[Cite as *State v. Roy*, 2010-Ohio-5528.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-12-305
	:	O P I N I O N
- vs -		11/15/2010
	:	
JOSEPH R. ROY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MIDDLETOWN MUNICIPAL COURT
Case No. 09TRC03142

Carrie A. Carpenter, Middletown City Prosecutor, Daniel R. Allnutt, One Donham Plaza, Middletown, Ohio 45042, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Joseph Roy, appeals his convictions in the Middletown Municipal Court for single counts of OVI, failure to control, and driving under a financial responsibility (FRA) suspension. We affirm the decision of the trial court in part and reverse in part.

{¶2} In the early morning hours of May 31, 2009, State Trooper Mike Steele came upon a red pickup truck smashed against a guardrail near the Middletown exit on Interstate 75. The truck was positioned against traffic, and Steele noticed that the driver was asleep. Once Steele approached the passenger side of the truck, he could see the driver, later identified as Roy, sleeping with an unlit cigarette in his mouth and drool on his shirt. After Steele's attempts to wake Roy by pounding on the window were unsuccessful, Steele opened the passenger side door and shook Roy on the shoulder.

{¶3} As Roy began to awaken, Steele asked for his license and registration. Roy attempted to hand Steele his license from his wallet, but dropped it several times before successfully handing it to Steele. According to Steele's trial testimony, he could smell a strong odor of alcoholic beverage on Roy's person, and Roy's eyes were glassy and bloodshot. Steele also testified that Roy's speech was strongly slurred and that he could not walk or stand up once he exited the truck.

{¶4} Steele then arrested Roy for OVI, failure to control, driving under a FRA suspension, failure to wear a safety belt, and refusal to submit to testing after a prior OVI conviction. Roy pled not guilty to the charges, and claimed instead that he had experienced an epileptic seizure that caused him to lose control of his truck and hit the guardrail. Before the bench trial occurred, multiple continuances occurred that delayed the trial until November 23, 2009. However, the record fails to journalize the reasons for the continuances or at whose behest the continuances were granted.

{¶5} Following a bench trial, the court acquitted Roy of failure to wear a seatbelt, but found him guilty of the remaining offenses. Roy was sentenced to fines and 60 days in jail, with 50 days suspended. Roy now appeals his convictions,

raising the following assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "APPELLANT JOSEPH ROY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE."

{¶8} In his first assignment of error, Roy claims that he received ineffective assistance of counsel when his trial counsel failed to move to dismiss the charges against him once his right to a speedy trial was violated. This argument lacks merit.

{¶9} The Sixth Amendment pronounces an accused's right to effective assistance of counsel. Warning against the temptation to view counsel's actions in hindsight, the Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential * * *. Because of the difficulties inherent in making the evaluation, 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 v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158.

{¶10} Also within *Strickland*, the Supreme Court established a two-part test that requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No.

CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶11} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

{¶12} According to the Ohio Constitution and R.C. 2945.71, defendants have the right to a speedy trial. A defendant may expressly waive his right to a speedy trial so long as the waiver is made knowingly and voluntarily. *State v. Alcorn*, Brown App. No. CA2009-04-016, 2010-Ohio-731. Additionally, R.C. 2945.72 lists several factors that may extend or toll the calculations for determining whether a defendant's right to speedy trial was violated. For example, tolling events include "the 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." R.C. 2945.72(H).

{¶13} Roy was arrested on June 1, 2009 for among other crimes, OVI, a first-degree misdemeanor. According to R.C. 2945.71, a defendant accused of a first-degree misdemeanor must be tried within 90 days. However, Roy's bench trial did not occur until November 23, 2009, 175 days after his arrest. The record lists six dates on which the trial date was continued, but does not contain the purpose of the continuance, who the continuance should be charged against, or even who requested the continuance. The trial court did not journalize its reasons for permitting the continuances or whether it considered the continuances reasonable.

{¶14} Roy now claims that the only tolling event that extended the speedy trial time frame was the time necessary for the trial court to consider his motion to

suppress. According to Roy, the motion to suppress was filed on July 16, 2009 and ruled on by the trial court on August 10, 2009 so that 26 days were tolled pursuant to R.C. 2945.72(E). Excluding these 26 days, Roy asserts that he was not brought to trial until 149 days after his arrest and 59 days beyond the required speedy trial time period.

{¶15} Conversely, the state argues that several tolling events occurred so that Roy's speedy trial rights were not violated. The state contends that the following events should toll the time frame: an initial pretrial conference that occurred on June 17, 2009 so that Roy's trial counsel could perform preliminary work on the case, the motion to suppress, the state's agreement to a continuance on July 23, 2009, and the time between the suppression hearing and the initial trial date on September 10, 2009. According to the state's claim, it was prepared to try Roy on August 10, 2009 but Roy's trial counsel chose a date for trial according to his personal schedule that was 32 days later. Based on these proposed tolling events, the state asserts that the total number of days that had elapsed that were not tolled or waived were 81, nine days short of the 90-day speedy trial deadline.

{¶16} While each party has asserted its arguments regarding Roy's speedy trial rights, neither party is able to demonstrate from the record that the argument they assert is meritorious. The state is unable to cite any specific journalizations in the record to support its contention that the above-mentioned events should not be charged against the state for speedy trial purposes. Roy is similarly unable to demonstrate from the record that the continuances did not legitimately toll the speedy trial time frame or that they were not for his own benefit.

{¶17} Roy failed to raise his speedy trial violation argument before the trial

court. Because of that, he failed to present any evidence via a motion to dismiss on which the trial court could have determined whether Roy's rights were violated. This court has long held that "the speedy trial provisions of R.C. 2945.37 are not self-executing, but must be asserted by an accused in a timely fashion. The plain language of the statute states that the proper method of raising this issue is 'upon motion made *at or prior to* the commencement of the trial.'" *State v. Hamilton*, Clermont App. No. CA2001-04-044, 5, 2002-Ohio-560, quoting R.C. 2945.73(B). (Emphasis in original.)

{¶18} In *Hamilton*, a case very similar to the one at bar, Hamilton failed to raise a speedy trial rights violation argument at the trial level, and instead, argued on appeal that his trial counsel was ineffective for failing to file a motion to dismiss. Neither Hamilton nor the state could demonstrate on the record against whom the continuance should be charged. Hamilton admitted that his request for a bill of particulars and motions for new counsel and a bond review tolled the speedy trial frame, but still contended that he had not been tried on his felony charge within 270 days as required by statute. The state argued that a holder or other parole issue extended the speedy trial time frame under R.C. 2945.72. However, the record did not contain documentation regarding either party's argument, and we were unable to determine from the record on appeal the merits of either assertion.

{¶19} After citing the provisions within R.C. 2945.73(B), we noted that "it is the motion [to dismiss] that triggers the prosecution's duty to produce evidence which rebuts the defendant's assertion that his trial has been delayed too long. Absent such a motion, the state does not have a burden to produce evidence justifying the delay." Id. at 5-6, citing *State v. Thompson* (1994), 97 Ohio App.3d 183, 186.

{¶20} After finding that Hamilton's right to a speedy trial was waived by his failure to claim it at the trial level, we found that his "ineffective assistance of counsel argument, premised on the failure to file a motion to dismiss on speedy trial grounds, is precluded by his failure to raise the issue at trial. On direct appeal, an appellate court can consider only the evidence to which the trial court was privy. Upon the record before us, we are unable to determine whether the premise of appellant's argument is accurate. * * * Since from the record before us it is not possible to discern whether there was a reasonable probability that a motion to dismiss on speedy trial grounds would have been successful, appellant has failed to demonstrate that his trial counsel was ineffective for failing to raise such a motion." Id. at 6-7.

{¶21} Like *Hamilton*, Roy failed to raise his speedy trial argument in the trial court. Without the motion, the state was not under a duty to produce evidence that the trial occurred within the speedy trial time frame. However, the mere failure to file the motion cannot overcome the presumption that Roy's properly-licensed attorney was competent or that counsel's conduct did not fall within the wide range of professional assistance. See *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301; and *Strickland* at 689.

{¶22} Instead, we are unable to determine whether there was a reasonable probability that a motion to dismiss on speedy trial grounds would have been successful.[1] Absent that determination, Roy has failed to demonstrate that his trial

1. Normally, an ambiguity within the record would be charged against the state. See *State v. Myers*, 97 Ohio St.3d 335, 345, 2002-Ohio-6658 (holding that when it is not clear who requested the continuance or the reason behind it, the time "must be charged to the state"). However, because Roy waived his speedy trial right argument by not raising the issue at the trial level, we must determine this

counsel was ineffective for failing to raise the motion to dismiss.

{¶23} Roy's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING HIS CRIM.R. 29 MOTION FOR ACQUITTAL AND IN RENDERING A JUDGMENT OF CONVICTION AGAINST APPELLANT."

{¶26} In his second assignment of error, Roy claims that the trial court erred in not granting his motion for acquittal of the driving under a FRA suspension. Finding this argument meritorious, we sustain Roy's second assignment of error.

{¶27} Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." On review, "an appellate court 'will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all elements of the crime beyond a reasonable doubt.'" *State v. Adams,* Butler App. No. CA2006-07-160, 2007-Ohio-2583, ¶19, quoting *State v. Miley* (1996), 114 Ohio App.3d 738, 742.

{¶28} "[W]hen reviewing the sufficiency of the evidence to support a criminal conviction * * * [an appellate court must] examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt * * * whether, after viewing the evidence in a light most favorable to the state, any rationale trier of fact could have

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issue within the confines of Roy's ineffective assistance of counsel argument and the exacting standard of review set forth in *Strickland*.

found the essential elements of the crime proven beyond a reasonable doubt." *State v. Gomez-Silva,* Butler App. No. CA2000-11-230, 2001-Ohio-8649, at 11.

{¶29} After the close of the state's case-in-chief, Roy moved for an acquittal pursuant to Crim.R. 29. The trial court denied Roy's motion and later found him guilty of all counts except the failure to wear a seatbelt charge. However, after reviewing the record, the trial court erred by not granting Roy's motion as it applied to the charge for driving under a FRA suspension.

{¶30} According to the citation, Roy was charged with a violation of R.C. 4510.16(A) which forbids driving while under a FRA suspension. According to Trooper Steele, when he asked for Roy's proof of insurance, Roy was unable to produce it. However, Roy produced evidence that demonstrated he was covered by insurance at the time of his arrest, and Steel confirmed that the document demonstrated that Roy had not been driving under a FRA suspension at the time of the incident. Steele then admitted that the only reason he charged Roy with driving under a FRA suspension was because Roy failed to produce proof of coverage and therefore he "didn't know whether [Roy] had insurance or not."

{¶31} Once Steele ran Roy's information through the police LEADS system, he received confirmation that Roy's license had been suspended because of a previous OVI conviction. Instead of charging Roy with driving under an OVI suspension, Steele indicated that Roy's violation was specific to the prohibition in R.C. 4510.16(A) of driving while under a FRA suspension. All parties proceeded under that charge, and at no time did the state amend the citation to charge Roy with driving under an OVI suspension.

{¶32} The state now claims that the conviction for driving under a FRA

suspension was merely a clerical error that should be corrected in a nunc pro tunc entry changing the name of the offense to driving while under a suspension for OVI. In support of its contention, the state relies on this court's decision in *State v. Wesley*, Warren App. No. CA2008-06-086, 2008-Ohio-6755, in which we discussed when it is appropriate to correct a clerical error by way of a nunc pro tunc entry.

{¶33} "Crim.R. 36(A) permits a trial court to correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission. The term, 'clerical mistake,' refers to 'a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. [W]hile courts possess authority to correct errors in judgment entries so that the record speaks the truth, nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide.'" Id. at ¶13. (Internal citations omitted.)

{¶34} We are unwilling to characterize Roy's conviction for driving under a FRA suspension as a clerical error that can be corrected via a nunc pro tunc entry. Changing the identity of the crime to something completely different is not a clerical error where a conviction for driving under an OVI suspension would have required a different legal decision or judgment by the trial court.

{¶35} We cannot assume that the trial court might have or should have considered the driving under OVI suspension charge, or what the court intended to decide. Instead, the record contains a judgment entry stating that Roy appeared in court charged with a violation of driving under a FRA suspension and that he was found guilty after a bench trial. Therefore a nunc pro tunc entry changing the name

of the offense would not reflect what the trial court actually decided where the trial court's ruling was specific to driving under a FRA suspension.

{¶36} After examining the evidence admitted at trial, we find that because Roy submitted proof that he was insured at the time of the accident, no rational trier of fact could have found the essential elements of driving under a FRA suspension proven beyond a reasonable doubt. Accordingly, the trial court erred in not granting Roy's motion for acquittal.

{¶37} Roy's second assignment of error is sustained, the conviction for driving under a FRA suspension is vacated and Roy is hereby discharged as to that specific count. The balance of the trial court's judgment is affirmed.

{¶38} Judgment affirmed in part and reversed in part.

YOUNG, P.J., and BRESSLER, J., concur.