

[Cite as *State v. Johnson*, 2018-Ohio-4516.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
Plaintiff-Appellee, : Case No. 17CA3814
 :
vs. :
 :
CHARLES L. JOHNSON, II, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. :

APPEARANCES:

Charles L. Johnson, II, Ironton, Ohio, pro se.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:10-24-18

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a request for post-conviction relief filed by Charles L. Johnson, defendant below and appellant herein.

Appellant assigns the following error for review:

“APPELLEE [SIC.] SUFFERED A VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL UNDER THE 6TH AMENDMENT IN THE U.S. CONSTITUTION; SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.”

{¶ 2} On April 11, 2016, the Scioto County Grand Jury returned an indictment that charged

appellant with (1) two counts of aggravated vehicular assault, (2) two counts of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them, and (3) one count of driving under suspension. On October 25, 2016, appellant pled guilty to Count 1, Count 2, (aggravated vehicular assault), and Count 4 (operating a vehicle under the influence of alcohol). The trial court sentenced appellant to serve a total aggregate sentence of two years. The court noted that, pursuant to R.C. 2953.08(D),¹ the sentence is jointly recommended and agreed.

{¶ 3} On September 13, 2017, appellant filed a petition to vacate or set aside his judgment of conviction or sentence and argued that he received ineffective assistance of counsel. In particular, appellant asserted that although his attorney instructed him to sign a speedy trial waiver, that waiver extended time only for a limited time (from June 20, 2016 to August 29, 2016). On September 21, 2017, the trial court overruled appellant's petition. This appeal followed.

{¶ 4} The post-conviction relief process is a collateral civil attack on a criminal judgment, rather than an appeal of the judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Post-conviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *Id.*; *State v. Betts*, 4th Dist. Vinton No. 18CA710, 2018-Ohio-2720, ¶ 11. The post-conviction process is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence that may support the claim is not contained in the record. *State v. McDougald*, 4th Dist. Scioto No. 16CA3736, 2016-Ohio-5080, ¶ 19-20, citing *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 18; *Betts*, *supra*.

{¶ 5} “[A] trial court’s decision granting or denying a post-conviction petition filed pursuant

¹ In a companion case, *State v. Johnson, II*, 4th Dist. Scioto 17CA3813, appellant filed a motion to seek leave to file a delayed appeal. This court denied the motion on January 30, 2018, concluding that appellant did not set forth sufficient reasons for the delay in filing his appeal and that little probability exists that error occurred.

to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for post-conviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 390, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58; *State v. Black*, 4th Dist. Ross No. 15CA3509, 2016-Ohio-3104, ¶ 7. "A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable." *State v. Rinehart*, 4th Dist. Ross No. 17CA3606, 2018-Ohio-1261, ¶ 10, citing *State v. Knauff* at ¶ 19.

{¶ 6} In his sole assignment of error, appellant asserts that he was denied his right to a speedy trial under the Sixth Amendment to the U.S. Constitution, and Section 10, Article 1 of the Ohio Constitution. Although appellant's assignment of error focuses solely on speedy trial rights, his underlying argument is that he also received ineffective assistance of counsel. Appellant contends that both of his trial counsel made numerous errors, including advising him to sign a waiver of his speedy trial rights. Appellant thus contends that his case should have been dismissed prior to the plea agreement.

{¶ 7} The state contends that this court's January 30, 2018 entry in *State v. Johnson, II*, 4th Dist. Scioto 17CA3813 is evidence that appellant's sentence is not reviewable. We point out, however, that *Johnson II* involved appellant's motion for leave to file a delayed appeal. This court denied the motion and stated: "pursuant to R.C. 2953.08(D)(1), agreed sentences are not generally reviewable on appeal. *See also, State v. Turner*, 2d Dist Montgomery No. 24421, 2011-Ohio-6714. Johnson pled guilty and an agreed sentence was imposed; therefore, Johnson would have very limited issues which could be raised on appeal." However, because *Johnson II* involved a delayed appeal and not a post-conviction proceeding, R.C. 2953.08(D)(1) is inapplicable.

{¶ 8} Second, the state argues that, although appellant's brief contains only one assignment

of error, he raises two issues including speedy trial and ineffective assistance of counsel. App.R. 12(A) provides: “(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).” Moreover, App.R. 16 states: “The appellant shall include in its brief, under the headings and in the order indicated, all of the following: * * * (3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.” Thus, the state contends that, pursuant to App.R. 12 and App.R. 16, this court should refuse to review all arguments not properly presented as assignments of error. The state cites a Tenth District decision, *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, in which a portion of the argument in support of an assignment of error focused on an issue that the party had failed to assign as error. In *Ellinger* the court concluded “this court rules on assignments of error only, and will not address mere arguments.” *Ellinger*, ¶ 70, citing *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶ 5. In the case sub judice, however, even though appellant did not specifically mention the ineffective assistance of counsel issue in his assignment of error, he did cite the Sixth Amendment, which encompasses the right to counsel as well as the right to a speedy trial.

{¶ 9} Turning to the merits of appellant’s petition, after our review we find no abuse of discretion in the trial court’s decision. The standard for ineffective assistance of counsel is set forth in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Appellant must establish two criteria: first, he must establish that counsel’s performance fell below “an objective standard of reasonable representation; second, appellant must establish that prejudice arises from counsel’s performance. *Id.* at 142. Thus, an appellant must establish that “but for counsel’s unprofessional

errors, the result of the proceedings would have been different.” *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 10} In the case sub judice, our review reveals that appellant’s first trial counsel filed a motion to suppress evidence prior to his withdrawal as counsel. The state points out that because appellant’s second trial counsel recognized that the issues raised in the motion to suppress had already been decided in the state’s favor in other appellate cases, counsel appropriately withdrew the motion and negotiated a fair and just plea agreement. Moreover, the state claims that appellant failed to show any prejudice as the plea agreement limited appellant’s sentence to two years in prison, when he could have been sentenced to sixteen and one half years in prison.

{¶ 11} With respect to the speedy trial issue, appellant challenges the trial court’s denial of his post-conviction relief request on the basis of an alleged statutory speedy trial violation. However, we point out that appellant did not raise the speedy trial issue prior, or after, he entered his knowing, voluntary and intelligent guilty plea. Consequently, the doctrine of res judicata bars further litigation of any claim decided on direct appeal, or that could have been raised and decided on direct appeal, but was not. See *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995). Again, the post-conviction relief remedy is designed for errors based upon facts and evidence outside the record and not reviewable on direct appeal. *State v. Damron*, 4th Dist. Ross No. 10CA3158, 2010-Ohio-6459, ¶ 20; *State v. Rodriguez*, 65 Ohio App.3d 151, 153, 583 N.E.2d 347 (9th Dist.1989). This includes alleged speedy trial errors. See *State v. Ross*, 7th Dist. No. 11-MA-32, 2012-Ohio-2433, ¶ 38. Here, appellant points to no evidence outside the record to support his claim. Furthermore, we also point out that appellant opted to enter a guilty plea pursuant to a plea

agreement.²

{¶ 12} Finally, it appears from our review that appellant's discovery demands, his motion to suppress evidence, and other motions to continue the proceeding legitimately tolled the speedy trial clock. Time was tolled from April 20, 2016 to May 10, 2016 for discovery (*See* R.C. 2945.72(E); *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, syllabus), from June 6, 2016 to September 30, 2016 for appellant's motion to suppress (*See* R.C. 2945.72(E)), and from June 8, 2016 to October 31, 2016 for appellant's motion to continue (*See* R.C. 2945.72(H)). Appellant entered his plea on October 25, 2016. As the state points out, the date by which the case had to be tried, after consideration of all tolling events, was November 21, 2016. Thus, this case had been concluded within the prescribed speedy trial time.

{¶ 13} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

² Generally, a plea of guilty, about an assertion of actual innocence, is a complete admission of guilt. *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 1 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.