# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 13, 2004 |
| v | Nos. 245446, 250072<br>Calhoun Circuit Court |
| GENE RAY FULCHER,<br><br>Defendant-Appellant. | LC No. 02-001781-FH |

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for third degree fleeing and eluding, MCL 750.479a(3); operating under the influence, MCL 257.625(1)(a); and possession of marijuana, MCL 333.7403(2)(d). We affirm.

Defendant first argues that the trial court erred when it denied his motion to dismiss based on the prosecutor's failure to try his charges within 180 days of discovering that he was incarcerated. We disagree. When a defendant is confined in state prison, a prosecutor must ordinarily try any new criminal charges within 180-days of learning that the charged defendant is incarcerated, or the trial court will dismiss the charges. MCL 780.131(1), MCR 6.004(D). Defendant contends that trial began sixteen days after the 180-day limit expired. However, if the defendant causes delays, they obliterate any claimed violation. *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987). In this case, the trial court correctly attributed a substantial delay to defense counsel's failure to prepare an adequate writ for defendant's delivery to the courthouse, resulting in the scheduling conference's postponement. Another failed attempt to writ defendant caused a second delay, but the cause for that failure was not known. Under these circumstances, and without any evidence of actual prejudice from the minor delays technically attributable to the prosecutor, the trial court did not err when it denied defendant's motion to dismiss the charges on this ground.

Next, defendant argues that he received ineffective assistance for his trial counsel's failure to communicate a plea offer. We disagree. Even if trial counsel fails to communicate properly a plea offer to a defendant, the trial court need not sentence defendant according to the offer unless there was a "reasonable probability" that the defendant would have accepted it. *Magana v Hofbauer*, 263 F3d 542, 550 (CA 6, 2001). Defendant's trial attorney explained that defendant thought the charges at issue were included in an earlier plea bargain involving separate charges. According to the attorney, this belief led defendant to focus only on the fact that the

current charges were already adjudicated and should be dismissed. This misunderstanding caused defendant to repeatedly beseech the court and his attorney to review the earlier bargain and dismiss the charges. According to the attorney, the mistaken belief grew into an obsession and prevented defendant from properly considering any other options, including plea offers. Given the fact that the trial court had not yet ruled on defendant's misguided request to dismiss until after the deadline had passed for accepting the disputed plea agreement, the trial court correctly found that defendant would have rejected any offer irrespective of whether his attorney properly conveyed it. Deferring to the trial court's first-hand evaluation of the witnesses' demeanor and testimony, the trial court did not clearly err when it found that defendant had no reasonable likelihood of accepting the plea agreement. Therefore, defendant is not now entitled to a sentence in accordance with the unaccepted plea offer.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray