[Cite as *State v. Grissom*, 2009-Ohio-2603.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-08-008

Appellee — Trial Court No. 2006-CR-773

v.

Charles L. Grissom — **DECISION AND JUDGMENT**

Appellant — Decided: June 5, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Dennis P. Levin, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, entered after defendant-appellant, Charles L. Grissom, was convicted of one count of possession of crack cocaine and one count of possession of cocaine, and sentenced accordingly. Appellant now challenges that judgment through the following assignments of error:

{¶ 2} "1. The trial court erred in not granting appellant's 'Motion for a Discharge for Delay in Trial.'

{¶ 3} "2. Appellant was denied his right to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States and Article 1 Section 10 of the Ohio Constitution."

{¶ 4} On November 28, 2006, appellant was arrested and charged in Sandusky Municipal Court with four drug related offenses. At that time, appellant was on parole in Lucas County case No. CR-93-7007A and on conditional release in another Erie County case. The following day, the court set bail and continued the case for appellant to secure counsel. Thereafter, on December 7, 2006, appellant appeared with counsel for arraignment, pled not guilty, and the case was continued for a preliminary hearing, set for December 15, 2006. On that day, the preliminary hearing was waived, the bond was continued and the case was bound over to the grand jury.

{¶ 5} Appellant was indicted on April 13, 2007, and charged with one count of possession of cocaine and one count of possession of crack cocaine. Other critical events will be discussed infra. The case ultimately proceeded to trial on January 7, 2008, at the conclusion of which appellant was found guilty of both offenses. Thereafter, appellant was sentenced to three years incarceration on the possession of crack cocaine conviction and 11 months incarceration on the possession of cocaine conviction, with the terms to run consecutively. It is from that conviction that appellant now appeals.

{¶ 6} In his first assignment of error, appellant asserts that his right to a speedy trial was violated and that the lower court therefore erred in failing to grant his motion to discharge his case.

{¶ 7} We first note that appellant filed his motion to discharge his case pro se before the trial court. Appellant was, however, represented by counsel in the trial court proceedings. On the first day of trial, the state requested that another pro se motion filed by appellant be stricken from the record. The court responded by ordering all of appellant's pro se motions stricken from the record. It is well-settled that "[i]n 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." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, paragraph one of the syllabus. Accordingly, appellant's pro se motion was not properly before the court and the court had no obligation to rule on it. Nevertheless, because this court is required to independently review the issue of whether an accused was deprived of his right to a speedy trial, strictly construing the law against the state, we will address appellant's speedy trial claim. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57.

{¶ 8} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending

charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). Therefore, if an accused is held in jail for the entire time from arrest to trial, he must be brought to trial within 90 days. The time by which an accused must be brought to trial, however, may be tolled under certain conditions, including:

{¶ 9} "(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined * * *;

{¶ 10} "(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

{¶ 11} "* * *

{¶ 12} "(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused;

{¶ 13} "* * *

{¶ 14} "(H) 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[.]" R.C. 2945.72

{¶ 15} Accordingly, an accused's demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E). *State v. Brown,* 98 Ohio St.3d 121, 124, 2002-Ohio-7040, ¶ 26. Similarly, where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Covington* (Dec. 17, 1999), 6th Dist. No. L-97-1196. In

addition, the state and federal rights to a speedy trial can be waived in writing or in open court on the record. *State v. King* (1994), 70 Ohio St.3d 158, at syllabus. In this regard, when an accused signs an unlimited waiver of his right to a speedy trial, the accused may not seek dismissal of the criminal charges against him on speedy-trial grounds "unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time." *State v. O'Brien* (1987), 34 Ohio St.3d 7, paragraph two of the syllabus.

{¶ 16} The record reveals the following series of events. Appellant was first arrested and charged in Sandusky Municipal Court with four drug related offenses on November 28, 2006. It is well settled that the day of arrest is not counted in computing the time by which an accused must be brought to trial. *State v. Lautenslager* (1996), 112 Ohio App.3d 108, 110. Appellant's first appearance in that court was on November 29, 2006, at which time bail was set. At the November 29, 2006, appearance, however, the case was continued until December 7, 2006, to allow appellant to secure counsel. On November 30, 2006, however, the Adult Parole Authority placed a parole hold on appellant. The time from November 29 to December 7, 2006, was therefore tolled pursuant to R.C. 2945.72(C). Appellant was arraigned on December 7, 2006, he pled not guilty to the charges and the case was continued for a preliminary hearing. That is the date on which the clock began to run.

{¶ 17} At the next appearance, on December 15, 2006, the preliminary hearing was waived, the case was bound over to the grand jury and the bond was continued.

