

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92695

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL ANDREWS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No.CR-514320

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

RELEASED AND JOURNALIZED: July 29, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Michael Andrews, through counsel, appeals his convictions and assigns the following errors for our review:

“I. The appellant was denied the effective assistance of counsel.”

“II. The appellant’s convictions are against the manifest weight of the evidence.”

{¶ 2} Andrews, pro se, assigns the following supplemental errors for our review:

“I. Defendant-Appellant was denied due process under Ohio law and the United States Constitution where the trial court failed to comply with mandatory speedy trial requirement.”

“II. Defendant-Appellant was denied effective assistance of trial counsel in violation of Ohio and United States Constitution when counsel failed to properly file motion to dismiss charges based upon the expiration of speedy trial time in violation of Article I, Section 16, of Ohio Law and the 6th Amendment of the U.S. Constitution.”

{¶ 3} Having reviewed the record and pertinent law, we affirm Andrews’s convictions. The apposite facts follow.

{¶ 4} On August 19, 2008, a Cuyahoga County Grand Jury indicted Andrews on one count each of drug possession, drug trafficking, and possession of criminal tools in connection with a controlled delivery of cocaine shipped from California to Cleveland. Andrews pleaded not guilty at the arraignment, several pretrials followed, and on October 27, 2008, a jury trial commenced.

Jury Trial

{¶ 5} Michael Cernelich testified that he is a United States Postal Inspector who assists federal, state, and local law enforcement in agencies drug enforcement. Cernelich testified that on July 28, 2008, he was contacted by Cleveland Police Narcotics Unit to assist in a controlled drug delivery of a Federal Express package that was shipped from California to an address on Cleveland's west side.

{¶ 6} Cernelich testified that he obtained a Federal Express truck and uniform and traveled to the address accompanied by a Cleveland police detective. Cernelich testified that when he arrived at the location with the package that was addressed to one Maria Lopez, he initially received no response when he knocked on the door. However, an individual named Brittany Logan appeared at the rear upstairs window, subsequently came downstairs, and eventually signed for the package.

{¶ 7} Logan indicated that Lopez was a friend who was unavailable, therefore, Logan would sign for the package. Cernelich gave Logan the package and watched her walk back up the stairs with the package.

{¶ 8} Around April or May of 2008, Logan met Andrews, who is also known as "Big Mac," through her boyfriend Keion Morgan, who is also known as "Ghost." Logan, at the same time, also met an individual introduced to her as "O.C." that was visiting from California. Logan's boyfriend was

subsequently arrested for a parole violation and extradited to his home state of California.

{¶ 9} When Morgan was extradited to California, Andrews would periodically check to see how Logan was doing. A few weeks prior to the delivery of the package, Andrews learned that Logan was experiencing financial hardship. Andrews offered to have a package delivered to her residence and in exchange he would give her some drugs.

{¶ 10} Two days prior to the delivery, Andrews contacted Logan, gave her the confirmation number, and instructed her not to answer the door when the packaged arrived. The night before the anticipated delivery, Andrews stayed at her house, but the package never arrived, and Andrews instructed her to go to a pay phone to check the status. Upon checking the status, Logan learned that the delivery was scheduled for the following Monday.

{¶ 11} Early Monday morning, Andrews contacted Logan by means of a “chirp” from the walkie talkie feature of his Nextel phone to alert her to wait for the package. Logan waited for the package and signed for it when it was delivered.

{¶ 12} Logan testified that immediately after the package was delivered, the police arrived. Logan told the police that the package belonged to Andrews, and they instructed her to contact Andrews. Logan stated that when she told Andrews the package had been delivered, he instructed her to

walk around the block to see if there was anything unusual. The police instructed Logan to tell Andrews that she did not notice anything unusual, and she complied.

{¶ 13} Andrews initially asked her to pick him up at his nephew's home, but instructed her to leave the package at her house. Logan traveled to Cleveland's east side with a detective in her car and other police officers following behind. Logan stated that Andrews chirped her while she was en route and instructed her to pick him up at a corner store located at the Eddy and Arlington Roads. Logan stated that the detective exited her car before she reached the appointed location.

{¶ 14} When Logan arrived at the corner store, Andrews entered her car and asked if she was sure no one was following her. Logan testified that as they attempted to drive away, the police stopped the car, at which point, Andrews stated "I knew it."

{¶ 15} Detective Franklin Lake of the Cleveland Police Department testified that he provided surveillance of Logan's address before the package was delivered. After the delivery of the package, Detective Lake and fellow members of the force entered Logan's residence to execute a search warrant, at which time Logan indicated that the package was for Andrews.

{¶ 16} Detective Lake stated that Logan was instructed to contact Andrews, and when she did, he listened to the entire conversation on the

speaker phone. Detective Lake monitored Logan as she traveled to pick up Andrews on Cleveland's east side. Detective Lake observed Andrews enter Logan's car when she arrived at the designated location.

{¶ 17} Detective Gloria Santiago of the Cleveland Police Department testified that she was part of the surveillance team and assisted in the execution of the search warrant after the package was delivered. Detective Santiago was present when Logan indicated the package belonged to Andrews and she was privy to all the conversations between Andrews and Logan regarding picking him up from his nephew's house.

{¶ 18} Detective Santiago rode in Logan's vehicle to meet Andrews, and as they neared the location, Andrews contacted Logan and instructed her to pick him up at a corner store located at the intersection of Eddy and Arlington Roads. Detective Santiago exited Logan's vehicle when they were approaching the corner store. Detective Santiago observed Andrews enter Logan's vehicle.

{¶ 19} Detective Jamaal Ansari of the Cleveland Police Department's Narcotics Division testified that he leads a parcel interdiction team. Detective Ansari stated that the subject package came to their attention because of canine alert, which resulted in it being confiscated and a search warrant obtained to open the package.

{¶ 20} Once opened, the team found two Arizona Tea cans containing suspected powdered cocaine. Detective Ansari subsequently obtained a search warrant for the address, arranged for a controlled delivery, and began surveillance of the address.

{¶ 21} Detective Ansari testified that on July 28, 2008, his team executed the controlled delivery of the package and once completed, his team entered Logan's residence to execute the search warrant. Detective Ansari stated that Logan agreed to cooperate and indicated that the package belonged to Andrews. Logan contacted Andrews while Detective Ansari and the fellow officers listened on the speaker phone to the conversation that ensued.

{¶ 22} Detective Ansari and his team provided surveillance and monitoring as Logan traveled to meet Andrews. Once Andrews entered Logan's vehicle, Detective Ansari gave the order to initiate a felony stop of the vehicle. After Andrews and Logan were removed from the vehicle, he reached in and picked up Logan's cellular phone and found another cellular phone on the passenger seat. Detective Ansari used Logan's phone to call the phone number of the last call received, and the cellular phone he found on the passenger's seat rang.

{¶ 23} The jury found Andrews guilty of drug possession and possession of criminal tools, but not guilty of drug trafficking. On January 12, 2009, the

trial court sentenced Andrews to a prison term of five years for drug possession and six months for possession of criminal tools. The trial court ordered the sentences served concurrently.

Manifest Weight of Evidence

{¶ 24} We begin with the second assigned error, wherein Andrews argues his convictions were against the manifest weight of the evidence.

{¶ 25} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive --- the state’s or the defendant’s? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. ‘When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony.’ *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.”

{¶ 26} In the instant case, Andrews was convicted of violating R.C. 2925.11, which states, “No person shall knowingly obtain, possess, or use a controlled substance.” R.C. 2925.11(A). “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). Whether a person acted knowingly generally must be determined from all the surrounding facts and circumstances. See *State v. Huff* (2001), 145 Ohio App.3d 555, 763 N.E.2d 695. Therefore, “the test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria.” *State v. Bettis*, 1st Dist. No. C-060202, 2007-Ohio-1724. See, also, *State v. McDaniel* (May 1, 1998), 2nd Dist. No. 16221, citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412.

