[Cite as *State v. Childs*, 2010-Ohio-1814.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-076
	:	O P I N I O N
- vs -		4/26/2010
	:	
NATHAN D. CHILDS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-07-1297

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, OH 45011, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Nathan D. Childs, appeals from his conviction and sentence in the Butler County Court of Common Pleas for attempted aggravated burglary and robbery, following his guilty plea to those charges.

{¶2} In the early morning hours of July 12, 2008, 82-year-old Juanita Reffitt was awakened by the sound of a loud crash at her home on Roosevelt Avenue in

Middletown, Ohio. When she went to investigate, she was confronted by two men who told her, "Just give us the money and we won't hurt you." Reffitt retrieved a bank envelope from her bedroom containing $450 and gave it to the men who then fled. After the men left, Reffitt discovered that her riding lawnmower and push lawnmower were missing from her garage. She called the police, who broadcast a description of the men. Shortly thereafter, a police officer stopped a vehicle for speeding and saw that the two men inside the vehicle matched the description of the two men who had just burglarized Reffitt's home and robbed her. The men were arrested and transported to the police station for further questioning. One of the men arrested was Childs, who, after initially denying it, admitted taking part in the crimes.

{¶3} Childs was indicted by the Butler County Grand Jury on two counts of aggravated burglary, both first-degree felonies, in violation of R.C. 2911.11(A)(1) (Counts One and Four); two counts of robbery, both second-degree felonies, in violation of R.C. 2911.02(A)(2) (Counts Two and Five); and one count of theft, a fifth-degree felony, in violation of R.C. 2913.02(A)(1) ~ 2913.71(A) (Count Three). At Childs' arraignment on the charges, the trial judge informed the parties he would have to recuse himself from the case because he was a friend of Childs' father and his uncle. Child's counsel stated, "for the record, my client has signed a limited time waiver." Immediately following arraignment, a time waiver of unlimited duration, signed by Childs and his counsel, was entered into the record.

{¶4} On December 17, 2008, Childs, though represented by counsel, filed a pro se "Motion to Dismiss with Request for Evidentiary Hearing," asking that the charges against him be dismissed because his speedy trial rights had been violated.

Before the trial court ruled on the motion, Childs agreed to plead guilty to Count Four, which was amended to a charge of attempted aggravated burglary, a second-degree felony, and Count Five (robbery) in exchange for the state's agreement to dismiss the remaining charges against him. The trial court accepted Childs' guilty pleas and found him guilty of amended Count Four and Count Five, after conducting a thorough Crim.R. 11 colloquy with him.

{¶5} Immediately prior to the start of his sentencing hearing, Childs moved to withdraw his guilty pleas. The trial court overruled the motion and sentenced Childs to an aggregate, six-year prison term for his attempted aggravated burglary and robbery convictions.

{¶6} Childs now appeals, raising four assignments of error:

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT ACCEPTED GUILTY PLEAS THAT WERE NOT KNOWING, NTELLIGENT [sic] AND VOLUNTARY."

{¶9} Childs argues the trial court erred by accepting his guilty pleas because he did not make them knowingly, intelligently and voluntarily since the trial court failed to inform him that by entering his guilty pleas, he was waiving his right to appeal his conviction on speedy trial grounds. We disagree with this argument.

{¶10} Crim.R. 11(C)(2) provides:

{¶11} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first

addressing the defendant personally and doing all of the following:

{¶12} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶13} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶14} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶15} While a trial court must *strictly* comply with its duty to inform a defendant and determine that he understands that by pleading guilty or no contest, he is waiving the constitutional rights listed in Crim.R. 11(C)(2)(c), the court need only *substantially* comply with its duty to inform the defendant of, and determine that he understands, the nonconstitutional rights listed in Crim.R. 11(C)(2), such as the maximum possible penalty he is facing and the effect of his guilty or no contest plea. See *State v. Clark,* 119 Ohio St.3d 239, 2008-Ohio-3748, ¶31.

{¶16} Relying primarily on this court's decision in *State v. Ryerson,* Butler App. No. CA2003-06-153, 2004-Ohio-3353, Childs argues his guilty pleas were not made knowingly, intelligently or voluntarily because the trial court failed to inform him

that, by pleading guilty, he was waiving his right to appeal his conviction on speedy trial grounds. However, Childs' reliance on *Ryerson* is misplaced.

{¶17} In *Ryerson,* a defendant charged with attempted unlawful sexual conduct with a minor and importuning filed numerous pretrial motions seeking to have the charges dismissed on various constitutional and statutory grounds. Before the trial court ruled on the motions, the defendant agreed to plead no contest to the charge of importuning in exchange for the state's agreement to dismiss the charge of attempted sexual conduct with a minor. The trial court accepted defendant's no contest plea and found him guilty of importuning after agreeing with defense counsel's contention that when a trial court fails to rule on a pretrial motion, the court is deemed to have overruled it, and therefore the defendant is permitted to challenge the implicit denial of the motion on appeal under Crim.R. 12(I). See *Ryerson,* 2004-Ohio-3353 at ¶6-14.

{¶18} When the defendant appealed his conviction to this court and raised the arguments he had raised in his pretrial motions, the state argued defendant had waived the arguments by pleading no contest before the trial court ruled on the pretrial motions. The *Ryerson* court rejected the state's argument and found that the trial court committed plain error in accepting the defendant's no contest plea because the plea was "not made knowingly, intelligently, and voluntarily" since he "was not fully informed of the consequences of his no contest plea *under the facts and circumstances of this case*." (Emphasis added.) Id. at ¶57. In explaining the rationale for its decision, the *Ryerson* court noted:

{¶19} "Where a defendant tenders a no contest plea to a trial court before that court has had an opportunity to rule on any pretrial motions the defendant may have

brought, the trial court should inform the defendant that such motions will be treated as if they had never been raised if the defendant insists on entering the plea without his motions being ruled upon. The trial court need not inform the defendant that by its failure to rule on them, the motions will be deemed to have been overruled, thereby allowing the issues raised therein to be appealed pursuant to Crim.R. 12(I). If we were to hold otherwise, then trial courts and defendants alike would be able to send all major constitutional, statutory or evidentiary issues straight to the court of appeals, without having to address them at the trial court level. Crim.R. 12 and the general rule that pretrial motions not ruled upon will ordinarily be presumed to have been overruled, were never meant to be used in this manner." Id. at ¶55.

{¶20} *Ryerson* is readily distinguishable from this case, as that case involved a no contest plea, which does not preclude a defendant from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion, see Crim.R. 12(I), whereas this case involved a guilty plea, which generally precludes a defendant from challenging a trial court's denial of his pretrial motions, including a motion to dismiss on speedy trial grounds, see, e.g., *State v. Kelly* (1991), 57 Ohio St.3d 127, paragraph one of the syllabus.

{¶21} Also, *Ryerson* expressly limited its finding that the defendant was not fully informed of the consequences of his no contest plea to "the facts and circumstances" present in that case. Id. at ¶57. Among other things, the defense counsel in *Ryerson* stated during the change of plea hearing, "We don't anticipate there being an appeal, but I cannot waive his rights to that under these circumstances in accepting a no contest plea." Thus the defendant in *Ryerson,* through his counsel, made it clear he was conditioning his plea on the understanding

that he would be able to appeal the implicit denial of his pretrial motions. In this case, neither Childs nor his counsel indicated at the change of plea hearing that Childs was pleading guilty only on the condition that he would be permitted to appeal his convictions on speedy trial grounds.

{¶22} Childs also argues his guilty pleas were not made voluntarily, knowingly and intelligently because his counsel provided him with inaccurate legal advice by advising him that he would be able to withdraw his guilty pleas if he wished, but "not to say nothing [sic] to [the trial judge] about it." Childs also points out that his "[t]rial counsel made no effort to deny or refute these rather serious allegations[.]"

{¶23} However, Childs did not make these statements at the change of plea hearing; instead, he made them when he moved to withdraw his guilty pleas immediately prior to his sentencing. He also omits mentioning that when his counsel advised him, "Don't talk[,]" at the hearing held on his oral motion to withdraw his guilty pleas, Childs responded by telling him, "Brother, don't say nothing to me, please." It is apparent that the trial court did not believe Childs' allegations that his counsel advised him that he would be allowed to withdraw his plea, but not to say anything to the trial judge about it, and the court's decision not to believe Childs' allegations was amply supported by the record.

{¶24} Therefore, Childs' first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FAILING TO CONDUCT A FULL HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEAS AND IN DENYING SAID MOTION."

{¶27} Childs argues the trial court erred by failing to conduct a "full" or

evidentiary hearing on his motion to withdraw his guilty pleas and by denying said motion. We disagree with both arguments.

{¶28} "Generally, a motion to withdraw a guilty plea, filed before sentencing, 'should be freely and liberally granted.'" *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Nevertheless, "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing." Id. at paragraph one of the syllabus. "A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." Id. The decision to grant or deny a presentence motion to withdraw a guilty plea is within the trial court's sound discretion, id., and the court's decision will not be overturned absent an abuse thereof, i.e., the decision is arbitrary, unconscionable or unreasonable. Id. at 527.

{¶29} In determining whether to grant a motion to withdraw a guilty plea, a trial court should consider "whether withdrawal of the plea will prejudice the prosecution, the timing of the motion, the reasons given for the withdrawal, the defendant's understanding of the charges and penalties, and the existence of a meritorious defense." *State v. Metcalf,* Butler App. No. 2002-12-299, 2003-Ohio-6782, ¶11.

{¶30} The trial court held a hearing on Childs' oral motion to withdraw his guilty pleas and permitted both Childs and his defense counsel to make arguments in support of the motion. Childs was represented by competent counsel in this case and voluntarily waived his right to a trial after the trial court conducted a thorough Crim.R. 11 hearing, at which the court determined that Childs understood the charges against him and the penalties he was facing.

{¶31} Childs did not move to withdraw his guilty pleas until immediately before

sentencing. He claims he was unable to raise the motion sooner because he could not reach his counsel. However, the record shows that Childs' counsel was in contact with both Childs and Childs' girlfriend before the sentencing hearing and Childs had more than one month prior to his sentencing to seek to withdraw his guilty pleas. Childs argues there was no evidence that the prosecution would have been prejudiced by allowing him to withdraw his plea, but the record shows that his victim was 82 years old at the time of the offense.

{¶32} Childs did not protest his innocence when he requested that he be allowed to withdraw his guilty pleas. Nevertheless, he argues he had a meritorious defense to present, namely, that his speedy trial rights were violated. We disagree.

{¶33} "The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. The individual states are obligated under the Fourteenth Amendment to afford a person accused of a crime such a right. *Klopfer v. North Carolina* (1967), 386 U.S. 213, 222-223, 87 S.Ct. 988, 993, 18 L.Ed.2d 1, 7-8. However, the states are free to prescribe a reasonable period of time to conform to constitutional requirements. *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 113. In response to this constitutional mandate, Ohio has enacted R.C. 2945.71 to 2945.73, which designate specific time requirements for the state to bring an accused to trial. Specifically, under R.C. 2945.71(C)(2), a person against whom a charge of felony is pending must be brought to trial within 270 days after his arrest." *State v. Baker*, 78 Ohio St.3d 108, 110, 1997-Ohio-229.

{¶34} Childs and his counsel executed and filed a written time waiver of unlimited duration that stated:

{¶35} "Now comes the undersigned, _____, and after fully consulting with my attorney and after discussing this matter in detail with him, and upon receiving his advise, I voluntarily state that I have been informed and told of my right to a speed [sic] trial, and that my trial must take place within a specific number of days as required by law. I understand among other things, if my trial does not take place within the time required by law, my attorney could file a motion to dismiss the charges against me and I would be free of those charges.

{¶36} "I also understand my speedy trial rights, and intelligently and voluntarily waive, or give-up those rights, I voluntarily waive and give-up all Constitutional and statutory time requirements (specifically pursuant to Ohio Revised Code Section 2945.71) for the purposes of my trial being scheduled. I have completely read this Time Waiver and understand its consequences and effects. I have been promised nothing and expect nothing for waiving time and executing this document. I have not been threatened, coerced, or pressured in any way whatsoever, to give up these speedy trial rights. I waive the right to a speedy trial, it being in my best interest."

{¶37} At the hearing held on his motion to withdraw his guilty pleas, Childs pointed out that his counsel had stated at the arraignment hearing that Childs had signed a "limited waiver." Childs asserted that his counsel told him the time waiver was needed to permit the case to be transferred from the original judge assigned to the case, who needed to recuse himself since he was friends with Childs' father and uncle, to another judge of the common pleas court. Childs' counsel corroborated Childs' assertion, stating he had told Childs the waiver "[w]as for the purpose to transfer it to this current court. I absolutely did tell my client that."

{¶38} However, Childs' counsel never informed the trial court that he intended for the time waiver signed by Childs and him to be only for a limited purpose, and the written waiver filed with the trial court was clearly for an unlimited duration. The Ohio Supreme Court had held that "[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." State v. McBreen (1978), 54 Ohio St.2d 315, syllabus.

{¶39} Here, the time waiver of unlimited duration, executed by both Childs and his counsel and entered into the record, stated that Childs was waiving his speedy trial rights because it was in his "best interest" to do so. It can be reasonably inferred from this language and the circumstances in which the time waiver was signed that Childs' counsel sought the time waiver to aid in the preparation of Childs' defense. Thus, it was not unreasonable for the trial court to rely on the written time waiver of unlimited duration in rejecting Childs' speedy trial claim. In light of these circumstances, the trial court did not abuse its discretion in denying Childs' motion to withdraw his guilty pleas. The trial court also did not abuse its discretion in not holding a "full" or evidentiary hearing on Childs' motion to withdraw his guilty pleas, since Childs did not request such a hearing and the facts do not show that such a hearing was warranted.

{¶40} Consequently, Childs' second assignment of error is overruled.

{¶41} Assignment of Error No. 3:

{¶42} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS HIS INDICTMENT FOR VIOLATION OF HIS RIGHT TO A SPEEDY

TRIAL."

{¶43} Childs argues the trial court erred by accepting his guilty pleas before ruling on his pro se motion to dismiss the charges against him on speedy trial grounds and by finding that there was no basis for his speedy trial claim when it overruled his motion to withdraw his guilty pleas. We disagree with both contentions.

{¶44} The trial court had no obligation to rule on Childs' pro se motion to dismiss on speedy trial grounds because Childs was represented by counsel in this case, and therefore, was not entitled to represent himself as well, since criminal defendants in this state are not entitled to hybrid representation. See *State v. Martin,* 103 Ohio St.3d 385, 391, 2004-Ohio-5471, ¶32. Even if Childs' counsel had raised the motion, the trial court would have been obligated to overrule it for the reasons stated in our response to Childs' second assignment of error. Finally, Childs' guilty pleas to the charges, which were made knowingly, intelligently and voluntarily for the reasons cited in our response to Childs' first assignment of error, preclude him from challenging on appeal the trial court's denial of his motion to dismiss the charges against him on speedy trial grounds. See *Kelly,* 57 Ohio St.3d 127, paragraph one of the syllabus.

{¶45} Therefore, Childs' third assignment of error is overruled.

{¶46} Assignment of Error No. 4:

{¶47} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL TO HIS PREJUDICE AND IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶48} Childs argues his defense counsel provided him with ineffective

assistance by not waiting for the trial court to rule on his motion to dismiss the charges on speedy trial grounds before advising him to plead guilty. We disagree.

{¶49} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. Id. A failure to make a sufficient showing on either the "performance" or "prejudice" prong of the *Strickland* standard will doom an appellant's ineffective assistance claim. See id. at 697.

{¶50} Childs has failed to make a sufficient showing on either the "performance" prong or "prejudice" prong of the *Strickland* standard. Childs stated at the change of plea hearing that he was satisfied with his counsel's performance. Moreover, for the reasons cited in our response to his second and third assignments of error, Childs was not entitled to have the charges against him dismissed on speedy trial grounds. Therefore, Childs' counsel was not ineffective for failing to advise Childs not to plead guilty to the attempted aggravated burglary and robbery charges before the trial court ruled on Childs' pro se motion to dismiss on speedy trial grounds.

{¶51} Accordingly, Childs' fourth assignment of error is overruled.

{¶52} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.