[Cite as *State v. Sunbury*, 2010-Ohio-3294.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STATE OF OHIO

and

THE VILLAGE OF SUNBURY

Plaintiffs-Appellees

-vs-

PAUL M. SPUNG

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case Nos. 09CAC060059
09CAC060060

O P I N I O N

CHARACTER OF PROCEEDING: Appeals from the Municipal Court, Case Nos. 09CRB00122 and 08CRB02032

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 9, 2010

APPEARANCES:

For Plaintiffs-Appellees

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Farmer, P.J.

{¶1} On July 31, 2008, appellant, Paul Spung, was charged with seven counts of falsification in violation of R.C. 2921.13(A)(1) (Case No. 08CRB02032).

{¶2} On January 20, 2009, appellant was charged with one count of disorderly conduct in violation of R.C. 2917.11(A)(1), one count of falsification in violation of R.C. 2921.13(A)(1), one count of obstructing official business in violation of R.C. 2921.31(A), and one count of failure to disclose personal information in violation of R.C. 2921.29(A)(1) (Case No. 09CRB00122).

{¶3} Both cases were joined for purposes of trial, and a jury trial commenced on June 4, 2009. Appellant represented himself, but had appointed counsel on standby.

{¶4} On the first case involving the seven falsification charges, the jury found appellant guilty of all but one. On the second case, the trial court found appellant not guilty of the falsification and disorderly conduct charges, and the jury found appellant guilty of the two remaining charges.

{¶5} By judgment entries filed June 4, 2009, the trial court sentenced appellant to an aggregate term of one hundred five days in jail.

{¶6} Appellant filed an appeal in each case and this matter is now before this court for consideration. The following three assignments of error are listed in each appeal:

I

{¶7} "APPELLANT NEVER WAIVED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL BECAUSE HE INSISTED THAT HIS

STANDBY COUNSEL PROVIDE HIM WITH THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS."

II

{¶8} "APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION TO DISMISS WITHOUT WAITING FOR A RESPONSE FROM THE PROSECUTION."

III

{¶9} "APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO SEVER THE FALSIFICATION AND DISORDERLY CONDUCT CASES."

{¶10} Pertinent to Case No. 09CAC060059 is the following fourth assignment of error:

IV

{¶11} "APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE VIOLATED BECAUSE HIS DISORDERLY CONDUCT CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶12} Pertinent to Case No. 09CAC060060 is the following fourth assignment of error:

IV

{¶13} "APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE VIOLATED BECAUSE HIS FALSIFICATION CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I

{¶14} Appellant claims the trial court denied him his constitutional right to counsel as he did not waive his right to counsel and the trial court erred in giving him standby counsel. We disagree.

{¶15} On April 7, 2009, appellant filed the following motion in each case:

{¶16} "The Alleged-Defendant, Paul M. Spung, hereby notifies the Court of his intention to exercise his right under the United States Constitution and the Ohio Constitution to represent himself during all further proceedings in this matter. Mr. Spung further requests that this Court continue his Appointed Counsel's appointment, but converts his status to stand-by counsel. That is he wants Appointed Counsel to continue to advise as to the legal issues, but does not wish Appointed Counsel to represent during hearings."

{¶17} In *State v. Martin,* 103 Ohio St.3d 385, 2004-Ohio-5471, ¶24, 31-34, the Supreme Court of Ohio discussed the distinction between standby counsel and hybrid counsel as follows:

{¶18} "This court, too, has concluded that 'a defendant in a state criminal trial has an independent constitutional right of self-representation and***may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so.' *State v. Gibson* (1976), 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraph one of the syllabus, citing *Faretta*.

{¶19} "This court has held that '[n]either the United States Constitution, the Ohio Constitution nor case law mandates***hybrid representation. See *McKaskle v. Wiggins* (1984), 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122]. Although appellant has the right

either to appear *pro se* or to have counsel, he has no corresponding right to act as co-counsel on his own behalf.' *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407.

{¶20} "Today we reaffirm and hold that in Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously. *Parren v. State* (1987), 309 Md. 260, 269, 523 A.2d 597.

{¶21} "Hybrid representation raises several troubling issues. First, situations may arise in a hybrid representation environment where the accused and his 'co-counsel' disagree on strategy, which witnesses to call, and other key trial issues. Who is the ultimate decision maker? Hybrid representation poses difficult ethical issues for counsel and management issues for the trial judge when the defendant and his counsel disagree as to how the trial should proceed.

{¶22} "Even more troubling is the issue of waiver. As the Maryland high court stated in *Parren v. State*: 'The problems arising from such a concept of hybrid representation are apparent. It could not be ascertained by anyone, including the trial court itself, until after the trial whether the defendant had enjoyed representation by counsel, self-representation or hybrid representation, for "[t]he question is one of degree." [*Bright v. State* (1986), 68 Md.App. 41] at 47, 509 A.2d [1227] at 1230. Neither the court, nor the defendant, nor counsel, nor the prosecutor would know until the record of the trial was examined who was actually responsible for the conduct of the defense and in control of deciding questions and resolving problems as they arose."

{¶23} As appellant's standby counsel explained to the trial court, appellant was not requesting co-counsel or hybrid counsel as defined by the *Martin* court:

{¶24} "MR. CORNELY: Your Honor, my understanding from Mr. Spung is that he's going to be representing himself. And I've advised him that there are only two options as to representation. Either he does it himself which means he asks all the questions and does all the talking, or I represent him and I do it all. There's no, unfortunately, no provision for co-counsel.

{¶25} "So he has advised me he wants to do all of that, but he does want me here to counsel him as to the law and other matters as stand-by counsel." June 3, 2009 T. at 15, attached to Appellee's Brief in Case No. 09CAC060059 as Appendix C.

{¶26} The trial court then informed appellant of the "hazards of representing yourself." Id. at 16-24. When asked by the trial court if he still wished to represent himself, appellant stated the following and then the following colloquy occurred:

{¶27} "THE DEFENDANT: I'm representing myself but I've got stand-by counsel and I'm expecting stand-by counsel to be effective assistance of counsel. I hope that answers your question.

{¶28} "THE COURT: Well, Mr. Cornely is going to do his best. But ultimately if you represent yourself***you're giving up the right to counsel. And I haven't researched it, but I suspect it would be quite difficult for someone who has given up their right to counsel and is convicted to argue that you didn't have effective assistance of counsel because you are giving up that right, okay. I'm not trying to make your life difficult, but I'm just telling you - -

{¶29} "THE DEFENDANT: I understand.

{¶30} "THE COURT: - - you're putting yourself in one box or the other here and you've got to pick.

{¶31} "THE DEFENDANT: Right.

{¶32} "THE COURT: And you can't just kind of straddle.

{¶33} "THE DEFENDANT: I understand.

{¶34} "***

{¶35} "THE COURT: I understand. All right. So is your decision entirely voluntarily to represent yourself at trial?

{¶36} "THE DEFENDANT: Yes." Id. at 24-25.

{¶37} The waiver of right to counsel filed June 3, 2009 was signed by appellant and his standby counsel and included the following language:

{¶38} "I knowingly, voluntarily and intelligently waive and give up my right to be represented by an attorney and exercise my right to proceed pro se and represent myself. I acknowledge that I have been informed in open court about the hazards of self representation. I am requesting counsel to be appointed as stand by counsel, and my understanding is stand by counsel has been appointed for the duration of trial."

{¶39} On the day of trial, the trial court once again addressed the issue:

{¶40} "Judge: ***When a person chooses to proceed pro se at trial, petitioner has no right to allege claims of ineffective assistance of standby counsel.***So your wish today to represent yourself in the trial, is it Mr. Spung?

{¶41} "Defendant: Yes, however, I do want, for the record, I do object to that position and I do expect that this attorney would be effective and I won't release him from that liability, on the record.

{¶42} "Judge: Alright, well, I will say as a matter of Ohio law that he is not bound by the same professional obligations that he would have if he were representing you.

