

[Cite as *State v. Grant*, 2004-Ohio-2810.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2003-05-114
	:	
-vs-	:	<u>O P I N I O N</u>
	:	6/1/2004
	:	
CLARENCE GRANT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No.CR93-12-0890

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515, for plaintiff-appellee

Schad & Cook, Melynda Cook Reich, Kevin Schad, 8240 Beckett Park Drive, Indian Springs, OH, 45011, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Clarence Grant, appeals his conviction in the Butler County Court of Common Pleas for aggravated trafficking in cocaine.

{¶2} Appellant was indicted on December 6, 1993 on two counts of aggravated trafficking in cocaine in violation of R.C.

2925.03(A)(1) (second-degree felonies). The indictment alleged that appellant sold cocaine to an undercover police officer on two separate occasions on August 1, 1993. The indictment further alleged that appellant had been convicted in 1989 of a felony drug abuse offense. For tactical reasons, appellant was not arrested on the day of the offenses. Sometime in 1993, appellant moved to Arkansas where he lived for the next nine years. In November 2002, appellant was stopped for a traffic violation in Missouri, at which time it came to light that he was wanted on the indictment. After waiving extradition, appellant was returned to Ohio. On February 10, 2003, a jury found him guilty as charged.

{¶3} Appellant now appeals, raising four assignments of error. The first and second assignments of error will be considered together. The third and fourth assignments of error will be considered out of order.

{¶4} Assignment of Error No. 1:

{¶5} "THE PROSECUTION OF THE APPELLANT WAS IN CONTRAVENTION OF THE STATUTE OF LIMITATIONS."

{¶6} Assignment of Error No. 2:

{¶7} "THE APPELLANT'S SPEEDY TRIAL RIGHTS WERE VIOLATED."

{¶8} In his first assignment of error, appellant argues that the state of Ohio violated R.C. 2901.13(A)(1)(a) by prosecuting him more than six years after the alleged felony offenses. In his second assignment of error, appellant argues that the delay of more than nine years between his indictment and trial violated his constitutional right to a speedy trial.

{¶9} In order to challenge a charged offense on statute of limitations grounds or speedy trial grounds, a defendant must file a motion to dismiss prior to trial. See Crim.R. 12(C)(1) (defenses and objections based on defects in the institution of the prosecution must be raised before trial). Failure to file a motion to dismiss under Crim.R. 12(C) waives the statute of limitations defense as well as the speedy trial defense. See Crim.R. 12(H). In the case at bar, appellant never challenged his indictment and prosecution through a pre-trial motion to dismiss. He has therefore waived the right to challenge these alleged errors on appeal. See State v. Shipley, Lorain App. No. 03CA008275, 2004-Ohio-434; State v. Mruk (May 9, 1997), Lucas App. No. L-96-075. Appellant's first and second assignments of error are overruled.

{¶10} Assignment of Error No. 4:

{¶11} "THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. State v. Thompkins, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52. The standard for reversal for manifest weight of the evidence has been summarized as follows:

{¶13} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a

new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 387.

{¶14} An appellate court will not reverse a judgment as against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony. Id. at 389. When reviewing the evidence, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶15} At trial, the state presented the testimony of three law enforcement officers who took part in the undercover operation on August 1, 1993. Lieutenant Mike Mathis of the Springdale Police Department testified that on August 1, 1993, he was working as an undercover officer with the Hamilton Police Department, trying to purchase drugs on street corners in the Hamilton area. At 1:46 p.m. that day, Lt. Mathis was driving an unmarked car with a confidential informant in the area of Second Street between Chestnut and Walnut Streets. As they approached a group of people standing on the street by the curb, Lt. Mathis slowed down and made eye contact with them. Eventually, an individual approached the vehicle and sold Lt. Mathis and the informant a \$20 rock of cocaine. After leaving the scene, Lt. Mathis delivered the rock at another location to Detective James Cifuentes of the Hamilton Police Department, who field-tested it for cocaine.

{¶16} Later that day, Lt. Mathis and the informant returned to the same area and were again approached by the same individual. This time, the individual sold them \$40 worth of cocaine. Again, Lt. Mathis delivered the rock to Det. Cifuentes who field-tested it for cocaine.

{¶17} On both occasions, Lt. Mathis was wired with a radio transmitter, with surveillance officers listening in on a receiver and making an audio recording of both transactions. Immediately after making the first purchase, Lt. Mathis gave a description of the individual and his location over the radio transmitter. A marked police cruiser manned by police officers Dave Weissinger and Mel Gray was then dispatched to the location to identify the individual described by Lt. Mathis. Based on information obtained from the officers, Det. Cifuentes obtained a photograph from appellant's police files. Within an hour of the second drug transaction, the photograph was showed to Lt. Mathis who identified appellant as the individual who sold him the drugs on both occasions. At trial, Lt. Mathis identified appellant as the individual who sold him the drugs on August 1, 1993.

{¶18} Testifying on his behalf, appellant denied selling cocaine to Lt. Mathis on August 1, 1993. Appellant testified that in June 1993, he moved to Arkansas where he lived for the next nine years. Appellant could not, therefore, be the individual who had sold the cocaine to Lt. Mathis. Appellant admitted that other than his word, he had no evidence, such as phone bills or leases, to prove he lived in Arkansas in August 1993. While he did not

recognize the voice of the drug seller on the audiotape for the second drug transaction, appellant stated the voice of the seller on the audiotape for the first drug transaction sounded like his brother Clyde. At the time, Clyde lived in Hamilton.

{¶19} Det. Cifuentes, by contrast, testified that he knew both appellant and Clyde, and that he had "no problem believing" that the voice of the seller on the first audiotape was appellant's voice. Det. Cifuentes stated that the seller's voice on the second audiotape sounded identical to the seller's voice on the first audiotape. Det. Cifuentes believed the seller's voice on both audio recordings was appellant's voice. Det. Cifuentes further testified that Officer Weissinger knew both appellant and Clyde, and that on August 1, 1993, the officer identified appellant as the seller. Officer Weissinger confirmed he knew both appellant and his brother Clyde. While the officer did not recall August 1, 1993, he testified that the surveillance log for that day indicated that the seller was identified as being appellant by both him and Officer Gray.

{¶20} Our review of the evidence fails to persuade us the jury lost its way in resolving the conflicting evidence and created such a miscarriage of justice that the conviction should be overturned.

Appellant's conviction for aggravated trafficking in cocaine is supported by the manifest weight of the evidence. Appellant's fourth assignment of error is overruled.

{¶21} Assignment of Error No. 3:

{¶22} "COUNSEL WAS INEFFECTIVE AT TRIAL."

{¶23} Appellant argues that his trial counsel was ineffective because he failed to file (1) a timely notice of alibi, and (2) a pretrial motion to dismiss the aggravated trafficking charges on statute of limitations grounds and/or speedy trial grounds.

{¶24} To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's actions were outside the wide range of professionally competent assistance and that he was prejudiced as a result of counsel's actions. Strickland v. Washington (1984), 466 U.S. 668, 689, 104 S.Ct. 2052. To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A strong presumption exists that licensed attorneys are competent and that the challenged action is the product of a sound trial strategy. State v. Bradley (1989), 42 Ohio St.3d 136, 142.

{¶25} Upon reviewing the record, we find that trial counsel implicitly admitted below that his pretrial performance was deficient. Indeed, three days before trial, trial counsel filed a motion to withdraw as counsel on the grounds, inter alia, that "Counsel has advised [appellant] that he failed to file in a timely fashion a Motion to Dismiss and an Alibi Notice. [Appellant] has refused to allow [to] sign a time waiver or to let Counsel request

a continuance so that leave may be sought to file these pleadings so that [appellant] may be properly represented."¹

{¶26} The foregoing statements clearly show that trial counsel's failure to file a notice of alibi or a motion to dismiss on speedy trial grounds and/or statute of limitations grounds was not a strategic decision or a matter of trial tactics. The first prong of the Strickland test is therefore met. See, also, State v. Seeley, Columbiana App. No. 2001 CO 27, 2002-Ohio-1545 (trial counsel's failure to notice possible violation of statute of limitations was deficient under Strickland).

{¶27} Appellant must also show he was prejudiced by trial counsel's performance. With regard to trial counsel's failure to file a notice of alibi, we find that appellant was allowed to testify as to his whereabouts on August 1, 1993 by testifying he was living in Arkansas. Because appellant was able to present an alibi for the crimes to the jury, we cannot conclude that trial counsel's failure to file the notice of alibi under Crim.R. 12.1 prejudiced the outcome of the case. See State v. Moman, Columbiana App. No. 02 CO 52, 2004-Ohio-1387; State v. McDuffie, Marion App. No. 9-2000-92, 2001-Ohio-2217.

{¶28} We now consider whether trial counsel's failure to file a pretrial motion to dismiss the charges on statute of limitations grounds prejudiced appellant.

1. In his motion to withdraw, trial counsel also argued that "it has come to the attention of counsel that a motion for an independent inspection of the drugs in this case should have been filed. The drugs *** have been misplaced, which would mean that such a motion would be denied by the Court. A motion to dismiss should then be filed. Counsel has failed to do this.

{¶29} R.C. 2901.13(A)(1) states that a prosecution for a felony other than aggravated murder or murder shall be barred unless it is commenced within six years after the offense is committed. Appellant was indicted on December 6, 1993. The applicable period of limitations therefore expired on December 6, 1999. Appellant was not tried until February 2003.

{¶30} The period of limitations, however, is tolled when the accused "purposely avoids prosecution." R.C. 2901.13(G). "Proof that the accused absented himself from this state or concealed the accused's identity or whereabouts is prima-facie evidence of the accused's purpose to avoid prosecution." Id. The state bears the burden of proving an offense was committed within the appropriate statute of limitations. State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A., 85 Ohio St.3d 582, 587, 1999-Ohio-408.

{¶31} It is undisputed that appellant left Ohio for Arkansas in 1993. Appellant's act of leaving Ohio is therefore prima facie evidence of a purpose to avoid prosecution. The record, however, contains no affirmative evidence that appellant left Ohio or tried to conceal his identity or whereabouts to avoid prosecution for the drug transactions.

{¶32} At trial, appellant testified that upon being released from prison in May 1993, he stayed one month in Ohio before moving to his childhood town in Arkansas in June 1993. Appellant explained he went to Arkansas to take care of his very ill father.

[Appellant] has refused to allow counsel to request a continuance so that

Appellant lived with his father at his father's house for nine years before he was arrested in Missouri in November 2002. During that nine-year period, appellant came back to Ohio twice, once in the late 1990's and once in 2002 for a vacation. Appellant denied he left Ohio to avoid prosecution. His testimony at trial shows that he did not know about the aggravated trafficking charges until his arrest in Missouri. Appellant testified that two of his siblings, including his brother Clyde, lived in Hamilton, Ohio and that they knew where to reach him in Arkansas. Yet, nobody ever called him to let him know he was wanted.

{¶33} R.C. 2901.13(E) states that a "prosecution is commenced on the date an indictment is returned ***, or on the date a warrant *** is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment *** unless reasonable diligence is exercised to issue and execute process on the same." (Emphasis sic.) As the supreme court noted, the primary purpose of a criminal statute of limitations such as R.C. 2901.13 "is to limit exposure to prosecution to a certain fixed period of time following the occurrence of acts[.] *** [T]he intent of R.C. 2901.13 is to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct. *** The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence[.]" Climaco, 85 Ohio St.3d at 586.

said motions can be filed."

{¶34} Appellant was indicted on December 6, 1993. That same day, the state filed a request for issuance of warrant upon indictment. The trial court docket sheet, however, shows no indication of attempts to serve the warrant. There is no evidence in the record that a return was made on the warrant or that the warrant was executed before it expired on December 15, 2000. In fact, the trial court docket sheet shows absolutely no activity between the state's December 1993 request and the return of the expired warrant from the sheriff's office on December 28, 2000. During that seven-year period of time, appellant was arrested several times. Yet, it never came to light that he was wanted on the indictment.

{¶35} On March 2, 2001, the trial court issued a capias for appellant's arrest. The trial court docket sheet indicates that a warrant was served three days later at a Hamilton, Ohio address. Thereafter, when appellant was arrested in Missouri in the fall of 2002, it was discovered he was wanted on the indictment.

{¶36} In light of all of the foregoing, and more specifically appellant's testimony and the trial court docket sheet, we find that the fact that appellant was arrested on the indictment after the date the statute of limitations ran creates a reasonable possibility that, had trial counsel raised this defense, the charges against appellant would have been dismissed for violating the statute of limitations, R.C. 2901.13. We therefore hold that appellant's trial counsel was ineffective for failing to raise the statute of limitations as a defense to the aggravated trafficking

charges. See Seeley, Columbiana App. No. 2001 CO 27, 2002-Ohio-1545.

{¶37} Finally, we consider whether trial counsel's failure to file a pretrial motion to dismiss the charges on speedy trial grounds prejudiced appellant.

{¶38} The constitutional guarantee of a speedy trial is not limited in scope to the period following formal arrest. See Doggett v. United States (1992), 505 U.S. 647, 112 S.Ct. 2686. A delay between an indictment and an arrest may violate a defendant's right to a speedy trial. *Id.* In Barker v. Wingo (1972), 407 U.S. 514, 92 S.Ct. 2182, the United States Supreme Court set forth a four-part test to determine whether an individual has been denied his constitutional right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) whether the individual asserted his right to a speedy trial, and (4) the prejudice to the individual. It is not essential that the accused affirmatively demonstrates prejudice to establish a denial of the constitutional right to a speedy trial. State v. Behymer (1992), 80 Ohio App.3d 791, 793.

{¶39} With respect to the first factor, the more than nine-year delay between indictment and trial was presumptively prejudicial. As the Supreme Court noted, "courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." Doggett, 505 U.S. at 652, fn. 1, 112 S.Ct. 2686.

{¶40} With respect to the second factor, the reason for the delay, we find that based upon appellant's testimony and the trial court docket sheet, the facts weigh in appellant's favor. As previously noted, while appellant left Ohio, there is no affirmative evidence he did so to avoid prosecution or that he concealed his identity and whereabouts. Appellant's testimony at trial indicates he was not aware he had been charged with a crime until after his arrest in Missouri in 2002. While appellant should not necessarily have become "the focus of an all-out search by the sheriff's department," see State v. Packard (1988), 52 Ohio App.3d 99, it does not appear from the trial court docket sheet that the state ever attempted to notify appellant of his indictment prior to December 2000. As previously noted, the docket sheet shows absolutely no activity between December 1993 and December 2000.

{¶41} With regard to the third factor, appellant's assertion of his right to a speedy trial, it is undisputed that appellant never asserted his right during the delay, arguably because he was unaware of the charges against him. Trial counsel's failure to assert such right before trial is the focus of appellant's third assignment of error.

{¶42} With regard to the fourth factor, prejudice, the possibility that a defense could be impaired by dimming memories and the loss of exculpatory evidence is the most serious form of prejudice a pretrial delay can bring. Doggett, 505 U.S. at 654, 112 S.Ct. 2686. In the case at bar, Officer Weissinger could not recall August 1, 1993; Lt. Mathis experienced fading memory

regarding some events on August 1, 1993 and what the drug seller wore. In addition, Lt. Mathis was unsure as to whether a picture of appellant introduced at trial was the one he looked at after the second drug transaction. Presumptive prejudice and the reason for the delay are directly related. *Id.* at 656; State v. Triplett, 78 Ohio St.3d 566, 1997-Ohio-182. When a defendant's own actions are a major cause of the delay, and the record fails to reflect negligence on the part of the state, a speedy trial claim fails. State v. Daniels, Cuyahoga App. No. 82586, 2003-Ohio-6479, ¶27.

{¶43} In light of all of the foregoing, we find that there is a reasonable possibility that, had trial counsel raised the speedy trial defense, the outcome of the proceeding would have been different. We therefore hold that appellant's trial counsel was ineffective for failing to raise the constitutional right to a speedy trial as a defense to the aggravated trafficking charges. Appellant's third assignment of error is overruled in part and sustained in part.

{¶44} We reverse appellant's conviction and remand this case for proceedings consistent with this opinion. Upon remand, it is within the province of the trial court to resolve the issue of the state's diligence with regard to the statute of limitations and speedy trial. The trial court is to permit the state to present evidence as to R.C. 2901.13(A) and (E), and the potential violation of appellant's right to a speedy trial, to which appellant may respond. If it is determined that appellant's conviction should be

upheld, judgment of conviction may be re-entered and sentence imposed. State v. Tolliver (2001), 146 Ohio App.3d 186, 199.

{¶45} Judgment affirmed in part, reversed in part, and remanded.

POWELL and VALEN, JJ., concur.

[Cite as *State v. Grant*, 2004-Ohio-2810.]