

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 106187
	:	
v.	:	
	:	
GREGORY BAXTER,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 17, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-16-602878-A
Application for Reopening
Motion No. 519793

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Katherine E. Mullin, Assistant Prosecuting
Attorney, *for appellee*.

Gregory Baxter, *pro se*.

ANITA LASTER MAYS, J.:

{¶ 1} Gregory Baxter, pursuant to App.R. 26(B), timely applied to reopen this court's judgment in *State v. Baxter*, 8th Dist. Cuyahoga No. 106187, 2018-Ohio-2237, which affirmed his convictions for kidnapping, felonious assault, and

voluntary manslaughter. The state of Ohio has filed a brief in opposition. For the following reasons, this court denies the application.

{¶ 2} To reopen the appeal Baxter must establish a claim of ineffective assistance of appellate counsel consistent with the two requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Baxter must show (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced him. *Id.*

{¶ 3} In the application, Baxter insists that his appellate counsel was ineffective because he failed to argue ineffective assistance of trial counsel, by allowing Baxter to plead guilty despite a speedy trial right violation. Baxter properly identifies that he has a right to a speedy trial, and that where that right is violated an effective appellate counsel ought to raise the error. However, Baxter's claim is based on his misunderstanding of speedy trial provisions and how time is calculated.

{¶ 4} In Ohio, R.C. 2945.71 and 2945.72 codify a defendant's speedy trial rights in felony cases. R.C. 2945.71(C)(2) dictates that the state only has 270 days from the arrest until the case must be brought to trial. Under R.C. 2945.71(E) each day a person is held in jail counts as three days. Thus, when the defendant is in jail awaiting trial, as Baxter was, trial must commence within 90 days of the arrest. Over a year elapsed between Baxter's arrest and his trial date at which time he entered a plea deal, resolving the case without a full trial. Thus, Baxter argues that his trial attorney was ineffective for not raising the speedy trial violation. However, Baxter fails to acknowledge that (1) the plea waived speedy trial objections, and (2) R.C.

2945.72(E) and 2945.72(H) tolled Baxter's time. R.C. 2945.72(E) tolls due to "delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused." R.C. 2945.72(H) provides that "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" tolls the time period allowed for trial. The defendant's counsel waiving time is attributed to the defendant even if the defendant did not consent to the waiver. *State v. McBreen*, 54 Ohio St.2d 315, 376, 376 N.E.2d 593 (1978). After subtracting the time tolled due to continuances requested by Baxter's attorney and reasonable continuances granted to parties, the total time lapsed is no more than 33 days, less than the 90-day period.

{¶ 5} Baxter was arrested on January 20, 2016. A Cuyahoga County Grand Jury indicted Baxter on February 9, 2016, for two counts of murder, one count of felonious assault, one count of voluntary manslaughter, and one count of grand theft.

{¶ 6} Baxter's arraignment took place on February 12, 2016. Defense counsel requested discovery February 15, 2016. Thus, 26 speedy trial days had run. The first pretrial was set for February 18, 2016. That pretrial was continued at the defendant's request, because discovery was ongoing. Because discovery was not complete, the defense requested continuance of pretrial proceedings on six occasions before the original trial date. The defense also requested five other continuances during that time, four of which were due to a conflict in the defense counsel's schedule. When a pretrial was finally held on June 8, 2016, trial was set

for June 22, 2016, at the request of the defendant. The June 22, 2016 trial date was also rescheduled based on the defense's request because defendant's attorney was preoccupied with another unrelated matter in a different jurisdiction. Based on the defense's request for continuance the case was again set for pretrial, in part to set a new trial date. The defense rescheduled that June 28, 2016 pretrial because the defense's discovery was ongoing. Pretrial was rescheduled five more times on the defense counsel's request either because defense counsel was otherwise engaged or because the defense's discovery was not yet complete. Eventually, the final pretrial was scheduled for November 4, 2016. Because the delay from February 15, 2016, to November 4, 2016, was based on defendant's request according to R.C. 2945.72(E) and 2945.72(H), none of those days count against the 90-day period.

{¶ 7} On November 4, 2016, a final pretrial was held. Trial was scheduled for November 28, 2016, per defense request. On November 28, 2016, the court was engaged in another trial. Parties waited on standby. Eventually, the court rescheduled for December 5, 2016. Seven days of the 90-day period did lapse here, because it was the court, not defendant, who rescheduled. Defense counsel rescheduled the December 5, 2016 trial date due to a personal concern. The court granted the continuance and set the case for pretrial to schedule a new trial date. Trial was set for January 23, 2017, at defendant's request. That trial was also rescheduled; based on a joint-party request, a new trial date was set for February 13, 2017. The defense asked for a continuance on this third scheduled trial date, because

the defense did not want to be put on standby because the court was involved in another criminal trial. At defendant's request, trial was set for March 15, 2017.

{¶ 8} On March 15, 2017, over a year after Baxter's arrest and indictment and on the scheduled trial date, the parties entered into a plea agreement. The state amended the charges to kidnapping, felonious assault, and one count of voluntary manslaughter. Baxter expressly waived grand jury indictment of the new charge, was informed of all of his constitutional rights, and pled guilty to these charges. The trial court confirmed that Baxter knowingly and voluntarily entered into the plea. The trial court sentenced him to 22-years imprisonment on March 20, 2017. Thus, no more speedy trial time elapsed.

{¶ 9} Baxter's delayed appeal alleged a single assignment of error for review: "[t]he trial court abused its discretion by accepting the appellant's guilty plea without ensuring that the appellant knowingly, intelligently, and voluntarily waived his right to a grand jury to determine whether a sufficient factual basis existed to charge him with kidnapping, R.C. 2905.01." This court found that Baxter waived his right to a grand jury indictment in the plea agreement and affirmed.

{¶ 10} The delay in reaching trial was largely due to continuances requested by defense counsel, thus all but 33 of 90 jail days or 99 of 270 actual days were tolled. There was no violation of Baxter's speedy trial rights. Appellate counsel was not ineffective in failing to raise the issue. Accordingly, Baxter fails to demonstrate the elements required for a claim of ineffective assistance of appellate counsel under App.R. 26(B).

{¶ 11} Accordingly, this court denies his application for reopening.

ANITA LASTER MAYS, JUDGE

**PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR**