[Cite as *State v. Johnson*, 2019-Ohio-3178.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 106532

v. :

ROBERT D. JOHNSON, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: August 6, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-614774-A
Application for Reopening
Motion No. 521796

Appearances:

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

Robert D. Johnson, *pro se*.

LARRY A. JONES, SR., J.:

{¶ 1} On October 9, 2018, the applicant, Robert Johnson, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Johnson*, 8th Dist. Cuyahoga No. 106532, 2018-Ohio-3999, in which this court affirmed his conviction

and sentences. Johnson now asserts that his appellate counsel was ineffective for not arguing that Johnson was denied his right to a speedy trial and that his trial counsel were ineffective for not seeking his discharge. In a supplement, filed October 22, 2018, Johnson added that his appellate counsel should have raised insufficiency of the evidence. The state of Ohio filed its brief in opposition on November 8, 2018. Johnson filed a reply brief on November 16, 2018. For the following reasons, this court denies the application to reopen.

{¶ 2} On the night of February 22, 2017, Johnson was trying to talk to his ex-girlfriend, who was carrying their baby. After going to her home, he argued through the door. When he broke a window and the outer front door, she called the police, and he fled.

{¶ 3} In the early morning hours of February 24, 2017, he returned to his ex-girlfriend's home and broke windows using a bar and punched out the plexiglass of the back door. When he heard screaming from the house, he fled again. He returned a short time later and this time broke down the back door. Upon entering the home, he seized his ex-girlfriend, choked her, pulled out her hair extensions, ripped off her clothes, and tried to rape her. Responding to a call from one of the ex-girlfriend's children, the police arrived at her residence and arrested Johnson.

{¶ 4} In a trial that began on September 19, 2017, a jury convicted him of attempted rape, aggravated burglary, abduction, assault, and criminal damaging. The trial judge imposed a prison sentence of 12 years. He merged the attempted rape charge with the abduction charge and imposed an eight-year sentence for

attempted rape. He merged aggravated burglary with the burglary charge and imposed a four-year sentence for aggravated burglary to be served consecutively to the attempted rape sentence. The judge imposed 180-day sentences for assault and criminal damaging to be served concurrently.

{¶ 5} On appeal, counsel argued that the attempted rape charges and the aggravated burglary charges should have merged as allied offenses and that the court erred in imposing the maximum eight-year sentence for attempted rape. Johnson now argues that his appellate counsel was ineffective.

{¶ 6} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶ 7} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

{¶ 8} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶ 9} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient

before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 10} Johnson first argues that his appellate counsel should have argued denial of speedy trial. R.C. 2945.71(C)(2) requires that the state bring a person charged with a felony to trial within 270 days after the person's arrests. Under subsection (E), each day the person is held in jail counts as three days. However, this time period may be waived, extended, or tolled under R.C. 2945.72. Subsection (C) provides that the time may be extend by "[a]ny period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law." "Any period of delay occasioned by the neglect or improper act of the accused" would also toll the time period. R.C. 2945.72(D). For example, the speedy trial calculation is tolled after a reasonable time has elapsed for a defendant to respond to the state's discovery request; the time is tolled while the state awaits the defendant's responses. *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011; and *State v. Mitchell*, 8th Dist. Cuyahoga No. 88977, 2007-Ohio-6190. Similarly, any "delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused" tolls the period. R.C. 2945.72(E). A defendant's demand for discovery tolls the speedy-trial time for a reasonable time, usually considered 30 days, for the state to fulfill the discovery request or until the state responds, whichever is sooner. *State v. Shabazz*, 8th Dist.

Cuyahoga No. 95012, 2011-Ohio-2260, and *State v. Jones,* 8th Dist. Cuyahoga No. 106150, 2019-Ohio-783.

{¶ 11} Finally, subsection (H) provides that the period is tolled by "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." Thus, any continuance granted at the defendant's request tolls the period. *State v. Brelo,* 8th Dist. Cuyahoga No. 79580, 2001-Ohio-4245, and *State v. Ferrell,* 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882. This includes the time necessary for new defense counsel to prepare for trial. *State v. Christian,* 7th Dist. Mahoning No. 12 MA 164, 2014-Ohio-2590. The court further notes that defense counsel's actions in waiving the time period is attributable to the defendant, even if the defendant did not consent to the waiver. *State v. McBreen,* 54 Ohio St.2d 315, 376 N.E.2d 593 (1978). Scheduling and docketing conflicts are reasonable grounds for extending an accused's trial date beyond the speedy trial limit date. *State v. Gibson,* 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421.

{¶ 12} Johnson never made bail, so each day is subject to the triple-count provisions. If he can establish that more than 90 days elapsed after allowing for all waivers and extensions, his claim may have merit. The time for speedy trial begins to run when the accused is arrested, but the actual day of arrest is not counted. *State v. Canty,* 7th Dist. Mahoning No. 08-MA-1565, 2009-Ohio-6161.

{¶ 13} An examination of the docket and the transcript demonstrates that Johnson was not denied his right to a speedy trial under Ohio law. The police

arrested Johnson on February 24, 2017. On March 2 and March 9, the trial court accepted Johnson's plea of not guilty, declared him indigent, appointed counsel, and set bond. On March 13, 2017, the state received the defendant's demand for discovery. Thus, the 17 days from February 24, to March 13, 2017, counted toward the speedy-trial time.

{¶ 14} Under the principles of tolling, state must fulfill discovery within a reasonable time, usually considered 30 days or until the state complies with the request. Thirty days from March 13, would be April 12, 2017. However, the state responded to discovery on March 15, 2017, at which time it made its own demand for discovery, and April 5, 2017. Thus, speedy-trial time was tolled until April 5, 2018.

{¶ 15} From April 5, 2017, until May 8, 2017, there were two pretrials held and trial was scheduled for May 8, 2017, but the record does not specify that continuances were granted at defendant's request. On May 8, 2017, the trial court entered on the docket that the trial scheduled for May 8, 2017, was rescheduled to May 12, 2017, at defendant's request. In a favorable light to Johnson, the 33 days from April 5, to May 8, 2017, counted toward the speedy-trial time for a total of 50 days.

{¶ 16} There is no entry for May 12, 2017, the scheduled trial date. The next docket entry, dated May 16, 2017, states the previously scheduled trial was rescheduled to June 15, 2017, at defendant's request. Thus, four more days counted toward the speedy-trial time for a total of 54.

{¶ 17} While awaiting trial, Johnson filed a pro se motion to disqualify his attorney on May 22, 2017. At a pretrial on June 8, 2017, the judge conducted a hearing on the motion to remove counsel, and Johnson agreed to keep his attorney. The trial judge, the prosecutor, and defense counsel then agreed to a back-up trial date of July 5, 2017. (Tr. 40-41.) Thus, the record shows that the speedy-trial time was tolled until July 5, 2017. *State v. Martin*, Slip Opinion No. 2019-Ohio-2010.

{¶ 18} On July 5, 2017, another pretrial was held on the record and showed that the trial judge and defense counsel were engaged in trial on the previously scheduled trial date, providing another reason for tolling the speedy-trial time. (Tr. 45 and 61.) At that time the trial date was continued to July 24, at defendant's request.

{¶ 19} On July 17, 2017, Johnson filed a notification with the court that he had filed a grievance against his attorney. At the pretrial on July 24, defense counsel explained that she could no longer represent Johnson, because he had filed a grievance against her, and the trial judge agreed. In a journal entry filed on July 25, 2017, the judge appointed new counsel and noted that the pretrial was set for July 31, 2017, at defendant's request. Allowing new defense counsel the reasonable time of 30 days to prepare for trial would toll the speedy-trial time to August 24, 2017.

{¶ 20} The docket shows that the entry for July 25, 2017, set the next pretrial for July 31, 2017, at defendant's request. The July 31, 2017 docket entry continued the pretrial until August 15, 2017, at defendant's request. The docket entries from

August 15, to the start of trial on September 19, 2017, do not include the notation of continued at defendant's request.

{¶ 21} From August 24, 2017, to September 19, 2017, 26 days elapsed that counted toward the speedy-trial time; 54 + 26 = 80. Thus, the records shows that Johnson's right to a speedy trial was not violated. Even adding the nine days from August 15, 2017, the last notation of continued at defendant's request, to the 26 days until trial still brings Johnson to trial with the 90 days. In its argument before the trial judge on Johnson's motion to dismiss for lack of a speedy trial, that state submitted that because of discovery and Johnson's own motions, almost all of the time from March 13, 2017, to May 8, 2017, was tolled. Alternatively, as Johnson admits in his reply brief, the defense never answered the state's demand for discovery. Thus, all of the time from April 14, 2017, until the trial date could be considered tolled.

{¶ 22} Although it may be possible to construe the docket in such a way that it would appear that more than 90 speedy-trial days had elapsed, appellate counsel in the exercise of professional judgment properly rejected this argument, because the above review of the record shows that less than 90 days of speedy trial had elapsed.

{¶ 23} Johnson's second argument, that his trial counsel were ineffective for not seeking his discharge, is a reformulation of his speedy-trial argument through the lens of ineffective assistance of counsel. Because the initial argument was not well-founded, this restatement is also not well-founded.

{¶ 24} Finally, appellate counsel in the exercise of professional judgment properly rejected an insufficiency of the evidence argument. The testimony of the victim was sufficient evidence to support the convictions.

{¶ 25} Accordingly, the court denies the application to reopen.

LARRY A. JONES, SR., JUDGE

EILEEN A. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR