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MICHAEL J. PELLETIER
State Appellate Defender

DAVID P. BERGSCHNEIDER
Deputy State Appellate Defender, Editor

P.O. Box 5240
Springfield, IL 62705-5240
Phone: 217/782-7203
http://www.state.il.us/defender/

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§2-6(a)

People v. Golden, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 104315, 6/5/08)

After their direct appeals were denied because the record on appeal was insufficient to allow the Appellate Court to consider the claims, defendants filed post-conviction petitions arguing that appellate counsel was ineffective for failing to file a complete record. As relief, the petition sought to have the trial court order the Appellate Court to allow the defendants to supplement the record and resubmit their briefs. In addition, defendants made oral motions for leave to file late notices of appeal.

The trial court found that appellate counsel was ineffective, but that it had no authority to order the Appellate Court to act. The Appellate Court subsequently agreed that the trial court lacked authority to grant leave to file late notices of appeal, but held that the cause should be remanded with instructions to allow petitioners to file successive post-conviction petitions restating their ineffective assistance claims and requesting some other relief.

1. The Supreme Court held that once the Appellate Court concluded that the trial court correctly denied the post-conviction petitions, it lacked jurisdiction to remand the cause with instructions on possible additional proceedings. In effect, the Appellate Court's remand order was "an exercise of supervisory authority the appellate court does not possess."

2. The court noted, however:

> [T]he petitioners have every right to file whatever pleadings they wish - *e.g.*, successive postconviction petitions . . ., petitions for relief from judgment under section 2-1401 . . ., and *habeas corpus* petitions. . . . They did not need an appellate court order to allow them to do so.

The cause was remanded with instructions for the trial court to conduct a hearing on the petitioners' ineffective assistance claims and, if necessary, to fashion an appropriate remedy.

§2-6(e)

People v. Lopez, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 103768, 6/19/08)

1. In the absence of a majority opinion, the holding of the United States Supreme Court is the position taken by the members who concurred on the narrowest grounds. In ***Missouri v. Siebert***, 542 U.S. 600 (2004), the narrowest such ground was the concurring opinion of Justice Kennedy. (See also **CONFESSIONS**, §10-4(a),(c)).

§2-6(e)

People v. Alberts, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2008) (No. 4-07-0582, 6/26/08)

1. A "new rule" is one which places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or which requires the observance of procedures that are implicit in the concept of ordered liberty. A new *substantive* rule must be applied retroactively to cases on collateral review if the rule narrows application of a substantive criminal statute. A new *procedural* rule is applied retroactively if it satisfies the requirements of ***Teague v. Lane***, 489 U.S. 288 (1989); however, ***Teague*** does not apply to *substantive* rules.

2. ***People v. Hari***, 218 Ill.2d 275, 843 N.E.2d 349 (2006), which expanded the Illinois involuntary intoxication defense to include an unexpected adverse reaction to medications taken at a doctor's direction, applies retroactively. The court found that ***Hari*** constituted a substantive rule because it broadened the scope of an affirmative defense,[1] and should be applied retroactively because it had the same practical effect as a decision limiting the conduct proscribed by a criminal statute. The court also noted that in light of ***Hari***, there were "grave doubts" about the accuracy of defendant's original trial.

[1]Prior to ***Hari***, the involuntary intoxication defense was limited to defendants who were intoxicated due to trick, artifice, or force.

§2-7(b)

People v. Exson, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0924, 6/23/08)

Generally, a defendant who is in custody is entitled to be tried within 120 days of the date he was taken in custody. The 120-day-period may be extended once by up to 60 days if the State has been unable to obtain evidence despite due diligence and there are reasonable grounds to believe that the evidence will be available at a later date. (725 ILCS 5/103-5(c)). The decision to extend the speedy trial period beyond 120 days lies within the discretion of the trial court, whose decision will not be disturbed absent a clear abuse. (See also **SPEEDY TRIAL**, §48-5).

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

§2-7(b)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0058, 6/6/08)

1. Under ***People v. Krankel***, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court must conduct a primary inquiry to examine the factual basis of a *pro se* claim of ineffective assistance of counsel at trial. If the claim lacks merit or concerns only trial strategy, the court may deny the motion without appointing counsel. However, if the *pro se* claim points to possible neglect of the case, new counsel must be appointed.

The trial court's refusal to appoint new counsel should be overturned on appeal only the decision is manifestly erroneous. The court rejected the argument that the *de novo* standard of review should apply.

2. See also **COUNSEL**, §13-4(a).

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

§2-7(b)

People v. Wheat, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2008) (No. 2-06-0888, 6/2/08)

Any findings of fact made by the trial court concerning the discharge of the jury and the defendant's request to poll the jury are to be accepted by the reviewing court unless against the manifest weight of the evidence. The "manifest weight" standard is applied because the trial court is in a superior position to determine such matters as whether there was an adequate opportunity to request a poll and whether the defendant made a timely request. (See also **JURY**, §31-9).

COLLATERAL REMEDIES

§9-1(a)

People v. Ross, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 103972, 6/5/08)

1. Whether defense counsel is ineffective for failing to file a notice of appeal depends on whether ***Strickland*** is satisfied. Defense counsel acts unreasonably by disregarding specific instructions from the defendant to file a notice of appeal. Prejudice is shown where the failure to file a notice of appeal deprives the defendant of an appeal which he would otherwise have taken.

2. A criminal defendant whose attorney was ineffective for failing to file a notice of appeal is entitled to a direct appeal with the benefit of the effective assistance of counsel. Because a post-conviction proceeding is not the equivalent of a direct appeal - even if the defendant is allowed to raise issues that would have been proper in a direct appeal - the court concluded that 725 ILCS 5/5-122 authorizes a post-conviction court to grant the petitioner leave to file a late notice of appeal. In these limited circumstances, Supreme Court Rule 606, which authorizes late notices of appeal only within seven months after the original notice of appeal was due, does not apply. (See also **ROBBERY**, §44-2).

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

CONFESSIONS

§10-4(a),(c)

People v. Lopez, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 103768, 6/19/08)

1. In the absence of a majority opinion, the holding of the United States Supreme Court is the position taken by the members who concurred on the narrowest grounds. In ***Missouri v. Siebert***, 542 U.S. 600 (2004), the narrowest such ground was the concurring opinion of Justice Kennedy. Thus, when police deliberately elect not to give ***Miranda*** warnings until after they obtain a statement, in hopes that a subsequent statement given after ***Miranda*** warnings are administered will be admissible, the subsequent statement is involuntary unless sufficient "curative measures" were taken to compensate for the failure to give timely warnings.

Such "curative measures" might include a substantial break in time and circumstances between the unwarned and warned statements, or an explanation that the unwarned statement is inadmissible. The relevant question is whether the circumstances are such that a reasonable suspect would appreciate that he has a genuine choice whether to continue speaking with authorities.

By contrast, where the failure to give ***Miranda*** is an innocent mistake rather than a deliberate investigative technique, ***Oregon v. Elstad***, 470 U.S. 298 (1985) holds that the second, post-***Miranda*** statement is admissible if voluntary.

2. In determining whether police deliberately withheld ***Miranda*** warnings, courts must consider whether the "objective evidence and any available subjective evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the ***Miranda*** warning." Factors to be considered include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the pre- and post-warning statements.

Here, the evidence showed that officers asked defendant - a 15-year-old boy with no prior record - to come to the police station for questioning about a murder. The officers assured defendant that he was not a suspect, but left him alone in the interrogation room for several hours while investigating information which he gave them. Defendant testified that he thought the door to the interrogation room was locked; the officers denied locking the door but admitted telling defendant to knock on the door if he needed anything.

When the officers returned, they told defendant that a co-defendant had admitted to participating in the murder and had implicated the defendant. Without giving ***Miranda*** warnings, the detectives asked whether defendant had been involved in the crime. Defendant then gave an incriminating oral statement.

After obtaining the unwarned statement, the detectives stopped the questioning, gave ***Miranda*** warnings, and terminated the interview. Two hours later, ***Miranda*** warnings were given and defendant allowed to speak to his father. An Assistant States Attorney then obtained a written statement, which the State sought to introduce at trial.

The court concluded that the objective and subjective evidence showed that police deliberately engaged in the "question first, warn later" technique. Defendant was questioned, isolated for several hours without being told he was free to leave, and confronted with evidence of his guilt - all without being warned of his rights. In addition, although an officer insisted that defendant was regarded as a mere witness even after he was implicated by the co-defendant, the court noted that the co-defendant had been arrested and that the officer testified defendant would not have been allowed to leave the station.

The court also held that the ***Miranda*** warnings, when finally given, were insufficient to afford knowledge to a reasonable person that he was not required to cooperate with the officers. Factors to be considered in making this determination include : (1) the passage of time between the unwarned and warned statements, (2) the location where those statements were taken, (3) whether the same person questioned the suspect during the unwarned and warned statements, (4) whether details obtained during the unwarned phase were used during the warned phase, (5) whether the suspect was advised that the unwarned statement could not be used against him, and (6) whether the two sessions would reasonably have been regarded as parts of a continuum.

The court concluded that a reasonable 15-year-old in defendant's situation would not have believed that he had a choice whether to continue to cooperate, even though the handwritten statement was taken after ***Miranda*** warnings had been administered at least twice, the questioning was by an assistant State's Attorney rather than the detectives who conducted the earlier interrogations, and the defendant's father was present. The court noted that the unwarned and warned statements were taken a short time apart and in the same room, one of the interrogating detectives was present for both statements, and defendant was not advised that his unwarned statement was inadmissible.

Because defendant's handwritten statement was involuntary under ***Siebert***, it should have been excluded. The conviction was reversed and the cause remanded for a new trial.

3. In the course of its holding, the court concluded that although defendant was merely a suspect when he initially came to the police station, his status changed when he was left alone in an interview room for four hours while officers investigated his statements. An arrest occurs when a reasonable person, innocent of any crime, would have concluded he was not free to leave. When a juvenile is involved, the "reasonable person" standard is modified to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted. Several factors are considered in making this determination, including: (1) the officer's intent; (2) the defendant's understanding; (3) whether defendant was told that he was free to leave or that he was under arrest; (4) whether defendant would have been restrained had he attempted to leave; (5) whether ***Miranda*** warnings were given; (6) the number of police officers present; (7) whether defendant was placed in an interview room rather than in a common area, and (8) the method of interrogation.

The court found that a reasonable 15-year-old, innocent of any crime, would not have thought that he was free to leave under these circumstances. Defendant was questioned by police and then left alone for four hours. Defendant was told to knock on the door if he needed to use the restroom or required other assistance, and believed that he was in a locked interrogation room. Finally, neither defendant nor members of his family who called the station were ever told that he was free to leave.

COUNSEL

§13-4(a)

People v. Ross, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 103972, 6/5/08)

1. Whether defense counsel is ineffective for failing to file a notice of appeal depends on whether ***Strickland*** is satisfied. Defense counsel acts unreasonably by disregarding specific instructions from the defendant to file a notice of appeal. Prejudice is shown where the failure to file a notice of appeal deprives the defendant of an appeal which he would otherwise have taken.

The court concluded that as a remedy for counsel's failure to file a notice of appeal, 725 ILCS 5/5-122 authorizes a post-conviction court to grant leave to file a late notice of appeal. (See **COLLATERAL REMEDIES**, §9-1(a)).

2. See also **ROBBERY**, §44-2.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

§13-4(a)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0058, 6/6/08)

1. Under ***People v. Krankel***, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court must conduct a primary inquiry to examine the factual basis of a *pro se* claim of ineffective assistance of counsel at trial. If the claim lacks merit or concerns only trial strategy, the court may deny the motion without appointing counsel. However, if the *pro se* claim points to possible neglect of the case, new counsel must be appointed.

In determining whether the trial court met its burden under ***Krankel***, the question for the reviewing court is whether the judge conducted an adequate inquiry. In most cases, some interchange between the court and trial counsel is necessary; however, the trial court may also rely on its observation of counsel's performance at trial and the adequacy of defendant's *pro se* allegations.

The trial court's refusal to appoint new counsel should be overturned on appeal only the decision is manifestly erroneous. The court rejected the argument that the *de novo* standard of review should apply.

2. It is the prerogative of the defendant, rather than counsel, to decide whether to waive a jury trial. Where the trial court made no effort to ask defendant to provide further details concerning his claim that his attorney overrode his desire for a bench trial, and the trial court gave no basis for denying defendant's claim other than to state that the error was harmless because in a bench trial its finding would have been no different than that of the jury, the ***Krankel*** inquiry was insufficient. The court noted that the denial of the right to a bench trial is structural error which cannot be harmless.

The cause was remanded for the trial court to determine whether there was any proper basis to deny defendant's claim that he was improperly denied a bench trial, and to provide relief if appropriate.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

GUILTY PLEAS

§24-6(a)

People v. Delvillar, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-2449, 6/11/08)

1. Noting a conflict in Appellate Court authority, the court found that 725 ILCS 5/113-8 creates a mandatory duty to admonish a guilty plea defendant that if he or she is not a citizen of the United States, the plea may result in deportation, exclusion from admission to the United States, or denial of naturalization. The plain language of §113-8 requires the admonishment whether or not the defendant is known to be a non-citizen; it is the fact that a guilty plea is entered - rather than the defendant's immigration status - which triggers the admonishment requirement.

2. Because the trial court is required to admonish guilty plea defendants of the possible consequences of the plea on immigration status, the defendant's misrepresentation that he was a U.S. citizen did not excuse the failure to give the admonishment.

§24-6(d)

People v. Gulley, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2008) (No. 2-06-1077, 6/13/08)

1.Under ***People v. Whitfield***, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is denied where a defendant enters a guilty plea in return for a specified sentence and is not advised that an additional term of mandatory supervised release will be imposed. In ***Whitfield***, the court concluded that the appropriate relief was to reduce the prison term by the length of the MSR, so the combination of the prison term and MSR equaled the sentence for which the parties had bargained.

2. Defendant bargained for a maximum 30-year-sentence but received a 33-year-sentence when the statutorily mandated MSR term was added. The Appellate Court concluded that ***Whitfield*** applies where the defendant pleads guilty in return for an agreed sentencing cap, at least where the combination of the sentence imposed and the MSR term exceed the cap. "Whatever the distinction between a fully negotiated plea and cap, it has no relevance here, where the sentencing cap for which the defendant bargained is the very term that was violated."

3. Defendant did not waive the issue by failing to raise it in a post-plea motion, because defendant alleged that he learned of the MSR term only after he began to serve the prison term. Similarly, the issue was not waived because defendant voluntarily withdrew a direct appeal in which it had been raised, because defendant alleged that he dismissed the appeal in reliance on incorrect advice from his appellate attorney concerning available relief.

4. The court rejected the State's argument that because defendant had previously served MSR on unrelated convictions, he should have been aware of the MSR requirement on this offense. The court noted that in ***Whitfield***, the Supreme Court rejected the argument that a guilty plea defendant is entitled to relief only if he can establish that he was unaware of the MSR requirement.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

INDICTMENTS, INFORMATIONS, COMPLAINTS

§28-3

People v. Williams, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0141, 6/20/08)

1. When considering the defendant's motion to dismiss an indictment because no evidence of defendant's guilt was presented to the grand jury, the trial court must consider the grand jury transcripts to determine if the evidence connected the accused to the offense. An indictment will withstand scrutiny if the transcript of grand jury proceedings reveals "some evidence relative to the charge." The State need not provide the grand jury with evidence of each element of the offense; the indictment is proper if there is evidence which "tends to connect" defendant to the crime.

The court concluded that there was sufficient evidence to sustain the indictment where a detective described the offense, testified that defendant had "participated," and stated that one of the complainants had identified defendant from a photo array.

2. See also **REASONABLE DOUBT**, §43-5 and **WITNESSES,** §58-3.

INSANITY – MENTALLY ILL – INTOXICATION

§29-2

People v. Alberts, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2008) (No. 4-07-0582, 6/26/08)

People v. Hari, 218 Ill.2d 275, 843 N.E.2d 349 (2006), which expanded the Illinois involuntary intoxication defense to include an unexpected adverse reaction to a drug taken on doctor's orders, is applied to cases on collateral review. (See **APPEAL**, §2-6(e)).

JURY

§31-3(a)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0058, 6/6/08)

1. Under ***People v. Krankel***, 102 Ill.2d 181, 464 N.E.2d 1045 (1984), the trial court must conduct a primary inquiry to examine the factual basis of a *pro se* claim of ineffective assistance of counsel at trial. If the claim lacks merit or concerns only trial strategy, the court may deny the motion without appointing counsel. However, if the *pro se* claim points to possible neglect of the case, new counsel must be appointed. (See also **COUNSEL**, §13-4(a)).

2. It is the prerogative of the defendant, rather than counsel, to decide whether to waive a jury trial. Where the trial court made no effort to ask defendant to provide further details concerning his claim that his attorney overrode his desire for a bench trial, and the trial court gave no basis for denying defendant's claim other than to state that the error was harmless because in a bench trial its finding would have been no different than that of the jury, the ***Krankel*** inquiry

was insufficient. The court noted that the denial of the right to a bench trial is structural error which cannot be harmless.

The cause was remanded for the trial court to determine whether there was any proper basis to deny defendant's claim that he was improperly denied a bench trial, and to provide relief if appropriate.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

§31-4(a)

People v. Garstecki, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2008) (No. 3-07-0259, 5/16/08)

1. Noting a conflict in precedent, the Appellate Court concluded that Supreme Court Rule 431, which provides that the trial court "shall" permit the parties to supplement *voir dire* by direct questioning as deemed proper by the court under the circumstances, affords the parties the right to directly question prospective jurors, subject only to reasonable limitations of scope and time.

2. However, the trial judge's failure to allow the parties to question jurors directly did not require reversal where the trial court thoroughly inquired into all the areas which defendant wished to raise in direct questioning. Because the court's examination was sufficient to ensure an impartial jury, the verdict would have been the same had defendant questioned the prospective jurors directly.

§31-6(c)

People v. Johnson, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2008) (No. 3-06-0555, 6/10/08)

1. A criminal defendant has a constitutional right to appear personally and by counsel at all proceedings involving his substantial rights. Thus, once the jury has begun to deliberate, the defendant has the right to be present during any communication between the jury and the trial court. If communication between the judge and jury occurs in the defendant's absence, the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced.

2. As a matter of plain error, the Appellate Court found that the State failed to sustain its burden of showing that the trial court's *ex parte* communication with

the jury did not cause prejudice. After deliberating 30 to 40 minutes, the jury sent a note to the judge stating that it was split 11 to one and asking for advice. Without notifying the parties, the judge responded that the jury should continue to deliberate.

The Appellate Court concluded that the State could not carry its burden of showing a lack of prejudice by arguing that due to the short duration of deliberations, the trial judge would have refused to give the ***Prim*** instruction even had the defense been present and requested the instruction. Similarly, defendant's failure to ask for the ***Prim*** instruction at his first trial, which ended in a mistrial due to a hung jury, did not mean he would have failed to request the instruction at this trial. "Speculation by the State does not rise to the level necessary to sustain its burden of proving beyond a reasonable doubt that [defendant] was not prejudiced."

(Defendant was represented by Deputy Defender Robert Agostinelli, Ottawa.)

§31-9

People v. Wheat, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2008) (No. 2-06-0888, 6/2/08)

1. The opportunity to poll the jury is a basic right of the criminal justice system. A criminal defendant has an absolute right to request a poll after a verdict is returned and before the jury is discharged. If the jury is not polled despite a timely request, the conviction must be reversed.

In determining whether there was a sufficient opportunity to request a poll, the relevant time period is that between when the trial court finishes reading the verdict and when it discharges the jury.

2. Any findings of fact made by the trial court concerning the discharge of the jury and the defendant's request to poll the jury are to be accepted by the reviewing court unless against the manifest weight of the evidence. The "manifest weight" standard is applied because the trial court is in a superior position to determine such matters as whether there was an adequate opportunity to request a poll and whether the defendant made a timely request.

3. After reading the verdict, the trial court must give both parties a reasonable opportunity to poll the jury. The court rejected the State's argument

that a two-second pause between the return of the verdict and the discharge of the jury was a reasonable opportunity for the defense to ask that the jury be polled:

> A defendant exercising his right to poll the jury is not a quiz show contest who must anticipatorily press the buzzer before the host is finished asking the question or risk losing points. . . . A defendant is not required to impede on the trial's decorum by interrupting the trial court's reading of the verdict in order to preserve his request to poll.

4. The court also noted that when defense counsel made a request to poll the jury at the first reasonable opportunity, the trial court denied the request on the ground that the jury had been discharged. However, the judge continued to address the jury for another minute or so. Because the jurors remained in their seats and had not been exposed to any improper matters, the court concluded that despite the technical "discharge," the trial judge should have granted the request to poll the jury.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

NARCOTICS

§34-4

People v. Galmore, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2008) (No. 4-07-0073, 4/30/08)

1. 730 ILCS 5/5-9-1.1(a) provides that in a controlled substance case, the trial court "shall" impose a fine of "not less than the full street value" of the substance. The "street value" determination is based on testimony of law enforcement personnel, the defendant, and other witnesses as may be required.

2. As a matter of plain error, the trial judge erred by imposing a street value fine of $10,000. The testimony indicated that the 50 rocks of crack cocaine would have sold on the street for $20-$30 each, establishing a street value fine between $1000 and $1500. At the sentencing hearing, the prosecutor claimed that the fine should be $10 per one-tenth gram of cocaine, but gave no explanation for choosing that method of determining the fine.

The court also noted that under the prosecutor's method, the fine would amount to only $8,380, not $10,000. Although §5-9-1.1(a) authorizes a court to impose a fine greater than the actual value of the illegal substance, the fine must have some "concrete evidentiary basis" in the record.

The street value fine was vacated and the cause remanded for a hearing to determine an appropriate fine.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

REASONABLE DOUBT

§43-5

People v. Williams, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0141, 6/20/08)

1. In considering a challenge to the sufficiency of the evidence, the relevant question is whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here, the evidence was insufficient to sustain a conviction for aggravated kidnapping as an accomplice. The court criticized the only evidence of guilt - the testimony of two children - as "riddled with internal inconsistencies and self-contradictions," "hesitant" and "vague," and "impeached by the testimony of other witnesses and . . . telephone records."

2. See also **INDICTMENTS, INFORMATIONS, COMPLAINTS,** §28-3 and **WITNESSES**, §58-3.

ROBBERY

§44-2

People v. Ross, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 103972, 6/5/08)

1. The court concluded that as a remedy for counsel's failure to file a notice of appeal, 725 ILCS 5/5-122 authorizes a post-conviction court to grant leave to file a late notice of appeal. (See **COLLATERAL REMEDIES**, §9-1(a)).

2. A person commits armed robbery by committing robbery while armed with a dangerous weapon. Illinois law does not create a mandatory presumption that any weapon is dangerous; however, the trier of fact may infer dangerousness from evidence that a firearm is loaded and operable, was used as a bludgeon, or was capable of being used as a bludgeon.

Where the State's evidence showed only that the petitioner had a small, portable and concealable weapon, an officer testified that police recovered a pellet gun with a 3-inch barrel, the State presented neither the weapon nor photographs of it at the trial, and there was no evidence that the gun was loaded or used as a bludgeon or regarding its weight or composition, the Appellate Court properly concluded that the evidence failed to show that defendant used a dangerous weapon.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

SEARCH & SEIZURE

§45-4(b)

People v. Leggions, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2008) (No. 4-07-0187, 6/13/08)

The court concluded that exiting one vehicle and entering another, even in an area known for drug crimes, does not create a reasonable suspicion of criminal activity sufficient to justify an investigatory stop:

> A very large category of innocent travelers get out of their own cars and into other people's cars. Teenagers do so. Friends do so when they simply want to confer together and make plans for the day. If we deemed such behavior, together with presence in a high crime neighborhood, to create reasonable suspicion, we would be giving the police absolute discretion to intrude into the lives of this broad category of innocent travelers simply because they had the misfortune to visit or reside in a high-crime neighborhood.

SENTENCING

§46-8(b)

People v. Brown, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 104375, 6/19/08)

1. The Habitual Criminal Act mandates a life sentence for a person with three convictions for Class X felonies, criminal sexual assault, aggravated kidnapping, or first degree murder, if the third offense was committed after conviction of the second offense and the second offense was committed after conviction of the first offense. (See 720 ILCS 5/33B-1). The court acknowledged that the State bears the burden of proving by a preponderance of the evidence that the defendant is eligible for habitual criminal sentencing. However, the court found that introducing "duly authenticated" copies of the prior convictions constitutes a *prima facie* case satisfying the State's burden of production. Such evidence creates a permissive rebuttable presumption that the defendant is eligible for enhanced sentencing.

Although the defendant has no burden to produce evidence that he is not eligible, the failure to do so creates the risk that the trial court will find that the State has carried its burden of persuasion to establish habitual criminal eligibility.

2. Here, the State proved by a preponderance that defendant was eligible for habitual criminal status. The State submitted certified records showing that defendant had been convicted of the required prior offenses and that the convictions occurred on separate occasions. In addition, the State introduced a presentence report showing the dates on which defendant was arrested for committing the offenses leading to the prior convictions. Finally, the prosecutor stated that defendant had been on parole when he committed the second and third offenses.

Such evidence created a rebuttable presumption the defendant was eligible for habitual criminal sentencing. Defendant did not contest the presumption, and in fact admitted that he was eligible.

3. The court also noted that under §33B-2(c), the defendant waives the right to contest habitual criminal eligibility on direct appeal if he fails to present evidence to contradict the rebuttable presumption at trial, unless the State's evidence affirmatively shows a lack of eligibility. Here, defendant forfeited his right to challenge habitual criminal eligibility because he failed to rebut the permissive presumption and in fact conceded his eligibility.

The court noted, however, that if defendant was in fact ineligible for habitual criminal sentencing, he could file a post-conviction petition alleging ineffective assistance of counsel for failing to introduce evidence of his lack of eligibility.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

§46-8(d)

People v. Rodriguez, ___ Ill.2d ___, ___ N.E.2d ___ (2008) (No. 104679, 6/5/08)

730 ILCS 5/5-8-1(a)(1)(d)(i) provides that a person who commits first degree murder "while armed with a firearm" shall receive a 15-year enhancement in addition to the sentence imposed by the court. The court concluded that the 15-year enhancement applies to a defendant who is not personally armed but who is convicted of first-degree murder based on accountability. "When a defendant aids or abets another in committing a crime, he is accountable and may be punished for any criminal act [which his co-defendant commits], whether that act was inflicting severe bodily injury, committing a brutal and heinous felony, or being armed with a firearm."

The court also noted that subsections (d)(ii) and (iii), which impose enhanced sentences of 20 and 25 years for personally discharging a firearm or personally discharging a firearm and causing great bodily harm or death, require that the defendant personally discharged the weapon. Had the legislature intended to restrict subsection (i) to persons who are personally armed, it would have included a similar limitation in that subsection.

SPEEDY TRIAL

§§48-1(b), 48-4

People v. Sitkowski, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2008) (No. 2-07-0305, 6/9/08)

1. The Illinois legislature has enacted three speedy trial statutes for criminal cases. 725 ILCS 5/103-5(a) provides an automatic 120-day speedy trial right for a person who is in custody, and does not require a demand. 725 ILCS 5/103-5(b) provides a 160-day-speedy trial right for a person released on bond or recognizance, but requires a written demand for speedy trial. Finally, 730 ILCS

5/3-8-10 applies a 160-day speedy trial right for a person committed to an institution, facility or program of the Department of Corrections, provided that a speedy trial demand is made.

2. Under 730 ILCS 5/3-14-2(a), the Department of Corrections retains custody of persons placed on mandatory supervised release. Thus, under the plain language of 730 ILCS 5/3-8-10, a speedy trial demand filed by a person who is committed to DOC remains effective after he is placed on mandatory supervised release.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

§48-5

People v. Exson, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0924, 6/23/08)

1. Generally, a defendant who is in custody is entitled to be tried within 120 days of the date he was taken in custody. The 120-day-period may be extended once by up to 60 days if: (1) the State has been unable to obtain evidence despite due diligence, and (2) there are reasonable grounds to believe that the evidence will be available at a later date. (725 ILCS 5/103 – 5(c)). The decision to extend the speedy trial period beyond 120 days lies within the discretion of the trial court, whose decision will not be disturbed absent a clear abuse of discretion.

2. The trial court abused its discretion by granting the State a 30-day-extension of the statutory speedy trial period for the purpose of obtaining the testimony of the chemist who performed forensic analysis of a suspected controlled substance. To obtain an extension of the speedy trial period, the State must exercise due diligence to obtain the evidence in question. The State exercises due diligence where it begins efforts to locate the witness in sufficient time to secure her presence within the speedy trial term.

Here, the prosecution conceded that it made no attempt to contact the chemist until the 119th day of the term. The State failed to contact the chemist because it assumed that defendant would waive a jury and that defense counsel - a member of the Cook County Public Defender's office - would follow that office's practice of stipulating to the results of forensic testing. When it learned that defendant wanted a jury trial, it attempted to contact the chemist but found that she had left the State's employ some two months earlier.

The court rejected the argument that it was reasonable for the State to rely on the Public Defender's practice of stipulating to test results:

> We find the State's failure to ask defendant's counsel whether the defense intended to stipulate to the lab reports is evidence of a lack of diligence on the part of the State. We agree with the defendant's claim that the State had no right to rely entirely on a purported stipulation custom in bench trials.

3. The defendant did not waive the speedy trial claim although he failed to raise it in the post-trial motion. Defendant raised several objections in the trial court, and filed a motion to dismiss based on the State's lack of diligence in obtaining the testimony of the witness. Because the trial court had ample opportunity to review the issue, and because the speedy trial statute implicates the constitutional right to a speedy trial, the court elected to reach the issue.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

WAIVER – PLAIN ERROR – HARMLESS ERROR

§57-1

People v. Exson, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0924, 6/23/08)

The defendant did not waive a speedy trial claim although he failed to raise it in the post-trial motion. Defendant raised several objections in the trial court, and filed a motion to dismiss based on the claim. Because the trial court had ample opportunity to review the issue, and because the speedy trial statute implicates the constitutional right to a speedy trial, the court elected to reach the issue. (See also **SPEEDY TRIAL**, §48-5).

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

WITNESSES

§58-3

People v. Williams, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2008) (No. 1-06-0141, 6/20/08)

1. All witnesses are presumed competent to testify. Witnesses are incompetent if they are: (1) incapable of expressing themselves concerning the matter at hand so as to be understood, or (2) incapable of understanding the duty of a witness to tell the truth. The burden of proving that a witness is incompetent to testify falls upon the party challenging the witness's ability to testify. The question of competency to testify is determined by the trial judge, whose determination is not to be disturbed absent a clear abuse of discretion.

2. The court concluded that a nine-year-old boy was competent to testify. A child is not required to give perfect answers to preliminary questions in order to be deemed a competent witness; here, after "prodding" by the prosecutor and the trial judge, the witness "displayed a threshold grasp of the difference between telling the truth and lying."

3. The court concluded that the defendant waived his challenge to the competency of an 11-year-old boy. The defendant failed to raise the issue in the trial court, and on appeal referred to the witness only tangentially when discussing the competency of the younger witness.

4. See also **INDICTMENTS, INFORMATIONS, COMPLAINTS**, §28-3 and **REASONABLE DOUBT**, §43-5.