{¶43} "***

{¶44} "Judge: Well, I respect that view. This is challenging to balance the two rights that we discussed yesterday: The defendant's right to represent himself and his right to counsel. He has chosen to represent himself. But there are enough court decisions out there that talk about the role of standby counsel, I think I understand what the proper role is. I intend to hold [standby counsel] and all parties here to the restrictions on standby counsel. As I said, it is a very limited passive role. He won't be participating in the trial in any way that the jurors or I or opposing counsel will presumably notice. I will allow the defendant to have an attorney seated with him. I don't expect that to result in lengthy delays in the case and I will do my best to keep everything moving along.***" Transcript of Portion of Trial, attached to Appellant's Briefs as Exhibit 2.

{¶45} The trial court, despite its reservations on the issue of "standby counsel," assented to appellant's request to proceed pro se. The signed waiver was clearly voluntarily and knowingly given, and it even included the issue of standby counsel.

{¶46} Upon review, we find the trial court did not err in accepting the waiver and permitting appellant to proceed pro se.

{¶47} Assignment of Error I is denied.

II

{¶48} Appellant claims the trial court erred in denying his motion to dismiss for speedy trial violations in each case as neither appellee responded and absent responses, the motions should have been granted. We disagree.

{¶49} R.C. 2945.71 governs time within which hearing or trial must be held. Applicable to these cases is subsection (B)(2) which states:

{¶50} "(B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

{¶51} "(2) Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days."

{¶52} Pursuant to subsection (E), "[f]or 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.***"

{¶53} Both cases were set for trial within the speedy trial guidelines set forth supra. See, Notices of Hearing filed March 13, 2009. On March 31, 2009, appellant filed a pro se motion to continue the trial date "to allow him further time to prepare for trial. The Defendant requests that the time period of this continuance request not exceed his statutory speedy trial time."

{¶54} By judgment entry filed April 2, 2009, the trial court granted the request, ruling as follows:

{¶55} "Because the defendant's motion for a continuance in the newer of these two cases is grounded on his need for additional time to prepare for trial, I consider that motion to have tolled the running of the speedy-trial clock in that case. I note, however, that the defendant's motion asks that the trial be held within the speedy-trial time period set by Ohio law. Because that time has nearly run, I will set a new trial date in the newer case very promptly.

{¶56} "In the older case, I will not toll the speedy-trial clock. The defendant's motion for a continuance in that older case is grounded on the prosecutor's failure to produce a bill of particulars. Normally the filing by a defendant of a request for a bill of particulars in a criminal case would toll the running of the speedy-trial clock for a reasonable period of time until the prosecutor filed a response. The prosecutor acknowledges, however, that he had not yet produced the requested bill of particulars as of the day before the trial. I therefore do not believe that any resulting delay in the starting date of the trial on April 2, 2009 can be attributed to the defendant on that issue, and I will not treat either the February 6, 2009 request for the bill or the defendant's March 31, 2009 motion to continue – which was based on the prosecutor's failure to provide that bill – as events that toll the running of the speedy-trial clock in the older of these two cases."

{¶57} On April 7, 2009, appellant's standby counsel filed a motion to continue the new trial date "because the Alleged-Defendant desires to represent himself in this matter and needs additional time to prepare." By judgment entry filed April 9, 2009, the trial court granted the motion stating, "[s]peedy trial time is hereby tolled from April 8, 2009 until May 7, 2009 on Defendant's Motions to Continue filed on April 7, 2009."

{¶58} On May 5, 2009, appellant's standby counsel once again filed a motion to continue the new trial date as he would be unavailable on that date to act as standby counsel. By judgment entry filed May 8, 2009, the trial court granted the motion stating, "[s]peedy trial time is hereby tolled from May 7, 2009 until June 6, 2009 on the defendant's Motion for Continuance filed May 6, 2009."

{¶59} On May 29, 2009, appellant filed a pro se motion to dismiss due to expiration of speedy trial time. Appellant is correct that appellees did not file responses. However, in denying the motion to dismiss, the trial court conducted its own personal review of the record and concluded the following:

{¶60} "In short, any delays following the April 2, 2009 trial date have been caused by the defendant's motions to continue.

{¶61} "Because 80 days – rather than 91 or more days – have run on the speedy-trial clock in this case, the defendant's motion to dismiss on speedy-trial grounds is denied."

{¶62} Although the burden to bring a defendant to trial in a timely manner rests upon the Executive Branch of government under the separation of powers doctrine, we find the trial court's decision did not violate the doctrine nor was it contrary to law.

{¶63} The trial court specifically found a tolling of the speedy trial statute by its own judgment entries of April 9, and May 8, 2009 granting appellant's requests for a continuance. The matter at issue was clearly determined by a review of the trial court's own docket and judgment entries and did not require any input from appellees.

{¶64} Assignment of Error II is denied.

III

{¶65} Appellant claims the trial court erred in consolidating the two cases for trial. We disagree.

{¶66} Crim.R. 8(A) governs joinder of offenses and states the following:

{¶67} "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶68} "A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim.R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial." *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus.

{¶69} "For an appellate court to reverse a trial court ruling denying severance, the defendant must demonstrate that the trial court abused its discretion." *State v. Lott* (1990), 51 Ohio St.3d 160, 163. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶70} On May 8, 2009, appellant filed a motion to bifurcate the cases which was denied on May 8, 2009. Appellant acknowledges because the motion was not renewed at the close of the case, the matter is to be reviewed under a plain error standard. Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶71} Appellant argues prejudice resulted from the joinder because the evidence of falsification in the one case was not admissible in the other case pursuant to Evid.R. 404(B) "because it merely demonstrated character in order to show action in conformity." Appellant's Briefs at 15.

{¶72} We note appellant was found guilty of six of the seven falsification charges in Case No. 08CRB02032 and not guilty of the falsification charge in Case No. 09CRB00122.

{¶73} In denying appellant's motion to bifurcate the case, the trial court stated the following:

{¶74} "Because the offenses charged in the complaints in these cases are – in the words of Ohio Criminal Rule 8(A) – 'of the same or similar character,' and because they were arguably 'connected together or constitut[ed] parts of a common scheme or plan,' I believe that joinder of the offenses was proper under Criminal Rules 8(A) and 13. And because I do not find that the defendant or the prosecution would be prejudiced by the trial of all of these charges before a single jury, I do not believe that

severance is warranted. A single trial will not deprive the parties of their right to a fair trial, and – based on the complaints – the evidence appears likely to be simple and direct on the various charges. I will, of course, provide appropriate instructions to the jury on the various charges, and I will give the jury any limiting instructions that might be necessary to ensure the parties a fair trial." See, Judgment Entries filed May 8, 2009.

{¶75} We are unable to review the evidence at trial because the only part of the videotaped record reduced to writing is the part dealing with the issue of waiver of right to counsel. App.R. 9(A) specifically states:

{¶76} "The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs."

{¶77} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d

162. This principle is recognized in App.R. 9(B), which provides, in part, that '***the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. (Footnote omitted.)

{¶78} Assignment of Error III is denied.

IV IN EACH CASE

{¶79} Appellant claims the evidence was insufficient to support his convictions. As we noted in Assignment of Error III, a transcript of the trial was not filed for our review. As a result, we are unable to review these assignments as to the sufficiency of the evidence.

{¶80} Assignments of Error IV in each case are denied.

{¶81} The judgments of the Municipal Court of Delaware County, Ohio are hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THE STATE OF OHIO	:	
and	:	
THE VILLAGE OF SUNBURY	:	
Plaintiffs-Appellees	:	JUDGMENT ENTRY
-vs-	:	
PAUL M. SPUNG	:	
Defendant-Appellant	:	CASE NOS. 09CAC060059 09CAC060060

For the reasons stated in our accompanying Memorandum-Opinion, the judgments of the Municipal Court of Delaware County, Ohio are affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES