009.

¶ 9 On November 4, 2009, defendant was represented by new counsel, Ms. Curran. When the parties initially stepped up before the trial court judge on this date, Ms. Curran filed an appearance and a written demand for a speedy trial. In response to Ms. Curran's speedy trial

demand, the State's Attorney requested that the case be passed to see if any of the witnesses were in court that day. After Ms. Curran and the State's Attorney discussed the matter, they stepped back up before the judge and the following conversation took place on the record:

> MR. LARRABEE [Assistant State's Attorney]: I am tendering discovery. As far as the assets go there is no confirmation.
>
> THE COURT: Okay. Motion for discovery, discovery tendered. Defendant acknowledge receipt, receipt is in the file.
>
> MS. CURRAN [defense attorney]: And Your Honor, as there is no confirmation we would be continuing our demand.
>
> THE COURT: Sure, it will go by order of the court.
>
> MR. LARRABEE: 12-15 by agreement case in chief.
>
> THE COURT: So it will go order of the court by on the SS, and then by agreement on the case in chief then. We'll set the case in chief just for status that day?
>
> MR. LARRABEE: That's fine.
>
> THE COURT: All right.
>
> MS. CURRAN: Your Honor, actually on the case in chief I would also be demanding on that as well.
>
> THE COURT: You want to set it for trial?
>
> MS. CURRAN: If we could set it for trial on the 15th.
>
> MR. LARRABEE: If we could pass it then, Judge, we'll see if the witnesses are here today.

* * *

MS. CURRAN: I have had a chance to speak with the state's attorney in this case, we wish to go by agreement on the case in chief to December 15th.

THE COURT: All right.

MS. CURRAN: But we are still continuing our demand for the summary suspension hearing.

THE COURT: Okay. It's actually the summary suspension is going to go order of the court for [Traynor] purposes which is the same for you as opposed to motion state because they don't have a conformation. So your demand is continued on that, and it will go by agreement 12-15-09 on the case in chief for status.

MR. LARRABEE: It's at nine o'clock, right, for trial.

THE COURT: It's actually one o'clock.

¶ 10 On November 19, 2009, prior to the scheduled December 15, 2009 court date, defendant appeared *pro se* and filed a motion to advance his case and grant his petition to rescind the summary suspension. At this November 19, 2009 hearing, the trial court clarified the record from the prior hearing and stated that on November 4, 2009, the parties had agreed to continue the matter for status to December 15, 2009. Of relevance, the following conversation took place on the record at the November 19, 2009 hearing:

MR. NEHLS [Assistant State's Attorney]: And with regard to the case-in-chief, it is set for trial. So just make sure it –

DEFENDANT: Actually, Judge, this is set for status.

THE COURT: I have it set for trial.

DEFENDANT: We originally demanded. And counsel wanted to get the officer in here for a – trying to get him in here for trial. So we went by agreement.

MR. NEHLS: It is set by agreement for trial so.

DEFENDANT: Well by agreement for status as far as I know.

THE COURT: You know what? I'm showing here it looks like order of the Court to 12-15 for SS hearing.

DEFEDANT: Right.

THE COURT: Is what I've got. I don't have it set for trial.

DEFENDANT: The officer wasn't here so if it was set for trial, we would have demanded.

THE COURT: Here you go. Take a look. And I didn't have it down on here either.

MR. NEHLS: You know what, Judge? It is what it is. I understand. My file says otherwise but it says what it says right there so.

THE COURT: So then, well, we can go ahead –

MR. NEHLS: Just keep it on the same status date, Judge.

THE COURT: Okay. So back to 12-15 is fine?

DEFENDANT: For status; correct.

MR. NEHLS: That's correct. By agreement for status.

THE COURT: 12-15 by agreement for status; okay. Okay.

That will be the order.

¶ 11 At the next hearing, which was held on December 15, 2009, defendant filed a motion to quash his arrest and suppress evidence. After this date, the parties made numerous court appearances until June 23, 2011. However, the trial court did not make any rulings on the cause of the delays that resulted from the hearings between December 15, 2009 and June 23, 2011.

¶ 12 On June 23, 2011, new counsel for defendant filed another written demand for a speedy trial. Defendant's new counsel stated that the June 23, 2011 demand was the first written demand for a speedy trial; however, the record clearly shows that the first demand was actually filed on November 4, 2009 by Ms. Curran. From June 23, 2011 to November 29, 2011, the date that this matter went to trial, both parties concede in their briefs that there was a 160-day delay,[1] and that that 160-day delay was attributable to the State. In the State's appellant brief, it states: "the record unambiguously shows that the defendant first demanded trial on June 23, 2011, and that defendant's term was tolled from June 23, 2011, to November 29, 2011, which is 160 days." Defendant's appellee brief states: "Appellee agrees with the Appellant['s] contentions that from June 23, 2011 until trial on November 29, 2011 exactly 160 days passed attributable to the State." And, the State's reply brief does not contest the assertion made in the appellee brief in any way.

¶ 13 Following trial on November 29, 2011, defendant was found guilty of driving under the influence and driving too closely. Defendant subsequently filed several post-trial motions, including a motion for a new trial and a motion to dismiss pursuant to the Speedy Trial Act. The motion to dismiss attached an affidavit of Ms. Curran, who ceased representing defendant in

[1] Our calculation shows a 159-day delay; however, the briefs concede a 160-day delay.

2009, that stated the following with respect to the November 4, 2009 hearing:

> "That during my conversation with the State, they indicated to me that they would keep asking the judge to pass the defendant's case until 4:30 p.m. or the end of the court call, in an attempt to reach their witnesses. Therefore, when the defendant's case was recalled during the 2:00 p.m. hour, I agreed to a continuance as to the criminal charges, but I never withdrew the Defendant's Demand for Speedy Trial."

¶ 14 On September 25, 2012, the trial court granted defendant's motion for a new trial and vacated the prior finding of guilty. On December 18, 2012, the trial court granted defendant's motion to dismiss based upon its finding that defendant's Speedy Trial Act rights had been violated when he had not been brought to trial within 160 days due to delays that he did not contribute to or cause. Specifically, in granting defendant's motion to dismiss, the trial court judge reasoned that she had to give effect to the written demand for a speedy trial that had been filed on November 4, 2009 and, accordingly, attribute any delay to the State. At the hearing on the motion to dismiss, the trial court judge made the following comments:

> "And the fact that a Demand is written and tendered to the Court and is part of the file and despite what the two judges wrote, and I don't know why two judges would have been on the call; but, maybe they were in training, I don't know; I have to give that Demand effect; and that's 42 days."

¶ 15 At the hearing on the State's motion to reconsider the motion to dismiss, which the trial court denied, the trial court judge made the following remarks:

> "I also have what's unequivocal on the record is a – and this is considering not only the affidavit but that there is a written Speedy demand. I also have the affidavit of Pamela Curran. This is addresses – the affidavit is addressed as a self-serving document and the contents is unequivocal as the Defendant's Demand is in that Pamela Curran stepped up and acted on behalf of the Defendant, filed the Speedy demand.
>
> * * *
>
> So [the entries by the judges are] not reliable in terms of the two judges who give different information so I have to rely on the file demand and the affidavit."

¶ 16 The State now appeals the trial court's ruling that defendant's Speedy Trial Act rights were violated. The State argues that it was not responsible for more than 160 days of delay and, therefore, the Speedy Trial Act had not been violated here. For the reasons that follow, we reverse the trial court's ruling and remand this matter for further proceedings consistent with this order.

¶ 17 ANALYSIS

¶ 18 At the outset, we must address the appropriate standard of review as there is a disagreement between the parties as to which standard of review applies here: *de novo* or abuse of discretion. While we acknowledge the State's argument that the standard of review should be *de novo*, the issue on appeal here requires a determination as to who caused delay in bringing defendant to trial, and particularly who caused the delay on November 4, 2009. Our courts have held that such a determination is to be analyzed under the abuse of discretion standard. *People v.*

Reimolds, 92 Ill. 2d 101, 107 (1982) ("The decision of the trial court as to accountability for delay in bringing the defendant to trial should be sustained, absent a clear showing of abuse of discretion."). Further, the cases cited by the State for the proposition that we should apply the *de novo* standard of review are inapplicable here. The first case, *McWilliams v. Dettore*, 387 Ill. App. 3d 833 (2009), is a medical malpractice case that dealt with laying a foundation for an expert's opinion, which is clearly a legal issue. And in the second case, *People v. Crane*, 195 Ill. 2d 42, 52 (2001), the Court was only faced with the issue of whether defendant's constitutional right to a speedy trial had been violated and not whether his statutory speedy trial rights had been violated. *Crane*, 195 Ill. 2d at n. 2. As such, the Court in *Crane* was not faced with the issue presented here, which is who was responsible for the delay that resulted on November 4, 2009 pursuant to the Speedy Trial Act, and such a determination is reviewed under an abuse of discretion standard. *People v. Turner*, 120 Ill. 2d 540, 550-51 (1989).

¶ 19 Under section 103-5 of the Speedy Trial Act, it is the duty of the State to bring a defendant to trial within the statutory period. See 725 ILCS 5/103-5(b) (West 2008); *People v. Beyah*, 67 Ill. 2d 423, 427 (1977). Section 103-5(b) of the Speedy Trial Act states:

> "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 this 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." 725 ILCS 5/103-5(b) (West 2008).

On a motion to dismiss, the defendant has the burden of affirmatively establishing the violation of his right to a speedy trial (*People v. Jones*, 33 Ill. 2d 357, 361 (1965)), meaning "a demonstration that he caused no delay, which must be affirmatively established by the record." *People v. Boyce*, 51 Ill. App. 3d 549, 554 (1977). Where a delay is attributable to the defendant, the statutory period is tolled. *People v. Donalson*, 64 Ill. 2d 536, 540 (1976); *People v. Ortiz*, 313 Ill. App. 3d 896, 899-900 (2000) (Under either 103-5(a) or (b), "the speedy trial time limitation is suspended during those times that the defendant actually causes or contributes to a delay."). In other words, any period of delay occasioned by the defendant temporarily suspends the running of the speedy-trial period until the expiration of the delay, at which point the statute shall recommence to run. *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). "[A] defendant's speedy trial period begins when he makes his speedy trial demand, not subsequently at arraignment." *People v. LaFaire*, 374 Ill. App. 3d 461, 464 (2007); 725 ILCS 5/103-5(b) (West 2008) (defendant's speedy trial term begins on "the date [he] demands trial."). Each delay must be reviewed individually and attributed to the party who causes it. *People v. Mayo*, 198 Ill. 2d 530, 537 (2002).

¶ 20 A delay is held to be occasioned by the defendant when the defendant's act in fact caused or contributed to the delay. *Mayo*, 198 Ill. 2d at 541. "A defendant is considered to have occasioned a delay when he requests a continuance, agrees to a continuance, or when his actions otherwise cause or contribute to the delay." *People v. Hatch*, 110 Ill. App. 3d 531, 537 (1982); *Reimolds*, 92 Ill. 2d at 106-07; *People v. Cunningham*, 77 Ill. App. 3d 949, 951 (1979) ("where a

defendant requests or agrees to a continuance he is charged with occasioning delay."). A defense counsel's express agreement to a continuance may be considered an affirmative act contributing to a delay which is attributable to the defendant. *Kliner*, 185 Ill. 2d at 114. While there is no duty imposed upon the defendant to object to a delay under section 103-5(b), as there is under section 103-5(a) (see *LaFaire*, 374 Ill. App. 3d at 464-65), where defendant is merely acquiescent to a date suggested by the trial court or where the record is silent or the defendant fails to object to a delay requested by the State, those delays cannot be attributed to the defendant. *People v. Zeleny*, 396 Ill. App. 3d 917, 921 (2009).

¶ 21 A court of review must determine the issues before it solely on the basis of the record made in the trial court. *People v. Jackson*, 28 Ill. 2d 37, 39 (1963). The decision of the trial court as to accountability for delay in bringing the defendant to trial should be sustained, absent a clear showing of abuse of discretion. *People v. Wilkins*, 77 Ill. App. 3d 179, 182 (1979). An abuse of discretion will be found where the wrong legal standard has been applied or a conclusion of law is reached that does not support that conclusion. *Zavell & Associates, Inc. v. CCA Industries, Inc.*, 257 Ill. App. 3d 319, 322 (1993).

¶ 22 Here, both parties concede that the delay between June 23, 2011 and November 29, 2011 (defendant's trial date) was attributable to the State. This delay amounts to exactly 159 days. Further, the record clearly shows that between those dates, June 23, 2011 and November 29, 2011, defendant consistently answered ready for trial and the State answered not ready and had the date continued. Thus, if any delay outside of the 159-day delay between June 23, 2011 and November 29, 2011 can be attributed to the State, defendant's Speedy Trial Act rights were violated, and the charges against defendant must be dismissed.

¶ 23 The trial court found that the delay following the November 4, 2009 hearing was

attributable to the State, thus resulting in a violation of the Speedy Trial Act. The trial court ruled this way because it found that defendant's attorney had filed a written demand for trial on November 4, 2009 and, further, defendant's attorney attested that she filed the written demand on that date and never withdrew it. Based on these findings, the trial court found that the delay on November 4, 2009 was attributable to the State and, therefore, the State was responsible for a delay in bringing defendant to trial that was more than 160 days. Because the trial court's finding with respect to the delay between November 4, 2009 and December 15, 2009 was sufficient to grant defendant's motion to dismiss, it did not determine whether any other delays between November 4, 2009 and June 23, 2011 were attributable to defendant or the State.

¶ 24 Before we discuss trial court's finding with respect to the delay that occurred on November 4, 2009, we note that there was some dispute as to whether a written demand for trial was filed on November 4, 2009. The record includes a written demand for a speedy trial filed on November 4, 2009 as well as an oral request for a speedy trial made by Ms. Curran that same day. As such, we find that defendant made a request for a speedy trial, both orally and in writing, on November 4, 2009.

¶ 25 However, although defendant made a valid request for a speedy trial, subsequent to defense counsel's initial written and oral demand for a speedy trial, our reading of the transcript shows that defense counsel retreated on her position and in fact agreed to a continuance to December 15, 2009. Because counsel orally agreed to a continuance on the record, this in effect negated the demand for a speedy trial so that the clock on defendant's Speedy Trial Act claim was tolled. Thus, while we acknowledge that defense counsel filed a demand for speedy trial at the November 4, 2009 hearing and never withdrew it, the record clearly shows that subsequent to that filing, defense counsel specifically agreed on the record to a continuance. Not only do Ms.

Curran's words indicate that she agreed to a continuance on November 4, 2009, but the subsequent hearing shows that both defendant and the judge understood her agreed continuance to be an agreement on the record to continue the hearing on the summary suspension and a continuance for status on the case-in-chief. Illinois law is clear in that when a defendant agrees to a continuance, the resulting delay is attributable to defendant. *People v. Smith*, 251 Ill. App. 3d 839, 842 (1993) ("An express agreement on the record to a continuance is an affirmative act attributable to the defendant."); *Turner*, 128 Ill. 2d at 553 ("an express agreement to a continuance on the record is an affirmative act attributable to the defendant.").

¶ 26 The trial court relied on the fact that the written demand was filed, and the fact that Ms. Curran's affidavit indicated that she never withdrew the written demand, to find that the subsequent delay was attributable to the State. In doing so, the trial court apparently made a finding that counsel's written demand superseded any subsequent acquiescence in a continuance. However, the demand for trial must include not only the demand for a speedy trial, but also a willingness to go to trial. Counsel's subsequent agreement to continue the case to December 15, 2009 served to toll the running of the 160-day demand for trial. Because the trial court relied on the fact that a demand was made and never withdrawn and ignored the subsequent acquiescence by defense counsel to continue the case to December 15, 2009, the trial court applied the wrong standard when it found that the delay on November 4, 2009 was attributable to the State. Because the court applied the wrong standard, the trial court abused its discretion. *Zavell & Associates, Inc.*, 257 Ill. App. 3d at 322 (abuse of discretion will be found where the wrong legal standard has been applied.).

