2011 IL App (5th) 090697-U

NO. 5-09-0697

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) Jackson County.
	)
v.	) No. 08-CF-632
	)
JONATHAN R. MOORE,	) Honorable W. Charles Grace &
	) Honorable E. Dan Kimmel,
Defendant-Appellant.	) Judges, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Welch and Donovan concurred in the judgment.

O R D E R

¶ 1 *Held*: The defendant's conviction is affirmed. The inventory search of the defendant's vehicle was valid. There was no speedy trial violation.

¶ 2 The defendant, Jonathan R. Moore, appeals his conviction, claiming the trial court erred by denying his motion to quash arrest and suppress evidence and by denying his motion to dismiss for a violation of his right to a speedy trial. For the following reasons, we affirm the defendant's conviction.

FACTS

¶ 3 On October 15, 2008, cocaine was found during the inventory search of a leased vehicle of which the defendant was an authorized driver. The defendant was charged, by information, with unlawful possession of a controlled substance, in violation of section 402(a)(2)(A) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/402(a)(2)(A) (West 2008)), and with unlawful possession with the intent to deliver a controlled substance,

in violation of section 401(a)(2)(A) of the Act (720 ILCS 570/401(a)(2)(A) (West 2008)). On December 3, 2008, the defendant filed a motion to quash his arrest and to suppress the evidence. A hearing on the motion was conducted on December 30, 2008, before the Honorable W. Charles Grace, where the following testimony and evidence relevant to the issues on appeal was adduced.

¶ 4 Matthew Dunning testified that he is a police officer for the City of Carbondale. Dunning was on duty on October 15, 2008, when he went to 404A East Ashley Street to look for and arrest an individual by the name of Ryan Gibbs. Dunning confirmed that a party was occurring in the vicinity and that several people were in and about the residence. Dunning testified that he was unable to locate Gibbs but that while standing on the front porch of 404A East Ashley Street, he observed the defendant walking eastbound on East Ashley Street and approaching a silver Pontiac G6, which Dunning noted was parked legally on the north side of East Ashley Street and was facing westbound.

¶ 5 Due to an encounter with the defendant the previous week regarding the same vehicle, Dunning was aware that Enterprise Leasing actually owned the vehicle, that an individual by the name of Natasha Perry leased the vehicle, and that the defendant was listed as an additional driver on the vehicle rental agreement. Dunning confirmed that the defendant was in control of the vehicle on the evening in question because he was an authorized driver who proceeded to the driver's side door, opened the door, and stood between the door and the interior of the vehicle. Dunning testified that he did not observe any criminal activity concerning the vehicle, nor did he observe any contraband in plain view. Moreover, he did not observe the defendant driving the vehicle or sitting in the vehicle, nor were the keys in the ignition. Dunning testified, however, that the defendant had access to the interior of the vehicle when he was standing between the open door and the interior, with one arm resting on top of the vehicle and the other arm resting on top of the door. Dunning testified that he

and another officer, Sergeant Goddard, approached the defendant, who stepped away from the vehicle, shut the door, and took a couple of steps back from the driver's side door.

¶ 6 Dunning testified that he handcuffed the defendant and placed him under arrest due to a warrant for a failure to appear in a case involving aggravated battery. Dunning noted that he patted down the defendant at the time of the arrest but found no contraband on his person. Dunning testified that the defendant attempted to hand the keys of the vehicle to an individual named Torrion Creer, when another officer, Sergeant Reno, took custody of the keys. Dunning testified that no other person was in the car and that Natasha Perry was not present when the defendant was arrested. Dunning testified that his intent was to search the vehicle incident to the defendant's arrest but that a crowd of people on the scene became hostile and the vehicle was towed to the police department and inventoried, pursuant to the police department tow policy.

¶ 7 Sergeant Reno corroborated Dunning's testimony regarding the defendant's arrest. Reno testified that no attempt was made to obtain a search warrant for the vehicle. He explained that the vehicle would have been searched incident to the defendant's arrest but that doing so would have been unsafe due to the hostile crowd. Reno testified that he took custody of the defendant's keys at the scene in order to secure them, because all the property found on an arrestee stays with that person until it can be determined if something needs to be subsequently transported. Reno stated that the vehicle was ultimately towed and inventoried in accordance with the tow policy. Reno testified that pursuant to the policy, anytime a person is arrested from a vehicle, it is towed and searched. Reno added that if the registered owner comes to take the vehicle, the officer may allow the transfer at his discretion but that in this case the only other authorized driver was Natasha Perry, who never came forward to request the keys to the vehicle. On February 3, 2009, Judge Grace entered an order denying the defendant's motion to quash his arrest and suppress the evidence.

¶ 8 On June 19, 2009, the defendant filed a second motion to quash his arrest and suppress the evidence, based on the then-recent Unites States Supreme Court case of *Arizona v. Gant*, 556 U.S. 332, ____, 129 S. Ct. 1710, 1716 (2009). On July 20, 2009, the motion was denied by Judge Grace in a docket entry which stated, *inter alia*, that the evidence was the fruit of a valid inventory search. The defendant filed a motion to reconsider, which was denied by the trial court. On September 11, 2009, the defendant filed a motion to dismiss, alleging that his speedy trial rights were violated. The Honorable E. Dan Kimmel denied the motion to dismiss on October 1, 2009. On November 12, 2009, a stipulated bench trial was held and the defendant was convicted of unlawful possession of a controlled substance. A judgment was entered on November 17, 2009, sentencing the defendant to 10 years of imprisonment in the Illinois Department of Corrections. The defendant filed a timely notice of appeal. Additional facts will be added as necessary in our analysis of the issues.

ANALYSIS

¶ 9 The defendant's first issue on appeal is whether his conviction should be reversed because the trial court erred by denying his motion to quash his arrest and suppress the evidence. "On review of a trial court's ruling on a motion to suppress, we accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence." *People v. Gipson*, 203 Ill. 2d 298, 303 (2003). "However, we review *de novo* the ultimate legal question of whether suppression is warranted." *Id.* at 304. The facts necessary to the disposition of this appeal are undisputed. Accordingly, we will proceed solely on the above legal inquiry.

¶ 10 "Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established

and well-delineated exceptions.' " *Arizona v. Gant*, 556 U.S. 332, ____, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "An inventory search is a judicially created exception to the warrant requirement of the fourth amendment." *People v. Hundley*, 156 Ill. 2d 135, 138 (1993).

¶ 11 In this case, the State concedes that the search of the vehicle was not a valid search incident to arrest. Accordingly, the defendant challenges only the validity of the inventory search. The defendant notes in his brief on appeal that the determinative issue is whether the police properly seized the vehicle, because if the seizure was improper from its inception, the inventory search which followed could not have been valid. The defendant contends that because the police did not properly seize the vehicle in this case, the ensuing inventory search was not valid. The defendant emphasizes that the vehicle was legally parked in a residential area, the doors were locked, and the vehicle was neither impeding traffic nor threatening public safety. See *People v. Clark*, 394 Ill. App. 3d 344, 348 (2009). The defendant also notes that leaving his car unattended "is not a sufficient reason for impoundment unless the vehicle is illegally parked." *People v. Mason*, 403 Ill. App. 3d 1048, 1054 (2010).

¶ 12 In response, the State contends the seizure of the vehicle was lawful. We agree. Although Officer Dunning testified that the defendant's vehicle was legally parked, section 11-1302(c)(3) of the Illinois Vehicle Code (Code) provides as follows:

¶ 13 "Any police officer is hereby authorized to remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when *** the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a proper magistrate without unnecessary delay." 625 ILCS 5/11-1302(c)(3) (West 2008).

¶ 14 Section 1-126 of the Code defines "highway" as "[t]he entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of

the public for purposes of vehicular travel." 625 ILCS 5/1-126 (West 2008).

¶ 15 In this case, testimony showed that the defendant was in control of the vehicle because he was an authorized driver under the vehicle lease, he had the keys to the vehicle, and he was standing between the open driver's side door and the interior of the vehicle when the officers approached him. The vehicle was parked on Ashley Street, which constitutes a highway as defined in the Code. Moreover, the defendant was arrested for an outstanding failure-to-appear warrant for a case involving aggravated battery, which required the defendant to be brought before a judge without unnecessary delay. Accordingly, the seizure of the vehicle was lawful.

