[Cite as *State v. Jones*, 2012-Ohio-3767.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-1123
v.	:	(C.P.C. No. 05CR-2681)
Keith L. Jones,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 21, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Keith L. Jones, pro se.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Defendant-appellant, Keith L. Jones, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to dismiss based on plaintiff-appellee, the State of Ohio, violating his right to a speedy trial. Because (1) the State did not violate defendant's speedy trial rights, and (2) defendant's trial counsel did not render ineffective assistance, we affirm.

I. Facts & Procedural History

{¶2} On April 25, 2005, the State indicted defendant on three counts of identity fraud, two counts of forgery, and two counts of theft. Defendant was arraigned before a magistrate two days later and entered a plea of not guilty to all charges. Both sides pursued discovery and, following a June 1, 2005 pretrial, the court set the matter for

trial on June 14, 2005. *See also State v. Jones*, 10th Dist. No. 11AP-498, 2012-Ohio-559, ¶ 9.

{¶3} On June 14, July 12, and September 7, 2005, the parties jointly requested the trial court to continue the trial date, causing the court ultimately to schedule trial for November 3, 2005. In the interim, the court on September 7, 2005 granted defendant a $10,000 recognizance bond. After being released on his own recognizance, defendant failed to appear for his November 3, 2005 trial. The court revoked defendant's recognizance bond and issued a warrant for his arrest. *Id.* at ¶ 15.

{¶4} In his pro se motion to dismiss the charges involved here, defendant explained that his April 2005 arrest in Ohio for the charges involved in this appeal violated his federal parole obligations, prompting a United States District Court judge to sentence defendant to a 23-month prison term at the Federal Correctional Institution in Manchester, Kentucky. *Id.* at ¶ 17. The State issued a detainer capias to the Federal Correctional Institution on May 9, 2006, defendant was re-arrested on January 10, 2007, and the Franklin County Court of Common Pleas ordered the case re-activated.

{¶5} At a February 8, 2007 plea hearing, defendant pled guilty to two counts of identity fraud, and the court dismissed the remaining charges. The court ordered a pre-sentence investigation and, on the State's recommendation, released defendant on a recognizance bond. Originally scheduling the matter for sentencing on July 18, 2007, the trial court continued the sentencing to July 25, 2007. *Id.* at ¶ 18.

{¶6} When defendant failed to appear for sentencing on July 25, the court issued a warrant for his arrest. Defendant was arrested in Cincinnati, Ohio on auto theft charges, and the court issued a detainer capias to the Hamilton County jail on September 18, 2007. The State made several attempts to retrieve defendant from Hamilton County and ultimately succeeded in bringing him before the Franklin County Court of Common Pleas. *Id.* at ¶ 20.

{¶7} On July 10, 2008, defendant filed a pro se motion requesting that his felony charges, to which he already pled guilty, be dismissed "pursuant to R.C. 2941.401." Defendant asked the court to either dismiss the action with prejudice "or in the alternative allow the Defendant to withdraw his plea of GUILTY." (Emphasis sic.)

The State filed a memorandum opposing defendant's motion to dismiss, noting defendant's guilty plea negated his speedy trial claim.

{¶8} After being placed on house arrest for health problems, defendant violated house arrest, causing the court to issue a warrant for his arrest. On November 16, 2009, defendant filed a pro se motion to dismiss "pursuant to Section [R.C.] 2963.30." Following a continuance, the court held defendant's sentencing hearing on December 10, 2009, sentenced defendant to five years of community control, and informed defendant that he would go to prison for five years on each count if he violated his community control.

{¶9} After his sentencing hearing, defendant failed to report to the probation office as required and, on March 23, 2010, the trial court filed an entry that declared defendant an absconder. At the probation revocation hearing, defendant stipulated to violating the terms of his probation. *Id*. at ¶ 24. On May 5, 2011, the court filed a judgment entry revoking defendant's community control and imposing the promised sentence of five years on each count.

{¶10} Defendant filed a notice of appeal from the court's May 5 judgment entry, alleging that the trial court should have granted defendant's pro se motion to dismiss pursuant to R.C. 2941.401 and 2963.30. *Id*. This court overruled the sole assignment of error, noting that defendant entered guilty pleas before he filed his motion to dismiss, failed to file a direct appeal from his initial sentencing, and stipulated to revoking his community control. *Id*. at ¶ 25.

{¶11} On December 6, 2011, the trial court issued a decision and entry denying defendant's motion to dismiss filed July 10, 2008. The court noted defendant signed numerous continuances, "which clearly state[d] that he waived the right to speedy trial for the period of those continuances." Defendant timely appeals from the court's December 6, 2011 entry.

II. Assignments of Error

{¶12} On appeal, defendant assigns the following errors:

> **ASSIGNMENT OF ERROR NO.1:** THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT THE APPELLANT'S GUILTY PLEA TO BE VACATED PURSUANT TO OHIO CRIMINAL RULE 32.1 AS HIS CRIMINAL ATTORNEY'S CONDUCT CONSTITUTES INEFFECTIVE ASSISTANT [sic]

> OF COUNSEL UNDER THE TWO PART STRICKLAND TEST.
>
> **ASSIGNMENT OF ERROR NO. 2:** THE TRIAL COURT ERRED IN BY FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA AND VACATE HIS CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1 DESPPITE [sic] APPELLANTS CLEAR AND UNEQUIVICAL [sic] REQUEST IN A MOTION THAT WAS FILED ON JULY 10, 2008, BUT DENIED BY THE TRIAL COURT AFTER APPELLANT WAS COMPELLED TO FILE A MANDAMUS. THE TRIAL COURT ISSUED ITS DENIAL ON November 31, 2011 THREE YEARS AFTERWARDS.

{¶13} Defendant's assignments of error appear to present issues regarding the trial court's decision to deny defendant's motion to withdraw his guilty pleas. Defendant, however, never moved to withdraw his guilty pleas. Rather, his July 10, 2008 pro se motion sought to dismiss the case pursuant to R.C. 2941.401 and, as a remedy for the perceived speedy trial violation, suggested the court either dismiss the case or permit defendant to withdraw his guilty pleas. Similarly, defendant's November 16, 2009 pro se motion to dismiss alleged a violation of his speedy trial rights under R.C. 2963.30. As a result, even though defendant's appellate brief contends the trial court erred in overruling his motion to withdraw his guilty pleas or, at the least, in failing to hold a hearing on his motion, the court did not err in either respect, given defendant's never having so moved.

{¶14} Apart from the language of his assigned errors, defendant's substantive arguments on appeal concern perceived violations of his speedy trial rights. Although, pursuant to App.R. 12(A), we are to determine the appeal on the assignments of error set forth in the brief, in the interests of justice we will determine the appeal by addressing the merits of defendant's substantive arguments, to the extent his prior appeal did not resolve the issues.

III. No Speedy Trial Violation

{¶15} Defendant contends the State violated his speedy trial rights, although he focuses his attention on particular aspects of particular statutes. In an effort to address fully his arguments on appeal, we resolve defendant's contentions under R.C. 2945.71,

2941.401, and 2963.30. " 'The proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72.' " *State v. Vrapi*, 10th Dist. No. 11AP-700, 2012-Ohio-1018, ¶ 6, quoting *In re F.S.*, 10th Dist. No. 11AP-244, 2011-Ohio-6135, ¶ 7, quoting *State v. Gonzalez*, 10th Dist. No. 08AP-716, 2009-Ohio-3236, ¶ 9.

A. *Speedy trial under R.C. 2945.71*

{¶16} "An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10." *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 13, citing *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. Ohio's speedy trial statutes, R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Id.*, citing *Brecksville v. Cook*, 75 Ohio St.3d 53, 55 (1996); *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 10.