{¶ 27} Possession may be either actual or constructive. *State v. Kobl* (1997), 122 Ohio App.3d 160, 174, 701 N.E.2d 420. “Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be in his immediate physical possession.” *State v. Upton*, 1st Dist. No. C-050076, 2006-Ohio-1107, quoting *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362,

syllabus. Circumstantial evidence is sufficient to establish constructive possession. *State v. Gaiter*, 9th Dist. No. 24758, 2010-Ohio-2205.

{¶ 28} Andrews now argues he was convicted of drug possession based on Logan's inconsistent, questionable, and self-serving testimony. We disagree.

{¶ 29} In addition to Logan's testimony that the delivered package was intended for Andrews and that she only agreed to receive it because she was having financial difficulties, three police detectives testified about the post-delivery conversations between Logan and Andrews. Detectives Lake, Santiago, and Ansari all testified about the cellular phone conversation that ensued when Logan chirped Andrews. The detectives testified that the conversation was conducted on the speaker phone, and they heard Andrews instructing Logan to check for suspicious activity, to pick him up at his nephew's house, and to leave the package at her house.

{¶ 30} Based on Andrews's instruction to Logan, the detectives traveled with Logan to the appointed location. Detective Santiago, who traveled in Logan's vehicle, testified that Andrews chirped Logan and instructed her to pick him up at a corner store located at Eddy and Arlington Roads. Detective Santiago overheard the entire conversation because it was conducted on the speaker phone.

{¶ 31} Further, Detective Ansari recovered a cellular phone from Logan's vehicle on the passenger seat where Andrews had been sitting when he entered the vehicle. Detective Ansari used Logan's cellular phone to dial the number of the last call received and the cellular phone he recovered rang.

Detective Ansari dialed the number to confirm that the chirps were received from the phone Andrews was carrying.

{¶ 32} Both Logan's and Andrews's cellular phones revealed that the last chirp was sent and received at 1:55 p.m. on July 28, 2008. Phone records introduced at trial detailed the various calls that were sent and received between Andrews and Logan.

{¶ 33} Based upon the review required of this court, and considering the entire record, including the testimony of the three detectives who overheard the telephone conversations between Andrews and Logan specifically discussing the delivered package, the jury did not "clearly los[e] its way" and "create [] such a manifest miscarriage of justice" that Andrews's convictions must be reversed. Accordingly, we overrule the second assigned error.

Ineffective Assistance of Counsel

{¶ 34} In the first assigned error, Andrews argues he was denied the effective assistance of counsel.

{¶ 35} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. *Id.* at paragraph two of the syllabus.

{¶ 36} In the instant case, Andrews argues he was denied the effective assistance of counsel because trial counsel failed to subpoena a representative from Spring/Nextel to interpret the telephone records. We are not persuaded.

{¶ 37} "Normally, an attorney's failure to subpoena witnesses [is] within the realm of trial tactics and, absent a showing of prejudice, [is] not deemed a denial of effective assistance of counsel, *State v. Hill*, 2nd Dist. No. 23468, 2010-Ohio-500, quoting *State v. Hunt* (1984), 20 Ohio App.3d 310, 486 N.E.2d 108, and especially in the absence of any showing that the testimony of such a suggested witness would have assisted the defense." *Id.*, citing *State v. Reese* (1982), 8 Ohio App.3d 202, 456 N.E.2d 1253. See, also, *State v. Maxwell* (Oct. 7, 1993), 2nd Dist. No. 13966.

{¶ 38} As discussed in the resolution of the previous assigned error, Andrews's convictions were not against the manifest weight of the evidence. Three detectives overheard Andrews on the speaker phone discussing the package and instructing Logan what steps to take. The cellular phone Andrews was carrying when he was arrested activated when Detective Ansari used Logan's cellular phone to dial the number of the last call received.

{¶ 39} In addition, defense counsel cross-examined Logan about the phone records admitted into evidence and cross-examined all three detectives regarding the conversations they overheard between Andrews and Logan. Without any evidence regarding what testimony the potential witness from Sprint/Nextel might have offered, Andrews has failed to demonstrate that the actual outcome of the trial would have been different. Other than pure conjecture, Andrews has failed to establish that his counsel's performance was deficient in any way.

{¶ 40} Moreover, the record indicates that defense counsel issued subpoenas for UPS, DHL, and Federal Express representatives. Given that defense counsel issued subpoenas for representatives of UPS, DHL, and Federal Express, but not for Sprint/Nextel, is a matter of trial strategy. There are numerous avenues through which counsel can provide effective assistance of counsel in any given case, and debatable trial strategies do not constitute ineffective assistance of counsel. *State v. Feliciano*, 9th Dist. No.

09CA009595, 2010-Ohio-2809, citing *State v. Diaz*, 9th Dist. No. 04CA008573, 2005-Ohio-3108, at ¶23, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. Accordingly, we overrule the first assigned error.

Speedy Trial

{¶ 41} In his first pro se supplemental error, Andrews argues his right to a speedy trial was violated.

{¶ 42} The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee an accused the right to a speedy and public trial. *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30. In *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court declared that, with regard to fixing a time frame for speedy trials, “the States * * * are free to prescribe a reasonable period consistent with constitutional standards * * *.” To that end, the Ohio General Assembly enacted R.C. 2945.71 in order to comply with the *Barker* decision. See, also, *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854.

{¶ 43} The standard of review that appellate courts apply to speedy trial issues is to count days as set forth in R.C. 2945.71. *State v. Stevens*, Cuyahoga App. No. 87693, 2006-Ohio-5914. Trial must be held within 270 days of arrest in order to effectuate a speedy trial. See R.C. 2945.71(C)(2). However, pursuant to R.C. 2945.71(E), each day spent in jail “on a pending

charge” acts as three days toward speedy trial time, thus 90 days time in jail would equate to 270 days using the triple-count provision.

{¶ 44} In the instant case, the record indicates that Andrews was held in jail until he was brought to trial, therefore the triple count provision of R.C. 2945.71(E) applies and the state had 90 days to bring Andrews to trial. Andrews was arrested on July 28, 2008. Applying the speedy trial period from that date, Andrews was required to be brought to trial no later than October 26, 2008, unless that period was tolled. The record indicates Andrews’s trial commenced October 27, 2008, one day past any tolling events.

{¶ 45} The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended by the period of any continuance granted on the accused’s own motion and the period of any reasonable continuance granted other than upon the accused’s own motion. See

{¶ 46} R.C. 2945.72(H).

{¶ 47} The record indicates that the first pretrial was conducted on August 28, 2008, and defense counsel requested a continuance until September 18, 2008 for further discovery. Pursuant to R.C. 2945.72(E), the speedy trial time is extended for any period of delay necessitated by a motion filed by the defendant. Requests for discovery are tolling events under this

provision. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159.

{¶ 48} Here, 21 days elapsed between August 29, 2008 and September 18, 2008 and are chargeable to Andrews. Since the trial commenced on October 27, 2008, one day after the state was required to bring him to trial if there were no tolling events, Andrews's right to a speedy trial was not violated. Accordingly, we overrule the first supplemental, pro se, assigned error.

Effective Assistance of Counsel

{¶ 49} In his second supplemental, pro se, assigned error, Andrews argues that his defense counsel was ineffective for failing to file a motion to dismiss the charges based upon the expiration of the speedy trial time.

{¶ 50} As discussed in the first pro se supplemental error, Andrews's right to a speedy trial was not violated. Given that it is undisputed that Andrews's right to a speedy trial was not violated, defense counsel's decision not to file a motion to dismiss on said grounds was sound trial strategy. Accordingly, we overrule the second supplemental pro se assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR