[Cite as *State v. Freeman*, 2010-Ohio-1357.]

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

State of Ohio — Court of Appeals No. L-09-1086

Appellee — Trial Court No. CR0200803096

v.

Mark Freeman — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Mark Freeman, appeals from his conviction and sentence entered by the Lucas County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} The record and findings of the trial court indicate the following. During the late evening hours of June 5 or the early morning hours of June 6, 2008, appellant drove his 1993 Cadillac to the 400 block of Bronson, in Toledo, Ohio, where an altercation took place. At some point, appellant wrecked the Cadillac, hitting a tree in front of 427 Bronson. He left the scene before the police arrived.

{¶ 3} At approximately 3:00 a.m., the police appeared at the scene in response to a report of an in-progress burglary in the 400 block of Bronson. When they arrived, they saw appellant's unoccupied black Cadillac smashed against the tree. The car had apparently collided with other vehicles before striking the tree, resulting in significant damage to the vehicle. The center front of the bumper was damaged, and the windshield was "spiderwebbed." In addition, the driver's side window, the front passenger window and the rear deck window were completely smashed out. Bystanders and the woman who reported the burglary told the police that appellant had been driving the car.

{¶ 4} Because the car was inoperable and had been abandoned by the driver, the police, pursuant to the Toledo Police Department's standard procedures, performed an inventory of the car's contents before having the car towed. A tow report was completed, and contained the following information: the date, time, and location that the report was made, the make of the subject vehicle, the registered owner of the vehicle, the tow company, and a description of the property found in the vehicle.

{¶ 5} In performing the inventory, the police opened the trunk by means of a release button located in the car's unlocked glove box. Inside the car's trunk was an

unlocked suitcase containing suspected crack cocaine, some bootleg DVDs, a towel, and hair clippers.

{¶ 6} Appellant was arrested the next day. At that time, police located bootleg CDs that were "very similar" to those recovered from the suitcase in the trunk of the wrecked vehicle. Drug testing by the Toledo Police crime lab revealed that the substance removed from the suitcase was 55 grams of crack cocaine.

{¶ 7} On June 23, 2008, in Lucas County Court of Common Pleas case No. CR0200802427, appellant was indicted on two counts of aggravated burglary, both first degree felonies, one of which carried a firearm specification. On September 10, 2008, in Lucas County Court of Common Pleas case No. CR0200803096, appellant was indicted on one count of possession of cocaine, a fourth degree felony, as well as one count of possession of cocaine, a first degree felony. The two cases were then handled together.

{¶ 8} Appellant's first appointed counsel was attorney Kristin Stahlbush, who on November 10, 2008, filed a motion to dismiss all of the charges on grounds that the speedy trial statute had been violated. Shortly after filing the motion, attorney Stahlbush moved to withdraw as counsel because appellant had filed a grievance against her with the bar association. The court granted the motion to withdraw and appointed attorney Nicole Fech.

{¶ 9} After attorney Fech was appointed, the court denied the motion to dismiss. Attorney Fech subsequently filed a motion to suppress on behalf of appellant. An evidentiary hearing was held, and the motion was denied.

{¶ 10} On February 9, 2009, appellant entered a plea of no contest to a lesser included offense of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(d), a felony of the second degree. Before accepting the plea, the trial court verified that appellant had graduated from high school and attended college, and that he understood English, and was not under the influence of drugs or alcohol. Appellant stated that he understood the potential prison term and fine attached to the offense, the constitutional rights he would relinquish as a consequence of the plea, and the necessity of postrelease control. Finally, he stated that he was satisfied with his attorney's representation in the proceedings.

{¶ 11} Throughout the plea hearing, appellant demonstrated a clear understanding of the proceedings, as well as an ability to clarify to his satisfaction any points that were ambiguous. For example, appellant asked whether the anticipated nolle prosequi would be with or without prejudice. Appellant also verified that he could file an affidavit of indigency with respect to the mandatory fine, because he "wanted that to be on public record." Finally, he queried the trial court as to whether the prosecution's sentencing recommendation had "any merit" with the court.

{¶ 12} Less than three weeks after appellant stated that he was satisfied with attorney Fech's representation, she filed a motion to withdraw on grounds that appellant had brought a grievance against her, as well. Her motion was granted, and attorney Ann Baronas was appointed to undertake appellant's representation.

{¶ 13} At appellant's sentencing hearing, held just three weeks after attorney Baronas was appointed, Baronas requested leave to withdraw because appellant had said he intended to file a grievance against her. When questioned by the court, appellant complained about the manner in which Baronas had handled his request for a release to attend his father's funeral. The trial court denied the request to withdraw.

{¶ 14} Immediately after addressing attorney Baronas's request to withdraw from representation, the trial court invited appellant to make a statement for sentencing purposes. He responded by stating that he "should" withdraw his plea because of his dissatisfaction with his counsel. His exchange with the court on this topic was as follows:

{¶ 15} "THE DEFENDANT: I'm not ready for sentencing. I'm not ready for sentencing and I think I should withdraw my no contest plea and I think we should move forward for trial.

{¶ 16} "THE COURT: Mr. Freeman --

{¶ 17} "THE DEFENDANT: If you're gonna make me go to trial with her, I'm gonna go to trial with her then if you're going to make me stick with her.

{¶ 18} "THE COURT: Mr. Freeman, you were arraigned on September the 15th, 2008 on case 08-3096.

{¶ 19} "THE DEFENDANT: Where is my motion for discovery for that? I have been held for 291 days. I have no motion for discovery on that, nor on the CR09-1369. I've been held for 291 days, I have no motions for discovery. You've – I have not been

through Municipal Court. All my Constitutional Rights are constantly being violated in this courtroom, Your Honor, and it's not right."

{¶ 20} The trial court thanked appellant for his statement and proceeded to sentence him to a mandatory sentence of three years in prison. After the sentence was imposed, appellant asked, "So you're telling me I can't withdraw my no contest plea?" The trial court answered that he could not. A nolle prosequi was entered as to the aggravated burglary charges in case No. CR0200802427 and as to the second charge of possession of cocaine in case No. CR0200803096.

{¶ 21} Appellant appealed from the trial court's March 25, 2009 sentencing entry, raising the following assignments of error:

{¶ 22} I. "THE TRIAL COURT ERRED IN DENYING MR. FREEMAN'S MOTON TO SUPPRESS THE EVIDENCE OBTAINED THROUGH AN UNCONSTITUTIONAL SEARCH OF THE LOCKED TRUNK OF HIS VEHICLE."

{¶ 23} II. "THE TRIAL COURT ERRED IN OVERRULING MR. FREEMAN'S MOTION TO DISMISS ON GROUNDS OF VIOLATING HIS RIGHT TO A SPEEDY TRIAL."

{¶ 24} III. "THE TRIAL COURT ERRED IN DENYING MR. FREEMAN'S PRESENTENCE REQUEST TO WITHDRAW HIS PLEA."

{¶ 25} Appellant argues in his first assignment of error that the trial court erred in denying his motion to suppress evidence obtained pursuant to the inventory search of his vehicle. Specifically, appellant argues that the search of the locked trunk of the vehicle,

accessed by means of a trunk release button located in the unlocked glove box of the car, exceeded the scope of the Toledo Police Department Standard Operating Guidelines and, thus, was invalid.

{¶ 26} The relevant guidelines, effective as of November 1, 2002, provide as follows:

{¶ 27} "4.3 PROPERTY IN LOCKED COMPARTMENTS AND CLOSED CONTAINERS The towing officer shall inventory all locked compartments within the towed vehicle if keys to said compartments are readily available.

{¶ 28} "4.3.1 If keys are not available, the locked compartment shall be noted on the VEHICLE TOW REPORT and not forced open as part of a normal inventory."

{¶ 29} Regarding the established routine for conducting an inventory search of a car, Toledo Police Officer Larry Emery testified:

{¶ 30} "We start, usually, with the compartment, passenger compartment, start in there, do a thorough inventory search in there. And then, if the trunk is accessible, we'll go in there."

{¶ 31} Discussing the established routine for searching glove compartments, in particular, Officer Emery stated: "If the keys are with the vehicle, yes, we would probably go into the glove box. If the keys are not with the vehicle, no, I can't force it open."

{¶ 32} Inventory searches constitute a well-defined exception to the warrant requirement of the Fourth Amendment; they involve administrative procedures conducted

by law enforcement officials and are intended to: "(1) protect an individual's property while it is in police custody, (2) protect police against claims of lost, stolen or vandalized property, and (3) protect police from dangerous instrumentalities." *State v. Mesa* (1999), 87 Ohio St.3d 105, 108-109. "Because inventory searches are administrative caretaking functions unrelated to criminal investigations, the policies underlying the Fourth Amendment warrant requirement, including the standard of probable cause, are not implicated [citations omitted][;] [r]ather, the validity of an inventory search of a lawfully impounded vehicle is judged by the Fourth Amendment's standard of reasonableness." Id., at 109.

{¶ 33} The Supreme Court of Ohio, in *State v. Hathman* (1992), 65 Ohio St.3d 403, held that "[t]o satisfy the requirements of the Fourth Amendment to the United States Constitution, an inventory search of a lawfully impounded vehicle must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine." Id. at paragraph one of the syllabus.

{¶ 34} We note, in conducting this analysis, that the trunk is among the areas of an automobile that are normally part of an inventory search. Id. at 408. We additionally note that the search of a trunk of a lawfully impounded vehicle pursuant to standard department procedure is reasonable and satisfies the requirement of the Fourth Amendment. *State v. Robinson* (1979), 58 Ohio St.2d 478. Thus, the inventory search of appellant's trunk, so long as it was administered in good faith and in accordance with reasonable police procedure(s) or established routine, would not contravene the Fourth

Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution. See *State v. Mesa*, supra, at 110.

{¶ 35} In the instant case, appellant argues that the police failed to comply with their own standardized policy when they accessed the trunk of his car by means of a trunk release button located in the glove box of the car. We disagree.

{¶ 36} Considered by themselves (in pari materia), or together with the testimony of Officer Emery, Standard Operating Guidelines 4.3 and 4.3.1 are properly construed simply as prohibiting the forcing open of locked compartments. We reject as unreasonable appellant's suggestion that the guidelines forbid access without keys to a locked compartment that is otherwise accessible by way of a trunk release button.

{¶ 37} The inventory search of appellant's lawfully impounded vehicle was conducted in good faith and in accordance with reasonable police procedures, policy and established routine. See *State v. Mesa*, supra. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 38} Appellant argues in his second assignment of error that the trial court erred in overruling his motion to dismiss on grounds of violating his right to a speedy trial. Ohio's speedy trial statute, R.C. 2945.71, requires that felony charges be brought to trial within 270 days after a person's arrest. R.C. 2945.71(C)(2). The statute also provides that:

{¶ 39} "(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of

which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of the offense charged, as determined under divisions (A), (B), and (C) of this section.

{¶ 40} "(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. * * *"

{¶ 41} Appellant in this appeal challenges the trial court's treatment of the triple-count provision of R.C. 2945.71(E). The Ohio Supreme Court has held that the triple-count provision in the speedy trial statute applies "only to those defendants held in jail in lieu of bail solely on the pending charge." *State v. MacDonald* (1976), 48 Ohio St.2d 66, paragraph one of the syllabus. In a more recent decision, the court has clarified that "[w]hen multiple charges arise from a criminal incident and share a common litigation history, pretrial incarceration on the multiple charges constitutes incarceration on the 'pending charge' for purposes of the triple count provision of the speedy trial statute * * *." See *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, paragraph one of the syllabus.

{¶ 42} In a related ruling, in *State v. Adams* (1989), 43 Ohio St.3d 67, the court held that "when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." Id. at 68. An exception to the

speedy-trial timetable for subsequent indictments was recognized in *State v. Baker* (1997), 78 Ohio St.3d 108, wherein the court stated:

{¶ 43} "When additional criminal charges arise from facts distinct from those supporting an original charge, or the state was unaware of such facts at that time, the state is not required to bring the accused to trial within the same statutory period as the original charge under R.C. 2945.71 et seq." Id. at 112.

{¶ 44} In the instant case, we find that the charges of burglary, which arose out of the June 6, 2008 call to police and were based on eyewitness testimony, were separate and independent from the subsequently-filed drug possession charges that were brought after laboratory testing confirmed that the suitcase in appellant's car contained crack cocaine. Because the charges contained in the two indictments clearly do not share a "common litigation history," the triple-count provision in the speedy trial statute does not apply in this case pursuant to *State v. Parker*, supra.

{¶ 45} In addition, because the drug possession charges were based on additional facts that were revealed through further investigation, rather than on facts that were known by the state at the time of the initial indictment, *State v. Adams* is likewise inapplicable in this case. *State v. Adams*, supra. Instead, when the drug possession charges were brought, a new speedy trial time began to run. See *State v. Baker*, supra; see, also, *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658.

{¶ 46} For all of the foregoing reasons, appellant's second assignment of error is found not well-taken.

{¶ 47} Appellant argues in his third assignment of error that the trial court erred in denying his presentence request to withdraw his plea. As indicated above, appellant stated at his sentencing hearing that he was not ready to be sentenced and that he thought he "should" withdraw his plea and proceed to trial. The statement was phrased in the subjunctive and could reasonably be interpreted as a mere expression of anger at the trial court's refusal to appoint yet another attorney to represent him. The record thus fails to indicate with any degree of certainty that appellant was in fact making a request to withdraw his plea.

{¶ 48} Even if appellant had made a formal motion to withdraw his plea, the trial court would not have erred in disregarding the request. Appellant was represented by counsel at sentencing, and his counsel never made a verbal or written motion to withdraw the plea.

{¶ 49} Ohio law is clear that a defendant is not entitled to hybrid representation by both the defendant himself and an attorney. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, ¶ 10; *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 31-33; *State v. Amison* (June 10, 1988), 6th Dist. No. L-87-298. Therefore, when a defendant who is represented by counsel files a pro se motion to withdraw a plea prior to sentencing, that motion is properly denied or disregarded by the trial court. See *State v. Greenleaf*, 11th Dist. No. 2005-P-0017, 2006-Ohio-4317, ¶ 66-71.

{¶ 50} Finally, even if appellant's statements were construed as a formal motion to withdraw his plea that was properly before the court, the trial court did not commit

reversible error in refusing to grant the motion. First, oral arguments at a sentencing hearing on a motion to withdraw a plea may constitute a full and fair hearing on the motion to withdraw. *State v. Burnett*, 2d Dist. No. 20496, 2005-Ohio-1036, ¶ 20. And second, appellant's only stated ground for withdrawing his plea was dissatisfaction with his third appointed counsel.

{¶ 51} In reviewing the denial of a motion to withdraw a plea made before sentencing, this court considers a number of factors: "(1) whether the defendant was represented by highly competent counsel; (2) whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea; (3) whether the trial court conducted a full and impartial hearing on the motion to withdraw the plea; (4) whether the trial court gave full and fair consideration to the motion; (5) whether the motion was made within a reasonable time; (6) whether the motion set out specific reasons for the withdrawal; (7) whether the defendant understood the nature of the charges and the possible penalties; (8) whether the defendant was possibly not guilty of the charges or had a complete defense to the charges; and (9) whether the state would have been prejudiced by the withdrawal." *State v. Bohne*, 6th Dist. No. E-07-052, 2008-Ohio-2986, ¶ 58, quoting *State v. McIntosh* (2005), 160 Ohio App.3d 544, 547.

{¶ 52} Application of these factors compels the conclusion that any "motion" to withdraw a plea was properly denied. Appellant was represented by counsel at the plea hearing, and there is nothing to indicate that his representation was deficient. A complete Crim.R. 11 hearing was provided before the plea was entered, with appellant clearly

demonstrating his understanding of the charges and penalties, as well as his ability to clarify any potential questions he might have. The "motion" to withdraw the plea was made at the last possible moment, minutes before sentencing, and, construed in the light most favorable to appellant, stated only that appellant was dissatisfied with his counsel's inability to achieve his release for his father's funeral. Finally, there was no suggestion that appellant was not guilty or had a complete defense. Under the circumstances, the vast majority of the applicable factors weighed in favor of denying appellant's "motion" to withdraw his plea. In the final analysis, any error was not prejudicial to appellant. Accordingly, appellant's third assignment of error is therefore found not well-taken.

{¶ 53} For the foregoing reasons, the judgment of the Lucas 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. _____
CONCUR. _____
JUDGE

Keila D. Cosme, J., dissents.

COSME, J., dissenting.

{¶ 54} I respectfully dissent from the majority's disposition of appellant's second assignment of error because the drug possession charges arose from the same transaction as the burglary charge, and the state had knowledge of sufficient facts to indict appellant at the time of his arrest. Consequently, in my view, the delay in bringing the drug possession charge violated appellant's speedy-trial rights.

{¶ 55} Both the federal and state constitutions afford a criminal defendant the right to a speedy trial. Section 10, Article I, Ohio Constitution. In Ohio, that constitutional right is expressed in R.C. 2945.71, which required appellant to be tried within 270 days of his initial arrest. R.C. 2945.71(C)(2). The recurring question whether later criminal

charges relate back to prior events for speedy-trial purposes has resulted in a complex, but well-developed body of law. Several principles guide the analysis.

{¶ 56} Under the *Adams* rule, if the facts supporting the later charge were known by the prosecution and arose from the same transaction that gave rise to the original charge, the speedy-trial clock for the later charge starts at the time of the initial arrest. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. The rule in *Adams* generally applies when the only new evidence is a routine lab result confirming the nature of the substance seized. See *State v. Cooney* (1997), 124 Ohio App.3d 570; *State v. Lloyd*, 8th Dist. Nos. 86501, 86502, 2006-Ohio-1356, ¶ 28-29; *State v. Rukowski*, 8th Dist. No. 86289, 2006-Ohio-1087, ¶ 26.

{¶ 57} The police are permitted to establish probable cause for the seizure of evidence, relying only on their specialized knowledge, training, and experience to identify items as contraband where the incriminating nature is "immediately apparent." *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 307. See, also, *State v. Jackson*, 8th Dist. No. 86302, 2006-Ohio-2210 (probable cause to seize baggie of marijuana because officer recognized the contents of the bag from his prior police experience); *State v. Coleman* (June 21, 2002), 11th Dist. No. 2001-A-0012 (probable cause established by "crack cocaine" in baggie, identified by officer as immediately apparent as contraband); *State v. Strothers* (Dec. 22, 2000), 2d Dist. No. 18322 (probable cause established by baggie with crack cocaine based on police officer's testimony that he, "had been involved with perhaps thousands of drug arrests" and that "crack cocaine is commonly carried in

baggies."). Therefore, when police seize substances which are immediately apparent and identified as "crack cocaine," the lab confirmation of the police identification is merely a routine test that does not constitute new evidence that was unavailable at the time of arrest.

{¶ 58} If the facts supporting the later charge were either unknown, or arose from a different transaction than the original basis for arrest, then, under *Baker*, the later charge does not relate back to the earlier charge. *State v. Baker* (1997), 78 Ohio St.3d 108, 112. The *Baker* rule might apply to lab testing where the particular substance is exotic, uncommon, or unfamiliar to police, and the confirmation of the identity of the seized substance is required prior to charging the defendant. See *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658 (test results from analysis of khat, an exotic East African plant used as a psychoactive stimulant, was evidence not available at the time of arrest where seized substance was not easily identifiable by police and determination of the drug's exact organic makeup was critical to determining level of felony).

{¶ 59} The Supreme Court of Ohio often cautions that, "Ohio's speedy-trial statutes are mandatory" and "the state must strictly comply with their provisions." *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, ¶ 15; *State v. Hughes* (1999), 86 Ohio St.3d 424, 427. Each of these principles was reaffirmed in the court's most recent decision on the topic. See *Parker*, supra.

{¶ 60} In *Parker*, the Supreme Court of Ohio held that, "when multiple charges arise from a criminal incident and share a common litigation history, pretrial

incarceration on the multiple charges constitutes incarceration on the 'pending charge' for the purposes of the triple-count provision of the speedy-trial statute, R.C. 2945.71(E)." *Parker*, supra, at paragraph one of the syllabus. *Parker* is not limited to charges brought at the same time. Id. at ¶ 20. Furthermore, in rejecting the state's argument, the *Parker* court was critical of an outcome that enabled the state to manipulate application of the statute. Id. at ¶ 24.

{¶ 61} In this case, at the time of the first indictment, the police knew all of the facts, and had sufficient evidence to charge appellant with drug possession. The "suspected crack cocaine," as the police referred to it, was discovered at the time of appellant's arrest when the woman who reported the burglary identified appellant as the driver of the wrecked vehicle where the drugs were found. Crack cocaine is hardly an exotic or uncommon drug that is unknown to police. Indeed, law enforcement officers use a variety of field techniques in developing probable cause to seize the material for testing.

{¶ 62} And the fact that the Toledo Police Department had sufficient probable cause to seize the drugs in this case only reinforces the conclusion that the state had knowledge of sufficient facts to charge appellant with drug possession at the time of his arrest for burglary. The state does not need proof beyond a reasonable doubt to indict. Thus, the routine lab test confirming that the material removed from appellant's car was crack cocaine does not amount to "new or additional evidence" triggering application of

Baker. The only question remaining is whether the drug possession charge was subject to the triple-count provision in R.C. 2945.71(E).

{¶ 63} Under the statute, each day of incarceration on a pending charge is counted as three for purposes of the speedy-trial time limits. R.C. 2945.71(E). The facts of this case giving rise to the drug possession charge arose, and were known, at the time of appellant's arrest for burglary. Under *Adams*, the drug possession charge relates back to the burglary charge. And these multiple charges stemmed from a single transaction. They were the "pending charge" on which appellant's incarceration was predicated under R.C. 2945.71(E). To hold otherwise would allow the state to manipulate application of the speedy-trial statute. Although it possessed enough facts to indict appellant for drug possession when he was indicted and incarcerated for burglary, the state effectively extended the limits of the speedy trial statute simply by delaying the second charge. That is hardly strict compliance with the mandatory provisions of the statute.

{¶ 64} Accordingly, I would hold that the drug possession charge must be dismissed for violating appellant's speedy trial rights.