No. 126163

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ROBERT J. ROGERS, Defendant-Appellee.	) On Appeal from the Appellate) of Illinois, Third District, No.) 3-18-0088)) There on Appeal from the) Circuit Court of the Twelfth) Judicial Circuit, Will County,) Illinois, No. 15 DT 1703)) The Honorable) Chrystel Gavlin,) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

NICHOLAS MOELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5643
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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NATURE OF THE CASE

After a stipulated bench trial before the Circuit Court of Will County, the court found defendant Robert J. Rogers guilty of aggravated driving under the influence of a controlled substance and sentenced him to one year of court supervision. C118; R185-87.[1] On appeal, defendant argued that his trial counsel was ineffective for failing to move to dismiss the case based upon a purported speedy trial violation. A3. The Illinois Appellate Court, Third District, reversed the trial court's judgment and held that counsel was ineffective because a motion to dismiss the charge would have succeeded since the trial court would have been required to grant the motion where the 160-day statutory speedy trial period had expired. A8. The People appeal that judgment. No question is raised on the pleadings.

ISSUES PRESENTED

1. Whether the compulsory joinder requirement of section 3-3 of the Criminal Code (720 ILCS 5/3-3) applies where a police officer initially files charges by uniform citation and a State's Attorney later charges misdemeanors by information or indictment.

2. Whether defense counsel provided effective assistance where he chose not to raise an argument that was foreclosed by binding appellate precedent.

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[1] Citations to the common law record, report of proceedings, and this brief's appendix appear as "C__," "R __," and "A__," respectively.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On September 30, 2020, this Court allowed the People's petition for leave to appeal. *People v. Rogers*, No. 126163 (Sept. 30, 2020).

STATEMENT OF FACTS

On November 25, 2015, a police officer investigating a car accident issued a uniform citation charging defendant with driving under the influence of drugs or a combination of drugs under section 11-501(a)(4) of the Vehicle Code (625 ILCS 5/11-501(a)(4) (2015)). C6. Defendant was transported to a hospital for treatment where a blood test was administered. *See* C28, 31. He was ultimately released on bond pending trial. C17.

Trial Court Proceedings

The arresting officer filed the uniform citation on December 1, 2015. C2, 6. On December 14, 2015, defendant filed a demand for a speedy trial. C16.

On April 6, 2016, the People charged defendant by superseding information with two counts[2] of misdemeanor driving while intoxicated. C46-47. Count One charged defendant with driving while there was any amount of any of the listed drugs in his breath, blood, or urine under section 11-

[2] On October 28, 2016, the People filed a second, superseding information, adding Count Three, which charged defendant under section 11-501(a)(7) of the Vehicle Code. C74-75. The trial court dismissed Count Three on September 20, 2017. C114.

501(a)(6) of the Vehicle Code, and Count Two charged him with driving while under the influence of any drug or combination of drugs that rendered him incapable of driving safely under section 11-501(a)(4). *Id.* With the parties' agreement, the court continued the bench trial to May 20, 2016, tolling the speedy trial clock. R31-33.

On May 20, 2016, the trial court granted the People's motion to continue the trial over defendant's objection. R38-40. Defendant then agreed to toll the speedy trial clock. *Id.* On June 27, 2016, the People requested a continuance to September 20, 2016, and again defendant first objected before agreeing to toll the speedy trial clock. R47-49.

On September 16, 2016, the People moved for a continuance to pursue additional laboratory testing. C63. On September 20, 2016, the trial court granted the continuance to December 5, 2016, over defendant's objection. R52-59. The trial court attributed the continuance to the People. R56-59.

On December 1, 2016, the parties agreed to continue the trial date to December 20, 2016 and toll the speedy trial clock. R96-98. After numerous additional continuances and proceedings that tolled the speedy trial clock, R100-166, the court ultimately set the case for trial on January 17, 2018, R168-69.

Prior to the stipulated bench trial, the People *nolle prosequied* Count Two. R181. The parties stipulated that the arresting officer found defendant in actual, physical control of a motor vehicle, that defendant voluntarily

submitted to chemical testing, and that the test results showed defendant had THC in his system at the time of his arrest. R179-82. The trial court found defendant guilty of driving under the influence pursuant to section 11-501(a)(6) and sentenced him to 12 months of court supervision. R185-87.

Direct Appeal

On appeal, defendant argued that (1) trial counsel was ineffective for failing to move to dismiss Count One on speedy trial grounds, and (2) section 11-501(a)(6) violated his right to due process. A3, 8. The appellate court reversed defendant's conviction, holding that counsel was ineffective for failing to move to dismiss Count One. A8. The court reasoned that defendant was denied his statutory right to a speedy trial because Count One, initially charged by the Will County State's Attorney, and Count Two, initially charged by the arresting officer, were subject to compulsory joinder due to the similarity of the offenses; therefore, the speedy trial clock for Count One began to run on December 14, 2015, when defendant demanded trial on Count Two. A4-6. In so holding, the court departed from its prior opinion in *People v. Kazenko*, 2012 IL App (3d) 110529, which held that charges initially brought by a police officer and subsequent misdemeanor charges brought by the State's Attorney were not subject to compulsory joinder. A4-5. The court concluded that because a speedy trial challenge would have been successful, defense counsel's performance was deficient and prejudiced defendant. A-8. The court declined to address defendant's

constitutional challenge to section 11-501(a)(6), as the court's resolution of his speedy trial claim had rendered it moot. A8.

ARGUMENT

Defense counsel provided effective representation. Assuming that defendant's statutory right to counsel, *see* 725 ILCS 5/113-3(b), is coextensive with the Sixth Amendment right to counsel, because defendant ultimately received effective representation as described in *Strickland v. Washington*, 466 U.S. 668 (1984), his ineffective assistance claim fails.

Defendant's claim that counsel was ineffective because he did not move to dismiss Count One on speedy trial grounds must fail because only 72 days attributable to the People occurred between the filing of Count One and defendant's trial. Contrary to the appellate court's holding, the days between defendant's speedy trial demand on Count Two and the subsequent filing of Count One are not attributable to the People. Under this Court's long-standing precedent, a police officer is not the proper prosecuting officer under the compulsory joinder provisions of the Criminal Code (720 ILCS 5/3-3), and thus charges brought by uniform citation and complaint are not subject to compulsory joinder. *People v. Jackson*, 118 Ill. 2d 179, 192 (1987). Accordingly, the speedy trial clock did not begin to run on Count One until the charge was filed by the Will County State's Attorney, and any speedy trial challenge raised by defense counsel would have been meritless.

Even if this Court were to depart from *Jackson* and find that Counts One and Two were subject to compulsory joinder, defendant still could not establish that counsel was ineffective, because defendant's speedy trial claim was foreclosed by existing Third District precedent, *People v. Kazenko*, 2012 IL App (3d) 110529, and counsel is not required to predict future changes in the law.

Finally, this case should be remanded for further consideration of defendant's constitutional challenge to section 11-501(a)(6) of the Vehicle Code (625 ILCS 5/11-501(a)(6), which the appellate court declined to consider as moot given its resolution of the ineffective assistance claim.

I. Standards of Review

Where, as here, a claim of ineffective assistance was not considered by the trial court, the standard of review is de novo. *See People v. Moore*, 207 Ill. 2d 68, 75 (2003); *see also People v. Bates*, 2018 IL App (4th) 160255, ¶ 46.

Questions of statutory interpretation are also reviewed de novo. *People v. Hardman*, 2017 IL 121453, ¶ 19.

II. Defendant Received Effective Assistance of Counsel.

As an initial matter, defendant did not have a constitutional right to effective counsel because he was not sentenced to a term of imprisonment. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (constitutional right to counsel applies only where defendant is actually sentenced to term of imprisonment); *see also People ex rel. Glasgow v. Kinney*, 2012 IL 113197, ¶ 10. Instead,

because defendant faced potential penalties beyond a fine, defendant had a statutory right to counsel pursuant to section 113-3(b) of the Code of Criminal Procedure. 725 ILCS 5/113-3(b).

This Court has never determined whether the statutory right to counsel under section 113-3(b) includes the right to effective counsel, commensurate with the Sixth Amendment's constitutional right. And this Court need not decide that question to resolve this appeal because defendant's claim fails even under the constitutional standard set by *Strickland v. Washington*, 466 U.S. 668 (1984).

"To prevail on a [Sixth Amendment] claim of ineffective assistance, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to establish either prong — deficient performance or prejudice — is fatal to an ineffective assistance claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). Assuming, *arguendo*, that defendant's statutory right to counsel is coextensive with the Sixth Amendment right, his claim must fail because he cannot establish deficient performance: his underlying speedy trial claim is meritless and, even if it were not, his counsel was not deficient for failing to file a motion that would have been denied based on then-existing precedent.

A. Defendant's underlying speedy trial claim is meritless.

First, defendant cannot meet his burden to establish both prongs of *Strickland* because his underlying speedy trial claim is meritless. *See People*

v. Edwards, 195 Ill. 2d 142, 165 (2001) ("Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection.").

The governing speedy-trial principles are straightforward. Where, as here, a defendant is released on bond, the People must bring him to trial within 160 days of his speedy trial demand. 725 ILCS 5/103-5(b). However, delay caused by the defendant tolls the 160-day period, 725 ILCS 5/103-5(f), including any continuances agreed to by defense counsel, *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). If the People do not try the defendant within the statutory period, the charges must be dismissed. *People v. Hunter*, 2013 IL 114100, ¶ 10.

Here, via superseding information, the People charged defendant with Count One on April 6, 2016, C46, and defendant agreed to toll the speedy trial clock until May 20, 2016, R31-33. Defendant subsequently agreed to toll the clock from May 20, 2016, until September 20, 2016. R38-40, 47-50. On September 20, 2016, defendant objected to the State's request for a continuance, and the speedy trial clock began to run. R52-59. It then ran for 72 days, until December 1, 2020, when the parties agreed to continue the trial date. R96-98. The speedy trial clock then remained tolled through a series of agreed continuances and ended with defendant's trial on January, 17, 2018. R100-169. Accordingly, the People tried defendant well within the 160-day period, and any motion to dismiss Count One would have failed.

B. Compulsory joinder does not apply to uniform citations issued by police officers.

Contrary to the appellate court's holding below, compulsory joinder principles did not require joinder of the two counts, such that defendant's prosecution was untimely. In calculating the time attributable to the People, the appellate court erroneously included an additional 114 days — the period between the defendant's December 14, 2015 speedy trial demand for what became Count Two, and the filing of Count One on April 6, 2016 — upon concluding that compulsory joinder principles required joinder of the two charges. A7.

The question whether compulsory joinder principles are applicable is a matter of statutory interpretation. The primary goal of such interpretation is "to determine and effectuate the legislature's intent." *Hardman*, 2017 IL 121453, ¶ 19. The plain and ordinary meaning of the statutory language is the best indicator of the legislature's intent. *Id.* Where a statute is clear and unambiguous, courts cannot read into the statute conditions or terms not expressed by the legislature. *People v. Glisson*, 202 Ill. 2d 499, 505 (2002).

Compulsory joinder is governed by section 3-3(b) of the Criminal Code (720 ILCS 5/3-3(b)), which provides that all offenses based upon a single act and "known to the proper prosecuting officer at the time of commencing the prosecution" must be prosecuted in a single prosecution. *Id.*; *see also Hunter*, 2013 IL 114100, ¶ 10. In the speedy trial context, if two charges are subject to compulsory joinder, then the speedy trial clock begins to run for both

charges when a trial demand is made on the first charge, even if the People bring the second charge at a later date. *Hunter*, 2013 IL 114100, ¶ 10. Moreover, delays attributable to the defendant regarding the initial charge do not toll the speedy trial clock for the second charge. *People v. Williams*, 204 Ill. 2d 191, 207 (2003). Thus, if compulsory joinder principles applied here, the additional 114 days would have exceeded the 160-day speedy trial period (72 + 114 = 186).

But compulsory joinder provisions do not apply here. This Court has held that "the compulsory joinder provisions of section 3-3 do not apply to offenses that have been charged by the use of a uniform citation and complaint form provided for traffic offenses." *Jackson*, 118 Ill. 2d at 192, *overruled on other grounds by People v. Stefan*, 146 Ill. 2d 324 (1992). In *Jackson*, following a fatal car accident, a police officer issued the defendant a uniform traffic complaint citation for driving under the influence and illegal transportation of alcohol. *Id.* at 183. The State's Attorney later *nolle prosequied* the ticketed charges and indicted the defendant on two counts of reckless homicide. *Id.* On appeal, this Court considered whether the reckless homicide charges were subject to compulsory joinder with the driving under the influence and illegal transportation of alcohol charges, and thus precluded under section 3-4 of the Criminal Code (720 ILCS 5/3-4), which bars prosecution of an offense after the defendant has been convicted or

acquitted of another related charge subject to compulsory joinder. *Id.* at 191-92.

In holding that the charges were not subject to compulsory joinder, the Court focused on the legislature's use of the phrase "the proper prosecuting officer" in section 3-3. *Id.* at 192-93. As the Court explained, with section 3-3, the legislature clearly intended to regulate the actions of "the proper prosecuting officer," which is not a police officer but "the State's Attorney who has the responsibility to commence and prosecute all actions in which the people of the State or the county may be concerned." *Id.* at 193. The Court further explained that section 3-3 was drafted both before Illinois's 1970 Constitution established a single, unified trial court and before the establishment of the traffic regulations that underlie the offenses now charged by uniform citation and complaint. *Id.* Thus, the legislature could not have anticipated the changes to Illinois's legal system and the resulting role police officers play in issuing uniform citation and complaint forms for traffic offenses and minor crimes. *See id.*

Accordingly, this Court held that the legislature's clear intent to regulate the prosecutorial discretion of State's Attorneys did not also encompass police officers' use of tickets, and therefore section 3-3's compulsory joinder provisions did not apply to uniform citation and complaint forms. *Id.* at 192-93.

Following *Jackson*, a split developed between the districts of the appellate court — and within the Third District — regarding the reach of *Jackson*'s holding. In *People v. Kazenko*, 2012 IL App (3d) 110529, the Third District, applying *Jackson*, held that compulsory joinder did not apply in circumstances indistinguishable from those here. There, the defendant was initially charged with driving under the influence by uniform citation and complaint, and he made a speedy trial demand. *Id.* ¶¶ 3-4. Subsequently, the Will County State's Attorney filed an information charging the defendant with misdemeanor driving under the influence under a separate subsection of the relevant statute. *Id.* ¶ 5. The trial court dismissed the new misdemeanor charge on speedy trial grounds, holding that it was subject to compulsory joinder. *Id.* ¶¶ 5-7. The appellate court reversed, noting that this Court's ruling in *Jackson* "could not be any more clear": the compulsory joinder rule does not apply to charges brought by police officers through uniform citations and complaints. *Id.* ¶¶ 14, 16.

Kazenko is consistent with almost every appellate decision that has applied *Jackson*'s ruling on compulsory joinder. *See People v. Mauricio*, 249 Ill. App. 3d 904, 911 (2d Dist. 1993) ("[O]ur courts have held that sections 3-3 and 3-4(b)(1) do not apply to offenses that have been charged in a uniform traffic citation."); *People v. Crowe*, 232 Ill. App. 3d 955, 960 (4th Dist. 1992); *People v. Hoskinson*, 201 Ill. App. 3d 411, 414 (1st Dist. 1990); *People v. Helt*, 175 Ill. App. 3d 332, 333 (3d Dist.1987). Nevertheless, the Second District

reached the opposite holding in *People v. Thomas*, 2014 IL App (2d) 130660. There, the defendant was charged with driving under the influence of alcohol by complaint by a police officer. *Id.* ¶ 3.[3] The State's Attorney subsequently filed an information charging the defendant with misdemeanor driving under the influence of alcohol under a separate subsection. *Id.* ¶ 6. The trial court granted the defendant's motion to dismiss the new charge, ruling that his speedy trial rights were violated because the new charge was subject to compulsory joinder with the original charges. *Id.* ¶ 7. The Second District affirmed. *Id.* ¶ 33. Although the court acknowledged *Jackson*'s holding that compulsory joinder does not apply to charges brought by police officers, it explained that *Jackson*'s reasoning applies only where the later charge is a felony, because a contrary rule would allow a defendant to quickly plead guilty to a traffic violation to avoid liability on a more serious charge. *Id.* ¶¶ 20-21. The court also reasoned that the *Kazenko* court failed to recognize that most traffic violations and misdemeanors are brought by police officers, and a "mechanical[]" application of *Jackson* "would mean that compulsory joinder would almost never apply to misdemeanor charges." *Id.* ¶ 22. Here, the appellate court found *Thomas* persuasive and adopted its reasoning. A5.

The effort by the Second District and the court below to distinguish *Jackson* misapprehends the straightforward, categorical rule this Court

[3] The charges against Thomas were not brought by a uniform citation and complaint, but rather a verified complaint. *See id.* ¶ 17.

announced. The Court did not limit its holding that section 3-3's compulsory-joinder provisions do not apply to offenses charged by the use of a uniform citation and complaint form to instances where the charges were followed by a felony charge. *See Jackson*, 118 Ill. 2d at 192. Nor is *Jackson*'s holding concerned solely with preventing defendants from avoiding a greater charge by pleading guilty to an initially charged misdemeanor. A5; *accord Thomas*, 2014 IL App (2d) 130660, ¶ 21. Instead, this Court in *Jackson* correctly focused on the plain language of section 3-3, which anticipates that the actions of the prosecuting officer will determine whether compulsory joinder applies. *See* 118 Ill. 2d at 192-93; *see also* 720 ILCS 5/3-3(b) (requiring joinder only where offenses are "known to *the proper prosecuting officer* at the time of commencing the prosecution.") (emphasis added). And, ultimately, the county's State's Attorney — not an arresting officer — is the proper prosecuting officer. *See Jackson*, 118 Ill. 2d at 192-93; 55 ILCS 5/3-9005.

Although a police officer may initiate a prosecution by writing a ticket, police officers do not try cases and cannot dismiss charges. Thus, they do not qualify as a "proper prosecuting officer." Not only does the interpretation of section 3.3 adopted by the appellate court below and in *Thomas* ignore the plain statutory language, it would impermissibly allow a police officer's ticketing decision to hinder or circumscribe the prosecutorial authority of the State's Attorney, a constitutional officer, whether through section 3-4's relitigation bar, as in *Jackson*, or the speedy trial statute, as here. *See People*

ex rel. Alvarez v. Gaughan, 2016 IL 120110, ¶ 27 (legislature may not usurp State's Attorneys' constitutionally derived powers); *see also People v. Pankey*, 94 Ill. 2d 12, 18 (1983) (State's Attorney has responsibility to initiate and prosecute all actions by and for the People of the State of Illinois and police officer's actions in the first instance "must yield to the judgment and discretion of the constitutional officer empowered to act.").

In addition, this Court's determination in *Jackson* that "proper prosecuting officer" in the compulsory joinder statute excludes police officers writing citations has remained undisturbed by the legislature for over thirty years. *Compare* Ill. Rev. Stat. 1981, ch. 38, par. 3-3 *with* 720 ILCS 5/3-3 (2021). "The judicial construction of the statute becomes a part of the law, and the legislature is presumed to act with full knowledge of the prevailing case law and the judicial construction of the words in the prior enactment." *People v. Villa*, 2011 IL 110777, ¶ 36. Thus, the legislature's silence following *Jackson*'s holding that section 3-3 does not apply to offenses charged by a police officer through a uniform citation and complaint constitutes acquiescence in that interpretation. *See In re Marriage of Mathis*, 2012 IL 113496, ¶ 25. Simply put, if the legislature disagreed with *Jackson*'s interpretation of section 3-3, it could (and presumably would) have amended the statute in the three decades since the decision. Because it has not, the legislature's acquiescence demonstrates its approval of this Court's construction.

Finally, the Second District and the appellate court below declined to apply *Jackson*'s clear rule because otherwise "compulsory joinder would almost never apply to misdemeanor charges." *Thomas*, 2014 IL App (2d) 130660, ¶ 22; A5. That is not an adequate reason to depart from the plain language of section 3-3. Compulsory joinder rarely applies to the traffic violations and misdemeanors that are charged through uniform citation and complaint forms due to the nature of these less serious offenses. There is little reason compulsory joinder would ever arise in resolving a speeding ticket in traffic court or minor offense charged as a misdemeanor. And in the rare instances where a State's Attorney is required to file new and different misdemeanor charges, compulsory joinder would limit the State's Attorney's actions following that amendment. Thus, no compelling reason exists to depart from or distinguish *Jackson*'s clear rule.

Thus, the Court should apply the clear rule announced in *Jackson* and hold that Counts One and Two were not subject to compulsory joinder, the 114 days between defendant's speedy trial demand on Count Two and the subsequent filing of Count One is not chargeable to the People for speedy trial purposes, and any speedy trial challenge to Count One would have failed. Accordingly, defense counsel was not ineffective for failing to raise this meritless claim. *See Edwards*, 195 Ill. 2d at 165.

C. In the alternative, defense counsel's performance was not deficient for declining to file a motion that would have failed under existing precedent.

Even if this Court were to depart from *Jackson*, defendant still cannot establish deficiency under *Strickland*'s performance prong because counsel's reliance on existing precedent would not constitute deficient performance. This is so because, under *Strickland*, defense counsel's performance is assessed according to the law that existed at the time of the representation. *People v. English*, 2013 IL 112890, ¶ 34. Counsel is not required to predict future changes in the law. *See id.*

As discussed, *Jackson* held that compulsory joinder does not apply to charges brought through a uniform citation and complaint. 118 Ill. 2d at 192. Moreover, by the time of defendant's trial, the Third District had applied *Jackson* to facts indistinguishable from those at issue here and held that compulsory joinder did not apply to driving under the influence charges initially charged by a police officer and subsequent, related misdemeanor charges brought by the State's Attorney. *Kazenko*, 2012 IL App (3d) 110529, ¶¶ 14-16. Although the Second District reached a different conclusion in *Thomas*, *Kazenko* remained binding on the Circuit Court of Will County. *Aleckson v. Vill. of Round Lake Park*, 176 Ill. 2d 82, 92 (1997) ("[W]hen conflicts arise amongst the districts, the circuit court is bound by the decisions of the appellate court of the district in which it sits."). Thus, under binding precedent at the time, a motion to dismiss Count One of defendant's charges on speedy trial grounds would have failed. Accordingly, defense

counsel's decision not to file such a motion did not result in deficient performance, and defendant cannot establish ineffective assistance of counsel.

III. This Court Should Remand for Further Consideration of Defendant's Constitutional Challenge to Section 11-501(a)(6).

After holding that defendant received ineffective assistance of counsel, the appellate court declined to address as moot defendant's constitutional challenge to section 11-501(a)(6). A8. Accordingly, should this Court reverse the appellate court's judgment, it must remand the case to the appellate court for consideration of defendant's constitutional challenge to section 11-501(a)(6). *See Canadian Radium & Uranium Corp. v. Indem. Ins. Co. of N. Am.*, 411 Ill. 325, 336 (1952) (where appellate court has not decided an issue, it is not properly before this Court).

CONCLUSION

This Court should reverse the appellate court's judgment and remand for further consideration of defendant's constitutional challenge to section 11-501(a)(6).

February 19, 2021

Respectfully Submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

/s/ Nicholas Moeller
NICHOLAS MOELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5643
eserve.criminalappeals@atg.state.il.us
nmoeller@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 19 pages.

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General

APPENDIX

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Appellate Court

People v. Rogers, 2020 IL App (3d) 180088

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT J. ROGERS, Defendant-Appellant.
District & No.	Third District No. 3-18-0088
Filed	May 7, 2020
Decision Under Review	Appeal from the Circuit Court of Will County, No. 15-DT-1703; the Hon. Chrystel L. Gavlin, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	James E. Chadd, Peter A. Carusona, and Sean Conley, of State Appellate Defender's Office, of Ottawa, for appellant. James W. Glasgow, State's Attorney, of Joliet (Patrick Delfino, Thomas D. Arado, and Mark A. Austill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE O'BRIEN delivered the judgment of the court, with opinion. Presiding Justice Lytton and Justice Holdridge concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Robert J. Rogers, appeals from his conviction for driving while under the influence (DUI). Defendant argues (1) counsel provided ineffective assistance by failing to protect defendant's right to a speedy trial and (2) section 11-501(a)(6) of the Illinois Vehicle Code (hereinafter DUI(a)(6)) (625 ILCS 5/11-501(a)(6) (West 2014)) violated his right to due process. We reverse.

¶ 2 I. BACKGROUND

¶ 3 On November 25, 2015, a Joliet police officer investigated an automobile accident. The officer found defendant in physical control of a motor vehicle and suspected that defendant was "drunk or drugged." The officer charged defendant, by citation and complaint, with driving under the influence of drugs or combination of drugs under section 11-501(a)(4) of the Vehicle Code (hereinafter DUI(a)(4)) (*id.* § 11-501(a)(4)). Defendant was transported from the scene to an area hospital for treatment. During the treatment, defendant received a blood test. On December 1, 2015, the officer filed the citation and complaint.

¶ 4 On December 14, 2015, private counsel filed a demand for a speedy trial on defendant's behalf.

¶ 5 On April 6, 2016, the State filed a superseding information that charged defendant with two counts of DUI under DUI(a)(4) and DUI(a)(6) of the Vehicle Code (*id.* § 11-501(a)(4), (a)(6)). Both offenses were Class A misdemeanors. *Id.* § 11-501(c)(1). The case was continued, by agreement of the parties, to May 20, 2016.

¶ 6 On May 20, 2016, the State moved to continue the case. Defense counsel objected and announced that the defense was ready for trial. After the court granted the continuance, defense counsel agreed to toll speedy trial.

¶ 7 On June 27, 2016, the State filed a second motion to continue the case because a laboratory technician was unavailable to testify at trial. Defense counsel objected to the motion. The court granted the motion over counsel's objection. Defense counsel again agreed to toll speedy trial.

¶ 8 On September 20, 2016, the State requested a third continuance because a change to section 11-501 of the Vehicle Code required additional testing on defendant's blood sample. See Pub. Act 99-697 (eff. July 29, 2016) (amending 625 ILCS 5/11-501). Defense counsel objected and announced that the defense was ready for trial. The court granted the State's motion over the defense objection and set the case for a bench trial on December 5, 2016. The court noted that the period counted against the State for purposes of speedy trial.

¶ 9 On October 28, 2016, the State filed a superseding three-count information. Count I charged defendant with DUI(a)(6). Count II charged defendant with DUI(a)(4). Count III charged defendant with a third Class A misdemeanor, driving while under the influence of cannabis (625 ILCS 5/11-501(a)(7) (West 2016)). The case remained set for a bench trial on December 5, 2016.

¶ 10 On December 1, 2016, the parties made an agreed motion to strike the December 5 trial date and toll the speedy trial clock until December 20, 2016.

¶ 11 After numerous additional continuances, the case proceeded to a stipulated bench trial on January 17, 2018. Before the trial began, the State dismissed counts II and III of the superseding information. The parties also stipulated that the arresting officer located defendant

in actual physical control of a motor vehicle. Thereafter, defendant submitted to blood and urine testing. The parties stipulated to the introduction of two laboratory testing reports. The first report was dated March 3, 2016, and was from the Illinois State Police forensic science laboratory. It stated defendant's urine tested positive for the presence of an unspecified amount of tetrahydrocannabinol (THC) metabolite. The second report was dated October 31, 2016, and was from a private laboratory. It stated that defendant had 4.2 nanograms of THC per milliliter of blood and 17.4 nanograms of THC per milliliter of urine. The court found defendant guilty of DUI(a)(6) and sentenced defendant to 12 months' court supervision. Defendant appeals.

¶ 12 II. ANALYSIS

¶ 13 A. Right to the Effective Assistance of Counsel

¶ 14 Defendant argues trial counsel provided ineffective assistance when counsel failed to protect his statutory right to a speedy trial. After reviewing the record, we find that counsel erred in not moving to dismiss the case when the compulsory joinder of the new charges on April 6, 2016, plus the State's continuances, exceeded the 160-day speedy trial deadline.

