

[Cite as *State v. Nicholson*, 2009-Ohio-3592.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91652

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMUEL NICHOLSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498671

BEFORE: Celebrezze, J., Rocco, P.J., and Dyke, J.

RELEASED: July 23, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Samuel Nicholson, brings this appeal challenging his conviction for murder. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} On July 16, 2007, appellant was indicted on one count of aggravated murder with one- and three-year firearm specifications. Bond was set at \$1,000,000, and counsel was appointed because of appellant's indigency. Trial was originally set for August 21, 2007. At the first pretrial conference, appellant waived his speedy trial rights until December 31, 2007; this waiver was made in writing and in open court. Appellant again waived his speedy trial rights until February 28, 2008; this waiver was made in writing and in open court. A third time, appellant waived his speedy trial rights until April 30, 2008; this waiver was made in writing, but not in open court.

{¶ 3} Trial was then set for March 5, 2008. On that date, appellant appeared in court and entered a plea of guilty to the amended charge of murder in violation of R.C. 2903.02(A) with a three-year firearm specification.¹ On March 7, 2008, at the sentencing hearing but prior to the court imposing a sentence, appellant made an oral motion to withdraw his plea. The trial court denied appellant's motion and proceeded to sentencing. The trial court imposed

¹The state amended the original indictment by deleting the "prior calculation and design" element and the one-year firearm specification.

a sentence of three years on the firearm specification, to be served prior and consecutively to a term of 15 years to life on the murder conviction.

Review and Analysis

{¶ 4} Appellant was granted leave to file a delayed appeal by this court. He raises four assignments of error for our review.

Validity of Speedy Trial Waivers

{¶ 5} “I. The appellant was denied his right to a speedy trial when the trial court failed to personally sign the journal entries and instead used a rubber stamp or computer generated signature in violation of Loc.R. 19, Civ.R. 58, Crim.R. 54, Crim.R. 32(C), and the Fourteenth Amendment of the federal Constitution.”

{¶ 6} In his first assignment of error, appellant argues that the journal entries reflecting his waiver of speedy trial are not valid because the trial judge’s signature is computer-generated.² We find no merit in this argument.

{¶ 7} The Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 10, Article I of the Ohio Constitution, guarantee a criminal defendant the right to a speedy trial by the state. *State v. O’Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218. In *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 112-113, the United States

²Appellant argues that the signatures are either rubber-stamped or computer-generated, but it is clear that they are electronic signatures.

Supreme Court declared that, with regard to fixing a time frame for speedy trials, “[t]he States * * * are free to prescribe a reasonable period consistent with constitutional standards * * *.” To that end, the Ohio General Assembly enacted R.C. 2945.71³ in order to comply with the *Barker* decision. See, also, *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854.

{¶ 8} It is well established that the Ohio speedy trial statute constitutes a rational effort to enforce the constitutional right to a speedy public trial of an accused charged with the commission of a felony or misdemeanor and shall be strictly enforced by the courts of this state. *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *State v. Howard* (1992), 79 Ohio App.3d 705, 607 N.E.2d 1121. At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *State v. Geraldo* (1983), 13 Ohio App.3d 27, 468 N.E.2d 328.

³R.C. 2945.71 states in pertinent part: “(C) A person against whom a charge of felony is pending: (1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after his arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after his arrest if the accused is held in jail in lieu of bail on the pending charge; (2) Shall be brought to trial within two hundred seventy days after his arrest. * * * (E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.”

{¶ 9} It is undisputed that the statutory limit had expired, but the state demonstrated through appellant’s three separately executed speedy trial waivers that sufficient time was tolled pursuant to the statute. Appellant argues that his waivers were invalid because the court used an electronic signature instead of a handwritten signature on the journal entries.

{¶ 10} Loc.R. 19 states in relevant part: “The Court shall approve a journal entry deemed by it to be proper, sign it MANUALLY OR APPLY AN ELECTRONIC SIGNATURE TO THE JOURNAL ENTRY PURSUANT TO LOCAL RULE 19.1, and cause it to be filed with the Clerk, and notice of the filing of each journal entry for journalization shall on the day following such filing be published in the Daily Legal News.”⁴ (Emphasis in original.)

{¶ 11} Pursuant to Loc.R. 19, the electronic signature of the court that appears on the journal entries appellant is challenging are valid. Appellant’s

⁴ Loc.R.19.1 states:

“THE FOLLOWING DEFINITIONS SHALL APPLY TO THIS RULE: ‘ELECTRONIC’ AND ‘ELECTRONIC SIGNATURE’ HAVE THE SAME MEANING AS USED IN SECTION 1306.01 OF THE OHIO REVISED CODE. THE TERM ‘DOCUMENT’ INCLUDES JOURNAL ENTRIES, NOTICES, ORDERS, OPINIONS, AND ANY OTHER FILING BY A JUDGE OR MAGISTRATE OF THIS COURT.

(B) ELECTRONIC TRANSMISSION OF A DOCUMENT WITH AN ELECTRONIC SIGNATURE BY A JUDGE OR MAGISTRATE THAT IS SENT IN COMPLIANCE WITH PROCEDURES ADOPTED BY THE COURT SHALL, UPON THE COMPLETE RECEIPT OF THE SAME BY THE CLERK OF COURT, CONSTITUTE FILING OF THE DOCUMENT FOR ALL PURPOSES OF THE OHIO CIVIL RULES, RULES OF SUPERINTENDENCE, AND THE LOCAL RULES OF THIS COURT.”

argument that his speedy trial waivers are invalid is without merit, and his first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 12} “II. Trial counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when he failed to move to dismiss the case due to a violation of the appellant’s speedy trial rights.”

{¶ 13} In his second assignment of error, appellant argues that his counsel was ineffective for not moving to dismiss his case based on a speedy trial violation. He bases his argument on his previous assignment of error that the court’s electronic signature renders a judgment entry invalid. Having resolved the previous issue in the state’s favor, we do the same on this issue.

{¶ 14} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of the appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 15} Appellant is not able to demonstrate that counsel’s performance was flawed or deficient in any way for not having challenged the court’s electronic signature. Had counsel moved to dismiss appellant’s case on the basis that his speedy trial waivers were invalid, the motion would have been denied. As such,

appellant is unable to demonstrate the second prong under *Strickland*, since the charge against appellant would not have been dismissed.

{¶ 16} Appellant's second assignment of error is overruled.

Violation of Crim.R. 11

{¶ 17} "III. The appellant's guilty plea was not knowingly, intelligently and voluntarily given when the trial judge failed to explain the elements of murder and the Due Process Clause of the Fourteenth Amendment was violated."

{¶ 18} In his third assignment of error, appellant argues that the trial court violated Crim.R. 11 by failing to strictly comply with its requirements. Specifically, he argues that the court did not review the elements of the charge he was pleading guilty to, and therefore his plea was not knowingly, intelligently, and voluntarily made. As appellant recognizes from his own review of the case law on this issue, his argument has no merit.

{¶ 19} In *State v. Collins* (Oct. 18, 1979), Cuyahoga App. No. 39926, this court held that "there is no requirement in Criminal Rule 11 that the trial court explain the elements of the crime to the defendant at the time of the plea. In the case of *McCarthy v. United States* (1969), 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, the United States Supreme Court indicated that it was not constitutionally mandated that a court explain the elements of the crime charged to the accused. In *State v. Allen*, (Feb. 16, 1978), Cuyahoga App. No. 36862, we held that the

plea of guilty was voluntarily, knowingly, and intelligently made even where the elements of the offense were not spelled out to the accused.”

{¶ 20} The state and the trial court stated on the record that appellant would be pleading guilty to the amended charge of murder. Appellant stated on the record that he understood the charge against him and that he was pleading guilty to murder.

{¶ 21} Despite appellant’s appeal to this court to “take a new look at this issue,”

{¶ 22} we follow established precedent in our district and find that appellant’s plea was knowingly, intelligently, and voluntarily made.

{¶ 23} Appellant’s third assignment of error is overruled.

Withdrawal of Plea

{¶ 24} “IV. The trial court abused its discretion in denying the appellant’s motion to withdraw his guilty plea and thus violated the Fourteenth Amendment of the federal Constitution.”

{¶ 25} In his fourth assignment of error, appellant argues that the trial court erred by not allowing him to withdraw his guilty plea prior to sentencing.

{¶ 26} Crim.R. 32.1 governs withdrawals of guilty pleas and reads: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence

may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 27} With regard to presentence motions to withdraw a guilty plea, the Ohio Supreme Court has held: “Even though the general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality, * * * still the decision thereon is within the sound discretion of the trial court. * * * Thus, unless it is shown that the trial court acted unjustly or unfairly, there is no abuse of discretion. * * * One who enters a guilty plea has no right to withdraw it. It is within the sound discretion of the trial court to determine what circumstances justify granting such a motion * * *.” *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715, citing *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1226; *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863.

{¶ 28} In *Peterseim*, paragraph three of the syllabus, this court held that “[a] trial court does not abuse its discretion in overruling a motion to withdraw the plea: (1) where the accused is represented by highly competent counsel, (2) where the accused was offered a full hearing, pursuant to Crim.R. 11 before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.”

{¶ 29} These factors have been expanded to include: “(5) whether the court gave full and fair consideration to the motion; (6) whether the motion was made in a reasonable time; (7) whether the motion states specific reasons for withdrawal; (8) whether the accused understood the nature of the charges and the possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense.” *State v. Pinkerton* (Sept. 23, 1999), Cuyahoga App. Nos. 75906, 75907, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 661 N.E.2d 788.

{¶ 30} At his sentencing hearing, appellant made an oral motion to withdraw his plea stating, “[W]hen they brought me up here [on March 5th], I had an expectation to go to trial and I felt forced to make a decision that I wasn’t comfortable with and I haven’t been able to find peace with that decision.” In denying the motion, the trial court noted that when appellant entered his plea, he acknowledged that he understood the ramifications of the plea and also expressed remorse for his actions.

{¶ 31} There is nothing in the record to indicate the trial court acted unjustly or unfairly by denying appellant’s motion. We find that the trial court gave appellant’s motion sufficient consideration. Appellant simply had a change of heart. Changing one’s mind is not a sufficient basis for allowing the withdrawal of a plea. *State v. Salter*, Cuyahoga App. No. 82488, 2003-Ohio-5652; *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632. The

court did not abuse its discretion by refusing to allow withdrawal of appellant's guilty plea.

{¶ 32} Appellant's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY