

NOTICE  
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2012 IL App (4th) 090893-U

Filed 9/14/12

NO. 4-09-0893

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
GRANVILLE S. JOHNSON,	)	No. 08CF1424
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court did not abuse its discretion, when ruling on a motion to extend the speedy-trial deadline to permit DNA testing pursuant to section 103-5(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(c) (West 2008)), in finding the State had exercised without success due diligence to obtain DNA testing results material to the case.

(2) The record establishes, when the trial court granted the State's request, the court extended the speedy-trial deadline up to the section 103-5(c)'s maximum of 120 days.

¶ 2 After an August 2009 jury trial, defendant, Granville S. Johnson, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)). In November 2009, the trial court sentenced defendant to consecutive prison terms of 53 years for first degree murder and 32 years for attempt (first degree murder). Defendant appeals, arguing (1) the State failed to exercise

due diligence in obtaining deoxyribonucleic acid (DNA) test results and was not entitled to an extension of the speedy-trial deadline under section 103-5(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5(c) (West 2008)); and (2) in the alternative, even if the State properly received an extension of the deadline, the State should have received only a 29-day extension and the State failed to bring him to trial within the authorized time. We affirm.

¶ 3

### I. BACKGROUND

¶ 4

On June 30, 2008, victims and cousins Greg Moore and Isaac Moore drove a van to a duplex in Champaign for the purpose of meeting someone nicknamed "Bubba" to purchase marijuana. At the duplex, Isaac saw Greg speak to defendant through the driver's side window. Greg exited the van and entered the duplex with defendant, while Isaac stayed in the van. Greg returned and sat in the driver's seat. Defendant then allegedly reached into the driver's side window and began shooting, striking Greg twice in the head at short range and killing him. Defendant shot Isaac twice as Isaac was fleeing. A police officer arrived to aid Isaac, and Isaac identified "Bubba" as the shooter. Later, Isaac told the officer in the ambulance he did not know who shot him. At the hospital, Isaac identified the shooter by a nickname. The police linked the name to defendant. Another individual at the scene, one who knew what defendant looked like and who witnessed the shooting, could not identify the shooter.

¶ 5

On August 1, 2008, defendant was arrested for the first degree murder of Greg and attempt (first degree murder) of Isaac. Defendant did not post bond and remained incarcerated through his trials and sentencing.

¶ 6 On August 13, 2008, the State sent a number of items to the Illinois State Police crime lab for testing. These items included boots taken from an apartment of a woman connected to defendant, swabbings from the inside of those boots, swabbings of a projectile, the T-shirt defendant was wearing when arrested, and standards from Greg and Isaac.

¶ 7 On October 7, 2008, the State filed a motion under section 103-5(c), which set forth the following:

"NOW COME the People of the State of Illinois \*\*\* [which] move[s] that the above-styled cause which is now set for pretrial hearing on October 7, 2008 be continued to the November 4, 2008 pretrial date, and as grounds therefore state that:

"1. Forensic Scientist Aaron Small of the [crime lab] has not yet completed DNA testing of the numerous items of evidence relating to this case submitted to said laboratory, and the People would be prejudiced by the absence of Forensic Scientist Small's testimony as to the results of such testing.

2. Said items of evidence were submitted to the [crime lab] by the Champaign Police Department on August 13, 2008, twelve days after the Defendant's arrest. Based on Movant's telephone conversations with Forensic Scientist Small, there are reasonable grounds to believe that some or all of said testing can be completed prior to November 4, 2008. Thus, pursuant to 725 ILCS 5/103-

5(c), the People have thus far exercised without success due diligence to obtain DNA testing of said items of evidence, and there are reasonable grounds to believe that the results of said testing may be obtained at a later date."

¶ 8 That same day, a hearing was held on the State's motion. Defense counsel objected, on the ground he did not know what evidence had been taken or its relevance:

"Judge, I would note an objection for the record. I would also note that I really can't make any argument against the continuance at this moment, because it simply says 'numerous items of evidence were taken.' The State wants you to find due diligence, which perhaps you can. I got the discovery this morning, so I don't know what evidence was taken or what the relevance is. So, my client is in custody so I am objecting for the record only."

The prosecutor at this hearing was not the lead prosecutor on the case and could not specify what items had been sent to the crime lab. The trial court continued the hearing on the motion until October 16.

¶ 9 On October 15, 2008, the State moved to allow the destruction of evidence necessary for forensic testing. The State also requested an order mandating defendant submit biological and hair samples. In the motion, the State averred the crime lab reported the items tested had biological material suitable for DNA testing. The State also stated hairs had been found in a boot and on the shirt.

¶ 10 On October 20, 2008, the continued hearing was held on the State's October 7

motion. Defense counsel objected to the State's motion, stating his client remained in custody and wanted to maintain the speedy-trial clock. Defense counsel stated, "I understand the need or the necessity by the State perhaps for these things, but we would just object for the record." The court concluded the following in regard to the State's motion to continue:

"The court finds that the State has exercised due diligence, and pursuant to 725, 5/103-5, subsection C, I'm going to grant, over the defendant's objection, the motion to continue. This motion to continue can extend the speedy trial for an additional 120 days, so that would put us at a—at a trial date somewhat outside of the normal 120-day time frame. But I am going to grant that motion. There will come a point in time when we're actually going to have to see to it that we have some dates certain. But that motion will be granted. I'm going to set this matter over."

¶ 11 The trial court immediately continued: "Counsel, do you want it on the 4th of November? I'm not sure we're going to have much to do on the 4th of November other than set it over. I have a pretrial on December 30th at nine o'clock." Defense counsel replied, "We maintain our objection, but, yes, Judge, since the court has already ruled over our objection, I think there's no reason to have it set, and we could just—." At that point, the trial court interrupted and set the pretrial for December 30. The trial court warned counsel it would "stay on top of this, and as soon as the information is provided to the State, this case will be set for trial."

¶ 12 At the hearing, the trial court ordered defendant to provide the requested samples to the State and authorized the destruction of evidence for DNA testing. A crime-lab report, dated November 25, 2008, appears in the record. According to the report, the crime lab tested the physical evidence for DNA and compared the DNA to Greg's and Isaac's DNA samples.

¶ 13 A crime-lab report, dated February 3, 2009, indicated the crime lab received defendant's DNA sample on January 8, 2009. The crime lab determined the biological material on the shirt defendant was wearing at the time of his arrest belonged to defendant. Defendant's DNA was not found on the projectile. The DNA testing could not exclude defendant from having contributed to the DNA in the boots.

¶ 14 On May 11, 2009, defendant's first trial began. Defendant moved to dismiss the case against him, arguing the trial court had not granted a continuance pursuant to section 103-5(c). The court disagreed and denied the motion. The first trial ended in a hung jury; a mistrial was declared. A second jury trial in June 2009 had the same result. After defendant's third jury trial in August 2009, he was found guilty. The court sentenced him as stated.

¶ 15 This appeal followed.

## ¶ 16 II. ANALYSIS

### ¶ 17 A. Due Diligence

¶ 18 Defendant contends the State should not have been granted a continuance because it failed to exercise due diligence in obtaining DNA test results. Defendant provides three bases for his argument: (1) the State, despite sending other evidence for testing on

August 13, 2008, failed to request defendant provide a DNA standard for comparison until October 15, 2008; (2) despite obtaining defendant's sample, the State did not send the sample to the crime lab until early January 2009; and (3) the State could have avoided any delay had it checked the Illinois State Police DNA database, which contained defendant's "DNA since at least 2005." Defendant contends because the continuance was improperly given, the 120-day speedy-trial deadline expired on November 28, 2008.

¶ 19 Under section 103-5 of the Code (speedy-trial statute), the State must bring a defendant who remains in custody to trial within 120 days of his arrest. *People v. Colson*, 339 Ill. App. 3d 1039, 1041, 791 N.E.2d 650, 651 (2003) (citing 725 ILCS 5/103-5(a) (West 2008)). The speedy-trial statute also provides exceptions to allow the State additional time in starting a defendant's trial. See, e.g., 725 ILCS 5/103-5(c), (f) (West 2008). The exception applicable to this case is the one provided in section 103-5(c), which permits additional time for DNA testing. 725 ILCS 5/103-5(c) (West 2008).

¶ 20 According to section 103-5(c), a trial court may grant an extension if certain prerequisites are met, including a finding the State acted with due diligence: "If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103-5(c) (West 2008). Because the speedy-trial statute enforces a constitutional right, we liberally construe the statute in defendant's favor. *People v. Reimolds*, 92 Ill. 2d 101, 106, 440 N.E.2d 872, 874 (1982). "The provision for DNA testing was not meant to provide an

automatic continuance in every trial that involved DNA testing because the statute requires that the State must exercise 'without success due diligence to obtain results of DNA testing.' " *Colson*, 339 Ill. App. 3d at 1048, 791 N.E.2d at 656 (quoting 725 ILCS 5/103-5(c) (West 2000)). On the question of whether the State exercised due diligence, the State carries the burden of proof and the trial court must make a determination "on a case-by-case basis after careful review of the particular circumstances presented." *People v. Swanson*, 322 Ill. App. 3d 339, 342, 751 N.E.2d 1182, 1184 (2001).

¶ 21 This court will not reverse a trial court's decision on due diligence unless the decision is a clear abuse of discretion. *Swanson*, 322 Ill. App. 3d at 342, 751 N.E.2d at 1184. The question of whether the trial court abused its discretion is one to be reviewed by examining the information the court had before it *when* ruling on the motion for a continuance. *People v. Bonds*, 401 Ill. App. 3d 668, 674, 930 N.E.2d 437, 444 (2010). In reviewing the trial court's decision, this court "will examine the record as it existed at the time of the motion." *Bonds*, 401 Ill. App. 3d at 674, 930 N.E.2d at 444.

¶ 22 The record, as it existed at the time of the hearing, does not show the trial court abused its discretion in granting a continuance. By October 20, 2008, the record indicated the State sent evidence for DNA testing just 12 days after defendant's arrest. The record also established, as of October 15, 2008, the crime lab had found DNA suitable for testing. By that date, the State was seeking an order through which it would obtain defendant's DNA sample, so the State had not yet obtained and sent defendant's DNA. The reason for any delay in seeking defendant's DNA is not clear from the record. Defense counsel did not object on due-diligence grounds or any specific grounds. The



State was not asked to explain the reason for the delay. The delay may have been the result of any number of reasons. Perhaps the State chose to wait until the crime lab determined suitable DNA existed for testing.

¶ 23 We find the fact the State did not seek defendant's DNA sample until the crime lab found suitable DNA for testing does not render the finding of due diligence an abuse of discretion. Case law reveals it is not routine or automatic for the crime lab to perform tests looking for suitable DNA and then comparing DNA at the same time. In *Swanson*, 322 Ill. App. 3d at 341-42, 751 N.E.2d at 1184, although the defendant's DNA sample had been sent at the same time as other evidence, the State did not ask the laboratory to perform DNA testing until *after* the crime lab informed the State it found DNA evidence suitable for testing. Here physical evidence was sent within 12 days of defendant's arrest. The State followed up by requesting defendant's sample by October 15 after learning suitable DNA existed for testing. While not prompt, it was not excessive delay. We find no abuse of discretion in the finding of due diligence.

¶ 24 Defendant argues the fact the crime lab did not receive defendant's DNA sample until January 9, 2009, over 2 1/2 months after the trial court ordered defendant provide such sample, proves a lack of the requisite diligence for a section 103-5(c) continuance. This argument is unconvincing. The statute explicitly requires a due-diligence finding *before* the granting of the continuance (725 ILCS 5/103-5(c) (West 2008)). In addition, the case law shows courts, when examining diligence, should look to the evidence before the trial court at the time the decision was made and not to facts arising later. *Bonds*, 401 Ill. App. 3d at 674, 930 N.E.2d at 444. The failure to send the sample promptly does not

retroactively violate section 103-5(c) or render the trial court's decision retroactively improper. Defendant's cases do not hold otherwise. See *Swanson*, 322 Ill. App. 3d at 344, 751 N.E.2d at 1186; *People v. Spears*, 395 Ill. App. 3d 889, 896, 920 N.E.2d 488, 494 (2009).

¶ 25 In his reply brief, defendant concedes such a finding "may be legally correct." Defendant argues, however, a ruling that later failures should not be considered is problematic because the trial court's order will remedy the State's "subsequent failure." Defendant maintains the trial court would have denied the State's motion had it known the State already possessed defendant's DNA sample and failed to submit it for testing until more than 5 months after his arrest, which was 86 days *after* the State obtained permission to collect his sample. Defendant, citing the Illinois and federal constitutions, maintains the underlying issue in this case is his constitutional right to a speedy trial and the State has identified no case that permits it to violate his right to a speedy trial as long as it did not intend to do so.

¶ 26 We return to the language of section 103-5(c): "If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." 725 ILCS 5/103-5(c) (West 2008). According to the plain language of this statute, the General Assembly determined a trial court, upon finding due diligence, may extend the statutory speedy-trial guarantee to 240 days. No language in this subsection or in the remaining text of the speedy-trial statute mandates

the trial court, after granting such a motion, continue to monitor the State's conduct to ascertain whether the continuance should be shortened or revoked.

¶ 27 While defendant contends the underlying issue of this case is his *constitutional* right to a speedy trial, defendant's argument on appeal for a reversal is based only on the speedy-trial statute's guarantees. The two are not the same. See *People v. Crane*, 195 Ill. 2d 42, 48-49, 743 N.E.2d 555, 560 (2001). The statutory language that serves to guarantee defendant a speedy trial provides defendant no relief from the State's alleged failures that occur within the time of the continuance. Whether the constitutional guarantee is violated by the State's conduct postcontinuance is not at issue in this case. Defendant did not raise the issue in his opening brief and only referenced it in his reply brief. It is forfeited. See Ill. S. Ct. Rule 341(h)(7) (eff. Jul. 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief.").

¶ 28 Similarly, we find the State's failure to check the DNA database is irrelevant in this case to the question of due diligence and whether defendant's statutory speedy-trial right was violated. The record, at the time of the continuance motion, did not contain evidence of the State's failure.

¶ 29 B. The Length of the Continuance

¶ 30 Defendant next argues, in the alternative, if we find the trial court properly granted the State a continuance, the State should have received only 29 days and he was not brought to trial before the speedy-trial clock expired on December 26, 2008. Defendant contends the State, in its motion, asked for a continuance of the case until November 4, 2008. Defendant maintains, under this court's decision in *People v. Johnson*, 323 Ill.

App. 3d 284, 289, 751 N.E.2d 621, 625 (2001), the trial court could only extend the speedy-trial deadline the length of time requested by the State. Defendant further contends such conclusion is further supported by the fact the speedy-trial statute must be liberally construed in the defendant's favor.

¶ 31 Defendant bases this argument on half of a sentence in *Johnson*: "[T]he length of any extension up to the maximum necessarily depends upon the State's request."

*Johnson*, 323 Ill. App. 3d at 289, 751 N.E.2d at 625. We turn to the case.

¶ 32 In *Johnson*, the defendant was found guilty of armed robbery and attempt (aggravated criminal sexual assault). *Johnson*, 323 Ill. App. 3d at 285, 751 N.E.2d at 622. Approximately 2 months after his arrest, the State moved for a continuance pursuant to section 103-5(c) and argued it could not obtain certain DNA evidence within the initial 120 days provided by the speedy-trial statute. *Johnson*, 323 Ill. App. 3d at 286, 751 N.E.2d at 623. The State asked for an additional 120 days to take the defendant to trial. *Johnson*, 323 Ill. App. 3d at 286, 751 N.E.2d at 623. The trial court granted the motion over the defendant's objection. *Johnson*, 323 Ill. App. 3d at 286, 751 N.E.2d at 623. The issue on appeal was whether section 103-5(c) authorizes the grant of "an additional 120-day period only from the day" the motion is granted or whether it permits the days to be added to the 120-day speedy-trial limit, giving the State up to 240 days to bring a defendant to trial. *Johnson*, 323 Ill. App. 3d at 289, 751 N.E.2d at 625. We held section 103-5(c) authorizes the continuance of cases beyond the initial 120-day period to a maximum of 240 days without violating a defendant's speedy-trial rights. *Johnson*, 323 Ill. App. 3d at 289, 751 N.E.2d at 625. After our holding, the sentence relied upon by the

State appears. It states the following, in its entirety: "We note, however, that section 103-5(c) makes it incumbent upon the State to apply for such a continuance, and the length of any extension up to the maximum necessarily depends upon the State's request." *Johnson*, 323 Ill. App. 3d at 289, 751 N.E.2d at 625.

¶ 33 Defendant's argument is unconvincing. The language relied upon by defendant is *dicta*. The issue in *Johnson* is not the same as before this court here: whether the trial court's authority to decide the length of an extension is limited by the State's request in a written motion. *Johnson* did not answer the same question. The language can be fairly interpreted as not limiting the court's authority to what the State requests but indicating any extension depends upon the substance, merits, and needs found in the State's request. The plain language of section 103-5(c) does not limit the trial court in the manner defendant contends it does. The court is given the authority to grant an extension up to 120 days if certain requirements are met. One of those prerequisites is not a motion by the State dictating the maximum amount of time to be granted. See 725 ILCS 5/103-5(c) (West 2008).

¶ 34 We find unconvincing defendant's argument the fact the statute must be liberally construed results in the interpretation defendant espouses. Liberal construction does not confer the "authority to engage in judicial legislation." *In re M.M.*, 156 Ill. 2d 53, 67, 619 N.E.2d 702, 710 (1993). In the absence of any language so limiting trial courts' authority in deciding section 103-5(c) motions, we will not find trial courts so limited.

¶ 35 We turn to the record to determine whether the trial court ordered the continuance until November 4 or longer. The State's October 7, 2008, motion asked the trial court to

continue the cause "to the November 4, 2008 pretrial date." The State maintained "there [were] reasonable grounds to believe that some or all of said testing can be completed prior to November 4, 2008," indicating all DNA testing would not be completed by such date, particularly in light of its request, filed 8 days later and 5 days before the hearing, for defendant's DNA. At the October 20, 2008, hearing, defense counsel objected "for the record," stating he understood "the need or the necessity by the State perhaps for these things." The trial court then determined it would grant the motion to continue. The court next stated the motion could "extend the speedy trial for an additional 120 days \*\*\* at a trial date somewhat outside the normal 120-day time frame." The court did not set a definite time for the trial but stated it would do so "as soon as the information is provided to the State."

¶ 36 The record is clear. The trial court granted a continuance up to the 120-day maximum. See *Colson*, 339 Ill. App. 3d at 1041, 791 N.E.2d at 651 ("The grant of a section 103-5(c) continuance extends the 120-day speedy-trial term to a maximum of 240 days."). The court did not find the trial would be set after 29 days, but after the DNA-testing information was provided to the State. Defendant's argument fails.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. We grant the State its statutory assessment of \$75 as costs of this appeal.

¶ 39 Affirmed.

