

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-687
	:	(C.P.C. No. 08CR05-3419)
Howard Boddie, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 30, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

*McCarthy Law Offices, LLC*, and *Michael D. McCarthy*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Howard Boddie, Jr., appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

**Factual and Procedural Background**

{¶2} On May 6, 2008, a Franklin County Grand Jury indicted appellant with one count of domestic violence in violation of R.C. 2919.25 and one count of abduction in

violation of R.C. 2905.02, both felony offenses. Appellant entered a not guilty plea to the charges. Eventually, a jury found appellant guilty of both charges on May 27, 2010. The trial court sentenced appellant accordingly.

{¶3} Appellant appeals and assigns the following errors:

I. APPELLANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED UNDER OHIO LAW AS WELL AS THE OHIO AND FEDERAL CONSTITUTIONS WHEN NUMEROUS DELAYS OCCURRED PRIOR TO HIS TRIAL.

II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL CONTRA HIS RIGHTS UNDER THE OHIO AND FEDEAL CONSTITUTIONS.

#### **First Assignment of Error - The Right to a Speedy Trial**

{¶4} Although this assignment of error mentions both statutory and constitutional rights to a speedy trial, appellant's only argument is based on Ohio's statutory provisions regarding speedy trials. Therefore, we will only address Ohio's statutory speedy trial provisions found in R.C. 2945.71 et seq.

{¶5} Pursuant to R.C. 2945.71, a person against whom a felony charge is pending must be brought to trial within 270 days of arrest. R.C. 2945.71(C)(2). Each day spent in jail on the pending charge counts as three days. R.C. 2945.71(E). In the event a defendant is not brought to trial within the statutory speedy trial time frame, R.C. 2945.73 provides the remedy: "Upon a motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B).

{¶6} The Supreme Court of Ohio has held that a defendant's "failure to file a motion to dismiss on speedy trial grounds prior to trial and pursuant to R.C. 2945.73(B) prevents him from raising the issue on appeal." *State v. Taylor*, 98 Ohio St.3d 27, 2002-

Ohio-7017, ¶37. See also *State v. Talley*, 5th Dist. No. 06 CA 93, 2007-Ohio-2902, ¶41; *State v. Huffman*, 8th Dist. No. 93000, 2010-Ohio-5116, ¶22. Here, appellant did not file a motion to dismiss based on a speedy trial violation or otherwise bring this issue to the attention of the trial court. He is therefore precluded from arguing this issue on appeal. Accordingly, we overrule appellant's first assignment of error.

### **Second Assignment of Error - Ineffective Assistance of Counsel**

{¶7} Appellant contends in this assignment of error that he received ineffective assistance of trial counsel. He first contends that he received deficient representation because trial counsel failed to file a motion to dismiss based on the violation of his statutory right to a speedy trial. We disagree.

{¶8} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶133 (citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069) ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶9} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional

assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶204.

{¶10} When a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success. *State v. Barbour*, 10th Dist. No. 07AP-841, 2008-Ohio-2291, ¶14 (citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577).

{¶11} Appellant does not attempt to count days for purposes of his speedy trial rights. We note, however, the numerous events on the record in this case that would toll, waive, or stop the counting of days. See *State v. Bauer* (1980), 61 Ohio St.2d 83, 84-85 (defendant who fails to appear at a scheduled trial date waives speedy trial rights for time between initial arrest and rearrest); *State v. Palmer*, 84 Ohio St.3d 103, 1998-Ohio-507 (time tolled when defendant filed motion for mental competency determination); R.C. 2945.72(B) (time tolled while defendant not competent to stand trial); *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus (demand for discovery or bill of particulars tolls time); R.C. 2945.72(H) (time tolled for period of any reasonable continuance granted other than upon the accused's own motion). There may also have been other reasons for the statutory time limits to be tolled or extended, such as appellant being held on other charges, which are not apparent on the record. However, because appellant did not file a motion to dismiss based on speedy trial rights, the state had no reason to support these reasons on the record. *State v. Roy*, 12th Dist. No. CA2009-12-305, 2010-Ohio-5528, ¶8-22 (citing *State v. Hamilton*, 12th Dist. No. CA2001-04-044, 2002-Ohio-560). Based on

the record, appellant has failed to demonstrate that a motion to dismiss based on a violation of his speedy trial rights had a reasonable probability of success

{¶12} Because appellant has not shown that there was a reasonable probability that a motion to dismiss would have been successful, he has failed to demonstrate that trial counsel was ineffective for failing to file such a motion.

{¶13} Appellant also alleges that his trial counsel was deficient for failing to meet with him before trial. That failure, appellant alleges, deprived him of the ability to participate in developing trial strategy and calling witnesses. Appellant does not demonstrate how his participation would have changed trial counsel's trial strategy, nor does he explain what additional witnesses he would have called and how those witnesses would have assisted his defense. Absent these showings, appellant cannot demonstrate that trial counsel's alleged failure to meet with him caused him any prejudice. *State v. Dennis*, 10th Dist. No. 04AP-595, 2005-Ohio-1530, ¶¶21-23 (counsel not ineffective for failing to confer with defendant before trial or for failing to call witnesses).

{¶14} Appellant has not demonstrated that his trial counsel was ineffective. Accordingly, we overrule his second assignment of error.

{¶15} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT, P.J., and SADLER, J., concur.

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