{¶17} Pursuant to R.C. 2945.71(C)(2), the state must bring a defendant arrested on felony charges to trial within 270 days of his arrest. If the defendant is held in jail in lieu of bail on the pending charge, each day counts as three days. R.C. 2945.71(E); *Carmon* at ¶ 14. If an accused is not brought to trial within the speedy trial time limits, the court, upon motion, must discharge the defendant. R.C. 2945.73(B); *Id.* A defendant establishes a prima facie case for dismissal based on a speedy trial violation when the defendant demonstrates that more than 270 days elapsed before trial. "Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended." *Id.* at ¶ 15, citing *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9; *State v. Butcher*, 27 Ohio St.3d 28, 31 (1986). "[T]he time period in which to bring a defendant to trial may be extended for any of the reasons enumerated in R.C. 2945.72." *Carmon* at ¶ 14.

{¶18} The record indicates defendant was arrested on April 15, 2005 and pled guilty on February 12, 2007, suggesting the State violated the applicable speedy trial provisions. Defendant, however, pled guilty to two of the crimes charged, with the other charges being dismissed. Because " 'a guilty plea waives a defendant's right to trial, it also necessarily waives any claim that the defendant was denied a speedy trial.' " *State v. Robinson*, 10th Dist. No. 01AP-1005 (Apr. 30, 2002), quoting *Limpach v. Lane*, 4th

Dist. No. 99CA12 (Dec. 19, 2000). *See also State v. Kelley*, 57 Ohio St.3d 127 (1991), at paragraph one of the syllabus, following *Village of Montpelier v. Greeno*, 25 Ohio St.3d 170 (1986) (holding that "[a] plea of guilty waives a defendant's right to challenge his or her conviction on statutory speedy trial grounds pursuant to R.C. 2945.71(B)(2)"); *State v. Spates*, 64 Ohio St.3d 269, 272 (1992), quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (finding that " 'a guilty plea represents a break in the chain of events which has preceded it in the criminal process,' " and after a defendant admits his guilt in open court, " 'he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea' "). Accordingly, defendant's guilty plea waived any claim defendant may have had regarding a speedy trial violation.

{¶19} Even absent defendant's guilty plea, defendant's claim that the State violated his speedy trial rights would fail because the State brought defendant to trial within the speedy trial time limit. After defendant signed pre-plea waivers that tolled the speedy trial time pursuant to R.C. 2945.72(H), defendant failed to appear for his trial on November 3, 2005 and was not re-arrested until January 10, 2007.

{¶20} A "defendant who fails to appear at a scheduled trial, and whose trial must therefore be rescheduled for a later date, waives his right to assert the provisions of R.C. 2945.71 through 2945.73 for that period of time which elapses from his initial arrest to the date he is subsequently rearrested." *State v. Bauer*, 61 Ohio St.2d 83, 85 (1980). In *Bauer*, the Supreme Court rejected the defendant's suggestion that the court simply toll the time between the trial date and the defendant's subsequent re-arrest as "unworkable and inconsistent with the efficient administration of justice." *Id.* at 85. The court noted "no justification for a rule which could require a court to reschedule, within a few days after his rearrest, the trial of a defendant who has forfeited his appearance bond." *Id.* at 84-85 (concluding defendant was "afforded his statutory right to a speedy trial initially, but through his own design he chose to shun this right and impede the prompt administration of this cause"). *See also State v. Kirk*, 3rd Dist. No. 14-06-28, 2007-Ohio-1228, ¶ 48; *State v. Fultz*, 4th Dist. No. 06CA2923, 2007-Ohio-3619, ¶ 1, 15; *State v. Craft*, 5th Dist. No. 97CA00130 (June 29, 1998).

{¶21} Pursuant to *Bauer*, the defendant's statutory speedy trial time did not begin to run until January 10, 2007, the date of defendant's re-arrest. The trial court held defendant's plea hearing on February 8, 2007 and filed defendant's entry of guilty plea on February 12, 2007. Even under the triple count provisions, defendant was brought to trial well within the 270 days mandated by the statute.

B. *Speedy trial under R.C. 2963.30 and 2941.401*

{¶22} Even absent defendant's guilty pleas, defendant's arguments under R.C. 2941.401 or 2963.30 fail on their merits.

{¶23} R.C. 2941.401 "is a more specific speedy trial statute" than R.C. 2945.71 and "applies only to defendants who are already imprisoned for other crimes." *State v. Taylor*, 7th Dist. No. 08 CO 36, 2011-Ohio-1001, ¶ 4. The statute applies when a person enters upon a term of imprisonment in a "correctional institution of this state," and it requires the state to bring a defendant "to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter." R.C. 2941.401. Nothing in the record suggests defendant delivered the required notice to the prosecutor's office or the court.

{¶24} Moreover, where defendant is in the custody of the federal government, the provisions of R.C. 2941.401 do not apply. *State v. Barrett*, 191 Ohio App.3d 245, 2010-Ohio-5139, ¶ 6 (8th Dist.), quoting *State v. Centafanti*, 120 Ohio St.3d 275, 2008-Ohio-6102, ¶ 1. Here, prior to entering his guilty plea, defendant was imprisoned at a federal correctional institution in Kentucky. Accordingly, R.C. 2941.401 could not have applied to defendant's case.

{¶25} Defendant also alleges his speedy trial rights were violated pursuant to R.C. 2963.30, which codifies the Interstate Agreement on Detainers ("IAD"). The IAD is a compact among 48 states, the District of Columbia, Puerto Rico, and the United States. *State v. Keeble*, 2d Dist. No. 03CA84, 2004-Ohio-3785, ¶ 9. "Article III, Subsection (a) of the IAD sets out a procedure whereby a prisoner in a party state may demand trial within 180 days of any 'untried indictment, information, or complaint.' " *Id.* Pursuant to the statute, the 180-day time period begins when the prisoner causes "to be delivered to the prosecuting officer and the appropriate court of the prosecuting

officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint." R.C. 2963.30.

{¶26} To properly avail himself to R.C. 2963.30's 180-day speedy trial period, a prisoner must "substantially compl[y] with the requirements of the statute set forth in Article III(a) and (b) thereof." *State v. Mourey*, 64 Ohio St.3d 482 (1992), paragraph one of the syllabus. "A prisoner substantially complies with the requirements of Article III(a) and (b) of R.C. 2963.30 when he or she causes to be delivered to the prison officials where incarcerated, appropriate notice or documentation requesting a disposition of the charges for which the detainer has been filed against him or her." *Id*. at paragraph two of the syllabus. The 180-day period then begins to run when " 'the prisoner's request for final disposition of the charges against him *has actually been delivered* to the court and prosecuting officer of the jurisdiction that lodged the detainer against him.' " (Emphasis sic.) *State v. Ward*, 10th Dist. No. 02AP-56, 2002-Ohio-4852, ¶ 49, quoting *Fex v. Michigan* 507 U.S. 43 (1993). Moreover, "R.C. 2963.30 * * * does not apply to detainers placed on a prisoner who has already been convicted and needs only to be sentenced." *State v. Barnes*, 14 Ohio App.3d 351 (11th Dist.1984), syllabus. *See also State v. Johnson*, 12th Dist. No. CA2002-07-016, 2003-Ohio-6261, ¶ 11 (holding that the IAD applies only to " 'untried' indictments," and "[o]nce appellant pled guilty, his case had been tried").

{¶27} Defendant alleged in the November 16, 2009 motion to dismiss pursuant to R.C. 2963.30 that "Mr. Benge, of the U.S. Bureau of Prisons, at the request of the Defendant, sent notification to the Prosecuting Attorney requesting final disposition of the indictment." On the same date, defendant filed a document titled "request for disposition," stating defendant was imprisoned at the Federal Correctional Institution in Manchester, Kentucky and had reason to believe an untried indictment was pending against him in Franklin County. Defendant requested a "final disposition to be made of the matter." Although the file stamp on the document reflects a November 16, 2009 file date, defendant appears to have signed and dated the document on November 30, 2005.

{¶28} The record does not indicate defendant substantially complied with the requirements of R.C. 2963.30. In *Mourey*, Mourey "substantially complied with the terms of the IAD" as of the day he "complet[ed] the request form for a speedy trial and

deliver[ed] it to the California prison officials." *Id*. at 488. The parties in *Mourey* stipulated Mourey served the request for disposition form on prison officials the same day he filled out the form, and the California penal authorities sent the form to the Franklin County Prosecutor's Office. *Id*. at 484. Here, in contrast to *Mourey*, nothing in the record indicates whether or when defendant delivered the form to prison officials, whether federal prison officials sent the form to the Franklin County Prosecutor's Office, or whether the prosecutor's office received the form. The only form contained in the record was filed November 16, 2009, years after defendant pled guilty. *See Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, ¶ 34 (noting that, pursuant to App.R. 9, this court may only consider information contained within the trial record).

{¶29} The State did not violate defendant's right to speedy trial, and defendant's assignments of error contending it did are overruled.

IV. Ineffective Assistance of Counsel

{¶30} Defendant alleges his trial counsel was constitutionally ineffective in failing to file a motion to dismiss based on speedy trial violations and in advising defendant to waive his speedy trial rights. To prevail on an ineffective assistance of counsel claim, defendant must demonstrate (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving him of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus.

{¶31} "When a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success." *Carmon* at ¶ 12, citing *State v. Barbour*, 10th Dist. No. 07AP-841 (May 6, 2008); *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577 (4th Dist.) Because defendant did not demonstrate a reasonable probability that a motion to dismiss premised on a violation of his statutory speedy trial rights would have been successful, defendant likewise failed to demonstrate trial counsel was ineffective for failing to file a motion to dismiss on speedy trial grounds.

{¶32} To the extent defendant contends his counsel was ineffective in advising him to execute continuances waiving his speedy trial rights, defendant cannot demonstrate prejudice resulting from those waivers. Defendant executed three continuances waiving his speedy trial rights for the period of the continuances. Those continuances all occurred prior to the November 3, 2005 trial date and, because defendant failed to appear for his November 3, 2005 trial, the speedy trial time calculation did not begin until his subsequent re-arrest on January 10, 2007. Defendant did not sign, and neither party moved for, a continuance during the period of time between defendant's re-arrest and his guilty plea.

{¶33} Defendant also alleges that permitting him to enter a guilty plea after the speedy trial time expired "would amount to ineffective assistance of counsel, and thus, could affect the knowing and voluntary nature of the plea." (Appellant's brief, at 4.) Because the speedy trial time had not expired when defendant entered his plea, its purported expiration could not have affected the knowing and voluntary nature of defendant's guilty plea. To the extent defendant alleges generally that his counsel was ineffective in permitting him to plead guilty, he " 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 89, quoting *Hill v. Lockhart*, 474 U.S. 52 (1985). Defendant does not allege that, but for counsel's alleged error, he would have insisted on going to trial.

{¶34} In the end, the facts underlying the charges in the present case demonstrate that defendant, impersonating a well-known public official, contacted four different car dealerships, forged documents, and successfully obtained two vehicles without paying any money in advance. Despite such facts and defendant's lengthy history of theft-related charges, defendant's trial counsel successfully negotiated a deal on behalf of her client where defendant pled guilty to two counts of identity fraud and the court dismissed the remaining charges. Defendant cannot establish that defense counsel's strategy, in negotiating a favorable plea bargain, fell below a reasonable level of representation. *See State v. Bird*, 81 Ohio St.3d 582, 585 (1998) (concluding defense counsel's discovery may have been "sufficient to convince him that a plea bargain was the best trial tactic in the case"); *State v. Fowler*, 10th Dist. No. 09AP-622, 2010-Ohio-

747, ¶ 7 (deciding nothing in the record supported the defendant's ineffective assistance of counsel claim where defendant "entered into a very favorable plea bargain," his guilt "was clear," and he "openly acknowledged that guilt during his sentencing hearing").

{¶35} Defendant did not receive ineffective assistance of counsel, and his two assignments of error are overruled insofar as they contend he did.

V. Disposition

{¶36} Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.