Appellant was subsequently indicted on April 13, 2007. On April 25, 2007, appellant's counsel entered his appearance of record and filed a demand for discovery. Accordingly, on that date, the speedy trial time tolled. R.C. 2945.72(E). The state filed its answer to the discovery demand on June 19, 2007, and the time again began to run. On July 9, 2007, however, appellant filed a motion to continue the pretrial that had been scheduled for July 11, 2007, thereby again tolling the speedy trial time. That pretrial was rescheduled for August 15, 2007, but on that day, appellant, who was incarcerated in the Mansfield Correctional Institution, was not brought to court and the pretrial was rescheduled for August 29, 2007. In the judgment entry rescheduling the pretrial, the court noted that the speedy trial time was tolled. On August 30, 2007, however, appellant's counsel filed on appellant's behalf a motion for a continuance of the August 29 pretrial. That motion included an express waiver of speedy trial time until the next scheduled trial date, which was October 9, 2007. Then, on September 4, 2007, appellant filed a request for an evaluation of his competency. On September 26, 2007, appellant filed a pro se motion to dismiss on speedy trial grounds. A hearing on appellant's competency to stand trial was held on October 25, 2007, at which the court found appellant competent to stand trial. Additionally, in a judgment entry dated October 25, 2007, the lower court denied appellant's pro se motion to dismiss. At this point, we conclude that appellant's speedy trial time was tolled from April 25 to June 19, 2007, and then continuously from July 9 to October 25, 2007.

{¶ 18} The time began to run again on October 25, 2007, but was again tolled on November 27, 2007, when appellant filed a pro se notice of appeal from the October 25, 2007 judgment denying his motion to dismiss. On December 11, 2007, this court dismissed appellant's appeal for lack of a final appealable order. See *State v. Grissom*, 6th Dist. No. E-07-066. Also on December 11, 2007, however, appellant filed his pro se motion for discharge on speedy trial grounds, which is the subject of this assignment of error. When the case proceeded to trial on January 7, 2008, the court ordered that all pro se motions be stricken from the record. Because the court ordered that the motion for discharge be stricken from the record, the speedy trial time began to run again on December 11, 2007, with this court's dismissal of the appeal. Finally, appellant's case came on for trial on January 7, 2008.

{¶ 19} By our count, appellant's speedy trial time began to run on December 7, 2006. It was then tolled from April 25 to June 19, 2007, from July 9 to October 25, 2007, and from November 27 to December 11, 2007. Because a parole hold was placed on appellant on November 30, 2006, once the time began to run, he was not held in jail in lieu of bail on the charges in this case and, accordingly, appellant was not entitled to the three-for-one provision of R.C. 2945.71(E). Accordingly, by January 7, 2008, the date of appellant's trial, 223 days had run that could be counted toward the speedy trial calculation, and appellant's right to a speedy trial had not been violated. The first assignment of error is not well-taken.

{¶ 20} In his second assignment of error, appellant contends that he was denied the effective assistance of counsel because his trial counsel failed to raise an insanity defense and failed to move for dismissal of the case on speedy trial grounds. As we have already determined that appellant's right to a speedy trial was not violated, we need not address his argument that his trial counsel was ineffective for failing to raise the issue in the court below.

{¶ 21} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 686-687. In essence, appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. Id. at 693.

{¶ 22} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. Id. at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85. Even if the wisdom

of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland*, supra at 689; *State v. Keenan* (1998), 81 Ohio St.3d 133, 152.

{¶ 23} Appellant asserts that his trial counsel was ineffective for failing to raise an insanity defense in the proceedings below when he knew that appellant had previously been found not guilty by reason of insanity in another case.

{¶ 24} We recently addressed this same issue in *State v. Anaya*, 6th Dist. No. L-06-1375, 2008-Ohio-1853, where we stated:

{¶ 25} "Where facts and circumstances indicate that a plea of not guilty by reason of insanity would have had a reasonable probability of success, it is ineffective assistance of counsel to fail to enter the plea. *State v. Brown* (1992), 84 Ohio App.3d 414. Where, however, facts indicate that counsel was pursuing a reasonable strategy in not so pleading, or where the likelihood of success for the plea is low, the decision is not unreasonable. *State v. Twyman*, 2d Dist. No. 19086, 2002-Ohio-3558 (defendant had mental health disorder but no reasonable probability he would have been acquitted by reason of insanity); *State v. Martin*, 12th Dist. Nos. CA2003-06-065, CA2003-06-066, 2004-Ohio-702 (same); *State v. Robinson*, 6th Dist. No. L-03-1307, 2005-Ohio-5266, ¶ 33 (psychological evaluations and defendant's testimony showed counsel's decision not

to seek insanity defense was reasonable); *State v. Johnson*. [1st Dist. No. C-030643], 2004-Ohio-3624." Id. at ¶ 29.

{¶ 26} In the proceedings below, appellant's counsel filed a motion to have appellant's competency to stand trial evaluated. Appellant was referred to the Court Diagnostic and Treatment Center in Toledo, Ohio, where he was evaluated and determined to be competent to stand trial. In contrast to competency to stand trial, "[a] person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." R.C. 2901.01(A)(14). The record from the trial below reveals that appellant's trial counsel's strategy was to use evidence of appellant's mental state on the date of his arrest to argue that appellant did not "knowingly" possess the cocaine and crack cocaine. Given that this was clearly a matter of trial strategy, we cannot say that trial counsel's decision not to pursue an insanity defense rose to the level of ineffective assistance. The second assignment of error is therefore not well-taken.

{¶ 27} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Erie County Court of

Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE