

[Cite as *State v. Chappell*, 2014-Ohio-3877.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 12 MA 206
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
RONALD CHAPPELL)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 12 CR 111

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 3, 2014

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WAITE, J.

{¶1} Appellant Ronald Chappell appeals his convictions and sentences on four counts of harassment with a bodily substance and one count of vandalism. Each count was a fifth degree felony, and the court imposed one year in prison for each count, to be served consecutively, for a total of five years in prison. Appellant's attorney filed a motion to withdraw and a no merit brief pursuant to *State v. Toney*, 23 Ohio App.2d 203, 262, 262 N.E.2d 419 N.Ed.2d 419 (1970). For the following reasons, counsel's motion to withdraw is sustained and the trial court judgment is affirmed.

Background of the Appeal

{¶2} On February 2, 2012, Appellant was indicted on one count of domestic violence, four counts of harassment with a bodily substance, and one count of vandalism. The indictment stems from a domestic disturbance on January 22, 2012, at the home of Appellant's mother. Two police officers were called to the scene, and Appellant was arrested and placed in a police cruiser. While being driven to the police station, Appellant defecated into his own hand and spread feces all over the back of the police cruiser. He threatened to spit on the officers and to throw feces at them when they opened the door. After they arrived at the police station, sheriff's deputies were called to escort him from the vehicle and prepare him for intake. He was taken to a shower and then placed in a holding cell. As the deputies left the cell, Appellant defecated into his hand again and threw the feces at them, hitting two of them and narrowly missing one. Appellant was subsequently charged with vandalism of the police cruiser, domestic violence toward his mother, and four counts of

harassment with a bodily substance directed toward one City of Youngstown police officer and three Mahoning County Sheriff's deputies.

{¶13} Jury trial began on October 15, 2012. Appellant was convicted on October 18, 2012, of four counts of harassment with a bodily substance and one count of vandalism, all fifth degree felonies subject to a maximum prison term of twelve months each. Sentencing occurred on October 19, 2012. The record indicates that Appellant has a long record of misdemeanor convictions, including a prior domestic violence conviction and a juvenile delinquency adjudication for felony domestic violence. The court sentenced Appellant to one year in prison on each count, to be served consecutively, for a total prison term of five years. This timely appeal followed. Appellant's counsel filed a no merit brief, and Appellant supplemented the record with seven possible *pro se* issues for appeal.

Analysis

{¶14} Counsel is seeking to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and pursuant to our ruling in *Toney, supra*. “It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. To support such a request, appellate counsel must undertake a conscientious examination of the case and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly

frivolous.’ ” (Citations omitted.) *State v. Odorizzi*, 126 Ohio App.3d 512, 515, 710 N.E.2d 1142 (1998).

{¶15} In *Toney*, we set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent

appellant for the appointment of new counsel for the purposes of appeal should be denied.

7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶16} Although Appellant's counsel filed a no merit brief with no defined assignments of error, he did raise the possibility that error may exist regarding consecutive sentences. After examining the sentencing transcript and the sentencing judgment entry, there was no error in imposing consecutive sentences. Pursuant to revised R.C. 2929.14(C)(4), a trial court is required to make three findings before imposing consecutive sentences. The court can impose sentences consecutively only if it finds that: (1) consecutive service is necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) two of the offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of these offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶7} Although the trial court is required to make findings in support of consecutive sentences, it is not required to give reasons justifying those findings. *State v. Galindo–Barjas*, 7th Dist. No. 12 MA 37, 2013-Ohio-431, ¶16-17, 19. The court is not required to cite any “magic words” before imposing consecutive sentences, as long as it is “clear from the record that the trial court engaged in the appropriate analysis.” *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶40, quoting *State v. McKenzie*, 3d Dist. No. 15-12-07, 2012-Ohio-6117, ¶10. The trial court can use either the exact words from R.C. 2929.14(C)(4) or other language that reflects that it made the requisite findings. We then review the entire record to determine whether the findings were made. *State v. Hill*, 7th Dist. No. 13 CA 892, 2014-Ohio-1965, ¶33.

{¶8} The trial court found at the sentencing hearing that consecutive sentences were necessary to protect the public from future harm. (Tr., p. 13.) This satisfies the first required finding. The court also found that a single prison term did not adequately reflect the seriousness of Appellant's conduct. This satisfies the third required finding. Although the court did not use the words “proportionate” or “disproportionate” at the sentencing hearing, the judge made it clear that consecutive sentences in this case were proportionate to the crimes committed because they were crimes of violence and because Appellant has a long criminal history including a previous conviction for domestic violence. (Tr., p. 13.) The court also stated in its judgment entry that consecutive sentences were necessary “in order to protect the public and not punish the Defendant disproportionately and pursuant to

§2929.14(C)(4) that a prison term is necessary due to Defendant's previous convictions and a high risk of recidivism.” (10/19/12 J.E.) Therefore, all three findings are reflected in the record and there were no errors in imposing consecutive sentences.

{¶9} Appellant raises six additional *pro se* arguments on appeal. Appellant argues that the court should have granted a motion to dismiss he filed on March 12, 2012. The theory of dismissal was that Appellant did not receive a preliminary hearing at the Youngstown Municipal Court after he was initially arrested. It is well-settled that failure to hold a preliminary hearing within the time frame set by R.C. 2945.71(C)(1) does not affect a subsequent indictment and conviction. *State v. Pugh*, 53 Ohio St.2d 153, 372 N.E.2d 1351 (1978), syllabus. Further, a defendant has no right to a preliminary hearing once a grand jury has issued an indictment. *State ex rel. Haynes v. Powers*, 20 Ohio St.2d 46, 48, 254 N.E.2d 19 (1969).

{¶10} Appellant argues that he could not have been convicted on count two of the indictment because the municipal court dismissed a similar count without prejudice prior to the case going to the grand jury. There is no error here because a dismissal without prejudice does not bar the state from initiating further criminal proceedings against a defendant. *State v. Annable*, 194 Ohio App.3d 336, 2011-Ohio-2029, 956 N.E.2d 341, ¶22 (8th Dist.); *City of Tipp City v. Brooks*, 2d Dist. No. 2004 CA 7, 2005-Ohio-3174, ¶8.

{¶11} Appellant raises two issues related to ineffective assistance of counsel. Appellant argues that his counsel was ineffective because counsel allowed the court

to convict him on a charge that was dismissed by the municipal court, and because the court did not allow him to have counsel of his own choosing. To prevail on a claim of ineffective assistance of counsel, Appellant must show not only that counsel's performance was deficient, but also that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶107. "Deficient performance" means performance falling below an objective standard of reasonable representation. "Prejudice," in this context, means a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *Strickland* at 687-688, 694. We have addressed the first issue and determined that the state was permitted to try Appellant on a charge that had once been dismissed without prejudice. Hence, there was no error for counsel to assert. As to the second matter, an indigent defendant only has "the right to professionally competent, effective representation, not the right to have a particular attorney represent him." *State v. Evans*, 153 Ohio App.3d 226, 2003-Ohio-3475, 792 N.E.2d 757, ¶30. Appellant's desire to choose his appointed counsel is not a viable claim of ineffective assistance of counsel.

{¶12} Appellant argues that the charges should have been dismissed on statutory speedy trial grounds. He filed a *pro se* speedy trial motion on June 22, 2012. The court denied the motion on October 11, 2012. Under R.C. 2945.71, a person charged with a felony shall be brought to trial within 270 days after arrest, and each day the defendant is held in jail in lieu of bail on the pending charge is counted

as three days. Assuming *arguendo* that Appellant was held in jail in lieu of bond for the entire period of this case, the speedy trial clock would have expired on April 22, 2012. The statutory time period, though, may be extended by any delays necessitated by the actions of the defendant, by motions filed by the defendant, and by reasonable continuances granted other than by a defendant's motion, such as a *sua sponte* continuance granted by the court. R.C. 2945.72(E), (H). The record contains ten motions filed by Appellant or his counsel prior to June 22, 2012 that extended the speedy trial date, including discovery motions, motions to dismiss, motions to remove counsel, a motion for separate trial, a motion suggesting mental incompetency, and a motion to continue trial. In addition, the court had originally scheduled trial to begin on March 19, 2012, well within the speedy trial period, but due to a subsequent conflict with a previously scheduled trial, the court continued the trial to June 4, 2012. Appellant then filed a motion to further continue the trial and the motion was granted. The record demonstrates that Appellant's *pro se* motion to dismiss on speedy trial grounds was properly denied due to multiple continuances necessitated by Appellant's actions and by a reasonable continuance granted *sua sponte* by the court.

{¶13} Appellant presents two arguments challenging the manifest weight of the evidence. Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A manifest weight challenge questions whether the state has met its burden of persuasion. *Id.* at 390.

In reviewing a manifest weight of the evidence argument, the reviewing court examines the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id.*

{¶14} Appellant contends that the evidence does not support the conviction for vandalism and one of the four counts of harassment with a bodily substance. Appellant asserts that the testimony of the police officers and sheriff's deputies was not credible. “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶15} The arresting officer testified that Appellant, while detained in the back of the police cruiser, defecated into his hands and smeared excrement all over the back of the cruiser. This evidence amply supports the vandalism charge. The police officer and the sheriff's deputies all testified regarding Appellant's repeated threats to throw feces and spit on them. They testified that Appellant did throw feces while in the police cruiser and during his time at the jail, with the result that the deputies were spattered with Appellant's feces or nearly missed being hit. A person commits harassment with a bodily substance when, “with intent to harass, annoy, threaten, or alarm a law enforcement officer, shall cause or attempt to cause the law enforcement

officer to come into contact with * * * feces, or another bodily substance by throwing the bodily substance at the law enforcement officer, by expelling the bodily substance upon the law enforcement officer, or in any other manner.” R.C. 2921.38(B). The evidence overwhelmingly supports all four convictions for harassment with a bodily substance, and any manifest weight challenge is clearly frivolous.

{¶16} Appellant's final argument is that the trial judge erred in not allowing him to represent himself at trial. Appellant contends that it should have been self-evident that he needed to represent himself because his counsel was ineffective. Whether or not Appellant's counsel was ineffective, the right to self-representation must be clearly and unequivocally asserted in a timely manner and does not attach until asserted. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶38. The record contains no evidence that Appellant asserted his right to self-representation.

Conclusion

{¶17} There are no non-frivolous errors evident from the record or from Appellant's arguments. Counsel is permitted to withdraw in this case and the judgment of the trial court is affirmed in full.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.