¶ 16 The defendant further contends that the inventory search was not valid because its purpose was not to protect the owner's property or to protect the police from claims concerning the property and that it was not conducted in good faith. We disagree. Although both officers testified that their original intent was to search the vehicle incident to the defendant's arrest, both also testified that the vehicle was ultimately towed and inventoried pursuant to the police department tow policy. As the State notes in its brief, citing *People v. Ocon*, 221 Ill. App. 3d 311, 315-16 (1991), the very nature of the police procedure for inventory searches limits the circumstances under which such a search can take place, thereby eliminating any effect of an improper subjective motive to use an inventory search as an investigatory tool. The State also notes, citing *United States v. Garner*, 181 F.3d 988, 991 (8th Cir. 1999), that "[t]he presence of an investigative motive does not invalidate an otherwise proper inventory search." The State also cites *United States v. Hall*, 497 F.3d 846, 851 (8th Cir. 2007), which held that even if a police officer suspects that he might uncover evidence in a vehicle, he can still tow the vehicle and inventory its contents, as long as the impoundment is otherwise valid.

¶ 17 In this case, the evidence was discovered during a valid inventory search, which,

according to the testimony of Officer Dunning and Sergeant Reno, was conducted pursuant to the tow policy of the police department. As already established, the impoundment of the vehicle was valid. Because the nature of inventory searches eliminates the effects of any improper subjective motives in conducting the inventory (see *Ocon*, 221 Ill. App. 3d at 316), we cannot say that the inventory search in this case was conducted in bad faith or for any reason other than to protect the property or to protect the police from claims involving that property. Because the evidence in this case was discovered during the course of a valid inventory search, the circuit court did not err by denying the defendant's motion to quash his arrest and to suppress the evidence.

¶ 18 The defendant's second issue on appeal is whether his conviction should be reversed because he was denied a speedy trial. "[S]ubsection (a) of the speedy-trial act (725 ILCS 5/103-5(a) (West 2004)) provides an automatic 120-day speedy-trial right for persons held in custody on the pending charge and does not require such persons to file a demand to exercise that right." *People v. King*, 366 Ill. App. 3d 552, 554 (2006). "The 120-day period begins to run automatically when a defendant is taken into custody [citation], and a dismissal is mandatory when the 120-day period has been exceeded and any delay is not attributable to the defendant." *People v. Myers*, 352 Ill. App. 3d 684, 687 (2004). "However, delay caused by the defendant is excluded from the 120-day period, and delay is considered agreed to by [the] defendant unless he *** objects to the delay by making an oral or written demand for trial." *King*, 366 Ill. App. 3d at 554-55 (citing 725 ILCS 5/103-5(a) (West 2004)).

¶ 19 In this case, the defendant was taken into custody on October 15, 2008. "The period in custody is calculated by excluding the day of the arrest but including the day the trial begins." *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008). Accordingly, the speedy trial clock began running October 16, 2008. The defendant filed a motion to substitute judge on November 7, 2008. "Any type of motion filed by the defendant which eliminates the

possibility that the case could immediately be set for a trial also constitutes an affirmative act of delay attributable to the defendant." *People v. Myers*, 352 Ill. App. 3d 684, 688 (2004). "[The Illinois Supreme Court] has held that a motion for a substitution of judges constitutes a delay occasioned by the accused which will interrupt the running of the statutory period." *People v. Zuniga*, 53 Ill. 2d 550, 553 (1973).

¶ 20 In this case, the defendant concedes that the motion for a substitution of judge tolled the speedy trial period. The motion was granted on November 13, 2008. "[W]hen the period has been tolled for delay occasioned by the defendant, any later periods of custody subject to the 120-day period are calculated by excluding the first day and including the last." *Murray*, 379 Ill. App. 3d at 158. Accordingly, the speedy trial clock was again tolled, beginning on the day of the filing of the motion to substitute judge, and it resumed on November 13, 2008, the day the motion was granted. As of that date, the speedy trial clock totaled 23 days.

¶ 21 "A delay is 'occasioned by the defendant' when the defendant's acts caused or contributed to a delay resulting in the postponement of a trial." *People v. Hall*, 194 Ill. 2d 305, 326 (2000). In this case, the trial was scheduled for January 6, 2009. On December 3, 2008, the defendant filed a motion to quash his arrest and suppress the evidence, again tolling the speedy trial clock beginning on that date. A hearing was held on the motion on December 30, 2008, before the Honorable W. Charles Grace. The speedy trial clock resumed on February 3, 2009, the date the motion was denied, which was past the date on which the trial had been scheduled. As of that date, the speedy trial clock totaled 43 days. The trial was reset for March 16, 2009.

¶ 22 On March 12, 2009, defense counsel waived the right to a speedy trial on the record, due to a request for a plea and sentencing hearing. As of that date, the speedy trial clock totaled 79 days. Pursuant to defense counsel's request, the trial court docketed the plea and

sentencing hearing for March 16, 2009. On that date, the plea hearing was rescheduled for March 30, 2009. At the hearing on March 30, 2009, before the Honorable E. Dan Kimmel, defense counsel informed the court that they had "run into a snag again on the money" which was included in the terms of the negotiated plea that the defendant was to pay in advance. Regarding the trial, defense counsel stated the following:

¶ 23 "The trial is starting at 1:00, so he is aware that we are going to have to reset it at your convenience obviously and you have a busy docket. The prosecution has no objection, from what Mr. Hamrock has told me, to moving it over. Obviously, Your Honor, *** we are waiving any 120-day rule counting, so we would ask the Court to set it at your convenience whenever."

¶ 24 "Agreed continuances, made on the record, *** constitute affirmative acts of delay attributable to the defendant and will suspend the speedy trial period." *Myers*, 352 Ill. App. 3d at 688. Moreover, as noted by the Illinois Supreme Court: "It is in the interest of the defendant, the People and the Court[] that all continuances be made to a day certain. Indefinite continuances are an anathema to the law." *People v. Siglar*, 49 Ill. 2d 491, 497 (1971). In *People v. Williams*, 403 Ill. 429, 432 (1949), the supreme court held, "The failure to try [the defendant] within the statutory period was due to his agreement to an indefinite continuance; hence, the statute does not apply."

¶ 25 With these principles in mind, we note that defense counsel waived the right to a speedy trial on the record to an indefinite time, specifying that the trial court could schedule a trial date at its convenience. The same day of this waiver, a plea hearing was set for May 8, 2009, at which time the plea hearing was again reset for June 19, 2009. At the hearing on that date, defense counsel informed the trial court that although the case had been set for a plea and sentencing hearing, she had prepared a second motion to quash the arrest and suppress the evidence, and counsel requested a hearing on the motion. The second motion

to quash the arrest and suppress the evidence was filed on June 19, 2009, and a hearing on the motion was set for July 16, 2009. On July 20, 2009, the Honorable W. Charles Grace denied the second motion to quash the arrest and suppress the evidence. The defendant filed a motion to reconsider on July 30, 2009, which was denied the following day.

¶ 26 On September 2, 2009, notices were issued docketing the case for a trial on November 9, 2009. On September 11, 2009, the defendant filed a motion to dismiss, alleging a violation of his right to a speedy trial. On October 1, 2009, the motion to dismiss was denied by the Honorable E. Dan Kimmel, and a stipulated bench trial was ultimately held on November 12, 2009. The defendant now argues that his conviction should be reversed because his right to a speedy trial was violated. We find this argument without merit.

¶ 27 At the hearing on the motion to dismiss, the parties disagreed on whether plea negotiations were still pending. Defense counsel, in particular, stated that when *Arizona v. Gant*, 556 U.S. 332, ___, 129 S. Ct. 1710, 1716 (2009), was filed in April, "it changed everything," implying that plea negotiations were off and that the speedy trial clock began running again. However, we find this position to be of no consequence to the information before the trial court. The last exchange on the record prior to the motion to dismiss, regarding the scheduling of the trial, was the waiver by defense counsel to an indefinite future date to be chosen by the trial court. Defense counsel, in open court on March 30, 2009, acknowledged the crowded docket and requested the judge to reset the trial at the convenience of the court. At that point the speedy trial clock had not been exceeded.

¶ 28 Subsequently, plea hearings were requested, set, and reset, all at the request of the defendant. In addition, a second motion to quash the arrest and suppress the evidence was filed by the defendant and ruled upon by the trial court. The defendant waived his speedy trial right indefinitely, resulting in the inapplicability of the speedy trial statute. See *Williams*, 403 Ill. at 432. Accordingly, the defendant cannot now claim a violation of his

right to a speedy trial, and the trial court did not err by denying his motion to dismiss.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the trial court's conviction of the defendant.

¶ 31 Affirmed.