2012 IL App (2d) 100846-U
No. 2-10-0846
Order filed August 8, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES W. TURUC, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 07-CF-1763 Honorable Fred L. Foreman, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: (1) Defendant's "[m]ild objection" and lack of any reference to trial, let alone speedy trial, was insufficient to raise an affirmative and unambiguous request for speedy trial on the record; thus trial delay was attributable to defendant; (2) because there were no lawful grounds for moving for discharge on speedy trial grounds, counsel was not ineffective for withdrawing a motion to dismiss; (3) evidence was sufficient to prove that defendant held a position of trust for purposes of conviction of criminal sexual assault; (4) defendant forfeited his claim of sentencing error by failing to include the claim in his motion to reconsider sentence.

¶ 1 After a jury trial, defendant, James W. Turuc, was found guilty of one count of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2006)) and one count of aggravated criminal sexual

abuse (720 ILCS 5/12-16(d) (West 2006)). The trial court found that the offenses merged and sentenced defendant to a term of 15 years in the Department of Corrections on the criminal sexual assault charge. Defendant now appeals from both his conviction and his sentence. We affirm.

¶ 2 Defendant first contends that his right to a speedy trial was violated. Section 103-5(a) of the Code of Criminal Procedure of 1963 (Code) provides in relevant part that "[e]very person in custody in this State for an alleged offense 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 2006). Defendant was arrested on May 25, 2007 and remained in custody, without trial, until October 2, 2007, 130 days later, when he was released on bond.

¶ 3 We first note that, while defendant filed a motion to dismiss on speedy trial grounds on September 27, 125 days after his arrest, he withdrew the motion on October 2, the day on which he was released from custody. A withdrawn motion, as it has never been ruled upon, is not preserved for appeal. See *People v. Urdiales*, 225 Ill. 2d 354, 425 (2007). Where a defendant withdraws his motion to dismiss based on a speedy trial violation before the trial court can rule on the motion, the speedy trial issue is waived. *People v. Crowder*, 161 Ill. App. 3d 1009, 1013-14 (1987). Further, defendant did not raise the issue of a speedy trial violation in his post trial motion for judgment notwithstanding the verdict or for a new trial. In general, both an objection at trial and a written post-trial motion raising the issue are required to preserve an issue for appellate review. *People v. Blankenship*, 406 Ill. App. 3d 578, 581 (2010).

¶ 4 Defendant then argues that his trial counsel was ineffective for withdrawing the speedy trial motion. We apply the *Strickland* test to determine if trial counsel has rendered ineffective assistance. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 13; see *Strickland v. Washington*, 466 U.S. 668 (1984).

Under the *Strickland* test, a defendant must show that: (1) counsel's performance was unreasonable; and (2) but for the error, there is a reasonable probability that the outcome would have been different. *Theis*, 2011 IL App (2d) 091080, ¶ 13. Both prongs of the test must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *Id*.

¶ 5 Trial counsel's failure to move for discharge of his client on the basis of a speedy trial violation will constitute ineffective assistance of counsel where there is at least a reasonable possibility that the client would have been discharged had a timely motion been filed (and presented for ruling) and there was no justification for the attorney's decision to fail to do so. *People v. Workman*, 368 Ill. App. 3d 778, 784 (2006). Defense counsel can also be deemed ineffective if the issue is not raised in a posttrial motion. *Id*. However, there can be no constitutional incompetence if no basis for raising a claim of a speedy trial violation exists. *Id*.

¶ 6 Under section 103-5(a) of the Code, proof of a violation 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 delay. *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). A delay is occasioned by a defendant when his acts caused or contributed to a delay resulting in postponement of trial. *Id*. at 158-59. A delay is considered to be agreed to by a defendant unless he 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 2006). While section 103-5(a) does not require a "formal" demand, it does require an objection to a delay by making a demand for trial either in writing or on the record. *Murray*, 379 Ill. App. 3d at 161. No "magic words" are required to constitute a speedy trial demand; however, there must be some affirmative statement requesting a *speedy* trial. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010).

¶ 7 Defendant concedes only one day of delay attributable to him during the 130 days of his pretrial custody. However, on August 21, 2007 (defendant's 87th day in custody), the State requested a continuance of the trial from August 27 until "the October date" in order to obtain some medical records. When asked if there was an objection, defense counsel stated, "Mild objection. Yes, over objection." Counsel then raised another issue regarding expert testimony. The court then stated, "Over the objection of the defendant, I will continue on the State's motion to the October 1st trial date, set it for status of discovery and pretrial. Is the 18th of September agreeable?" Counsel responded, "Sure, that's fine."

¶ 8 While defense counsel objected to the continuance, and the trial court granted the continuance "on the State's motion" and "[o]ver the objection of the defendant," there clearly was no affirmative statement requesting a speedy trial; counsel did not specifically ask for trial or use language that would reference the speedy trial statute. See *Murray*, 379 Ill. App. 3d at 161 (no sufficient oral demand for trial where counsel stated readiness for trial and objected to delay "but did not specifically ask for trial or use language that would reference the speedy-trial statute."). Even stating a readiness for trial and "adamantly objecting to a delay have been found insufficient to affirmatively invoke the right to a speedy trial. See *People v. Wyatt*, 47 Ill. App. 3d 686, 688 (1977), cited approvingly in *Murray*, 379 Ill. App. 3d at 161. Here, defense counsel's "[m]ild objection" and lack of any reference to trial, let alone speedy trial, was insufficient to raise an affirmative and unambiguous request for speedy trial on the record. Thus, the period from August 21 until October 1 was attributable to defendant. Taking defendant's count of 87 days in custody to that point, it is clear that defendant's release from custody on October 2 resulted in, at most, 88 days in custody attributable to the State (assuming, *arguendo*, that it was attributable to the State), well within the

120 days required for speedy trial. Since there were no lawful grounds for moving for discharge on speedy trial grounds, we can find no deficient performance by defense counsel or prejudice to defendant based on counsel's withdrawal of the motion to dismiss for a speedy trial violation, and no ineffective assistance of counsel. See *Murray*, 379 Ill. App. 3d at 158; *Workman*, 368 Ill. App. 3d at 784. Thus, we find no error here.

¶ 9 Defendant next contends that his conviction of criminal sexual assault must be reversed because the State failed to prove a statutory element of the crime. Defendant was convicted of criminal sexual assault under section 12-13(a)(4) of the Criminal Code of 1961, which provides that a person commits criminal sexual assault if he:

> "commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim." 720 ILCS 5/12-13(a)(4) (West 2006).

Defendant now argues that the State failed to prove that defendant was in a position of trust in relation to the victim, Keith P.

¶ 10 On a challenge to the sufficiency of the evidence, we must determine whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Moore*, 394 Ill. App. 3d 361, 363-64 (2009). We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *Id*. at 363.

¶ 11 In the indictment, the State charged that defendant "held, as a substance abuse treatment counselor, a position of trust in relation to" the victim. The phrase "position of trust" is a nebulous

concept; it is not defined in the statute. See *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 121 (McLaren, J., dissenting). In the context of this charge, courts have given the word "trust" its common, dictionary meaning. See *People v. Secor*, 279 Ill. App. 3d 389, 396 (1996) (quoting American Heritage Dictionary 142 (2d coll. ed. 1985): " '[c]onfidence in the integrity, ability, character, and truth of a person ***[;] [s]omething committed into the care of another' "). In *Secor*, the court reasoned that, as it relates to "trust," section 12-13(a)(4) was enacted "to prevent sex offenses by *** those in whom the child has placed his trust ***. It is the trust that makes the child particularly vulnerable, and it is the betrayal of that trust that makes the offense particularly devastating." *Id*. The families of the defendant and the victim in *Secor* "had been friends for 10 years, a circumstance likely to generate mutual trust" that "was demonstrated on the occasions when the children slept at each others' houses." *Id*. at 394. In *People v. Reynolds*, 294 Ill. App. 3d 58, 69 (1997), the court found a position of trust established by evidence that the defendant had provided "career advice or mentorship, educational help, and financial support" to the victim.

¶ 12 Here, the victim, Keith P., testified that, when he was 14 years old, he ran away from home, taking no clothes or money. He was on juvenile probation for theft, drank alcohol, and sometimes smoked marijuana. After staying with a friend, he visited a church, where he attended an Alateen meeting. At the meeting, a woman gave him a business card for Hote House, a halfway house, where she suggested he try to find a place to stay. The card described Hote House as "A Sober Living House With a Golden Opportunity." Keith called the telephone number on the card and told the person that he spoke with (defendant testified that he took Keith's call) that he was 17. Defendant and another man picked up Keith shortly thereafter. After attending an Alcoholics Anonymous (AA) meeting together, defendant and Keith went to Hote House; however, Keith was not allowed to stay

there because he was under 18 years of age. They then went to defendant's house, where they slept in the same bed.

¶ 13 The next day, defendant gave Keith some clothes and took him out to breakfast. After going swimming at the home of defendant's friend, defendant and Keith attended an AA meeting. That night, they again slept together in the same bed. The pattern continued the next day, with defendant taking Keith to AA meetings, swimming, and out to eat. They slept together on a couch in a Wisconsin cabin. Defendant also gave Keith $25 cash to open a checking account, then told Keith to write him a $25 check on the account, which he immediately cashed.

¶ 14 The following day, defendant and Keith attended three AA meetings. They also discussed making money with a check depositing scheme. Keith and defendant stayed in a motel that night, where defendant gave Keith a marijuana cigarette to smoke. This cigarette made him feel different than his prior marijuana use had made him feel and made him hallucinate. After he lay down on the bed, defendant lay next to him and took Keith's pants off, even though Keith said that he was not "okay" with it. Defendant then performed oral and anal sex on him.

¶ 15 Defendant anally penetrated Keith again the next morning. Keith did not fight because he "had nowhere to go, no money, and couldn't go back home." They then went to a bank where Keith deposited a $4500 check that defendant's friend Mike had written. Keith requested and received $250 cash back, which he gave to defendant. After attending an AA meeting, they checked into a motel, where defendant "tried doing it again"; however, Keith told him no. Defendant also got angry when he discovered Keith using defendant's cell phone to call a friend. Defendant slept in the same bed with Keith again that night.

¶ 16 The next morning, defendant and his friend Mike took Keith to the bank, where he unsuccessfully attempted to withdraw $100 from the bank account. Defendant then took Keith to Kentucky to attend the funeral of defendant's AA sponsor. While they spent the night as guests in a private home, defendant "tried to get on top of" Keith, but Keith told him no.

¶ 17 Upon their return to Illinois, defendant had Keith write Mike a check for $4250, which the bank refused to cash. Mike accused Keith of stealing the money and put a gun to Keith's head. Defendant calmed the situation and eventually took Keith to both a party and an Alanon meeting. Defendant arranged for Keith to stay at the home of someone he met at the meeting. The following day, defendant and Mike took Keith home, where his mother called the police, and the three were taken into custody.

¶18 Defendant testified that he and some volunteers, all AA members, founded Hote House as a temporary placement for newly sober people. He was not a licensed counselor, but he volunteered to work at the house. Keith claimed that he was 18. He told defendant that he was having trouble with alcohol and drugs and, at some point, told him that his father was violent and abusive. Defendant tried to "problem-solve" with Keith, which was "part of the things" that defendant did at Hote House. He was trying to get Keith to "reconcile and go back" to his home and "[p]retty much" spent the entire time that Keith was with him trying to talk him into going back to his parents.

¶ 19 Defendant described taking Keith to AA meetings and having him stay at his personal residence and in the Wisconsin cabin, but did not say that they slept in the same bed. He loaned Keith $25 to open a bank account to help Keith establish documentation to get an identification card, a procedure that he had done for possibly 100 other people. Defendant denied any involvement with a scheme involving the deposit of a large check but thought that Keith may have deposited a large

sum after selling a car. Defendant stayed at a motel with Keith, but he did not give him any marijuana and did not engage in any sexual conduct with him. He did admit to sleeping in the same bed with Keith on two occasions in motels. Keith "begged" defendant to take him to Kentucky.

¶ 20 After viewing all the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential element of a position of trust in relation to the victim beyond a reasonable doubt. Keith contacted defendant via a call to Hote House,"A Sober Living House With a Golden Opportunity," while trying to find a place to stay. Defendant put him up in his own home, gave him clothes, bought him food, took him swimming, and took him to multiple support meetings. Defendant denied being a licensed counselor, and there was no evidence of such a licensed status. However, even defendant testified that he tried to "problem-solve" with Keith and tried to get Keith to "reconcile and go back" to his home. Defendant met Keith at a difficult moment in Keith's life and he fed, sheltered, and entertained him while trying to "problem-solve" his issues. These were all acts that would tend to establish trust. We find no error here.

¶ 21 Defendant next contends that the trial court erred in sentencing him when it considered in aggravation defendant's abuse of his position of trust, which is a factor inherent in the offense. We first note that defendant failed to raise this issue in his motion to reconsider sentence. The failure to include a claim of sentencing error in a postsentencing motion results in forfeiture of the claim. *People v. Baez*, 241 Ill. 2d 44, 129-30 (2011). Defendant does not dispute that he did not include this specific claim of error in his motion to reconsider sentence; he merely argues that he "preserved the challenge to his sentence by filing a timely motion to reconsider that sentence." However, the mere timely filing of a postsentencing motion is insufficient to preserve claims of error that are not contained in that motion. Therefore, we find this issue forfeited.

¶ 22 For these reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 23 Affirmed.