

[Cite as *State v. Buchanan*, 2019-Ohio-542.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107111

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID L. BUCHANAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-601270-A and CR-16-605149-A

BEFORE: S. Gallagher, P.J., E.A. Gallagher, J., and Headen, J.

RELEASED AND JOURNALIZED: February 14, 2019

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SEAN C. GALLAGHER, P.J.:

{¶1} Appellant David L. Buchanan appeals his convictions in the two underlying cases, Cuyahoga C.P. Nos. CR-16-601270-A and CR-16-605149-A.¹ Upon review, we affirm.

Background

{¶2} On November 24, 2015, appellant was indicted on 10 counts in Case No. CR-16-601270-A, which included offenses occurring in 2015, including rape charges relating to a single victim. On April 11, 2016, appellant was indicted on 16 counts in Case No. CR-16-605149-A, which is a cold case involving offenses occurring in 1996 and 1997, and included rape charges relating to four different victims. The cases were joined in the trial court.

{¶3} During the course of proceedings, appellant was found incompetent to stand trial and the court ordered him to in-patient treatment for competency restoration. On October 12,

¹ We note that appellant's last name is misspelled in Case No. CR-16-601270-A, and there are several inconsistencies in the spelling of his name throughout the record in both cases. Appellant's name is properly spelled David L. Buchanan.

2017, the parties stipulated to the findings contained in a competency evaluation prepared by the court psychiatric clinic.

{¶4} Various motions were filed with the trial court, including a motion to sever for relief from prejudicial joinder and for separate trials as to the two cases, as well as to the four separate sexual assault incidents in Case No. CR-16-605149-A, as well as a motion to dismiss the indictment for preindictment delay in Case No. CR-16-605149-A.

{¶5} Appellant ultimately reached a plea agreement with the state, pursuant to which he entered a plea of guilty to the following amended counts:

Cuyahoga C.P. No. CR-16-601270-A – Count 1, rape in violation of R.C. 2907.02(A)(2), a felony of the first degree.

Cuyahoga C.P. No. CR-16-605149-A – Counts 2, 6, 10, and 14, sexual battery in violation of R.C. 2907.03(A)(1), a felony of the third degree.

All remaining counts in the cases were nolle.

{¶6} Prior to accepting appellant's guilty pleas, the trial court fully advised appellant of his constitutional rights and ensured that appellant understood the nature of the charges, the effect of a plea, and the maximum penalties involved. The court advised the defendant that he could be sentenced to anywhere from 3 to 31 years in prison and the court could impose a fine of up to \$60,000 on the indicted charges. Although there was no jointly recommended sentencing range, the court indicated that with a plea, it would stick to a range of 7 to 15 years. Appellant expressed his understanding. The trial court found that the appellant's pleas were made knowingly, intelligently, and voluntarily.

{¶7} Prior to sentencing appellant, the trial court reviewed the presentence investigation report and considered the record and any statements made to the court. The court considered the

purposes and principles of sentencing under R.C. 2929.11 and appropriate factors under R.C. 2929.12. The court also made the requisite findings to justify the imposition of consecutive sentences under R.C. 2929.14(C).

{¶8} In Case No. 16-605149-A, the trial court imposed a sentence of two years on each of the four sexual battery counts, run consecutive for a total of 8 years in prison. In Case No. CR-16-601270-A, the trial court imposed a sentence of 6 years on the rape count, run consecutive to Case No. CR-16-605149-A. The aggregate term of imprisonment imposed in the two cases totaled 14 years. In the sentencing entry, the trial court denied any outstanding motions as moot. Appellant timely filed this appeal.

Law and Analysis

{¶9} Appellant raises three assignments of error for our review. Under his first and second assignments of error, appellant claims the trial court erred with regard to ruling on the motion to dismiss the indictment due to preindictment delay in Case No. CR-16-605149-A. Appellant entered his guilty pleas prior to any ruling on his motion, and the motion was deemed denied as moot.

{¶10} Appellant's guilty pleas constituted a complete admission of guilt. *See* Crim.R. 11(B)(1). By entering his guilty pleas, appellant waived the right to assert the challenges to his motion being raised on appeal. *See State v. Bogan*, 8th Dist. Cuyahoga No. 84468, 2005-Ohio-3412, ¶ 13-14 (finding appellant who entered a guilty plea prior to the trial court's ruling on a motion to suppress waived any error regarding the motion); *State v. Wilson*, 8th Dist. Cuyahoga No. 105876, 2018-Ohio-3666, ¶ 6 (finding appellant who entered a guilty plea prior to the trial court's ruling on a motion for relief from joinder waived the right to challenge the subsequent denial of his motion). Moreover, "[b]y pleading guilty, appellant waived all

constitutional violations apart from those related to the entry of his guilty plea.” *State v. Shivers*, 8th Dist. Cuyahoga No. 105621, 2018-Ohio-99, ¶ 11, citing *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105. “When a defendant enters a guilty plea, he generally waives all appealable errors that may have occurred unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea.” *Wilson* at ¶ 6.

{¶11} Even if the challenges were not waived, appellant fails to demonstrate actual prejudice by the preindictment delay. “Unlike a Sixth Amendment speedy-trial claim, no presumption of prejudice arises in the due-process context when a preindictment delay exceeds a particular length of time.” *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 98, citing *United States v. Schaffer*, 586 F.3d 414, 425 (6th Cir.2009).² Appellant must demonstrate that the lengthy preindictment delay resulted in actual prejudice to him.

{¶12} In his motion to dismiss, appellant argued the following with regard to actual prejudice: “the negative effect of the delay of the defendant [sic] twenty year pre-indictment delay because of the loss or destruction of evidence (including witness testimony and memory) possibly material to his defense.” However, “the possibility that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice.” *Adams* at ¶ 105, citing *United States v. Marion*, 404 U.S. 307, 325-326, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). “An unjustifiable delay between the commission of an offense and a defendant’s indictment therefor, which results in actual prejudice to the defendant, is a violation of the right

² Appellant’s reference to his right to a speedy trial in his first assignment of error is misplaced. In his motion to dismiss, appellant argued that the events giving rise to the charges in Case No. CR-16-605149-A occurred in 1996 and 1997, but that the state did not file an indictment until 2016, constituting a 20-year delay. The issue is not one of speedy trial, but due process. A preindictment delay can, under certain circumstances, constitute a violation of due process of law guaranteed by the federal and state constitutions. *State v. McDonall*, 8th Dist. Cuyahoga No. 105787, 2018-Ohio-2065, ¶ 27.

to due process of law’ under the United States and Ohio Constitutions.” *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 12, quoting *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

{¶13} Insofar as appellant argues on appeal that the state divulged at sentencing that one of the victims was deceased, the state filed a motion to supplement the record and indicated that this was an inaccurate statement and that the state has no reason to believe any of the four victims in Case No. CR-16-605149-A is deceased. Notwithstanding the state’s representation at sentencing and its efforts to supplement the record, there is no evidence in the record to demonstrate the unavailability of this victim. Under the burden-shifting framework for analyzing a due-process claim based on preindictment delay, a defendant must present evidence of actual prejudice before the burden shifts to the state to justify its delay. *Jones* at ¶ 13-14; *Shivers*, 8th Dist. Cuyahoga No. 105621, 2018-Ohio-99, at ¶ 12.

{¶14} Appellant’s first and second assignments of error are overruled.

{¶15} Under his third assignment of error, appellant argues that his guilty plea was not knowingly, intelligently, and voluntarily entered because exculpatory evidence was withheld during discovery and plea negotiations.

{¶16} In order to comply with due process requirements, a defendant’s guilty plea must be made knowingly, intelligently, and voluntarily. *State v. Bishop*, Slip Opinion No. 2018-Ohio-5132, ¶ 10. Appellant argues that the state did not disclose the death of one of the victims until sentencing. As discussed above, the state filed a motion indicating that the statement was made in error and there is no evidence in the record showing this victim was in fact deceased. Although the prosecutor may have misspoken at sentencing, this cannot be said to have had any effect upon appellant’s plea.

{¶17} Appellant further claims that his motion to dismiss and his motion for speedy trial should have been heard prior to trial and that he was coerced into making the plea by the joinder of cases and being given a possible 31-year aggregate sentence. The record reflects that the trial court complied with Crim.R. 11 and that appellant understood the implications of his plea and the rights he was waiving by entering a guilty plea. Although appellant faced a possible aggregate term of 31 years, the trial court informed appellant that with a plea, the court would sentence him within a range of 7 to 15 years. Because appellant entered his guilty pleas prior to any ruling on the motion to dismiss or the motion to sever, it cannot be said that the subsequent treatment of the motions as “denied as moot” influenced his plea. *See Wilson*, 8th Dist. Cuyahoga No. 105876, 2018-Ohio-3666, at ¶ 5-8.³ Accordingly, appellant’s second assigned error is overruled.

{¶18} Judgment affirmed.

It is ordered that appellee recover of 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.

³ Also, appellant’s motion to dismiss for a violation of the right to speedy trial was stricken by the trial court because it was filed pro se and appellant was represented by counsel. Insofar as the speedy trial issue was raised on the record, the trial court noted that there were matters that tolled the time and that it did not believe there would be a speedy trial issue.

SEAN C. GALLAGHER, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
RAYMOND C. HEADEN, J., CONCUR

KEY WORDS:

Appeal No. 107111 — State of Ohio v. David L. Buchanan