

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SAMMIE LEE TAYLOR

Defendant-Appellant

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JUDGES:

Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Earle E. Wise, Jr., J.

Case No. 17CA95

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 2017CR0115

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

May 9, 2018

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, E.

{¶ 1} Defendant-Appellant Sammie Lee Taylor appeals the October 11, 2017 judgment of conviction and sentence of the Court of Common Pleas of Richland County, Ohio. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 31, 2015, appellant entered the home of his estranged spouse without permission and in violation of a protection order obtained by his estranged spouse. According to stipulated facts in this matter, on November 6, 2015, misdemeanor charges stemming from the incident were filed against appellant.

{¶ 3} On November 9, 2015, appellant was released on bond, but was arrested again in November 13, 2015 for violating the conditions of his bond. He was released once again on November 16, 2015.

{¶ 4} On January 12, 2016, appellant signed a time waiver. The waiver set forth no specified time period.

{¶ 5} On January 21, 2016, a bench warrant issued for appellant's arrest. He was arrested on the same on August 13, 2016. On September 21, 2016, the state dismissed the case.

{¶ 6} On February 13, 2017, an indictment was filed by a special prosecuting attorney charging appellant with aggravated burglary, a felony of the first degree, with a repeat violent offender specification; burglary, a felony of the second degree; and violating a protection order, a felony of the third degree. The charges stemmed from the October 31, 2015 incident. Appellant was served with the indictment on March 27, 2017, and arraigned on April 7, 2017.

{¶ 7} On April 11, 2017, appellant filed a motion for discovery, and the state responded on April 25, 2017.

{¶ 8} On May 26, 2017, appellant filed a motion to continue his trial date. On June 28, 2017, appellant filed a motion to dismiss, alleging speedy trial violations. On July 24, the trial court issued a judgment entry indicating that by agreement of the parties, no hearing would be held on the matter. Rather, the parties agreed to submit a written stipulation as to the dates in question and permit the trial court to make a ruling based on the written stipulation.

{¶ 9} On August 15, 2017, the trial court overruled appellant's motion to dismiss based on speedy trial violations.

{¶ 10} On the morning of trial, October 10, 2017, after entering into plea negotiations with the state, appellant agreed to enter pleas of no contest in exchange for the state dismissing the charge of aggravated burglary and the repeat violent offender specification, and further amending the burglary charge from a second degree felony to a third degree felony, and violation of a protection order from a third degree felony to a first degree misdemeanor. The trial court then imposed an agreed upon sentence of 18 months in prison for burglary and 6 months in jail for violating a protection order. The trial court ordered appellant to serve the sentences concurrently, but consecutively to a sentence which appellant was already serving in an unrelated matter.

{¶ 11} Appellant subsequently filed this appeal. He raises two assignments of error for our consideration:

I

{¶ 12} “DEFENDANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT FILE A MOTION FOR DISMISSAL BASED ON DELAYED PROSECUTION.”

{¶ 13} In his first assignment of error, appellant argues his counsel rendered ineffective assistance when he failed to file a motion to dismiss based on preindictment delay. We disagree.

{¶ 14} The standard this issue must be measured against is set out in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶ 15} We have reviewed trial counsel's motion to dismiss and find counsel did in fact raise the issue of delayed prosecution, albeit somewhat unartfully. We therefore find appellant has failed to establish counsel's performance was in any way deficient.

{¶ 16} The first assignment of error is overruled.

II

{¶ 17} "THE LOWER COURT COMMITTED PLAIN ERROR WHEN IT DID NOT CONSIDER PROSECUTORIAL DELAY WHEN RULING ON THE SPEEDY TRIAL MOTION."

{¶ 18} In his second assignment of error, appellant argues the trial court, when ruling on his motion to dismiss, committed plain error when it failed to consider prosecutorial delay as raised in his motion to dismiss. We disagree.

{¶ 19} First, appellee contends that by entering a plea of guilty, appellant has waived his right to raise a speedy trial argument on appeal. We note that appellant pled no contest and Crim.R. 12(I) provides: The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence. We therefore find appellant has not waived his right to challenge the pretrial motion to dismiss.

{¶ 20} Next, because appellant failed to object to the trial court's analysis of his motion to dismiss, he has waived all but plain error. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978); 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. *Id.* 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.

{¶ 21} This Court held in *State v. Burden*, 5th Dist. Stark App. No.2012CA00074, 2013-Ohio-1628 ¶ 33-35:

When a defendant asserts a pre-indictment delay violating his due process rights, prejudice may not be presumed. *United States v. Crouch*, 84 F.3d 1497, 1514–1515 (5th Cir.1996). The notion that prejudice may be presumed from a lengthy delay arises in the context of the four-part balancing test used in determining whether a post-indictment or post-accusation delay has deprived a defendant of his Sixth Amendment right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101(1972). The Barker four-part test, and the concept of presumptive prejudice, applies only to post-indictment or post-accusation delays that implicate the Sixth Amendment right to a speedy trial, and has no application to pre-indictment delays. See, *State v. Metz*, 4th Dist. No. 96 CA 48, 1998 WL 199944 (Apr. 21, 1998) (Citation omitted); *State v. Schraishuhn*, 5th Dist. No.2010-CA-00635, 2011-Ohio-3805, ¶ 31; *State v. Harrell*, 5th Dist. No. 98CAA06029, 1999 WL 3887(Dec. 29, 1998).

The Ohio Supreme Court held that a delay in the commencement of prosecution by the state would be found unjustified when it is done in an attempt to gain a tactical advantage over the defendant, or when the state “through negligence or error in judgment, effectively ceases the active

investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.” *Luck*, 15 Ohio St.3d at 158, 472 N.E.2d 1097. The Court also held that the length of delay would normally be a key factor in this determination. *Id.*

The defendant has the burden of demonstrating prejudice. *United States v. Lawson* 780 F.2d 535, 541–542(6th Cir.1985). A lengthy delay in prosecuting the defendant, by itself, does not constitute actual prejudice. The defendant must demonstrate how the length of the delay has prejudiced his ability to have a fair trial. *United States v. Norris*, 501 F.Supp.2d 1092, 1096(S.D.Oh.2007). In *United States v. Wright*, 343 F.3d 849, 860(6th Cir.2003), the Court held that loss of memory is insufficient to establish prejudice as a matter of law.

{¶ 22} In *State v. Flickinger*, 4th Dist. No. 98CA09, 1999 WL 34854 (Jan. 19, 1999) the court noted:

A defendant must provide concrete proof that he will suffer actual prejudice at trial as a result of the government's delay in indicting the defendant. See, e.g., *Crouch*, 84 F.3d at 1515 (stating that vague assertions of faded memories are insufficient to establish actual prejudice; the defendant must state which witness is unable to fully recount the details of the crime and how the witness' lapsed memory will prejudice the defense); *United States*

v. Beszborn (C.A.5, 1994) 21 F.3d 62, 67, certiorari denied sub nom, *Westmoreland v. United States*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288 (stating that vague assertions of faded memories are insufficient to establish actual prejudice); *United States v. Stierwalt* (C.A.8, 1994), 16 F.3d 282, 285 (stating that assertions of faded memories are insufficient to establish actual prejudice when the defendant fails to specify how witness' lapsed memory will harm his defense); *United States v. Harrison* (S.D.N.Y.1991), 764 F.Supp. 29, 32 (stating that assertion of faded memories is insufficient to establish actual prejudice); *United States v. Greer* (D.Vt.1997), 956 F.Supp. 525, 528 (stating that a defendant must present concrete proof of actual prejudice and not mere speculation of actual prejudice).

{¶ 23} As noted by appellee, appellant has failed, in either his first or second assignment of error, to explain how he was prejudiced by the delay. Further, there is no evidence in this record as to if or how the delay would have impacted appellant's ability to have a fair trial. Appellant has thereby failed to establish that the outcome of this matter would have been any different but for the error complained of.

{¶ 24} The second assignment of error is overruled.

{¶ 25} The judgment of the Richland County Court of Common Pleas is affirmed.

By Wise, Earle, J.

Wise, John, P.J. and

Delaney, J. concur.

EEW/rw