

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-818
 : (C.P.C. No. 08CR-11-8478)
 Marcus J. Carmon, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on April 10, 2012

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Marcus J. Carmon, pro se.

APPEAL from Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Marcus J. Carmon, appeals pro se from the judgment of the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant was arrested on November 21, 2008, and on November 28, 2008, appellant was indicted on two counts of kidnapping, one count of aggravated burglary, two counts of aggravated robbery, four counts of robbery, and one count of having a weapon while under disability ("WUD"). All of the counts, with the exception of that for

WUD, contained a firearm specification. On December 14, 2009, appellant entered guilty pleas to two counts of robbery, one with a firearm specification. The trial court proceeded immediately to sentencing and imposed the jointly recommended aggregate sentence of ten years.¹ A judgment entry reflecting the same was filed on December 17, 2009.

{¶ 3} On August 9, 2011, over 20 months after his sentencing, appellant filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. The state opposed the motion, and on September 16, 2011, the trial court denied the motion to withdraw guilty pleas.

{¶ 4} This appeal followed and appellant brings the following assignment of error for our review:

The Appellant Was Denied The Effective Assistance Of Counsel When His Counsel Failed To Dismiss The Indictment Based Upon A Violation Of His Speedy Trial Rights.

{¶ 5} Motions to withdraw pleas of guilty are governed by Crim.R. 32.1, which provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Here, the motion to withdraw guilty plea was made after sentencing, therefore, the issue is whether granting the motion is necessary to correct a manifest injustice.

{¶ 6} "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. " '[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.' " *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶ 7, quoting *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

¹ Specifically, appellant was sentenced to consecutive four-year, five-year, and one-year terms of incarceration.

{¶ 7} Additionally, a trial court is not automatically required to hold a hearing on a post-sentence motion to withdraw a plea of guilty. A hearing must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Williams* at ¶ 6, citing *State v. Kent*, 10th Dist. No. 03AP-722, 2004-Ohio-2129, ¶ 8.

{¶ 8} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty and the decision whether to hold a hearing on the motion are subject to review for abuse of discretion. *Smith*. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} In deciding a Crim.R. 32.1 motion, the good faith, weight, and credibility of a moving party's assertions are a matter for resolution by the trial court. *Smith*. Thus, the trial court has great discretion in assessing the credibility of affidavits used to support a Crim.R. 32.1 motion. *State v. Roberts*, 8th Dist. No. 93439, 2010-Ohio-1436. We note that appellant's motion to withdraw his guilty pleas was filed over 20 months after his sentencing. Though not dispositive on its own, "[a]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith* at paragraph three of the syllabus.

{¶ 10} Appellant contends he should be permitted to withdraw his guilty pleas because his trial counsel was ineffective. Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813 (10th Dist.). A defendant seeking to withdraw a guilty plea based on ineffective assistance of counsel must show first that counsel's performance was deficient, and second that there is a reasonable probability that, but for counsel's errors, the defendant would not have agreed to plead guilty. *State v. Xie*, 62 Ohio St.3d 521 (1992).

{¶ 11} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The appellant must overcome the

strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 12} Specifically, appellant contends his counsel was ineffective for failing to assert a claim that his statutory speedy trial rights were violated. When a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success. *State v. Barbour*, 10th Dist. No. 07AP-841 (May 6, 2008), citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577 (4th Dist.).

{¶ 13} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. These speedy trial rights are essentially equivalent. *State v. Butler*, 19 Ohio St.2d 55, 57 (1969). Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55 (1996); *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 10.

{¶ 14} Pursuant to R.C. 2945.71(C)(2), a person against whom a felony charge is pending must be brought to trial within 270 days of arrest. When computing the time for purposes of applying R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail solely on the pending charge shall be counted as three days, meaning the accused must be tried within 90 days if he or she is incarcerated. R.C. 2945.71(E); *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658, ¶ 19. In the event a defendant is not brought to trial within the statutory speedy trial time frame, R.C. 2945.73(B) provides the remedy: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." However, the time period in which to bring a defendant to trial may be extended for any of the reasons enumerated in R.C. 2945.72.

{¶ 15} Here, 388 days elapsed from appellant's date of arrest, November 21, 2008, until appellant entered his guilty pleas on December 14, 2009. Upon demonstrating that more than 270 days elapsed before trial, a defendant establishes a prima facie case for dismissal based on a speedy trial violation. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9. Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended. *Id.*; *State v. Butcher*, 27 Ohio St.3d 28, 31 (1986). Hence, the proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶ 32, citing *State v. DePue*, 96 Ohio App.3d 513, 516 (4th Dist.1994). In order to meet its burden, the state argues that the speedy trial time was tolled as a result of multiple continuances that delayed appellant's trial. We agree.

{¶ 16} Pursuant to R.C. 2945.72(H), the time within which an accused must be brought to trial is extended by "[t]he 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." The trial court granted continuances upon the motion of appellant or the joint motions of the parties from January 21 to December 14, 2009. In sum, appellant's trial dates were continued either at his request or by the request of the parties for a total of 327 days. These continuances toll the speedy trial time limits. R.C. 2945.72(H) (continuances on accused's own motion toll time); *State v. Dillon*, 10th Dist. No. 05AP-679, 2006-Ohio-3312, ¶ 35 (continuances granted upon joint motions toll time); *State v. Brown*, 7th Dist. No. 03-MA-32, 2005-Ohio-2939, ¶ 41-44 (continuances granted on accused's own motion or by joint motions toll time). Thus, for statutory speedy trial purposes, appellant was brought to trial in 61 days—well within the 90-day triple-count provision of R.C. 2945.71's time limitation.

{¶ 17} On appeal, appellant argues time should not be tolled during the continued periods because he did not consent to the continuances. Specifically, appellant challenges four continuance entries, namely those of January 21, February 9, September 22, and November 10, 2009.

{¶ 18} The January 21, 2009 entry continues the matter for 19 days and states the continuance is being requested by the parties because the "assigned prosecutor [is] unavailable this week." Although not signed by appellant, the entry contains the signature of appellant's counsel. Appellant provided a partial transcript of the proceedings held on January 21, 2009, and the transcript reflects the assigned prosecutor was unavailable due to a prior commitment with the Supreme Court of Ohio. Appellant's counsel stated that she had spoken with the assigned prosecutor the previous week when she obtained discovery and explained to the court that she told the prosecutor she "would have been asking for a continuance as well." (Tr. 3.) Appellant addressed the court on his own behalf and stated he would not agree to a continuance unless he was given a recognizance bond. The trial court stated it was inclined to grant the request for a continuance, and the trial court informed appellant that he could cross out the time-waiver language on the entry if he did not agree with it.

{¶ 19} Construing this continuance as one requested solely by the state, time would be tolled because a continuance granted on the state's motion will toll the running of the speedy trial time " 'if the continuance is reasonable and necessary under the circumstances of the case.' " *State v. Brime*, 10th Dist. No. 09AP-491, 2009-Ohio-6572, ¶ 14, citing *State v. Williamson*, 5th Dist. No. 2005 CA 00046, 2005-Ohio-6198, ¶ 32. There is nothing in the record to indicate this 19-day continuance was either unreasonable or unnecessary. Moreover, the record reflects that had the state not requested a continuance, appellant's counsel would have requested a continuance in order to engage in trial preparation because she had just received discovery. Further, we find no merit to appellant's argument that this continuance should not toll the time period because he did not consent to the same. It is well-established that a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections. *State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶ 37, citing *State v. McBreen*, 54 Ohio St.2d 315 (1978). Upon review, we conclude this continuance entry tolled the time for speedy trial purposes.

{¶ 20} Next, appellant challenges the continuance entry of February 9, 2009. This entry, granting a 36-day continuance at the request of the parties, indicates the reason for the continuance was "court in trial, further investigation." Hence, it appears the

continuance was being sought, at least in part, because appellant's counsel was still engaged in trial preparation and investigation. Again, appellant argues that although his counsel signed the continuance entry, he did not consent to it. As stated previously, appellant was bound by his counsel's actions of waiving his speedy trial rights even if done over appellant's objections. *McQueen* at ¶ 37; *McBreen* at syllabus (a defendant's right to be brought to trial within the time limits expressed in R. C. 2945.71 may be waived by his counsel for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent).

{¶ 21} With respect to the September 22, 2009 continuance entry granting a 48-day continuance upon the motion of the "court/parties," said entry indicates the court was engaged in another trial. Appellant argues his signature that appears on the document is a forgery and that his attorney's signature is "suspect" because the attorney registration number does not appear under his counsel's purported signature.

{¶ 22} Initially, we note that there is no evidence in the record supporting appellant's claim that his attorney did not sign this continuance entry and did not agree to this continuance. Rather, it appears to be pure speculation based on the absence of the attorney registration number. In essence, appellant is arguing his counsel was ineffective for failing to file a motion to dismiss on speedy trial grounds based on a continuance entry upon which the attorney's signature was allegedly forged. Proof of ineffective assistance of counsel must consist of more than vague speculation. *State v. Giles*, 10th Dist. No. 08AP-941, 2009-Ohio-2661, ¶ 19, citing *State v. Otte*, 74 Ohio St.3d 555, 565 (1996); *State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136. Because such vague speculation, like that currently presented by appellant, is insufficient to establish ineffective assistance of counsel, we find appellant's arguments unpersuasive. Secondly, accepting the signature of appellant's counsel, the record reflects that counsel agreed to the continuance and waived appellant's speedy trial rights. As already stated, a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections. *McQueen*; *McBreen*.

{¶ 23} Moreover, we conclude the continuance was reasonable as it was based on the fact that the trial court was already engaged in trial. The issue of whether a continuance is reasonable must be established on a case-by-case basis, and is not subject

to any per se rule. *McQueen* at ¶ 45, citing *State v. Saffell*, 35 Ohio St.3d 90 (1988). A continuance based on the trial court's engagement in another trial is generally viewed as reasonable. *McQueen* at ¶ 45, citing *State v. Bounds*, 5th Dist. No. 2009-CA-0063, 2009-Ohio-4767. However, in such cases, a continuance may be rendered unreasonable based on the length of the continuance. *McQueen*.

{¶ 24} The September 22, 2009 entry grants a 48-day continuance, and we cannot say the length of the continuance was so unreasonable as to require that we find the speedy trial period was not tolled during that time period. *McQueen* (41-day continuance where court already in trial not unreasonable); *State v. Clary*, 73 Ohio App.3d 42 (10th Dist.1991) (56-day continuance not unreasonable where court was engaged in trial); *State v. Judd*, 10th Dist. No. 96APA03-330 (Sept. 19, 1996) (75-day continuance followed by a 36-day continuance reasonable and necessary under R.C. 2941.401, where the record reflects the court was already engaged in another trial).

{¶ 25} Lastly, appellant challenges the November 10, 2009 continuance entry signed by appellant's counsel that granted a 20-day continuance upon the motion of the parties because the prosecutors were in trial. The entry contains the signature of appellant, and next to appellant's signature appear the words "per authority Gary Phillips." On appeal, appellant argues he did not give his counsel's investigator, Mr. Phillips, authority to sign this document his behalf.

{¶ 26} Initially, we note the record is devoid of any evidence in the record to support appellant's blanket assertion made in his appellate brief that he did not give Mr. Phillips the authority to sign the entry on his behalf. Additionally, as noted previously, a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections. *McQueen* at ¶ 37; *McBreen*. Thus, even if the continuance entry did not contain appellant's signature or appellant indicated on the entry that he did not agree with the continuance, this record does not present a circumstance that would require us to stray from the well-established precedent that a defendant is bound by his counsel's actions in waiving speedy trial rights. Moreover, it has been found that a continuance granted because a prosecutor is in trial "states a valid reason" for continuing a trial date. *Brime* at ¶ 14, citing *Miller* at ¶ 12.

{¶ 27} In the case sub judice, the record demonstrates 388 days elapsed from appellant's date of arrest, November 21, 2008, until he entered guilty pleas on December 14, 2009. Continuances sufficiently tolled 327 days, thus for speedy trial purposes, appellant was brought to trial in 61 days. This calculation is based only on continuances and excludes other tolling events appearing in the record, i.e., a discovery request by defendant's initial counsel on December 9, 2008, and a discovery request made by appellant's newly appointed counsel on February 27, 2009. Under R.C. 2945.72(E), a defendant's discovery request tolls speedy trial time. *State v. Vrapic*, 10th Dist. No. 11AP-700, 2012-Ohio-1018, ¶ 7, citing *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, ¶ 26. In conclusion, we find appellant was brought to trial well within the 90-day time provision of R.C. 2945.71. Accordingly, we find appellant has not shown there was a reasonable probability that a motion to dismiss for a violation of his statutory speedy trial rights would have been successful, and, therefore, he has failed to demonstrate that trial counsel was ineffective for failing to file such a motion and that he should be entitled to withdraw his guilty pleas on this basis.

{¶ 28} For the foregoing reasons, we conclude the trial court did not abuse its discretion in concluding that appellant's motion to withdraw his pleas of guilty did not sufficiently demonstrate the existence of any manifest injustice, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
