2019 IL App (1st) 160611-U

FIRST DIVISION
January 22, 2019

No. 1-16-0611

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. 13 CR 5903 (02)
	)	
NASEAN FLOWERS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's trial counsel was not ineffective for failing to move to dismiss his case based on speedy trial grounds. Defendant's sentence was not excessive.

¶ 2 Defendant Nasean Flowers was found guilty by a jury of first degree murder and to have personally discharged a firearm that caused the death of another. The trial court sentenced him to 55 years in prison. On appeal, Mr. Flowers argues that (1) his conviction should be reversed because he was not brought to trial within 120 days of his arrest as required by section 103-5(a)

of the Speedy Trial Act (725 ILCS 5/103-5(a) (West 2012)); and (2) his 55-year sentence was excessive. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Mr. Flowers and his codefendant Dewayne Chester, who is not a party to this appeal, were both arrested for the shooting death of Tyquan Tyler. Mr. Flowers was arrested and held in custody starting on February 19, 2013, and his trial started on May 11, 2015.

¶ 5 The evidence at trial was that, on June 23, 2012, and into the early morning of June 24, there was a house party near the corner of 62nd Street and Rhodes Avenue in Chicago. Thirteen-year-old Tyquan was at the party with two of his sisters. After the party ended, "over 40 people" were standing outside. Someone fired into the crowd, Tyquan was shot, and Tyquan died as a result of his gunshot wound.

¶ 6 Dewayne Chester, the State's main witness, testified in exchange for a plea deal in two cases pending against him. In an unrelated gun case, Mr. Chester pled guilty and was sentenced to three years in prison; and for the murder of Tyquan, Mr. Chester pled guilty to an amended count of conspiracy to commit aggravated battery with a firearm and was sentenced to seven years in prison, to run consecutive to his three-year sentence.

¶ 7 Mr. Chester testified that on June 23, he was with about seven or eight other people, including Mr. Flowers, at 62nd Street and Vernon Avenue, smoking marijuana and drinking alcohol. In the early morning hours of June 24, Mr. Flowers asked whether Mr. Chester wanted to walk with him down Rhodes Avenue, which was two blocks away and Mr. Chester agreed. Before the two men started walking toward Rhodes Avenue, Mr. Flowers went to a car and got a silver, nine-millimeter gun from the passenger side. Mr. Chester and Mr. Flowers then walked into the alley between 62nd and 63rd Streets, toward Rhodes Avenue. They were the only people

in the alley and Mr. Flowers was the only person Mr. Chester saw with a gun. A green van in the alley was blocking the intersection at Rhodes Avenue. When the van moved, Mr. Flowers pulled out his gun and fired at a crowd of 20 to 30 people that were walking past on Rhodes Avenue two blocks away. Mr. Chester heard one gunshot and, although he had walked off and did not see the gun go off, he turned around when he heard the shot and saw "fire ricocheting off the wall from the bullet." When Mr. Chester turned around, Mr. Flowers had the gun pointed toward the crowd. Another shot went off, and Mr. Chester and Mr. Flowers both ran out of the alley, with Mr. Flowers still holding the gun. After they ran out of the alley, Mr. Chester heard Mr. Flowers say, "damn, this b**** jammed." Mr. Flowers got into one car, and Mr. Chester got into another, and both left the area.

¶ 8 The jury found Mr. Flowers guilty of first degree murder. The trial court denied Mr. Flowers's motion for a new trial and sentenced Mr. Flowers to 55 years in prison.

¶ 9 II. JURISDICTION

¶ 10 Mr. Flowers was sentenced on January 8, 2016, and a timely notice of appeal was filed that same day. This court has jurisdiction pursuant to article VI, section 6 of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. R. 603 (eff. Feb. 6, 2013), R. 606 (eff. Dec. 11, 2014)).

¶ 11 III. ANALYSIS

¶ 12 A. Ineffective Assistance of Counsel

¶ 13 Mr. Flowers argues that his counsel was ineffective for failing to move to dismiss his case on speedy trial grounds. A defendant who claims he received ineffective assistance of counsel must show that (1) his counsel's performance was deficient, and (2) that deficient

performance prejudiced him. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 123 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). But "[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." *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). Because we find no speedy trial violation, we reject Mr. Flowers's ineffective assistance of counsel claim.

¶ 14 A defendant has a right to a speedy trial pursuant to both the federal and Illinois constitutions (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8), and a state statute (725 ILCS 5/103-5 (West 2012)), but the constitutional and statutory rights are not coextensive (*People v. McGee*, 2015 IL App (1st) 130367, ¶ 25 (citing *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006))). Here, Mr. Flowers's argument is based on the statute.

¶ 15 Under subsection (a) of the Speedy Trial Act, a defendant who is held in custody pending trial is entitled to be tried within 120 days, "unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2012). If the defendant is not tried within the 120-day period, the charges must be dismissed. *Woodrum*, 223 Ill. 2d at 299. "Any period of delay occasioned by the defendant tolls the speedy-trial period." *Woodrum*, 223 Ill. 2d at 299.

¶ 16 The Act specifically provides that "[d]elay shall be considered 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 2012). As our supreme court has stressed, the Act "places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed." *Cordell*, 223 Ill. 2d at 391. Although the Act "does not mandate any magic words constituting a demand for trial, it does require some affirmative statement in the record requesting a speedy trial." (Internal quotation marks omitted.) *People v. Jones*, 2018 IL App (1st) 151307, ¶ 28.

¶ 17 In addition, a "defendant bears the burden of affirmatively establishing a speedy trial violation by showing that the delay was not attributable to him." *People v. Wade*, 2013 IL App (1st) 112547, ¶ 16. Under subsection (a) of the Act, we presume that any of that time passage is attributable to the State unless the defendant has consented, and the defendant is presumed to have consented unless he demands trial or objects to a delay that is requested by the State. 725 ILCS 5/103-5(a) (West 2012).

¶ 18 In this case, Mr. Flowers was arrested on February 19, 2013, and his trial began on May 11, 2015. He argues that 135 days within that time period are attributable to the State. The State disagrees with Mr. Flowers's computation of the time attributable to it with respect to the 25-day period between November 10 and December 5, 2014. Mr. Flowers's speedy trial claim depends on whether this 25-day period is attributable to him or to the State.

¶ 19 On November 10, 2014, the parties set the trial to start on January 5, 2015. On December 5, 2014, however, the parties rescheduled the trial, by agreement, for Jan 26, 2015, due to a conflict in the court calendar. Mr. Flowers argues that the 25 days between November 10 and December 5 were attributable to the State because "Illinois courts have held that parties agreeing to a trial date within the speedy trial term does not toll the speedy trial clock." The State disagrees, countering that those 25 days were not attributable to it because Mr. Flowers did not make a written or oral demand for trial on November 10. We agree with the State.

¶ 20 Mr. Flowers contends that when a trial is scheduled, any time between the day the trial date is set—here, November 10, 2014—and the next court date that is set—here, December 5, 2014—is attributable to the State, even if the defendant agrees to the trial date, so long as the trial date falls within the 120-day period allowed by the Act. We reject this argument for the same reason that this court rejected the same argument in *Wade*, 2013 IL App (1st) 112547.

¶ 21 In *Wade*, the defendant argued that "an agreement to a trial date inside the 120-day period for the Speedy Trial Act is not a 'delay' attributable to him." *Id.* ¶ 24. The *Wade* court, however, found:

> "To invoke speedy trial rights, the statute requires a clear objection and demand for trial from defendant. There is no language in the statute suggesting this requirement does not apply when the case has been set for trial. An agreed continuance tolls the speedy trial period, whether or not the case has been set for trial. Defendant's contention illustrates what the [supreme court] sought to prevent [in *Cordell*], the use of section 103-5(a) not as a shield to protect defendant's right to a speedy trial, but as a sword to defeat his conviction." *Wade*, 2013 IL App (1st) 112547, ¶ 26.

¶ 22 Mr. Flowers's attempt to distinguish *Wade* is not successful. He suggests that *Wade* did not address whether the time between the day that the initial trial date is set and the day that a later trial date is set should be attributable to the defendant, but addressed only the time periods between two trial dates. That is true but only because in *Wade*, both parties agreed that the time between arraignment and the initial trial date was attributable to the defendant and did not count against the speedy trial term. 2013 IL App (1st) 112547, ¶¶ 19-20. The import of *Wade* is that any passage of time to which the defendant fails to object, does not count towards the 120-day clock allowed under subsection (a) of the Act.

¶ 23 Mr. Flowers also asks us to reject *Wade* and follow *People v. Zeleny*, 396 Ill. App. 3d 917 (2009), *People v. LaFaire*, 374 Ill. App. 3d 461 (2007), and *People v. Workman*, 368 Ill. App. 3d 778 (2006). In each of those cases, the courts treated the time until the initial scheduled trial date itself as attributable to the State for speedy trial purposes, because the original trial date was

within the time allowed by the Act. *Zeleny*, 396 Ill. App. 3d at 922; *LaFaire*, 374 Ill. App. 3d at 464; *Workman*, 368 Ill. App. 3d at 785. However, *Zeleny* and *LaFaire* involve subsection (b) of the Speedy Trial Act rather than subsection (a). *Zeleny*, 396 Ill. App. 3d at 920; *LaFaire*, 374 Ill. App. 3d at 463. Subsection (b) does not include the explicit provision in subsection (a) that delays are considered to be agreed to by the defendant (and thus not attributable to the State) unless the defendant objects or demands trial. Compare 725 ILCS 5/103-5(a) and (b) (West 2012). Thus, those cases are simply not relevant.

¶ 24 *Workman*, however, involved a defendant in custody and so arose, as this case does, under subsection (a) of the Act. The primary speedy trial issue in that case was whether the 60-day continuance for the DNA testing should have been charged against the State for speedy trial purposes. But, in calculating the speedy trial clock, the court held that the defendant's agreement to "the original trial setting" which was within the speedy-trial limit "did not toll the speedy trial clock." *Workman*, 368 Ill. App. 3d at 785. However, the *Workman* court came to this conclusion without any analysis. And as this court noted in declining to follow *Workman* in our decision in *Wade*, "*Workman* was based on the specific facts before the court." *Wade*, 2013 IL App (1st) 112547, ¶ 28. To the extent that *Workman* and *Wade* conflict, we follow the reasoning and result in *Wade*.

¶ 25 We reject Mr. Flowers's suggestion that *Wade* is an outlier or is inconsistent with our supreme court's analysis of the Speedy Trial Act in *Cordell*. Mr. Flowers points to the reference by our supreme court to "delay" under the Act as "[a]ny action *** that moves the trial date out of that 120-day window." *Cordell*, 223 Ill. 2d at 390. From this, Mr. Flowers concludes that "setting a case for trial within the 120-day statutory window does not cause 'delay' under Illinois law." This argument takes the *Cordell* language completely out of context. The point that our

supreme court was making in *Cordell* is that *any* passage of time between the date custody begins and the date trial begins, to which the defendant does not object, is attributable to the defendant. *Id.*

¶ 26 As we recognized in *Wade,* and our supreme court emphasized in *Cordell*, the Speedy Trial Act should be used as "a shield to protect defendant's right to a speedy trial," not as "a sword to defeat his conviction." *Wade*, 2013 IL App (1st) 112547, ¶ 26; see also *Cordell*, 223 Ill. 2d at 390. Under Mr. Flowers's suggested interpretation of subsection (a) of the Act, a defendant could wait to make a speedy-trial objection until the day the 120-day clock had run. At that point, according to Mr. Flowers, all of the time that had passed would be attributable to the State and the State would have to immediately try the defendant or dismiss the case. This is the kind of conversion of the Act from a shield to a sword that distorts the Act's intended purpose.

¶ 27 Because the 25-day period between November 10 and December 5, 2014, should not be attributable to the State, Mr. Flowers's trial began within the 120-day period required by the Act and Mr. Flowers's speedy trial rights were not violated. And as there was no violation of Mr. Flowers's speedy trial rights, his trial counsel was not ineffective for failing to move to dismiss the case on speedy trial grounds. *Cordell*, 223 Ill. 2d at 385.

¶ 28 B. Excessive Sentence

¶ 29 Mr. Flowers next argues that his 55-year sentence was excessive based on his lack of criminal history and because the court did not allow him to make a statement in allocution. Mr. Flowers asks that we vacate his sentence and remand for a sentencing hearing. The State responds that the sentence was a proper exercise of the trial court's discretion.

¶ 30 A trial court has broad discretion in imposing sentences "and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). As the reviewing

court, we must give the trial court's judgment "great deference *** regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider" factors, such as "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." (Internal quotation marks omitted.) *Id.* at 212-13. We may not alter a defendant's sentence unless we find the trial court abused its discretion. *Id.* "A sentence will be deemed an abuse of discretion where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *Id.*

¶ 31 "A sentence promotes the spirit and purpose of the law when it reflects the seriousness of the offense and gives adequate consideration to [a] defendant's rehabilitative potential." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36. The seriousness of an offense is the most important factor in sentencing, and a trial court does not need to give greater weight to a defendant's rehabilitative potential than the seriousness of the offense. *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 82.

¶ 32 At sentencing, in aggravation the State argued that Mr. Flowers's "behavior was brazen, it was bold, and a complete disregard for human life." The State asked for a sentence substantially above the 45-year minimum. In mitigation, Mr. Flowers's defense counsel argued that nothing in the case was "[any more] aggravating than what the legislature had already accounted for by making it a 45 year minimum," pointing out that 45 years itself was a "very harsh sentence." Defense counsel further noted that Mr. Flowers had no prior convictions, a supportive family, no gang affiliations, and was a "young man who has a wonderful opportunity to rehabilitate himself."

¶ 33 In sentencing Mr. Flowers, the trial court stated: "When you do bad things, there are bad

consequences, and I think shooting a 13 year old boy for apparently no obvious reason or whatever or just for the fun of it, who knows, will warrant a significant sentence for Nasean Flowers." The court acknowledged that Mr. Flowers had essentially no prior record and that he was young. The court also stated that it considered "the factors in aggravation and mitigation set forth in the statute," the lawyers' arguments, the PSI, "and the evidence in the case itself, which is the most incriminating and damaging evidence [it] [had] heard in a bit."

¶ 34 Mr. Flowers's sentence of 55 years in prison included 25 years for the murder and an additional 30 years because he personally discharged a firearm that caused the death of another. The sentencing range for the offense first-degree murder is 20 to 60 years 730 ILCS 5/5-4.5-20(a)(2) (West 2012). The additional finding that a defendant personally discharged a firearm that caused the death of another adds from 25 years to a term of natural life to the sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012). Accordingly, Mr. Flowers's total possible sentence ranged from 45 years to natural life. His 55-year sentence falls within the statutory guidelines and was only 10 years above the minimum possible sentence. It is also clear from the record that the trial court considered the relevant factors. The trial court explicitly stated that it considered Mr. Flowers's lack of prior convictions and youth, but also that it found the seriousness of the offense to be significant.

¶ 35 Mr. Flowers notes that he was given no opportunity to speak at his sentencing hearing and that section 5-4-1 of the Unified Code of Corrections requires the trial court to give a defendant the opportunity to speak on his own behalf at a sentencing hearing (730 ILCS 5/5-4-1(a)(6) (West 2012)). But Mr. Flowers neither objected to this lack of opportunity nor raised the issue in his motion to reconsider his sentence, and therefore has forfeited this claim, unless it rises to the level of plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Mr. Flowers has

not argued that the forfeiture can be overlooked because the error rose to the level of plain error. Because it is the defendant's burden to show plain error, a "defendant who fails to argue for plain-error review obviously cannot meet his burden" and "forfeits plain-error review." *Id.* at 545-46. We affirm Mr. Flowers's sentence of 55 years in prison.

¶ 36 VI. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 38 Affirmed.