¶ 27 Defendant cites *People v. Workman*, 368 Ill. App. 3d 778 (2006), and *People v. LaFaire*, 374 Ill. App. 3d 461 (2007), for the proposition that when a defendant agrees to a trial date that is

within the 160-day Speedy Trial Act period, the Speedy Trial Act clock is not tolled and the delay is attributable to the State. However, here, defendant did not participate in the "scheduling of a mutually agreeable trial date that fell into the 160-day speedy trial period" as was the case in *LaFaire*. *LaFaire*, 374 Ill. App. 3d at 464. Instead, defendant's counsel expressly agreed on the record that the matter, which was set for hearing on defendant's summary suspension petition, would go "by agreement to 12-15." Thus, although defense counsel filed a written demand for a speedy trial earlier in the day on November 4, 2009, which began the speedy trial clock, defense counsel subsequently agreed on the record to go "by agreement" on the summary suspension hearing and the case in chief for status, which tolled the speedy trial clock until the expiration of that delay. *Kliner*, 185 Ill. 2d at 114 ("A defense counsel's express agreement to a continuance may be considered an affirmative act contributing to a delay which is attributable to the defendant.").

¶ 28 Further, while we find that language from the November 4, 2009 hearing to be sufficiently clear to show that the parties were not agreeing to continue the matter for a mutually agreeable trial date, the subsequent hearing on November 19, 2009 supports our finding. At the November 19, 2009 hearing, not only is defendant adamant that the case was never set for trial, but the trial court judge, upon looking closely at the prior judge's notes, determined that the matter was not set for trial at the November 4, 2009 hearing, and that the court had instead set the matter to December 15, 2009 for hearing on defendant's summary suspension petition. Thus, because the trial court applied the wrong standard when determining whether the Speedy Trial Act had been violated, we must reverse the trial court's ruling on that issue.

¶ 29 Although we have found that the trial court erred with respect to its finding on the November 4, 2009 delay, based on the record before us, we cannot conclusively determine

whether the Speedy Trial Act was violated in this case as the trial court failed to address whether other delays that occurred in the case were attributable to the State. The parties dispute whether the delays that occurred between November 4, 2009 and June 23, 2011 are attributable to defendant or the State, and the trial court made no findings with respect to those disputes. Accordingly, we must remand this case to the trial court so that a proper record can be made with respect to these other delays.

¶ 30 Last, while the parties offer arguments regarding defendant's constitutional speedy trial rights, the trial court's ruling was based solely upon the Speedy Trial Act and any issue relating to defendant's constitutional speedy trial rights was never properly raised on appeal. See *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). It is well known in Illinois that a defendant possesses both constitutional and statutory rights to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5 (West 2008). Although these provisions address similar concerns, "the rights established by each are not necessarily coextensive" (*People v. Hall*, 194 Ill. 2d 305, 326 (2000)), and "[p]roof of a violation of the statutory right requires only that the defendant has not been tried within the period set by the statute and that the defendant has not caused or contributed to the delays." *People v. Patterson*, 392 Ill. App. 3d 461, 465 (2009). Here, the only issue on appeal is whether defendant's statutory right to a speedy trial was violated. As such, we need not address any argument relating to defendant's constitutional right to a speedy trial as those were not at issue in the trial court and were not properly raised here. See *Mayo*, 198 Ill. 2d at 535.

¶ 31 CONCLUSION

¶ 32 For the reasons above, we reverse the trial court's ruling because it applied the wrong standard when it determined that the delay on November 4, 2009 was attributable to the State,

thus resulting in a Speedy Trial Act violation, and we remand the matter back to the trial court to make rulings on additional delays in order to determine whether defendant's Speedy Trial Act rights were in fact violated.

¶ 33 Reversed and remanded.