¶ 15 1. Right to Counsel

¶ 16 At the outset, we note that defendant did not have a federal constitutional right to the effective assistance of counsel because he was not sentenced to a term of imprisonment. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). However, subsection 113-3(b) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) provided defendant with the statutory right to counsel because the potential penalties were more than a fine only. See 725 ILCS 5/113-3(b) (West 2014); see also 625 ILCS 5/11-501(c)(1) (West 2014) (a violation of section 11-501(a) of the Vehicle Code is a Class A misdemeanor); 730 ILCS 5/5-4.5-55 (West 2014) (potential sentence for a Class A misdemeanor includes a term of imprisonment of less than one year). This statutory right necessarily included the right to the " '*effective* assistance of competent counsel.' " (Emphasis in original.) *People v. Mooney*, 2019 IL App (3d) 150607, ¶ 14 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

¶ 17 2. Ineffective Assistance of Counsel

¶ 18 To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011). In short, an ineffective assistance of counsel claim consists of two factors: (1) deficient performance and (2) prejudice.

¶ 19 Defendant argues trial counsel provided ineffective assistance by not asserting a violation of his statutory right to a speedy trial. According to defendant, this speedy trial violation occurred after the State filed the first superseding information on April 6, 2016, which was subject to compulsory joinder, and the State continued the case on September 20 to December 5, 2016, over defendant's objection. Defendant's argument turns on the confluence of his statutory right to a speedy trial and the compulsory joinder rule. Therefore, we begin by reviewing the applicability of the compulsory joinder rule.

¶ 20 a. Compulsory Joinder

¶ 21 "The compulsory joinder statute requires the State to prosecute all known offenses within the jurisdiction of a single court in a single criminal case 'if they are based on the same act.' " *People v. Hunter*, 2013 IL 114100, ¶ 10 (quoting 720 ILCS 5/3-3(b) (West 2008)). The compulsory joinder statute states:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** if they are based on the same act." 720 ILCS 5/3-3 (West 2014).

¶ 22 Presently, there is a split of authority on whether the compulsory joinder statute applies when the initial charge is filed by a police officer. See *People v. Thomas*, 2014 IL App (2d) 130660; *People v. Kazenko*, 2012 IL App (3d) 110529. This split derives from our supreme court's decision in *People v. Jackson*, 118 Ill. 2d 179 (1987), *overruled in part on other grounds by People v. Stefan*, 146 Ill. 2d 324 (1992). While *Jackson* did not review the combination of a compulsory joinder and speedy trial violation, it considered whether compulsory joinder barred the prosecution from bringing later charges that derived from the conduct that led to defendant's prior guilty pleas. *Id.* at 192-94. Therefore, its analysis is generally instructive of the application of the compulsory joinder rule.

¶ 23 In *Jackson*, the State charged defendant, by uniform traffic complaint and citation, with DUI and illegal transportation of alcohol. Defendant pled guilty to both charges. The court accepted defendant's pleas and continued the case for sentencing. Before sentencing, the State moved to *nolle prosequi* both charges and indicted defendant on two felony counts of reckless homicide. The court granted defendant's motion to dismiss one count on double jeopardy grounds and ruled that the evidence of DUI and illegal transportation of alcohol could not be used on the remaining count. *Id.* at 183. On appeal to the supreme court, defendant argued the compulsory joinder statute barred the reckless homicide charges. The supreme court held "the compulsory-joinder provisions *** do not apply to offenses that have been charged by the use of a uniform citation and complaint form provided for traffic offenses." *Id.* at 192. It explained that while the uniform citation and complaint forms are intended to be used by a police officer "in making a charge for traffic offenses and certain misdemeanors and petty offenses," these citations could not be used to charge a felony. *Id.* It did "not believe that the legislature intended that a driver could plead guilty to a traffic offense on a traffic ticket issued by a police officer and thereby avoid prosecution of a serious offense brought by the State's Attorney, such as reckless homicide, through the [compulsory joinder statute]." *Id.* at 193.

¶ 24 In *Kazenko*, this court reviewed the *Jackson* interpretation of the compulsory joinder rule and its impact on defendant's claim of a statutory speedy trial violation. The *Kazenko* defendant was initially charged by traffic citation with misdemeanor DUI (625 ILCS 5/11-501(a)(5) (West 2010)). Subsequently, the State filed an information that charged defendant with a second misdemeanor DUI charge (*id.* § 11-501(a)(2)). The majority opinion found that the *Jackson* rule "could not be any more clear," a DUI charged by uniform traffic citation and complaint is not subject to compulsory joinder to a DUI charge that is subsequently filed by the state's attorney. *Kazenko*, 2012 IL App (3d) 110529, ¶ 16. However, in his special concurrence, Presiding Justice Schmidt distinguished *Jackson*, stating:

> "Here, the new charge was not a felony, which could not have been charged along with the original charge. The new charge here was another charge of DUI, which the charging officer was aware of at the time the original charge was made and able to charge. While a felony is not subject to compulsory joinder with a charge made by uniform citation, a charge of DUI(a)(2) may well be subject to compulsory joinder with a charge of DUI(a)(5), which was charged by uniform citation. It would seem that the same logic which supports the supreme court's decision in *Jackson* would not apply here in the case of two almost identical misdemeanors. Here, we do not have the State lying in the bushes with a more serious charge." *Id.* ¶ 22 (Schmidt, P.J., specially concurring).

¶ 25 In *Thomas*, the Second District disagreed with the majority opinion in *Kazenko*. *Thomas* reviewed the application of the compulsory joinder statute to a defendant who was initially charged with two traffic offenses and one charge of DUI (625 ILCS 5/11-501(a)(2) (West 2010)). *Thomas*, 2014 IL App (2d) 130660, ¶ 3. Thereafter, the State charged defendant, by information, with DUI under section 11-501(a)(1) of the Vehicle Code (625 ILCS 5/11-501(a)(1) (West 2010)). *Thomas*, 2014 IL App (2d) 130660, ¶ 6. The circuit court dismissed the second DUI charge, finding that it was subject to compulsory joinder and the associated delay in bringing the charge violated defendant's statutory right to a speedy trial. *Id.* ¶ 7. On appeal, the Second District agreed with Presiding Justice Schmidt's special concurrence analysis from *Kazenko* that *Jackson* was primarily concerned with the possibility of a defendant avoiding prosecution of a later felony charge by pleading guilty to the earlier-filed lesser offense. *Id.* ¶ 21. The Second District then rejected a mechanical application of *Jackson*, noting,

> "The vast majority of traffic *and criminal misdemeanor* cases are charged by police officers, not by assistant State's Attorneys. Reading *Jackson* to say that compulsory joinder can *never* apply where the original charge is brought by a police officer would mean that compulsory joinder would almost never apply to misdemeanor charges. Such an outcome is absurd and ill-advised." (Emphases in original.) *Id.* ¶ 22.

It ultimately concluded that compulsory joinder applied to the second DUI charge because the results of the hospital blood draw that led to the second charge were known by the prosecution well before the additional charges were filed. *Id.* ¶¶ 25, 30.

¶ 26 After reviewing the split of authority, we are persuaded by *Thomas* that compulsory joinder can apply to misdemeanor charges that are initially filed by a police officer. First, we find that the instant case is distinct from *Jackson*. The focus of *Jackson* was to prevent defendants from avoiding a greater charge by pleading guilty to an initially charged misdemeanor. *Jackson*, 118 Ill. 2d at 193. This situation is not present in the instant case as both DUI charges were Class A misdemeanors. See 625 ILCS 5/11-501(c)(1) (West 2014). Second, a strict reading of *Jackson* would mean that the compulsory joinder statute would not apply to the vast majority of misdemeanors which are properly filed by police officers. See *Thomas*, 2014 IL App (2d) 130660, ¶ 22. Accordingly, we must consider whether the facts satisfy the compulsory joinder requirements of section 3-3 of the Criminal Code of 2012 (720 ILCS 5/3-3 (West 2014)).

¶ 27 The instant defendant was initially charged with DUI(a)(4) by a uniform citation and complaint filed by a police officer in December 2015. This citation and complaint derived from the officer's investigation and interaction with defendant at the scene of an automobile accident. The state's attorney filed the subsequent DUI(a)(6) charge more than four months

later. However, the record establishes that in December 2015, the police officer could have filed both DUI charges. Both offenses required proof of two common elements: (1) defendant was in physical control of a vehicle and (2) he had consumed drugs. See 625 ILCS 5/11-501(a)(4) (West 2014) ("[a] person shall not drive or be in actual physical control of any vehicle within this State while: *** *under the influence of any other drug* or combination of drugs to a degree that renders the person incapable of safely driving" (emphasis added)); *id.* § 11-501(a)(6) ("[a] person shall not drive or be in actual physical control of any vehicle within this State while: *** *there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption*" of a controlled substance (emphasis added)). While the language of the offenses varied in how they measured the consumption—impairment (*id.* § 11-501(a)(4)) versus an "amount" (*id.* § 11-501(a)(6))—both required some showing that defendant had consumed drugs. Due to the similarity of the offenses and the facts in record, the officer had sufficient knowledge to charge both offenses on December 1, 2015. Therefore, the two charges are subject to compulsory joinder.

¶ 28 Despite these facts, the State argues that compulsory joinder does not apply because the police officer was not the proper prosecuting officer, and neither the officer nor the state's attorney could have known at the time of the initial charge that defendant had any amount of cannabis in his system. We reject the State's contentions.

¶ 29 First, the State advocates for a narrow reading of the compulsory joinder statute. The State's argument that only the state's attorney is considered the proper prosecuting officer suffers from the precise defect identified in *Thomas*—compulsory joinder would almost never apply to misdemeanor charges that are predominantly filed by police officers. See *Thomas*, 2014 IL App (2d) 130660, ¶ 22. Additionally, the State's reading deemphasizes the second part of the compulsory joinder directive, the "offenses are known to the proper prosecuting officer *at the time of commencing the prosecution*." (Emphasis added.) 720 ILCS 5/3-3(b) (West 2014). At the time of commencing the prosecution in this case, the police officer was the only prosecuting officer. See *People v. Van Schoyck*, 232 Ill. 2d 330, 343 (2009) (Garman, J., dissenting, joined by Thomas and Karmeier, JJ.) ("issuance of a citation constitutes the charging of a defendant with the commission of an offense without any involvement of the State's Attorney's office whatsoever").

¶ 30 Second, the citation and complaint filed in this case establishes that the police officer had knowledge to suspect that defendant ingested some amount of drugs, as he charged defendant with DUI(a)(4) based on his belief that defendant was "under the influence of any other drug." 625 ILCS 5/11-501(a)(4) (West 2014); see also *supra* ¶ 27. The officer did not need to know, at that time, the exact type of drug that defendant had ingested as DUI(a)(6) is worded to generally cover "any amount of a *drug, substance, or compound* *** listed in the Illinois Controlled Substances Act *** Use of Intoxicating Compounds Act, or *** Methamphetamine Control and Community Protection Act." (Emphasis added.) 625 ILCS 5/11-501(a)(6) (West 2014). Moreover, as both DUI charges were misdemeanors, the officer's suspicion that defendant had consumed drugs did not need to rise to the level of probable cause to file the charges. See *People v. Motzko*, 2019 IL App (3d) 180184, ¶¶ 26-27. Therefore, we conclude that the compulsory joinder rule applied to the DUI(a)(4) and DUI(a)(6) charges.

¶ 31 b. Speedy Trial

¶ 32 Having found that the two DUI charges are subject to compulsory joinder, we must next determine whether the State violated defendant's statutory right to a speedy trial. Section 103-5 of the Criminal Procedure Code codifies defendant's right to a speedy trial. 725 ILCS 5/103-5 (West 2014). Where, as in this case, a defendant is free on bail, he must be brought to trial within 160 days of his speedy trial demand. *Id.* § 103-5(b). Following a defendant's speedy trial demand, any "[d]elay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried." *Id.* § 103-5(f). To show a violation of his speedy trial right, a defendant must show that he did not "cause[ ] or contribute[ ] to the delays." *People v. Staten*, 159 Ill. 2d 419, 426 (1994). Defense counsel's express agreement to a continuance "may be considered an affirmative act contributing to a delay which is attributable to the defendant." *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). If a defendant is not tried within the statutory period, he must be released from his trial obligations and have the charges dismissed. 725 ILCS 5/103-5(d) (West 2014); *Hunter*, 2013 IL 114100, ¶ 10. The speedy trial statute must be liberally construed in favor of defendant. *Thomas*, 2014 IL App (2d) 130660, ¶ 14 (citing *Van Schoyck*, 232 Ill. 2d at 335).

¶ 33 In this case, the speedy trial calculation is made more complex by the interplay of the compulsory joinder and speedy trial statutes. See *People v. Williams*, 204 Ill. 2d 191, 198 (2003). When the initial and subsequent charges are subject to compulsory joinder, the speedy trial term for both begins when defendant is brought into custody on the initial charge. *Id.* at 207. Delays that were attributed to defendant prior to the filing of the subsequent charge are attributed to the State. *Id.* Having found that the initial and subsequent DUI charges are subject to compulsory joinder, we must determine whether a speedy trial violation occurred after the joinder.

¶ 34 Here, the period between defendant's speedy trial demand and the filing of the first superseding information is attributable to the State. This period began on December 14, 2015, and ran to April 6, 2016, for a total of 114 days. Following this period, on September 20, 2016, the State moved to continue the case over defendant's objection. Due to defendant's objection, this period is attributable to the State. It ended on December 1, 2016, when the parties agreed to strike the preset December 5, 2016, trial date and reset the cause for trial on December 20, 2016. This period added 72 days to the speedy trial count. The State's September continuance plus the earlier 114-day period exceeded the 160-day speedy trial requirement (the speedy trial clock reached 160 days on November 6, 2016).

¶ 35 c. Deficient Performance

¶ 36 For the above-described speedy trial violation to constitute ineffective assistance of counsel, defendant must first show that counsel's failure to raise this violation constituted deficient performance. That is, "counsel's performance was so deficient[ ] that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment" and counsel's inaction is not the product of "sound trial strategy." *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 37 Following the expiration of the 160-day speedy trial period, defense counsel did not file a motion asserting this violation of defendant's statutory right to a speedy trial. We can discern no strategic reason to justify counsel's decision not to move to dismiss the charges because counsel previously filed a speedy trial demand and objected to several of the State's continuances, protecting this right. See *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 28;

People v. Hawkins, 212 Ill. App. 3d 973, 983-84 (1991); *People v. Alcazar*, 173 Ill. App. 3d 344, 354-55 (1988). Moreover, defense counsel could not have obtained a greater result for defendant by continuing with the proceeding, as the remedy for the speedy trial violation was dismissal of the charges. See 725 ILCS 5/103-5(d) (West 2014). Therefore, counsel's failure to raise the speedy trial violation amounted to deficient performance.

¶ 38 d. Prejudice

¶ 39 To prevail on his ineffective assistance of counsel claim, defendant must also demonstrate that prejudice resulted from counsel's inaction. To satisfy the prejudice component, a defendant "must prove a reasonable probability exists that, but for counsel's deficient performance, the outcome of the trial would have been different." *Mooney*, 2019 IL App (3d) 150607, ¶ 16.

¶ 40 If defense counsel had moved to dismiss the two DUI charges, the court would have been required to grant the motion due to the expiration of the speedy trial clock. See 725 ILCS 5/103-5(d) (West 2014); *People v. Woodrum*, 223 Ill. 2d 286, 299 (2006). Therefore, counsel's inaction altered the outcome of the case because counsel could have moved to dismiss the one charge that defendant now stands convicted of—DUI(a)(6).

¶ 41 Accordingly, we find that defendant has established that he received ineffective assistance of counsel resulting from counsel's failure to assert a violation of his right to a trial within the statutorily prescribed 160-day period. We therefore reverse defendant's DUI(a)(6) conviction outright. See *Mooney*, 2019 IL App (3d) 150607, ¶ 31.

¶ 42 B. Constitutionality of DUI(a)(6)

¶ 43 Defendant also argues DUI(a)(6) violates his right to due process. 625 ILCS 5/11-501(a)(6) (West 2014). Our reversal of his conviction in the first issue has rendered this issue moot. Accordingly, we take no position on the constitutionality of DUI(a)(6).

¶ 44 III. CONCLUSION

¶ 45 The judgment of the circuit court of Will County is reversed.

¶ 46 Reversed.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 19, 2021 the foregoing **Plaintiff-Appellant's Brief and Appendix** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

Sean Conley
Office of the State Appellate Defender
Third Judicial District
770 East Etna Road
Ottawa, Illinois 61350
(815) 434-5531
3rdDistrict@osad.state.il.us
Counsel for Defendant-Appellee

Patrick Delfino
Thomas D. Arado
State's Attorney's Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, Illinois 61350
3rddistrict@ilsaap.org

James W. Glasgow
Will County State's Attorney
Will County Courthouse
Joliet, Illinois 60431
jglasgow@willcountyillinois.com

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General
eserve.criminalappeals@atg.state.il.us

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Carolyn Taft Grosboll
SUPREME COURT CLERK