[Cite as *Cleveland Hts. v. Martin*, 2017-Ohio-4448.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105118

CITY OF CLEVELAND HEIGHTS

PLAINTIFF-APPELLEE

vs.

TRAMAINE E. MARTIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Heights Municipal Court
Case No. CRB-1600519

BEFORE: Laster Mays, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: June 22, 2017

FOR APPELLANT

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Tramaine E. Martin ("Martin") appeals his guilty plea and asks this court to reverse his conviction and dismiss his sentence. After a view of the record, which included the docket entries, the filed motions, and the journal entries, but no transcript, we affirm.

{¶2} Martin pleaded guilty to theft, a first-degree misdemeanor, in violation of R.C. 2913.02(A). The trial court sentenced him to 180 days of local incarceration and one-year of probation.

I. Facts

{¶3} On May 7, 2016, Martin was arrested for theft, possession of criminal tools, obstructing official business, criminal damaging, and criminal trespassing. Seventeen days later, Martin entered a not guilty plea and the case was set for pretrial on June 21, 2016. At pretrial, the court set a trial date of July 21, 2016. However, on July 7, 2016, Martin filed a motion to dismiss and a demand for discovery. On July 22, 2016, the prosecutor responded by providing discovery, and the trial was rescheduled for August 12, 2016. On that day, the trial court denied Martin's motion to dismiss. Martin then entered a guilty plea to theft and was scheduled to be sentenced on September 12, 2016. On September 9, 2016, Martin filed a motion to withdraw his guilty plea and enter a no contest plea. At sentencing, the trial court denied that motion and sentenced Martin to 180 days imprisonment.

{¶4} Martin filed a timely appeal asserting two assignments of error:

I. The denial of appellant's presentence motion to withdraw guilty plea was not within the sound discretion of the trial court; and

II. The appellant's case was not resolved within the time proscribed [sic] by R.C. 2945.71, and thereby appellant was denied a constitutional right to a speedy trial.

II. Presentence Motion to Withdraw Guilty Plea

A. Standard of Review

{¶5} A "presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. We review presentence motions to withdraw guilty pleas for an abuse of discretion." *State v. McClain*, 8th Dist. Cuyahoga No. 103089, 2016-Ohio-705, ¶ 13 quoting *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992).

{¶6} "The term 'abuse of discretion' implies that the court's attitude was unreasonable, arbitrary, or unconscionable." *Sheerer v. Billak*, 8th Dist. Cuyahoga No. 104879, 2017-Ohio-1556, ¶ 12, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

B. Law and Analysis

{¶7} In Martin's first assignment of error, he argues that the trial court's denial of his presentence motion to withdraw his guilty plea was not within the sound discretion of the court. We disagree. Crim.R. 32.1 states that a motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest

injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

> In determining whether the trial court abused its discretion by denying a defendant's motion to withdraw a plea, we consider the following factors: (1) whether the accused was represented by highly competent counsel; (2) whether the accused was afforded a full hearing pursuant to Crim.R. 11 before he entered the plea; (3) whether, after the motion to withdraw was filed, the accused was given a complete and impartial hearing on the motion; and (4) whether the record reveals that the court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980).

State v. McClain, 8th Dist. Cuyahoga No. 103089, 2016-Ohio-705, ¶ 14.

{¶8} Martin does not allege that he was not represented by highly competent counsel nor does he demonstrate that the trial court did not conduct a full hearing pursuant to Crim.R. 11. The journal entry reflects that Martin was given a complete and impartial hearing on his motion to withdraw his guilty plea, and the trial court gave full and fair consideration to his plea withdrawal request. The journal entry states, "after a hearing on the motion, the court finds that the defendant's plea of guilty was a knowing, intelligently, voluntary plea offered by the defendant at his request." Martin did not provide a transcript of these proceedings.

> It is the appellant's duty to preserve and exemplify the error of which he complains for appellate review. App.R. 9(B) and 12(A). *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980). In the absence of a record, the trial court proceedings are presumed correct. *State v. Brown*, 38 Ohio St.3d 305, 341, 528 N.E.2d 523, fn. 4 (1988), citing *State v. Summers*, 3 Ohio App.3d 234, 444 N.E.2d 1041 (1981), and *State v. Findley*, 39 Ohio App.2d 166, 317 N.E.2d 219 (1973). When a verbatim transcript is unavailable, the appellant has an obligation to provide a complete record pursuant to App.R. 9(C), (D), or (E).

State v. Glover, 8th Dist. Cuyahoga No. 55880, 1990 Ohio App. LEXIS 5465 (Dec. 13, 1990).

{¶9} Martin argues that he should have been able to withdraw his guilty plea for any reason. However, "a sufficient reason for the withdrawal must appear on the record and a 'mere change of heart' is not reason enough." *Cleveland v. Johnson*, 8th Dist. Cuyahoga No. 90707, 2008-Ohio-5484, ¶ 26. Therefore, we find that Martin's guilty plea was given knowingly, intelligently, and voluntarily, and the trial court did not abuse its discretion in denying Martin's motion withdraw his guilty plea. We overrule assignment of error one.

III. Right to a Speedy Trial

A. Standard of Review

{¶10} When reviewing a speedy trial issue,

> [T]he appellate court counts the days and determines whether the number of days not tolled exceeds the time limits for bringing the defendant to trial as set forth in R.C. 2945.71. *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 15; *State v. Shepherd*, 8th Dist. Cuyahoga No. 97962, 2012-Ohio-5415, ¶14-16, citing *State v. Barnett*, 12th Dist. Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 7. If the state has violated a defendant's right to a speedy trial, then upon motion made at or prior to trial, the defendant "shall be discharged," and further criminal proceedings based on the same conduct are barred. R.C. 2945.73(B); *State v. Torres*, 7th Dist. Jefferson Nos. 12 JE 30 and 12 JE 31, 2014-Ohio-3683, ¶ 18.

State v. Geraci, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 20.

B. Law and Analysis

{¶11} In Martin's second assignment of error, he contends that he was denied a constitutional right to a speedy trial because the case was not resolved within the time prescribed by R.C. 2945.71. We disagree.

> A defendant is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 51, citing *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. Pursuant to its authority to prescribed reasonable periods in which a trial must be held that are consistent with these constitutional requirements, Ohio enacted R.C. 2945.71 which sets forth the specific time requirements within which the state must bring a defendant to trial. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 14.

Id. at ¶ 18.

{¶12} R.C. 2945.71 states,

> Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows: Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

{¶13} Martin argues that since he was arrested on May 7, 2016 and the trial was set for August 12, 2016, there were more than 90 days between the two dates, thereby violating his speedy trial rights. However on July 7, 2016, Martin moved for discovery, and the prosecutor complied with the request on July 22, 2016. "Generally, when computing how much time has run against the state under R.C. 2945.71, we begin with the day after the accused was arrested. *State v. Broughton*, 62 Ohio St.3d 253, 260, 581 N.E.2d 541 (1991)." *State v. Shepherd*, 8th Dist. Cuyahoga No. 97962,

2012-Ohio-5415, ¶ 17. "However, pursuant to R.C. 2945.71(E), each day spent in jail 'on a pending charge' acts as three days toward speedy trial time." *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 15. Martin's argument on its face shows that 90 days had passed since his arrest, therefore, the prosecution must demonstrate that sufficient time has tolled.

> Once the statutory time limit has expired, the defendant has established a prima facie case for dismissal. *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431, ¶ 18, citing *State v. Howard*, 79 Ohio App.3d 705, 607 N.E.2d 1121 (8th Dist.1992). The burden then shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Steele* at ¶ 18, citing *State v. Geraldo*, 13 Ohio App.3d 27, 468 N.E.2d 328 (6th Dist.1983).

State v. Geraci, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 19.

{¶14} The docket entry shows that Martin was arrested on May 7, 2016. Martin's speedy trial rights therefore began on May 8, 2016. "Generally, when computing how much time has run against the state under R.C. 2945.71, we begin with the day after the accused was arrested. *State v. Broughton*, 62 Ohio St.3d 253, 260, 581 N.E.2d 541 (1991)." *State v. Shepherd*, 8th Dist. Cuyahoga No. 97962, 2012-Ohio-5415, ¶ 17. "However, pursuant to § 2945.71(E), each day spent in jail 'on a pending charge' acts as three days toward speedy trial time." *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 15. Martin posted bond on May 9, 2016, for a total of two days to be counted as six days toward speedy trial.

{¶15} The July 7, 2016 docket entry shows Martin moved for discovery, and the

prosecutor complied with the request on July 22, 2016. Therefore, Martin's speedy trial rights began on May 8, 2016 and continued to July 7, 2016, when he requested discovery. "It is well-established that an accused's request for discovery is a tolling event pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 781 N.E.2d 159 (2002); *State v. Benge*, 12th Dist. Butler No. CA99-05-095, 2000 Ohio App. LEXIS 1782." *State v. Barnett*, 12th Dist. Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 11. Martin's time tolled until July 22, 2016, when the prosecution complied with the discovery request. From July 23, 2016 until August 12, 2016, the speedy trial right days continued to run.

{¶16} When calculating the days from Martin's arrest on May 8 to July 7, there were 61 days. Then from July 22 to August 12, there were 20 days, for a total of 81 days. However, the defendant spent two days in jail that count as six days. So that is a total of 87 days, less than the 90 days required by statute. Therefore, Martin's second of assignment of error is overruled.

{¶17} Judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Heights Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
EILEEN T. GALLAGHER, J., CONCURS IN JUDGMENT
ONLY WITH SEPARATE OPINION

EILEEN T. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶18} I concur with the majority's decision to affirm Martin's convictions and sentence. However, I write separately to briefly address the nature of this court's review in the absence of a transcript.

{¶19} Regarding Martin's challenge to the trial court's judgment denying his motion to withdraw, the majority states that Martin was "given a complete and impartial hearing on his motion to withdraw his guilty plea" and concludes that "Martin's guilty plea was given knowingly, intelligently, and voluntarily." I agree that Martin failed to provide this court with the transcript of the August 12, 2016 plea hearing or the September 12, 2016 motion to withdraw hearing, thereby precluding this court from conducting any meaningful review. However, I write separately to reiterate that Martin's first assignment of error must be overruled based on our presumption of regularity with the trial court proceedings. Our affirmance of the trial court's judgment must not concern the arguments raised in Martin's motion to withdraw, the considerations

of the trial court at the withdrawal hearing, or the breadth of the trial court's Crim.R. 11 colloquy. *State v. Bruce*, 8th Dist. Cuyahoga No. 96365, 2011-Ohio-2937; *State v. Bleehash*, 5th Dist. Licking No. 05CA123, 2006-Ohio-4580.