2011 IL App (4th) 090662-U

Filed 8/31/11

NO. 4–09–0662

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
RAYMOND R. WILLIAMS,	)	No. 08CF649
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in finding defendant's speedy-trial rights were not violated.

(2) The trial court did not err by excusing a potential juror over defense counsel's *Batson* objection.

(3) Defendant was entitled to presentence credit for 439 days spent in custody and was entitled to $5-per-day credit against his fines for the 439 days spent in custody.

¶ 2 In February 2009, a jury found defendant, Raymond R. Williams, guilty of unlawful possession of a controlled substance with intent to deliver with a prior conviction for unlawful possession of a controlled substance with intent to deliver. 720 ILCS 570/401(c)(2) (West 2008); 730 ILCS 5/5–5–3(c)(2)(D) (West 2008). In July 2009, the trial court sentenced him to 13 years' imprisonment to be followed by a three-year period of mandatory supervised

release (MSR) and ordered him to pay a $2,000 mandatory assessment, a $100 lab fee, and a $1,210 street-value fine. The court gave defendant (1) presentence credit for May 11, 2008, to July 11, 2008, and for September 8, 2008, to July 23, 2009, and (2) an incarceration credit toward the mandatory assessment in the amount of $1,905.

¶ 3 Defendant appeals, arguing (1) he was denied his statutory speedy-trial right; (2) his trial counsel was ineffective for his failure to (a) object on speedy-trial grounds to the State's request for a continuance at the January 12, 2009, setting, and (b) file a motion for discharge based on the violation of defendant's speedy-trial right; (3) he was denied his constitutional right to equal protection when the State failed to provide a genuine, race-neutral reason for exercising a peremptory challenge against an African-American man in the venire panel; (4) he was entitled to 438 days in sentence credit for time served pursuant to section 5–8–7(b) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5–8–7(b) (West 2008)); and (5) he was entitled to $5-per-day credit against his fines under section 110–14(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110–14(a) (West 2008)).

¶ 4 I. BACKGROUND

¶ 5 A. Delays Leading Up to the Trial

¶ 6 On May 11, 2008, the police arrested defendant after finding a controlled substance containing cocaine in his possession during a routine traffic stop. Defendant was thereafter kept in custody. On May 13, 2008, defendant was charged by information with one count of unlawful possession of a controlled substance (more than 5 grams but less than 15 grams of a substance containing cocaine) with intent to deliver and one count of unlawful possession of a controlled substance (less than 15 grams of a substance containing cocaine). At

the May 14, 2008, arraignment, defendant requested a continuance for time to retain counsel, and the State had no objection. Thereafter, private counsel, Mark Bradley, entered his appearance to represent defendant in this case.

¶ 7 On May 28, 2008, a preliminary hearing was held, and a pretrial was set for June 16, 2008. On June 16, 2008, Bradley filed a demand for a speedy trial pursuant to section 103–5(a) of the Procedure Code (725 ILCS 5/103–5(a) (West 2008)) (a defendant shall be tried within 120 days from the date he was taken into custody unless delay is occasioned by the defendant). Further, on the same date, the State requested a continuance because the Illinois State Police Crime Laboratory (Crime Laboratory) had not completed analysis of the State's evidence. The trial court granted the continuance over Bradley's objection and set the pretrial for July 22, 2008.

¶ 8 On July 18, 2008, the State filed a motion to continue the July 22, 2008, pretrial because the Crime Laboratory had still not completed analysis of the State's evidence. At the July 22, 2008, hearing, the following exchange occurred between the trial court and Bradley regarding the State's motion to continue:

"THE COURT: *** And you're announcing ready for trial?

MR. BRADLEY: Yes, Judge.

THE COURT: Show: Defendant announces ready for trial."

The court thereafter scheduled a hearing on July 23, 2008, on the State's motion to continue and on the State's oral motion to release defendant on a recognizance bond.

¶ 9 On July 23, 2008, the State withdrew its motion to continue and oral motion to release defendant on a recognizance bond because the Crime Laboratory's analysis was in the

process of being completed. The trial court set defendant's jury trial for August 4, 2008.

¶ 10 On August 4, 2008, the trial court initially continued the jury trial to August 6, 2008, by agreement of both parties. However, after Bradley informed the court he would be disclosing additional witnesses, the following colloquy occurred:

> "[THE STATE]: Well, I am going to object to him disclosing witnesses. He has announced ready for trial and set for a trial date and then he is going to disclose witnesses to me at a future time?
>
> * * *
>
> THE COURT: What do you suggest? It is, obviously, his delay. What do you want to do, Ms. Wagoner?
>
> [THE STATE]: Well, You Honor, since I have not gotten any discovery on any of the witnesses, I would suggest setting it over for a pretrial and let the defendant provide me with discovery and the delay be attributable to him.
>
> THE COURT: I am sure you won't object, right, Mr. Bradley?
>
> MR. BRADLEY: No, Judge, I will agree to it.

Thereafter, the court set a pretrial hearing on August 25, 2008, by agreement of the parties.

