[Cite as *State v. Armstrong*, 2004-Ohio-726.]

STATE OF OHIO) IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA)

STATE OF OHIO

Appellee

v.

HERBERT ARMSTRONG

Appellant
C .A. No. 03CA0064-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 02-CR-0402

DECISION AND JOURNAL ENTRY

Dated: February 18, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Herbert Armstrong, appeals from the judgments of the Medina County Court of Common Pleas which denied his motion to dismiss and convicted him of possession of cocaine. We affirm.

I.

{¶2} On March 28, 2002, Mr. Armstrong was arrested and charged with possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), and criminal trespass, in violation of Brunswick City Ordinance 642.12(A)(4). Mr. Armstrong pled no contest to possessing drug paraphernalia and the State dismissed the criminal trespassing charge. Mr. Armstrong was sentenced accordingly.

{¶3} Thereafter, on October 2, 2002, the Medina County Grand Jury charged Mr. Armstrong with one count of possession of cocaine, in violation of R.C. 2925.11(A)(C)(4)(a). This charge related to the arrest of Mr. Armstrong on March 28, 2002. Mr. Armstrong filed a motion to dismiss for lack of a speedy trial and violation of the double jeopardy clause. The motion was denied. He then entered a plea of no contest and was sentenced to a ten month prison term and six month license suspension. Mr. Armstrong timely appealed, raising three assignments of error, which have been rearranged to facilitate review.

II.

A.

Second Assignment of Error

> "THE TRIAL COURT ERRED IN OVERRULING [MR. ARMSTRONG'S] MOTION TO DISMISS ON GROUNDS THAT HIS STATUTORY RIGHTS TO A SPEEDY TRIAL UNDER [R.C.

> 2945.71, ET SEQ.] WERE VIOLATED AND/OR HIS CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITION AND ARTICLE I, SECTION [10] OF THE OHIO CONSTITUION WERE VIOLATED."

{¶4} In his second assignment of error, Mr. Armstrong maintains that the court erred when it denied his motion to dismiss for failure to convene a speedy trial, in violation of R.C. 2945.71, et seq., and the applicable provisions of the Ohio and United States Constitutions. We disagree.

{¶5} The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. *State Pachay* (1980), 64 Ohio St.2d 218, 219. R.C. 2945.71, et seq. designates time periods within which the State must bring an accused to trial. The time for speedy trial begins to run when the accused is arrested, however, the actual day of arrest is not included in the calculation. *State v. Szorady*, 9th Dist. No. 02CA008159, 2003-Ohio-2716, at ¶12. Pursuant to R.C. 2945.71(C)(2), a person charged with a felony must be brought to trial within two hundred seventy days after his arrest.

{¶6} When a court is not in compliance with the time requirements specified in R.C. 2945.71, "a person charged with an offense shall be discharged if he is not brought to trial[.]" R.C. 2945.73(B). Such discharge is a bar to any further criminal proceedings against the accused based on the same conduct. R.C. 2945.73(D). The time requirements within which an accused must be brought to trial may be tolled by certain events listed in R.C. 2945.72. Specifically, the

speedy trial period may be tolled for "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" R.C. 2945.72(E).

{¶7} Additionally, special circumstances may arise in cases with multiple indictments. See *State v. Baker*, 78 Ohio St.3d 108, 110, 1997-Ohio-229. When issuing a subsequent indictment, "the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." Id., 78 Ohio St.3d 108 at syllabus. The State is not required to bring additional charges within the time period of the original indictment if the State did not have knowledge of the additional charges until performing investigations of later-seized evidence. See id. at 111.

{¶8} "When reviewing a defendant's claim that he was denied the right to a speedy trial, an appellate court applies the de novo standard to questions of law and the clearly erroneous standard to questions of fact." *State v. Berner*, 9th Dist. No. 3275-M, 2002-Ohio-3024, at ¶5, citing *State v. Thomas* (Aug. 4, 1999), 9th Dist. No. 98CA007058.

{¶9} Applying the above standards to the instant matter, we find that when issuing the second indictment against Mr. Armstrong, the State was not subject to the speedy trial time limits of the original arrest, as the subsequent charges were based on additional facts revealed through further investigation. See *Baker*, 78 Ohio St.3d at 111. Mr. Armstrong asserts that the time limit, pursuant

to R.C. 2945.71, began to run on March 28, 2002, the date of his arrest for possession of drug paraphernalia and criminal trespassing. At this time, a white substance was found in Mr. Armstrong's possession. It was then sent to the Bureau of Criminal Investigation ("BCI") for analysis. On August 28, 2002, Mr. Armstrong plead no contest to the possession of drug paraphernalia and the criminal trespassing charge was dropped. That same day, Mr. Armstrong was sentenced to a $150 fine and a six-month license suspension. Thereafter, on September 3, 2002, the State received the results of the tests performed by the BCI. The report indicated that the white substance tested positive for cocaine. Mr. Armstrong was then indicted for possession of cocaine on October 2, 2002 and arrested on December 6, 2002.

{¶10} In this case, the charge of possession of cocaine was dependent upon a laboratory analysis of the white substance seized from Mr. Armstrong upon his initial arrest on March 28, 2002. As the BCI report indicating that the substance tested positive for .24 grams of cocaine was not available to the State on that date, the rule announced in *Baker* applies and the State was not subject to the speedy trial timetable applicable to the initial charges. See *Baker*, 78 Ohio St.3d at 110-11; *State v. Riley* (June 12, 2000), 12th Dist. No. CA99-09-087 (finding that the possession charge "ultimately resulted out of an operative fact not present as to the [initial] DUI charge: the testing of the white powder and its confirmation as cocaine[]"); *State v. Lekan* (June 27, 1997), 2nd Dist. No. 16108 (finding that the second charge to the defendant was dependent upon a laboratory analysis of the

defendant's urine which was not available to the State at the time of the initial arrest); *State v. Clark*, 11th Dist. Nos. 2001-P-0031, 2001-P-0033 2001-P-0034, 2001-P-0057, and 2001-P-0058, 2004-Ohio-334, at ¶73 (finding that although the State "may have had a good idea that the substance was cocaine prior to the analysis date, they did not know for sure until the substance was analyzed" thus there was no violation of the defendant's right to a speedy trial); *State v. Wangul*, 8th Dist. No. 79393, 2002-Ohio-589 (finding that the subsequent indictment, filed after the marijuana was weighed and the charges determined, was based on new and additional facts which were not known at the time the defendant was arrested); *State v. Cantrell* (Sept. 7, 2001), 2nd Dist. No. 00CA0095. Thus, a new period began to run from Mr. Armstrong's arrest on December 6, 2002. See *Szorady* at ¶12.

{¶11} We also note that when Mr. Armstrong filed his motion to dismiss, he effectively extended the time in which the trial court was required to bring him to trial. See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 67. Thus, the speedy trial period was tolled from the filing of his motion, on March 3, 2003, until the date that the trial court denied Mr. Armstrong's motion, on March 17, 2003. Thus, Mr. Armstrong should have been brought to trial no later than September 16, 2003. See R.C. 2945.71(C)(2). Therefore, Mr. Armstrong's motion to dismiss, which was filed on March 3, 2002, was premature as it was filed approximately six months before the speedy trial period expired. See *State v. Hughes*, 9th Dist. No. 02CA008206, 2003-Ohio-5045, at ¶14. Consequently, on March 17, 2003,

the trial court properly denied Mr. Armstrong's motion. Mr. Armstrong's second assignment of error is overruled.

B.

First Assignment of Error

> "THE TRIAL COURT ERRED IN OVERRULING [MR. ARMSTRONG'S] MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶12} In his first assignment of error, Mr. Armstrong asserts that the trial court erred when it denied his motion to dismiss. Specifically, he argues that the charge for possession of cocaine was barred pursuant to the collateral estoppel component of the Double Jeopardy clause. Mr. Armstrong's argument is not well taken.

{¶13} Pursuant to the Fifth and Fourteenth Amendments to United States Constitution, "No person shall *** be subject for the same offence to be twice put in jeopardy of life or limb[.]" The Double Jeopardy clause embraces the belief that the State should not be permitted to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expenses, and a continuous state of anxiety and insecurity. *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 1997-Ohio-371, quoting *Green v. United States* (1957), 355 U.S. 184, 187-88, 2 L.Ed.2d 199.

{¶14} Additionally, the clause protects a defendant's right to have his trial completed by the same tribunal. *Lovejoy*, 79 Ohio St.3d at 443, quoting *Crist v. Bretz* (1978), 437 U.S. 28, 35-36, 5 L.Ed.2d 24. Once an issue of fact has been decided in favor of a defendant, the Double Jeopardy clause also prevents a second jury from considering that same issue in a later trial. *Lovejoy*, 79 Ohio St.3d at 443, citing *Dowling v. United States* (1990), 493 U.S. 342, 348, 107 L.Ed.2d 708. The doctrine of collateral estoppel, or issue preclusion, provides "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Lovejoy*, 79 Ohio St.3d at 443-444, quoting *Ashe v. Swenson* (1970), 397 U.S. 436, 443, 25 L.Ed.2d 469. Generally, collateral estoppel refers to the "acquittal prong" of double jeopardy. *Lovejoy*, 79 Ohio St.3d at 444. Thus, "[c]ollateral estoppel may be used to bar a later prosecution for a separate offense only where the government loses in the first proceeding." *State v. Phillips*, 74 Ohio St.3d 72, 80, 1995-Ohio-171, citing *United States v. Dixon* (1993), 509 U.S. 688, 705, 125 L.Ed.2d 556.

{¶15} In order to entertain a claim of collateral estoppel, a reviewing court must examine the record of the previous proceeding in order to ascertain which issues were actually decided therein. *Phillips*, 74 Ohio St.3d at 80, citing *Sealfon v. United States* (1948), 332 U.S. 575, 578-79, 92 L.Ed. 180. This cannot be done unless the previous record was made a part of the record below. *Phillips*, 74 Ohio

St.3d at 80. Thus, Mr. Armstrong was required to bring the record from the initial proceeding before the trial court. See *Phillips*, 74 Ohio St.3d at 80.

{¶16} In the present matter, Mr. Armstrong vaguely asserts that the charge for possession of cocaine "was barred because of the collateral component of the Double Jeopardy Clause[.]" He does not, however, cite to any factual issues that were determined in the initial proceedings for possession of drug paraphernalia and criminal trespassing and thus could not be litigated in the proceedings for possession of cocaine. Moreover, Mr. Armstrong failed to provide the trial court with the transcript of the proceedings or other evidence from his previous case to substantiate this claim. See *State v. Busby*, 9th Dist. No. 21229, 2003-Ohio-3361, at ¶7. As the trial court was not provided with an adequate record to determine Mr. Armstrong's double jeopardy claim, we are unable to conclude that the court erred when overruling his motion to dismiss. Mr. Armstrong's first assignment of error is overruled.

C.

Third Assignment of Error

> "[MR. ARMSTRONG] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO DUE TO COUNSEL'S FAILURE TO MOVE TO DISMISS, TO ARGUE FOR DISMISSAL OR TO SUBPOENA WITNESSES TO HEARING ON THE GROUNDS [MR. ARMSTRONG] WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AND/OR TO NOT BE SUBJECTED TO DOUBLE JEOPARDY."

{¶17} In his final assignment of error, Mr. Armstrong asserts that his trial counsel was ineffective. Mr. Armstrong states that counsel's alleged errors, which included both the failure to file a motion to dismiss and the failure to argue and subpoena witnesses in support of the motion, resulted in prejudice to him. Mr. Armstrong's assertions lack merit.

{¶18} In order to establish the existence of ineffective assistance of counsel, the defendant must satisfy a two-pronged test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶48, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674.

{¶19} Mr. Armstrong bears the burden of proof on this matter. *Colon* at ¶49, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Furthermore, there exists a strong presumption of the adequacy of counsel's performance, and that counsel's actions were sound trial tactics. *Colon* at ¶49, citing *Smith*, 17 Ohio St.3d at 100. "A strong presumption exists that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. It is also well established that "[c]ounsel need not raise *** frivolous issues[.]" *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, citing *Jones v. Barnes* (1983), 463 U.S. 745, 751, 77 L.Ed.2d 987; see, also, *Engle*

v. Isaac (1982), 456 U.S. 107, 134, 71 L.Ed.2d 783 (stating that "the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim"). Therefore, "[c]ounsel may limit the number of arguments raised in order to focus on those issues most likely to bear fruit." See *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-7039, at ¶4, citing *State v. Allen*, 77 Ohio St.3d 172, 173, 1996-Ohio-366. Additionally, we note that debatable trial tactics do not give rise to a claim for ineffective assistance of counsel. *In Re: Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. A defendant should put forth a showing of a substantial violation of an essential duty. *Watson*, supra.

{¶20} Prejudice, the second prong of the *Strickland* analysis, entails a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. The court is also to consider "'the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Colon* at ¶49, quoting *Strickland*, 466 U.S. at 690. An appellate court may analyze the second prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice. See *State v. Loza*, 71 Ohio St.3d 61, 83, 1994-Ohio-409.

{¶21} Therefore, based on the *Strickland* analysis, a defendant does not state a claim for ineffective assistance of counsel unless his attorney has acted unreasonably, given the facts of the case, and the unreasonable conduct was prejudicial to the defense. *State v. Mills* (1992), 62 Ohio St.3d 357, 370. Hence, the question of whether Mr. Armstrong's trial counsel provided effective or ineffective assistance is based upon whether the motion to dismiss would have been granted. As we have concluded that Mr. Armstrong was not denied the right to a speedy trial, it follows that Mr. Armstrong's trial counsel was not ineffective in failing to file such a motion based on this issue.

{¶22} In regards to the collateral estoppel issue, Mr. Armstrong has not demonstrated that but for counsel's failure to provide the trial court with the record from his previous case, the result would have been different. As noted above, Mr. Armstrong did not even cite any factual issues that were determined in the initial proceedings that could not be re-litigated in the instant matter. Thus, as Mr. Armstrong has not shown a reasonably probability exists that, but for counsel's errors, the result of the proceedings would have been different, we must overrule his third assignment of error. See *Bradley*, 42 Ohio St.3d 136 at paragraph three of the syllabus.

{¶23} Mr. Armstrong's assignments of error are overruled. The judgments of the Medina County Court of Common Pleas are affirmed.

Judgment affirmed.

WILLIAM G. BATCHELDER
FOR THE COURT

SLABY, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶24} I respectfully dissent as I feel Mr. Armstrong was deprived of a speedy trial and his counsel was ineffective in not filing a motion to dismiss for lack of a speedy trial.

{¶25} Although counsel enjoys a strong presumption of competence, nonetheless, I feel the effect of not filing a motion to dismiss was so serious here as to question the reliability of the result. Even though Mr. Armstrong filed his own pro se motion to dismiss on the grounds of a violation of his speedy trial rights, the proper arguments, facts, and case law were not brought to the trial court's attention in order for the trial court to meaningfully evaluate the same.

{¶26} "The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Pursuant to these constitutional mandates, R.C. 2945.71 through R.C. 2945.73 prescribe specific time requirements within which the State must bring an accused to trial." *State v. Edwards*, 5th Dist. No. 2002 AP 08 0065, 2003-Ohio-334, at ¶14 citing *State v. Baker* (1997), 78 Ohio St.3d 108, 110. Ohio law codifies a defendant's right to a speedy trial at R.C. 2945.71 et seq. According to R.C.

2945.71(C)(2), a person charged with a felony "shall be brought to trial within two hundred seventy days after the person's arrest."

{¶27} For purposes of this provision, when a subsequent indictment is issued against an accused after a previous indictment on a different charge, "the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know these facts at the time of the initial indictment." *Baker*, 78 Ohio St.3d at syllabus.

> "In *Baker*, the defendant was arrested because he sold prescription drugs to police informants. The same day, police officers seized numerous financial records from two pharmacies the defendant owned. A week later, the defendant was indicted on several counts of drug trafficking relating to the controlled buys.
>
> "While those charges were pending, state officials audited the financial records seized from the pharmacies. These audits resulted in a second indictment for drug trafficking against the defendant, which occurred almost a year after the defendant's arrest and original indictment. The defendant moved to dismiss the second indictment on the grounds that his speedy-trial rights had been violated, which the trial court overruled. The defendant subsequently pleaded no contest to reduced charges and was found guilty.
>
> "The defendant appealed and the court of appeals held that his statutory right to a speedy trial had been violated as to the second indictment because the speedy-trial clock for those charges began to run on the date of his arrest, not on the date of the second indictment. The supreme court disagreed with the court of appeals, holding that the defendant's speedy-trial rights had not been violated. Citing *Adams*, the court stated:
>
> "'Applying this standard to the instant case, we find that in issuing a second indictment against the defendant, the state was not subject to the speedy-trial time limits of the original indictment, since the

> subsequent charges were based on new and additional facts which the state had no knowledge of at the time of the original indictment. Additional crimes based on different facts should not be considered as arising from the same sequence of events for the purposes of speedy-trial computation. *Baker, supra,* at 111, 676 N.E.2d at 885-86.'
>
> "In *Baker,* the second set of charges resulted from the complex and time-consuming process of checking the defendant's financial records. The state could not have known if additional charges were appropriate until that process was completed. The two sets of charges were based on separate sets of facts and did not arise from the 'same sequence of events.' The court reasoned that 'to require the state to bring additional charges within the time period of the original indictment, when the state could not have had any knowledge of the additional charges until investigating later-seized evidence, would undermine the state's ability to prosecute elaborate or complex crimes.' *Id.* at 111, 676 N.E.2d at 886." *State v. Cooney* (1997), 124 Ohio App.3d 570, 572-573.

{¶28} This, on the other hand, is a simple case. According to officers' notes that were produced as part of Armstrong's discovery request, the police patted down Armstrong and discovered rocks of crack cocaine in a baggie on his person. Armstrong admitted the substance was crack cocaine and admitted to being a drug abuser. Armstrong's car was then searched and two crack pipes discovered. Probable cause existed at that point for the felony possession charge.

{¶29} The cases cited by the majority are clearly distinguishable from the instant fact pattern. As stated previously in *Baker,* the leading case on this issue, the second indictment resulted from a thorough and complex investigation of the defendant's financial and prescription records. The State was still in the process of gathering information to determine if additional charges were appropriate, and the two indictments did not arise out of the "same sequence of events." In *Riley*,

the two charges arose out of two different searches. The defendant was arrested for DUI, his vehicle was searched later and a white powder was discovered. The powder was then sent to BCI for testing. After the powder tested positive for cocaine, Defendant was additionally charged with possession of cocaine. The Court specifically ruled that probable cause did not exist to charge the Defendant prior to the results of the test.

{¶30} In *Lekan* and *Cantrell*, two other DUI cases, the defendant could not be charged with having a prohibited concentration of alcohol in his system without analysis of actual body fluids.

{¶31} In *Clark* the police could not charge the defendant with possession of cocaine because they did not know who possessed it at the time of the initial charge. Defendant later admitted to possessing the drug and was subsequently charged as a result.

{¶32} In *Wangul* the police were arresting the defendant at his residence on an outstanding warrant for grand theft when they discovered what appeared to be marijuana plants. Obviously the charges arose out of two different sets of facts.

{¶33} Mr. Armstrong's case here does not involve a complex drawn-out investigation, the testing of bodily fluids, or the discovery of who possessed the drugs. It involved one simple pat-down search and arrest where cocaine was discovered on Mr. Armstrong's body. The defendant admitted it was crack cocaine and indicated he was a drug abuser. The police then searched his car and discovered two crack pipes. To allow the State to charge on these two offenses at

two different times is the equivalent of giving judicial imprimatur to "piecemeal prosecution" and acts to erode the foundations of the "speedy trial protection" in multiple offense cases.

{¶34} I cannot agree to this. I respectfully dissent.

APPEARANCES:

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