[Cite as *State v. Devine*, 2019-Ohio-778.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

PHILLIP T. DEVINE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0013

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2016 CR 358

BEFORE:
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, *Atty. Megan L. Bickerton*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432 for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, *Atty Edward A. Czopur* 42 N. Phelps Street, Youngstown, Ohio 44503for Defendant-Appellant.

Dated: February 4, 2019

Robb, .J.

{¶1} Defendant-Appellant Phillip Devine appeals the decisions of the Columbiana County Common Pleas Court convicting him after a guilty plea to a drug charge and thereafter denying a post-sentence motion to withdraw his plea. In setting forth a speedy trial issue, Appellant alleges the court must look back to the date of his arrest on federal charges, which he claims arose from the same facts as this case. He argues the failure to consider the speedy trial issue using the date of his federal arrest constituted ineffective assistance of counsel and plain error. For the following reasons, the judgment of conviction and the judgment denying plea withdrawal are affirmed.

STATEMENT OF THE CASE

{¶2} On September 15, 2016, a secret indictment was issued by the grand jury in Columbiana County charging Appellant with two drug counts occurring on August 11, 2014. The first count alleged he knowingly manufactured or engaged in part of the production of methamphetamine (meth) in violation R.C. 2925.04(A), a felony of the second degree. The second count alleged he knowingly assembled or possessed a chemical that may be used to manufacture meth with intent to manufacture meth, a felony of the third degree in violation of R.C. 2925.041(A).

{¶3} On September 28, 2016, the indictment was served, and Appellant was arrested. He was incarcerated until October 21, 2016, when bond was modified. The day before his release, he filed requests for discovery and a bill of particulars. The state responded on November 17, 2016. The bill of particulars addressed the first count by explaining: during the execution of a search warrant at a named address in Leetonia, where Appellant was present and residing, agents located seven "one pot methamphetamine cooks," eight acid generators, lye, and lighter fluid. This evidence was repeated for the second count with the addition of "cut open lithium batteries."

{¶4} On November 30, 2016, Appellant moved for a continuance of the December jury trial date due to his inpatient treatment at a substance abuse facility. Before the new trial date, Appellant was granted another continuance. Trial was reset

for March 6, 2017, but on this date, the court canceled the trial due to Appellant's decision to change his plea and reset the case for a plea hearing.

{¶5} At the March 10, 2017 plea hearing, Appellant pled guilty to the third-degree felony in count two in exchange for the dismissal of the second-degree felony in count one. The state agreed to recommend a sentence of 24 months (where the maximum was 36 months). In addition to signing a written plea agreement, Appellant signed a response to the court wherein he answered affirmatively when asked: "Do you fully realize that, by your offer to plead guilty, you surrender the right to challenge everything that happened before you offered to plead guilty?" A statement to this effect was also contained in a written judicial advice to the defendant, which Appellant agreed he understood. (Tr. 7). Appellant additionally said he understood he was giving up all his constitutional rights in connection with this case and waiving the right to challenge any violations of his rights. (Plea Tr. 13-14). Upon accepting the guilty plea, the court ordered a presentence investigation (PSI).

{¶6} At sentencing, defense counsel posited: Appellant did not make meth as alleged in the count being dismissed; he bought Sudafed for others to use for meth-making; they provided him with heroin in return; and this was a means for him to support his former drug habit. (Sent.Tr. 3-4). In exercising his allocution right, Appellant said he "got raided" in August 2014; he also remarked, "the first time this case got brought up with the federal side that – I thought that, you know, perhaps like it was over with." (Sent.Tr. 8-9). In discussing Appellant's criminal history, it was noted Appellant was complying with his federal probation which began in June 2016. As to the federal case, defense counsel stated: "There is a federal felony offense listed as a conviction in 2016. That is actually the result of the same search and the same incident that brought him to court -- your court here today. That was one incident, one felony. One incident. Unfortunately, they got separated into the state court and into the federal court, based upon law enforcement decision." (Sent.Tr. 2-3).

{¶7} The court commented that the federal and state cases involved different drugs: the state case involved meth, while the federal case involved a conspiracy to possess heroin with an intent to distribute it. (Sent.Tr. 10). The court sentenced Appellant to 24 months in prison. Appellant filed a timely notice of appeal from the June

6, 2017 sentencing entry. Appellant's newly-appointed counsel filed a no merit brief and motion to withdraw. Appellant then retained counsel. In February 2018, Appellant's new attorney filed a brief and sought a limited remand to allow the trial court to rule on Appellant's motion to withdraw the guilty plea. On March 8, 2018, this court granted a limited remand. Our entry ruled Appellant could amend his notice of appeal and supplement the record and his brief if necessary.

{¶8} Appellant's motion to withdraw the guilty plea claimed his speedy trial rights were violated as time started accruing when he was arrested on the *federal* charge because the state charge arose from the same facts which were known by the state at the time. The motion set forth a claim of ineffective assistance of counsel in the failure to raise this issue or present facts establishing the original arrest date and claimed the trial court lacked jurisdiction due to the issue. He attached the return on an arrest warrant issued in *U.S. v. Devine*, N.D. Ohio 4:16CR047, showing he was arrested on Feb. 17, 2016 for conspiracy involving possession with intent to distribute heroin and for using a telephone to facilitate drug trafficking. He also attached the June 30, 2016 federal sentencing entry showing he was sentenced to probation after pleading guilty to the heroin conspiracy count.

{¶9} A supplemental brief in support of plea withdrawal was filed with leave of the trial court. Appellant attached the February 10, 2016 federal indictment showing he was indicted on the heroin conspiracy charge along with three co-defendants for events taking place between May and August of 2014; the indictment contained multiple excerpts from text messages and phone calls related to heroin distribution collected during the federal investigation. He also attached a Columbiana County Drug Task Force incident report, received in discovery, which demonstrated: the DEA executed a search warrant at Appellant's residence on August 11, 2014; a meth lab was discovered; and the drug task force and fire department were called to the scene.

{¶10} On June 13, 2018, the trial court denied Appellant's motion to withdraw his guilty plea. The court disagreed with Appellant's contention that the pertinent date was the February 17, 2016 date of arrest on the federal charges and found the pertinent date in this case was the September 28, 2016 arrest on the state indictment filed on September 14, 2016. The court opined the nexus with the federal case was not

dispositive, observing how the federal indictment arose out of a heroin distribution conspiracy but the state indictment arose out of the discovery of meth (facts different from the earlier federal indictment).

{¶11} On July 2, 2018, this court returned the case to the active docket, amended the notice of appeal to include the trial court's June 13, 2018 judgment entry, and noted Appellant's ability to file a supplemental brief. Appellant replied by opining rebriefing was unnecessary, and the state thereafter filed its brief.

ASSIGNMENTS OF ERROR: SPEEDY TRIAL

{¶12} Appellant's brief sets forth two assignments of error:

"The government failed to bring Devine to trial timely in violation of his Sixth and Fourteenth Amendment rights to speedy trial and under the deadline of R.C. 2945.73."

"Trial counsel was ineffective, or the trial court erred plainly, in failing to incorporate the arrest record of Devine's federal proceedings into the record below."

{¶13} "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." R.C. 2945.73(B)(2) (emphasis added). Appellant did not file a motion prior to pleading guilty. Even where a motion is filed, a defendant who pleads guilty waives the right to challenge his conviction on statutory speedy trial grounds. *State v. Kelley*, 57 Ohio St.3d 127, 130, 566 N.E.2d 658 (1991), citing *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2d 581 (1986) and *Partsch v. Haskins*, 175 Ohio St. 139, 141, 191 N.E.2d 922 (1963). While speedy trial "violations preclude the establishment of guilt by trial, that is the extent of their reach. The establishment of guilt by a proper plea is not condemned by these protections." *Montpelier*, 25 Ohio St.3d at 171-172 (and speedy trial issues are not jurisdictional).

{¶14} Notwithstanding this waiver by guilty plea, a defendant can raise issues on appeal that "are shown to have precluded the defendant from voluntarily entering into his or her plea pursuant to the dictates of Crim.R. 11 * * *." *Kelley*, 57 Ohio St.3d at 130. In other words, a "guilty plea waived any complaint as to claims of constitutional violations not related to the entry of the guilty plea." *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105. Although Appellant's brief does not

specifically claim the plea was involuntary, he suggests as much when he argues the case would have been dismissed if the issue had been addressed below.

{¶15} In attempting to address the speedy trial issue in the direct appeal from the sentencing entry after a guilty plea, Appellant's brief originally raised ineffective assistance of counsel and plain error. Appellant claims counsel was deficient and/or the trial court erred by failing to place the federal arrest date in the record and consider the speedy trial issue. In addition to deficient performance or error, a showing of prejudice would be required as well. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22 (and plain error review is discretionary). If a showing of deficiency or prejudice requires evidence outside the record, a direct appeal from the conviction is not the proper forum. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978).

{¶16} We note the trial court ordered a PSI and utilized the resulting report, which is part of the record on appeal from a sentence. *See* R.C. 2953.08(F)(1). This document lists the February 17, 2016 date of arrest in the federal case and shows the corresponding June 30, 2016 conviction, which matches the June 2016 conviction date placed into the record at sentencing. (Sent.Tr. 2-3).

{¶17} Furthermore, this court issued a limited remand for the trial court to rule on the plea withdrawal motion raising the issues set forth in the direct appeal. We subsequently amended the notice of appeal to include the trial court's denial of plea withdrawal. That decision and the record it is based upon contain the federal arrest date and certain other background circumstances supplied by Appellant to the trial court which distinguish the federal and state cases.

{¶18} As for the decision on the plea withdrawal motion: "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." Crim.R. 32.1. When a defendant seeks to withdraw a guilty plea after the trial court imposed a sentence, the defendant bears the burden of establishing the existence of a manifest injustice. *State*

v. Smith, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1997). Post-sentence plea withdrawal is allowable only in an extraordinary case. *Id.*

{¶19} As Appellant points out, the speedy trial time in this case was 270 days pursuant to R.C. 2945.71(C)(2). Although Appellant does not dispute speedy trial time did not expire if the pertinent trigger is the September 28, 2016 date of arrest on the state indictment, we briefly explain the time accrued after the state arrest.

{¶20} The accrual of time was initially triple-time since Appellant was held in jail in lieu of bail. R.C. 2945.71(E) ("each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days"). The day of arrest is not utilized in the count. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, fn. 7. From September 29, 2016 to the day of the first tolling event, triple-time resulted in the accrual of 66 days. The first tolling event was Appellant's October 20, 2016 request for discovery and a bill of particulars. *See* R.C. 2945.72(E) (speedy trial time is extended by "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused"). Time was tolled through the state's November 17, 2016 response. *See State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 26 ("It is the filing of the motion itself * * * that provides the state with an extension."); *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶ 18, 26 (it is well established that requests for discovery and for a bill of particulars are tolling events).

{¶21} During this tolled time, Appellant was released (on October 21, 2016) after his bond was reset; the subsequent accrual was thus no longer at the triple-time rate. After the state's response to discovery lifted the tolling, 13 days passed at which point Appellant's November 30, 2016 motion for a continuance tolled the time. *See* R.C. 2945.72(H) (speedy trial time is extended by "[t]he period of any continuance granted on the accused's own motion"). Time never resumed due to further continuances granted on Appellant's motion and a reasonable court's continuance of less than a week upon Appellant's decision to enter a plea rather than proceed to the scheduled trial. *See* R.C. 2945.72(H) (speedy trial time 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"). Under this calculation, the speedy trial time

would stand at 79 days. Again, there is no dispute that the speedy trial time did not expire if we are viewing only the events after the arrest on the state indictment.

{¶22} The question presented by Appellant is whether his speedy trial time in the state case began running when he was arrested on February 17, 2016 in the federal case. In support of the general contention that the speedy trial timetable on a prior indictment applies to a subsequent indictment, Appellant relies on the following statement in the Supreme Court's 1989 *Adams* case:

> "[W]hen 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."

State v. Adams, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989) (the initial charge was driving with a prohibited concentration and the new charge was driving under the influence; also, a time waiver on the initial charge will not apply to the new charge), quoting *State v. Clay*, 9 Ohio App.3d 216, 218, 459 N.E.2d 609 (11th Dist.1983).

{¶23} Therefore, as more recently stated in the 2015 *Adams* case: "A later indictment is not subject to the speedy-trial timetable of an earlier indictment or arrest 'when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment' or earlier arrest." *Adams*, 144 Ohio St.3d 429 at ¶ 84, quoting *State v. Baker*, 78 Ohio St.3d 108, 110, 676 N.E.2d 883 (1997). "Additional crimes based on different facts should not be considered as arising from the same sequence of events for the purposes of speedy-trial computation." *Baker*, 78 Ohio St.3d at 111 (initial charges based on an informant purchasing drugs from pharmacy, which prompted a search warrant; after a review of records seized during the search, new charges were filed; the Court held the new charges arose from different facts).

{¶24} As the government had knowledge of the facts underlying the new charge at the time of the earlier arrest, we emphasize the use of the word "or" in this disjunctive iteration of the test. That is, the subsequent indictment will not relate back to the prior indictment and arrest *if either* (1) the additional charge arises from facts different from

the original charge *or* (2) the state lacked knowledge of the facts from the new charge at the time of the earlier indictment or arrest. *Adams*, 144 Ohio St.3d 429 at ¶ 84. Stated differently, this means the subsequent indictment will relate back only if *both* (1) additional charges arise from the same facts as did the original charge *and* (2) the state knew of such facts at the time of the initial indictment. *Adams*, 43 Ohio St.3d at 68.

{¶25} Even where the later indictment is subject to the speedy trial timetable of an earlier arrest (because the new charge arose from the same facts as the original charge and the state knew of such facts at the time), the prior tolling events are maintained as tolling events. In *Blackburn*: the defendant was charged with illegal conveyance of drugs into prison; this charge was dismissed; a new indictment charged the same offense plus an additional count of conspiracy; the indictment was dismissed; and the next indictment charged the same conspiracy offense plus two counts of drug trafficking. After the parties agreed the subsequent offenses were based on the same facts as the original charge and arrest, the Supreme Court concluded the pre-existing speedy trial timetable, along with its tolling events, must be imported to the subsequent case. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 11-23 (distinguishing *Adams* as a rule for waivers, not tolling events). Specifically, "periods of delay resulting from motions filed by the defendant in a previous case also apply in a subsequent case in which there are different charges based on the same underlying facts and circumstances of the previous case." *Id.* at ¶ 23.

{¶26} First, we note Appellant does not cite law showing these speedy trial principles (for ascertaining whether state charges relate back to other state charges) apply to cause a state charge to "relate back" to a federal arrest on federal charges. On this topic, federal courts do not consider a prior state arrest for a violation of state law as the trigger date for later federal indictments, even if based on the same activity. *See, e.g., United States v. Battis*, 589 F.3d 673, 679 (3d Cir.2009) ("When an arrest on state charges is followed by a federal indictment, the right to a speedy trial in the federal case is triggered by the [federal] indictment, and the time period under consideration commences on that date"); - *States v. Garner*, 32 F.3d 1305, 1309 (8th Cir.1994) ("an arrest on state charges does not engage the speedy trial protection for a subsequent federal charge"); *United States v. Muniz*, 1 F.3d 1018, 1024 (10th Cir.1993). "The state

arrest and state prosecution do not control the speedy trial analysis because the state and federal governments are separate sovereign entities, and the actions of one cannot typically bind the other." *United States v. Rose*, 365 F. Appx. 384, 389 (3d Cir.2010). In a footnote, the United States Supreme Court observed: "Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign." *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), fn. 11. Therefore appear a federal arrest on federal charges would not trigger speedy trial time for later state charges.

{¶27} In any event, the trial court correctly concluded the prior indictment and resulting arrest were based upon facts different than the current charges and arrest. The federal arrest was on charges of conspiracy to possess heroin with intent to distribute it and use of a telephone to facilitate drug trafficking. As can be seen from the lengthy and detailed federal indictment, much of the federal evidence was gained through informant sales, phone calls, and texts beginning in May 2014, prior to the search warrant executed on August 11, 2014. During this search, a meth lab was discovered, and the state was called in to deal with this aspect of the search. The state indicted Appellant for manufacturing meth (or engaging in part of its production) and assembling or possessing a chemical used to manufacture meth with intent to manufacture meth. The state arrest had no relation to a conspiracy, intended drug trafficking, the use of a telephone, or the drug of heroin. The federal indictment was not based upon the same facts as the state indictment. Accordingly, the speedy trial time for the meth charges would not relate back to the prior arrest in the heroin case, and the prior speedy trial timetable would not be imported to the meth case, even if the rule in *Adams*, *Baker*, and *Blackburn* was applied to a scenario involving federal and then state charges.

{¶28} Lastly, we note Appellant proceeds as if the federal arrest date of February 17, 2016 is the only dispositive federal event. He suggests time ran without interruption from that date until the tolling events after the state arrest. As aforementioned, "periods of delay resulting from motions filed by the defendant in a previous case also apply in a subsequent case in which there are different charges

based on the same underlying facts and circumstances of the previous case." *Blackburn*, 118 Ohio St.3d 163 at ¶ 23. Any federal tolling events would thus be pertinent to the calculation (assuming arguendo the federal arrest was the pertinent date). Prejudice is difficult to discern where the motion for plea withdrawal incorporated no information on time accrued or tolled prior to the arrest on the state indictment. Just as a defendant has the burden to show prejudice on an ineffective assistance of counsel argument, *Bradley*, 42 Ohio St.3d at 142-143, the movant has the burden to demonstrate a manifest injustice when making a post-sentence plea withdrawal motion, *Smith*, 49 Ohio St.2d at 264.[1]

{¶29} Furthermore, Appellant's argument assumes a court would count the 89 days between the June 30, 2016 federal conviction and the September 28, 2016 state incarceration on the state indictment. Yet, in cases involving dismissal of an indictment and subsequent re-indictment based on the same facts, the speedy trial time (although relating back to the original indictment) is tolled between the dismissal and re-indictment/re-arrest (unless the defendant remained jailed or on bail under Crim.R. 11). *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, 859 N.E.2d 532, ¶ 17. Eliminating the 89 days during which no charges were pending, the accrued time would be less than 270 days even if we added the entire 133 days between the federal arrest and the sentencing entry (which assumes there were absolutely no federal tolling events) to the time accruing after the state arrest (with tolling events calculated above).

{¶30} Regardless, as set forth supra, the rule relied upon is inapplicable between federal and state cases, and there is no indication the two cases arose from

[1] Appellant cites *Butcher* for the proposition that once a defendant makes a prima facie case of a speedy trial violation, the burden of production shifts to the state. *See State v. Butcher*, 27 Ohio St.3d 28, 31, 500 N.E.2d 1368 (1986). In *Butcher*, the Court found the burden shifted to the state to produce evidence showing the defendant was not entitled to triple time after he showed he was incarcerated. (Unlike most parole holders which bar triple time, many tolling events are in the record for a trial court's perusal.) In any event, any burden-shifting rule would deal with speedy trial arguments timely presented to the trial court; the state could not have this burden in an appeal from a conviction where no speedy trial motion was filed. The rule derived from *Butcher* "does not relieve an appellant from specifying the time and contested tolling events in his brief on appeal." *State v. Henderson*, 7th Dist. No. 16 MA 0057, 2018-Ohio-5124, ¶ 57. Likewise, it would not relieve a post-sentence plea withdrawal movant from demonstrating his claim (the proper calculation), especially considering that Appellant's relation back argument concerns a federal case where the state prosecution was not a party.

the same facts in any event. Appellant's assignments of error and arguments are overruled, and the trial court's decisions are affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.