¶ 11 On August 25, 2008, the trial court set defendant's jury trial for September 15, 2008, and a final pretrial for September 8, 2008. On September 2, 2008, the State filed a motion to have independent counsel appointed to review with defendant the finding of ineffectiveness

entered against defense counsel, Mark Bradley, on August 28, 2008, and for determination of whether to proceed with Bradley as counsel. According to the motion, Bradley's actions had caused concern as to his ability to effectively represent his clients, and the Honorable Timothy Steadman found Bradley's conduct "rose to the level of ineffectiveness that denied" another defendant a fair trial in a Macon County case. Therefore, the State requested the court appoint independent counsel to review with defendant the finding of ineffectiveness and to allow defendant to make a knowing, intelligent, and voluntary waiver of effective counsel if he wished to proceed with Bradley as his counsel.

¶ 12 On September 9, 2008, a hearing was held on the State's motion to have independent counsel appointed. At the hearing, the following exchange occurred between the trial court and defendant:

> "THE COURT: Do you understand you can proceed with Mr. Bradley as your lawyer but there are some questions here about whether or not he would provide you with adequate or effective legal representation?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand if you tell me you want to continue with Mr. Bradley as your lawyer, you would be waiving or giving up the right to say later on that he did not do a good job or provide you with effective legal representation?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Knowing that, do you want to decide today

whether or not you want to keep Mr. Bradley, or do you want time to think about it?

* * *

THE DEFENDANT: Yes, sir. I'd like a couple weeks to think about it.

THE COURT: All right. Now, your case is set for trial, I think, on the 15th coming up. This will delay your case, and that would be your delay. Do you understand that?

THE DEFENDANT: Yes, sir.

Thereafter, Bradley requested a setting for a pretrial because he wanted to research the issue of whether the delay was attributable to defendant. The State argued the delay should be attributable to defendant because he was "asking for time to consider his future representation." The court continued the jury trial until September 22, 2008.

¶ 13 On September 22, 2008, Bradley requested a continuance due to witness unavailability, and the State agreed to the continuance. The trial court allowed the continuance and set a pretrial on September 29, 2008.

¶ 14 On September 29, 2008, the case was continued to the following day by agreement of both parties. On September 30, 2008, defendant informed the trial court he wanted to continue with Bradley as his attorney. The court accepted his decision and found defendant had knowingly and voluntarily waived his right to competent counsel. The court then asked Bradley the status of the unavailable witness. Bradley informed the court he still had two witnesses to disclose, but he was ready for trial. The court suggested setting a final pretrial to

give Bradley time to file additional discovery, and Bradley agreed. Therefore, the court continued the case for a final pretrial on October 14, 2008, and ordered Bradley to file his additional discovery on or before October 1, 2008. Further, the court set defendant's jury trial for October 20, 2008.

¶ 15 Additionally, Bradley reiterated he did not believe the delay caused by the State filing the motion to have independent counsel appointed was attributable to defendant. The trial court responded, "You might be right from the time the motion was filed until it was heard, but as far as asking for time for consideration, I think that's a different issue." Bradley agreed two separate issues were involved.

¶ 16 On October 14, 2008, Bradley requested leave to file a late discovery answer naming at least two prospective witnesses. In response, the State requested the trial court continue the jury trial. The court allowed the continuance over Bradley's objection and determined the delay was attributable to defendant because it was caused by Bradley's failure to file timely discovery responses. The court also granted Bradley's request for leave to file late discovery and ordered the discovery answer be filed on or before October 15, 2008. Additionally, the court set the cause for pretrial on October 27, 2008.

¶ 17 On October 27, 2008, the trial court granted the State leave to file a motion to discharge Bradley as defendant's counsel of choice and set the hearing on the motion for November 5, 2008. On October 28, 2008, the State filed a motion to discharge Bradley as defendant's attorney because criminal charges were pending against him for threatening a public official in Macon County, and as a condition of his bond, he was not allowed to enter the grounds of the Macon County court facility except in response to official process. Therefore, the State

argued Bradley was unable to represent defendant in the present case because Bradley was barred from entering the courthouse.

¶ 18 On November 5, 2008, Bradley filed a motion to dismiss for failure to meet speedy-trial demand. On this same date, the trial court held a hearing on the State's motion to discharge Bradley as defendant's attorney. Because the State filed identical motions to discharge in several of Bradley's Macon County cases, the court consolidated these cases for purposes of the motions, which included the present case. At this hearing, the State argued Bradley had "constructively moved to withdraw as counsel" by agreeing to the bond condition. Bradley disagreed and argued the bond condition expired the following day. After reviewing the order setting forth the conditions of Bradley's bond, the court noted the order did not contain an expiration date on the courthouse restriction.

¶ 19 The trial court subsequently admonished the defendants concerning their right to representation by an attorney of their own choosing. Further, the court informed the defendants regarding the following: (1) the potential effect of Bradley's agreement to refrain from entering the courthouse for an indefinite duration, (2) Bradley's history of mental illness, (3) Bradley's pending criminal charges, and (4) previous occasions where Bradley failed to effectively represent his clients, which resulted in a finding of ineffectiveness by a Macon County judge. Based on the above considerations, the court found as follows:

> " ' The Court does find *** Mark Bradley's mental condition and the constraints regarding his access to the Macon County Court Facility by virtue of the agreed order in [No.] 08-CF-1408 renders it unreasonably difficult for him to carry out his employment as an

attorney at law effectively. Therefore, Mr. Bradley's representation as counsel of choice is terminated pursuant to Illinois Rules of Professional Conduct, and specifically, that would be Rule 1.16 (a)(3).' "

Thereafter, defendant requested a public defender be appointed, and the court granted defendant's request. Defendant asked the court whether this delay would be attributable to the State because the State filed the motion. The court responded, "Not necessarily, sir. That's not for today to resolve. If and when it becomes an issue, we'll resolve it."

¶ 20 On November 26, 2008, defendant's appointed counsel requested a continuance to give him time to investigate what additional discovery Bradley intended to file in the case. The trial court allowed the continuance and set a pretrial on December 22, 2008. Additionally, the motion to dismiss for failure to meet speedy-trial demand filed by Bradley was stricken by the court.

¶ 21 On December 22, 2008, the parties announced ready for trial, and the trial court set defendant's jury trial for January 12, 2009. Initially, the court attempted to set the jury trial on January 5, 2009, but defendant's appointed counsel had a conflict.

¶ 22 On January 12, 2009, the State requested a continuance due to being in trial on another matter. When the trial court asked for appointed counsel's response, he responded, "I guess, you know, they have another case starting." The court then allowed the continuance and set the jury trial for January 20, 2009.

¶ 23 On January 20, 2009, the trial court continued the jury trial to January 21, 2009, because defendant's appointed counsel was physically unable to attend court. On January 21,

2009, the State requested a continuance of the jury trial due to a material witness being unavailable, and defendant's appointed counsel had no objection. The court continued the jury trial to February 17, 2009. On February 17, 2009, 282 days after the date defendant was taken into custody, defendant's jury trial began.

¶ 24 B. *Voir Dire*

¶ 25 During the February 17, 2009, *voir dire*, the State exercised one of its peremptory challenges to exclude David Dampeer, an African-American male, from the jury. Defendant's appointed counsel raised a *Batson* objection, arguing he failed to "see the reason for excusing him." The State responded, "I'm excusing Mr. Dampeer on the basis of his prior criminal history. Mr. Dampeer has notable felonies and misdemeanors." Defense counsel noted he did not remember the jury questionnaire indicating Dampeer had several felony and misdemeanor convictions. The trial court excluded Dampeer over defense counsel's objection. Thereafter, the following colloquy occurred with regard to the *Batson* objection:

> "MR. RUETER [(Defense counsel)]: Judge, the State indicated that he excused Mr. Dampeer because of prior criminal history. I indicated I didn't recall *** him disclosing on the questionnaire. I had a chance to check our jury questionnaire copy and he indicated at least on one question that he had no felony or misdemeanor convictions. Now sometimes people do not truthfully disclosure [*sic*], but that's where we are at. So, I'm renewing my objection to his peremptory challenge being granted.
>
> [THE STATE]: First of all, Your Honor, I think it's a two

part inquiry. You first have to establish a pattern by the State before you can ask the State *** to raise the race neutral basis for the exclusion. Obviously, as the Court is aware, Mr. Wilkins was a black juror who was accepted by the State. He was excused by the defense. Now we have Mr. Dampeer. The court cannot make a finding there has been a pattern of exclusion of people of color based upon that. So if you want me to make an argument for that, there has not been a showing of a pattern to get to the second step.

THE COURT: That's correct. Of course, Mr. Shaw [(the State)] volunteered that he excused him based on his prior history. Obviously, that's incorrect at least based on the questionnaire.

[THE STATE]: Mr. Shaw asked a question during *voir dire* about his prior professional contact with the police department. He indicated during the course of his response that he had a prior seat belt ticket. The State's records indicated that he also has received diversion for retail theft. Therefore, he was not quite as truthful about his prior police contacts.

THE COURT: Anything further?

MR. RUETER [(Defense counsel)]: No, Your Honor.

THE COURT: It is correct that there has to be a pattern and the pattern has not been demonstrated. As I indicated before, Mr. Shaw volunteered that information regarding the prior history. But even with

that being incorrect, there's been no demonstration of a pattern.

Consequently, Dampeer was excused as a juror in this case.

¶ 26 C. Motion To Discharge

¶ 27 Following the jury trial, defendant filed a *pro se* motion to have independent counsel appointed to determine whether he was entitled to discharge for violation of his speedy-trial right on March 19, 2009. In his *pro se* motion, defendant stated he asked his appointed counsel to file a motion for dismissal and discharge for violation of the speedy-trial requirement on several occasions, and counsel "failed and refused" to file the requested motion.

¶ 28 On March 20, 2009, defendant's appointed counsel filed a motion for hearing on defendant's motion for a speedy-trial violation, arguing the trial court should consider and rule on Bradley's November 2008 motion stricken by the court. On April 8, 2009, a hearing was held on defendant's *pro se* motion to have independent counsel appointed. The trial court appointed independent counsel to represent defendant "for purposes of determining whether or not to pursue the allegations contained" in defendant's *pro se* motion.

¶ 29 On May 11, 2009, a hearing was held on the speedy-trial issue. During the hearing, the following colloquy occurred:

"MRS. HAWKINS [(Independent Counsel)]: On the days, I have calculated, and I do not come up with the days. I do not come up with the violation of the 120 days.

THE COURT: Okay.

MRS. HAWKINS [(Independent Counsel)]: *** I've tried

and I cannot.

THE COURT: Okay. Miss Wagoner?

[THE STATE]: *** I would *** guess that if counsel had the opportunity to review the record and calculate the days, and if we're talking about whether or not [appointed counsel] was ineffective, obviously, there isn't an issue with regards to speedy trial, then [appointed counsel] cannot have been found ineffective for not raising the issue. So, I think at that point once there's that concession by counsel *** that kind of ends the issue both as to [appointed counsel's] ineffectiveness and for the motion regarding the actual speedy[-]trial violation.

THE COURT: Now, you calculated it up to what point, Miss Hawkins?

MRS HAWKINS [(Independent Counsel)]: I calculated up to the point that it went to trial with [appointed counsel]. I calculated it, and as Miss Wagoner and I were discussing, *** I come up with different numbers *** because Mr. Bradley did make several motions to continue. So, I calculated up between 92 days or up to 93 days was the most that I could come up based on the motions to continue filed by Mr. Bradley.

* * *

THE COURT: And has the State calculated this at all?

[THE STATE]: Yes. *** I get a range, depending upon how some

> of those days are charged, from *** 69 [*sic*] days attributed to the State up to a maximum of 109 attributed to the State, and that would be up to the date of trial. So, I think really the motion goes through the trial date. Anything subsequent is obviously delayed [*sic*] occasioned by the defendant, and we don't count those."

The trial court ordered the parties to submit their calculations to the court within 14 days of the hearing date and set a status hearing on June 2, 2009.

¶ 30 On May 12, 2009, the State submitted its calculations to the trial court showing 81 days were attributable to the State. According to the State, it was responsible for the following delays: (1) May 11, 2008, to May 14, 2008, (2) May 28, 2008, to June 16, 2008, (3) June 16, 2008, to July 22, 2008, (4) July 22, 2008, to July 23, 2008, (5) July 23, 2008, to August 4, 2008, and (6) January 12, 2009, to January 20, 2009. Further, the State argued the 28-day delay (from October 28, 2008, to November 26, 2008) caused by the removal of Bradley from the case and the appointment of different counsel was not attributable to the State because the delay was caused by defendant's chosen counsel and counsel's inability to represent defendant. However, the State argued if the 28-day delay was determined to be attributable to the State, it would only be responsible for 109 days.

¶ 31 On May 27, 2009, defendant's independent counsel filed a report concerning calculation of days containing two different calculations. In defendant's first calculation, 120 days were attributable to the State: (1) May 11, 2008, to May 14, 2008, (2) May 21, 2008, to August 4, 2008, (3) October 27, 2008, to November 26, 2008, and (4) January 12, 2009, to January 20, 2009. In the second calculation, 89 days were attributable to the State: (1) May 11,

2008, to May 14, 2008, (2) May 21, 2008, to August 4, 2008, and (3) January 12, 2009, to January 20, 2009.

¶ 32 On June 2, 2009, a hearing was held on the speedy-trial issue. At the hearing, the trial court determined "the State's calculation was correct." Therefore, the court concluded defendant's appointed counsel was " 'not ineffective because there is no calculation by which *** defendant *** would have had his right to a speedy trial violated based on the calculations *** submitted and the Court's review of the docket.' " Additionally, the court determined defendant's counsel was " ' not precluded from representing the defendant in this case.' "

¶ 33 C. Posttrial Motion and Sentencing Hearing

¶ 34 On June 5, 2009, defendant's appointed counsel filed an amended motion for new trial or for judgment notwithstanding the verdict, arguing (1) defendant was not proved guilty beyond a reasonable doubt, (2) the trial court erred in overruling defendant's *Batson* objection to the State's exercise of its peremptory challenge to excuse Dampeer from the jury, (3) the court erred in overruling defendant's objection to the qualification of Detective Chad Ramey as an expert witness, (4) the court erred in refusing to allow defendant to call Billy Richardson as a witness at trial, and (5) the court erred in failing to grant defendant's motion for a mistrial based on the prosecutor's improper reference to stricken testimony. (This motion amended a previous motion for new trial or for judgment notwithstanding the verdict filed by defendant's appointed counsel in February 2009.)

¶ 35 On June 24, 2009, a hearing was held on the amended motion for new trial. With regard to the *Batson* objection, the State argued as follows:

"As the court is aware and as the record indicates, there were 2 panels of

> jurors who were questioned. There was a first panel, then there were strikes made and there was a second panel with 14 brought in. In the first panel, Juror #14 was an individual by the name of Tony Wilkins who the court may recall. I don't think it was ever in the record what race a particular juror is, but Mr. Wilkins was a black male. At the time we did our strikes back in chambers, Mr. Wilkins was accepted by the State and stricken by preemptory [*sic*] challenge by the Defendant. It was Mr. Dampier [*sic*] that came up in the second panel. The court may recall, Mr. Dampier [*sic*], from appearances, is a mixed race male and after the arguments that were made during the course of the strikes back in chambers, basically what the court found was that there was no showing there had been a pattern, which I think is the appropriate ruling in this case given the State had already accepted a black juror in the first panel and then excused Mr. Dampier [*sic*], not based upon his race, but there were other issues. We don't get to the other issues unless there's first a primary showing that there has been a pattern. So, I believe in that instance that the court's ruling that there wasn't a showing of pattern exclusion based solely on race is appropriate and the court did not error [*sic*] in finding a *Batson* violation by the State."

The trial court denied the motion without further discussion.

¶ 36 On July 24, 2009, the trial court sentenced defendant to 13 years' imprisonment to be followed by a 3-year MSR term and ordered him to pay a $2,000 mandatory assessment, a

$100 crime-laboratory fee, and a $1,210 street-value fine. The court gave defendant (1) presentence credit for May 11, 2008, to July 11, 2008, and for September 8, 2008, to July 23, 2009, and (2) an incarceration credit toward the mandatory assessment in the amount of $1,905.

¶ 37 On August 5, 2009, defendant's appointed counsel filed a motion to reconsider sentence, arguing the trial court "abused its discretion in sentencing *** defendant to that period of confinement." On August 28, 2009, the trial court denied the motion to reconsider sentence.

¶ 38 This appeal followed.

¶ 39 II. ANALYSIS

¶ 40 A. Speedy-Trial Violation

¶ 41 Defendant argues he was not tried within 120 days of the date he was taken into custody, as required by section 103–5(a) of the Procedure Code (725 ILCS 5/103–5(a) (West 2008)) and more than 120 days of delay were attributable to the State. Further, defendant argues his appointed counsel was ineffective for (1) his failure to assert defendant's demand for a speedy trial at the January 12, 2009, setting, and (2) for his failure to fully preserve defendant's speedy-trial allegations for review. In contrast, the State argues (1) a 160-day speedy trial period applies in defendant's case pursuant to section 103–5(b) of the Procedure Code (725 ILCS 5/103–5(b) (West 2008)) and section 3–8–10 of the Unified Code (730 ILCS 5/3–8–10 (West 2008)), and (2) defendant received a speedy trial even if the 120-day speedy-trial provision was applicable.

¶ 42 1. *Standard of Review*

¶ 43 The trial court's "calculations of the number of days accruing against the State following a defendant's speedy trial demand" generally involves a question of fact; therefore, the reviewing court's standard of review is abuse of discretion. *People v. Klein*, 393 Ill. App. 3d 536,

545, 913 N.E.2d 620, 627 (2009). "An abuse of discretion occurs only when no reasonable person could agree with the position taken by the trial court." *People v. LaFaire*, 374 Ill. App. 3d 461, 465, 870 N.E.2d 862, 866 (2007).

¶ 44 2. *Intrastate-Detainers Provision*

¶ 45 Every person in custody in Illinois must be tried within 120 days from the date he was taken into custody unless the delay was caused by the defendant. 725 ILCS 5/103–5(a) (West 2008). However, every person on bail or recognizance shall be tried within 160 days from the date the defendant demands trial unless the delay was caused by the defendant. 725 ILCS 5/103–5(b) (West 2008). Subsection (b) of section 103–5 also applies "to persons committed to any institution or facility or program of the Illinois Department of Corrections who have untried complaints, charges or indictments pending in any county of this State[.]" 730 ILCS 5/3–8–10 (West 2008).

¶ 46 Here, the State argues the applicable speedy-trial period is 160 days as set forth in section 103–5(b), and the speedy-trial period never began to run because defendant never filed a written demand meeting the requirements of section 3–8–10 of the Unified Code. See 730 ILCS 5/3–8–10 (West 2008) ("such person [(committed to Department of Corrections who has untried complaints, charges, or indictments)] shall include in the demand under subsection (b), a statement of the place of present commitment, the term, and length of the remaining term, the charges pending against him or her to be tried and the county of the charges***."). Although the State correctly argues defendant's written speedy-trial demand did not satisfy the requirements of section 3–8–10, the State failed to argue section 103–5(b) applied during the trial-court proceedings.

¶ 47 This court previously declined to address the issue of the applicability of section 103–5(b) because the State attempted to invoke section 103–5(b)'s provisions for the first time on appeal. *People v. Hillsman*, 329 Ill. App. 3d 1110, 1113-14, 769 N.E.2d 1100, 1103 (2002). Thus, this court determined it would only address "the issue of whether the State violated defendant's right to a speedy trial under section 103–5(a)." *Hillsman*, 329 Ill. App. 3d at 1114, 769 N.E.2d at 1103. Likewise, we will only address the issue of whether the State violated defendant's speedy-trial rights under section 103–5(a) because the State failed to raise the applicability of section 103–5(b) in the trial court. Therefore, we will consider the applicable speedy-trial period to be 120 days.

¶ 48 3. *Delays*

¶ 49 Defendant argues the following six periods of delays are attributable to the State: (1) May 11, 2008, to May 14, 2008; (2) May 28, 2008, to August 4, 2008; (3) August 25, 2008, to September 9, 2008; (4) September 30, 2008, to October 14, 2008; (5) October 27, 2008, to November 26, 2008; and (6) December 22, 2008, to January 12, 2009. In its brief, the State accepts responsibility for 58 days of delays (May 11, 2008, to May 14, 2008, and May 28, 2008, to July 22, 2008). The State argues defendant is responsible for the remaining delays.

¶ 50 The remaining days in defendant's second-listed period run from July 22, 2008, to August 4, 2008: 13 days. On July 18, 2008, the State filed a motion to continue the July 22, 2008, pretrial. On July 22, 2008, Bradley announced he was ready for trial, and the trial court scheduled a hearing for July 23, 2008, on the State's motion to continue. On July 23, 2008, the State withdrew its motion to continue, and the court set defendant's jury trial for August 4, 2008. On appeal, the State argues this 13-day delay should be attributed to defendant because Bradley

failed to object to the delay in the form of a speedy-trial demand.

¶ 51 Although the State correctly points out Bradley did not make an explicit written or oral demand for trial on either July 22 or July 23, we note defendant filed a written demand for a speedy trial pursuant to section 103–5(a) of the Procedure Code (725 ILCS 5/103–5(a) (West 2008) on June 16, 2008. Further, " 'mere silence on the part of the defendant or failure to object to the State's request for a delay does not amount to an agreement or waiver of the right to a speedy trial by the defendant.' " *People v. Sanchez*, 392 Ill. App. 3d 1084, 1094, 912 N.E.2d 361, 370 (2009) (quoting *People v. Reimolds*, 92 Ill. 2d 101, 106, 440 N.E.2d 872, 875 (1982)). Because Bradley filed a written speedy-trial demand prior to the State's requested continuance, and Bradley's silence did not constitute agreement, the 13-day delay is attributable to the State.

¶ 52 Defendant's third-listed period runs from August 25, 2008, to September 9, 2008: 15 days. At the August 25, 2008, pretrial, Bradley announced ready for trial, and the trial court set a final pretrial for September 8, 2008. Again, we note Bradley filed a written demand for speedy trial on June 16, 2008, and counsel's mere silence regarding a delay does not constitute a waiver by defendant of his speedy-trial rights. Although the court did not attribute this delay to the State, we find this delay is identical to the July 22, 2008, delay attributed to the State by the court. Thus, this 15-day delay is attributable to the State.

¶ 53 Defendant's fourth-listed period runs from September 30, 2008, to October 14, 2008: 14 days. Although Bradley announced he was ready for trial on September 30, 2008, he also informed the trial court he still had two witnesses to disclose to the State. When the court suggested setting a final pretrial, Bradley responded, "That's fine." Therefore, the court "continued the cause" until October 14, 2008, for the final pretrial. Because the record

affirmatively establishes defendant contributed to this delay by having outstanding discovery and agreeing to the scheduling of a final pretrial, the 14-day delay is attributable to him. See *People v. Bowman*, 138 Ill. 2d 131, 139-40, 561 N.E.2d 633, 637 (1990) ("For purposes of a speedy-trial question, a delay is charged to the accused where his act in fact causes or contributes to the delay.").

¶ 54 Defendant's fifth-listed period runs from October 27, 2008, to November 26, 2008: 30 days. On October 27, 2008, the State requested leave to file a motion to discharge Bradley as defendant's counsel of choice because criminal charges were pending against Bradley for threatening a public official in Macon County, and as a condition of his bond, he was not allowed to enter the grounds of the Macon County court facility except in response to official process. The State argues these 30 days were attributable to defendant because (1) the record does not show Bradley tendered a discovery answer to the State, and (2) Bradley agreed to an order barring him from entering the courthouse, which effectively barred him from appearing in this case. Defendant argues this delay is attributable to the State because the State filed the motion to discharge Bradley. We agree with the State.

¶ 55 Again, a delay is charged to the defendant when "the defendant's acts caused or contributed to a delay resulting in the postponement of trial." *People v. Kliner*, 185 Ill. 2d 81, 114, 705 N.E.2d 850, 868 (1998). Therefore, a delay caused by the State filing a motion is not generally attributable to the defendant. However, "if there are two reasons for a delay, one attributable to the State and the other to the defendant, the fact *** the delay was partially attributable to the defendant will be sufficient to toll the statutory term." *People v. Myers*, 352 Ill. App. 3d 684, 688, 816 N.E.2d 820, 823-24 (2004).

¶ 56 Here, the 30-day delay was partly attributable to defendant because Bradley was unable to represent him due to a condition of Bradley's bond being he was unable to enter the courthouse. The trial court had previously informed defendant some questions had arisen as to whether his counsel would provide him with "adequate or effective legal representation." Despite the court's warning, defendant chose to continue with Bradley as his trial counsel. The court accepted this decision and found defendant had knowingly and voluntarily waived any objection to Mr. Bradley's continued representation of defendant. Therefore, the delay caused by the State filing the motion to discharge Bradley as defendant's counsel was partly attributable to defendant. Accordingly, these 30 days are attributable to him.

¶ 57 Defendant's sixth-listed period runs from December 22, 2008, to January 12, 2009: 21 days. On December 22, 2008, the trial court set defendant's jury trial for January 5, 2009; however, defendant's appointed attorney was unavailable and suggested either January 12 or January 19 as the trial date. Defendant acquiesced in this delay by suggesting a trial date later than the date originally suggested by the court. See *People v. Cabrera*, 188 Ill. App. 3d 369, 370-71, 544 N.E.2d 439, 440 (1989) (appellate court determined defense counsel acquiesced in the delay because he was given three potential dates to set the jury trial, he indicated a problem with one of the dates, the trial court then picked a later date, and counsel failed to object.) Thus, the 21-day delay is attributable to defendant.

¶ 58 Further, we note defendant admitted the following periods of delay were attributable to him: (1) May 14, 2008, to May 28, 2008; (2) August 4, 2008, to August 25, 2008; (3) September 9, 2008, to September 30, 2008; (4) October 14, 2008, to October 27, 2008; (5) November 26, 2008, to December 22, 2008; (6) January 20, 2009, to February 17, 2009.

Consequently, we find 86 days of delay were attributable to the State and 196 days were attributable to defendant (see the appended chart for a breakdown of the delays).

¶ 59 We note defendant argues his appointed counsel was ineffective for failing to (1) assert defendant's demand for a speedy trial at the January 12, 2009, setting, and (2) file a motion to discharge based on the violation of defendant's speedy-trial rights. On January 12, 2009, the State requested a continuance because it was in trial on another matter. In response to the State's request, defense counsel stated, "I guess, you know, they have another case starting." Defendant argues his counsel was ineffective because he failed to object to a setting outside the speedy-trial term. See *People v. Cordell*, 223 Ill. 2d 380, 390-91, 860 N.E.2d 323, 330 (2006) (when the trial court schedules the trial date outside the 120-day speedy-trial period, the defendant must object "to prevent the speedy-trial clock from tolling.")

¶ 60 According to our calculations, the 120-day time period had not yet passed on January 12, 2009, nor did the 8-day delay from January 12, 2009, to January 20, 2009, place defendant's jury trial outside the 120-day time period. Therefore, defendant's counsel was not ineffective for failing to object to the January 12, 2009, continuance.

¶ 61 Additionally, defense counsel was not ineffective for his failure to file a motion to dismiss because defendant's jury trial was set within the 120-day time period. Consequently, we find no error in the trial court's finding of no violation of defendant's speedy-trial rights.

¶ 62 B. *Batson* Violation

¶ 63 Next, defendant argues his constitutional right to equal protection was violated when the State failed to provide a genuine, race-neutral reason to strike Dampeer, an African-American venireperson, as required by *Batson v. Kentucky*, 476 U.S. 79, 94 (1986). Specifically,

defendant contends the reasons the State articulated for striking Dampeer were erroneous, and Dampeer shared similar characteristics with other jurors who were not stricken.

¶ 64 Once a defendant alleges his rights have been violated because the State has used its peremptory challenges in a racially discriminatory way, *Batson* requires the trial court conduct the following three-part inquiry: (1) the court must determine whether the defendant has established a *prima facie* case of purposeful discrimination; (2) once a *prima facie* case is shown, the State has the burden to articulate a nondiscriminatory, race-neutral explanation based on the facts of the case; and (3) considering the State's explanation, the court must then determine whether the defendant has shown purposeful discrimination. *People v. Rivera*, 221 Ill. 2d 481, 500, 852 N.E.2d 771, 783 (2006).

¶ 65 To determine whether the defendant has established a *prima facie* case of purposeful discrimination, the trial court must consider the totality of the facts and the relevant circumstances surrounding the peremptory challenge. *People v. Davis*, 231 Ill. 2d 349, 360, 899 N.E.2d 238, 245 (2008). The "threshold for making out a *prima facie* claim under *Batson* is not high: a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (Internal quotation marks omitted.) *Davis*, 231 Ill. 2d at 360, 899 N.E.2d at 245.

¶ 66 Further, a *prima facie* case may be established where the State has exercised a "pattern of strikes" against African-American venirepersons or where the State has consistently challenged a group of venirepersons "being otherwise as heterogeneous as the community as a whole, sharing race as their only common characteristic." (Internal quotation marks omitted.) *People v. Harris*, 129 Ill. 2d 123, 173, 544 N.E.2d 357, 379 (1989). "However, the mere fact of

a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis*, 231 Ill. 2d at 360-61, 899 N.E.2d at 245.

¶ 67 Defendant argues he sustained his burden of establishing a *prima facie* case of racial discrimination because the "exclusion of even a single African-American venire member sharing common characteristics with selected white jurors raises the necessary inference *** the African-American juror was excluded because of his race." Defendant compared the characteristics of Dampeer with the selected jury and determined Dampeer shared similar characteristics with white panelists who were accepted by the State.

¶ 68 Further, defendant argues the "record is not clear as to whether the trial court's ruling was meant as a first stage *Batson* analysis ruling"; however, the issue is moot because the State proceeded to the second stage of the *Batson* analysis and articulated "an ostensibly race-neutral explanation for striking the juror in question." Defendant concluded "the prosecutor's assertions of nondiscriminatory motives were undercut by the absence of information supporting" its reasons, and the court did not carefully examine the State's pretextual reasons. Therefore, defendant requests a new trial, or, in the alternative, remand for a *Batson* hearing because the record is incomplete.

¶ 69 In contrast, the State argues the trial court "stopped" after determining defendant "failed to make a *prima facie* showing of a pattern of discrimination." Therefore, the State argues the preliminary question of whether defendant established a *prima facie* case of purposeful discrimination was not moot because the court did not determine the ultimate question of intentional discrimination. Further, the State argues defendant's comparative juror

analysis failed to establish an inference of racial discrimination. Instead, the State argues (1) defendant can only show the State "relied on erroneous notes about criminal history," and (2) defendant cannot establish discriminatory intent was inherent in the State's race-neutral "citations to Dampeer's criminal history and his untruthfulness about his law enforcement contacts." We agree with the State.

¶ 70 Defendant's counsel raised a *Batson* objection to the State's exercise of a peremptory challenge to exclude an African-American male from the jury. Before the trial court had an opportunity to rule on whether defendant had established a *prima facie* case of purposeful discrimination, the State offered its reason for exercising its peremptory challenge. According to the State, the basis for the exclusion was Dampeer's "prior criminal history," which the State described as including "notable felonies and misdemeanors." After the State offered its explanation, the court excused Dampeer from the jury.

¶ 71 Defendant's counsel subsequently renewed its *Batson* objection because he had reviewed the jury questionnaire, and it indicated Dampeer had no felony or misdemeanor convictions. In response, the State noted a two-part inquiry was involved in a *Batson* objection. First, defendant must "establish a pattern by the State." Then, the State must provide a "race neutral basis for the exclusion." The State argued defendant could not establish "a pattern of exclusion of people of color" because it had previously accepted an African American juror, who was later excused by the defense. Therefore, the State argued "there has not been a showing of a pattern to get to the second step."

¶ 72 After the trial court noted the State volunteered the basis for its exclusion, the State further explained the reason for the exclusion by stating Dampeer "was not quite truthful

about his prior police contacts" because he failed to volunteer the fact he had previously "received a diversion for retail theft." After hearing the arguments of counsel, the court determined the State was correct in arguing "a pattern" must be demonstrated. Further, the court determined defense counsel failed to demonstrate "a pattern" even with the State's information regarding Dampeer's prior criminal history (having notable felonies and misdemeanors) being incorrect.

¶ 73 "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a [*prima facie*] showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). However, if the trial court never rules on the ultimate issue of purposeful discrimination, the *prima facie* showing does not become moot. *People v. Bohanan*, 243 Ill. App. 3d 348, 351, 612 N.E.2d 45, 48 (1993).

¶ 74 Here, the trial court never ruled on the ultimate issue of purposeful discrimination. Instead, the court determined defense counsel failed to establish a *prima facie* case because he failed to prove "a pattern" of the State excluding venirepersons based on their race. Therefore, we agree the court "stopped" after determining defendant "failed to make a *prima facie* showing of a pattern of discrimination." Because we find the court determined defendant failed to establish a *prima facie* case of purposeful discrimination, our analysis will focus on the first prong of the *Batson* inquiry.

¶ 75 Defendant argues he established his *prima facie* case because the State excluded an African-American venireperson who shared common characteristics with selected white jurors as shown by his comparative juror analysis. Although a comparative juror analysis is a useful

tool in assessing whether defendant has established a *prima facie* case of purposeful discrimination, the analysis, standing alone, is not necessarily sufficient to infer purposeful discrimination. *Davis*, 231 Ill. 2d at 361-62, 899 N.E.2d at 246. Further, as stated above, an inference of discrimination does not arise from the mere fact the State exercised a peremptory challenge to excuse an African-American venireperson who is the same race as defendant. See *Davis*, 231 Ill. 2d at 361, 899 N.E.2d at 245.

¶ 76 Additionally, in further support of the trial court's finding, we note the State had already accepted an African-American venireperson on the jury, but the juror was later excused by defense counsel. Therefore, we cannot find the court's decision to excuse Dampeer from the jury was against the manifest weight of the evidence. See *People v. Coleman*, 155 Ill. 2d 507, 514, 617 N.E.2d 1200, 1204 (1993) (The trial court's decision regarding whether defendant established a *prima facie* case will not be overturned unless the decision is against the manifest weight of the evidence.).

¶ 77 C. Credit

¶ 78 Defendant argues he is entitled to (1) 438 days in sentence credit for time served pursuant to 5–8–7(b) of the Unified Code (730 ILCS 5–8–7(b) (West 2008)) and (2) $5-per-day credit against his fines under section 110–14(a) of the Procedure Code (725 ILCS 5/110–14(a) (West 2008)). The State concedes defendant is entitled to sentence credit for time served and a $5-per-day credit against his fines. However, the State calculates defendant should receive sentence credit for 439 days previously served and $2,195 in monetary credit. We accept the State's concession and agree with its calculations.

¶ 79 First, defendants are entitled to one day of credit for each day spent in presentence

custody as a result of the offense for which the sentence is imposed. 730 ILCS 5/5–8–7(b) (West 2008). Here, the trial court gave defendant sentencing credit for May 11, 2008, through July 11, 2008, and September 8, 2008, through July 23, 2009 (not including the July 24, 2009, sentencing date). However, defendant remained in continuous custody from his May 11, 2008, arrest in the present case until his July 24, 2009, sentencing. Thus, defendant should have been given credit for 439 days previously served.

¶ 80 Further, section 110–14(a) of the Procedure Code governs the issuance of the $5-per-day credit and provides as follows:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110–14(a) (West 2008).

The statutory right to the $5-per-day credit is mandatory, and a defendant is entitled to this credit despite it not being requested in the trial court. *People v. Woodard*, 175 Ill. 2d 435, 457, 677 N.E.2d 935, 945-46 (1997).

¶ 81 As stated above, defendant spent 439 days in custody prior to sentencing but was only given credit for 381 days in custody. Therefore, defendant is entitled to a $5-per-day credit against his fines for the additional 58 days he spent in custody. Accordingly, we remand this case directing the trial court to amend the judgment order to reflect (1) 439 days of credit for time served prior to sentencing and (2) a $5-per-day credit against defendant's fines for the 439 days

he spent in custody.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated, we affirm the trial court's judgment as modified and remand with directions. Because the State has, in part, successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 84 Affirmed as modified and remanded with directions.