

[Cite as *State v. Phillips*, 2004-Ohio-4688.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2003-CA-15

vs. : T.C. CASE NO. 02CR0709

THOMAS B. PHILLIPS :

Defendant-Appellant :

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O P I N I O N

Rendered on the 3rd day of September, 2004

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GRADY, J.

{¶1} Defendant, Thomas Phillips, appeals from his conviction for Theft in violation of R.C. 2913.02, a felony of the fifth degree. Defendant was sentenced to serve a term of ten months imprisonment on his conviction.

{¶2} Phillips' offense arose from his theft of checks from an auto dealership in Clark County. He subsequently negotiated some of the checks in Montgomery County, having signed his own name to them.

{¶3} Phillips was incarcerated in the Greene County jail on unrelated charges when, on August 29, 2002, he was interviewed by Kettering Police Detective Michael L. Winters, who was investigating negotiation of at least three of the forged checks at a Meijers store in Kettering. After acknowledging his *Miranda* rights, Phillips gave oral and written statements admitting that he had stolen the checks and later negotiated them.

{¶4} While Phillips was yet in the Greene County jail on the unrelated charges, on September 4, 2002, Clark County authorities placed a "holder" on his release arising from his alleged theft of the checks in Clark County.

{¶5} On September 19, 2002, Phillips was convicted on the unrelated Greene County charges. He was transported to the Clark County jail on that same date.

{¶6} On September 30, 2002, an indictment was filed in Clark County charging Phillips with theft in violation of R.C. 2913.02. The property allegedly stolen was blank checks. Per paragraph (B)(2) of that section and R.C. 2913.71(B), that fact elevates the offense from a misdemeanor to a fifth degree felony.

{¶7} On October 2, 2002, while Phillips was incarcerated in the Clark County jail, the Ohio Adult Parole Authority placed a parole violation detainer on Phillips. The basis of the alleged

violation was the felony theft charge on which he'd been indicted.

{¶8} Counsel from the office of the Clark County Public Defender was appointed to represent Phillips. On October 29, 2002, another attorney from that office appeared at a pretrial conference and moved for a continuance of Phillips' trial date, which the court had previously set for November 6, 2002.

{¶9} The trial court granted the motion for continuance on the date it was made, but the court's written order set no new trial date. Subsequently, a form of memorandum, neither signed by the judge to whom the case was assigned nor journalized, was filed, setting a new trial date of January 2, 2003.¹

{¶10} On January 2, 2003, Phillips filed two written motions. One was a motion to suppress his statements to Kettering Police Detective Winters. That motion was filed on Phillips' behalf by his attorney. The other was a motion to dismiss, alleging that Phillips' statutory speedy trial rights had been violated. Phillips prepared and signed that motion pro se.

{¶11} The motion to suppress argued that the incriminating

¹The applicable statutory speedy trial time is tolled during "[t]he period of any continuance granted on the accused's own motion." R.C. 2945.72(H). In this situation, the "period" is the term between the trial date the defendant moved to continue and the new date ordered by the court. A court of record speaks only through its journal entries, and neither an oral announcement nor a written memorandum of intention is binding upon the judge as an act of the court. See 23 Ohio Jurisprudence 3d, Courts and Judges, Section 325. Therefore, an unsigned and unjournalized memorandum of the kind the court employed here to set a new trial date might prevent creation of the "period" contemplated by R.C. 2945.72(H). We encourage the trial court to employ signed and journalized entries for that purpose.

statements Phillips made to Detective Winters were procured on false promises of leniency; specifically, that Phillips would be charged with theft as a misdemeanor instead of as a felony if he confessed.

{¶12} The court heard evidence on the motion to suppress on the day it was filed. The court found that though Detective Winters had told Phillips that misdemeanor charges would be filed if he made a statement, the promise was limited to any charge that might be filed in Kettering and was not binding on Clark County authorities. On that basis, the court overruled the motion.

{¶13} The motion to dismiss was heard and decided on January 29, 2003. The court held that because Phillips was not entitled to the triple-count benefit of R.C. 2945.71(E) with respect to the time from October 2, 2002, when the APA detainer was filed until his motion was filed on January 2, 2003, the total time of his incarceration for speedy trial purposes was well short of the two hundred and seventy days by which the State must bring a defendant to trial. R.C. 2945.71(C)(2). The court denied the motion to dismiss on that basis.

{¶14} Phillips entered a plea of no contest to the felony theft charge after his motion to dismiss was overruled. He filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶15} "THE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS AS THE STATEMENT WAS NOT VOLUNTARY HAVING BEEN GIVEN IN RETURN FOR FALSE PROMISES."

{¶16} The trial court, after hearing the testimony of both Detective Winters and Defendant, found that "the detective indicated that by making this statement a misdemeanor charge would result in Kettering which is his jurisdiction, the City of Kettering, that he would proceed with a misdemeanor." (T. 47). We have reviewed the entire record, and we find that the trial court's finding is supported by competent, credible evidence. Therefore, we are bound by it. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St. 2d 279; *Cox v. Stolle Corp* (Mont. 1990), 56 Ohio App.3d 79.

{¶17} Notwithstanding its finding, the trial court held that Defendant's statements to Detective Winters were voluntary and not coerced because the promise the detective made did not extend to the felony charge that was filed in Clark County, because the Detective neither mentioned Clark County nor did he have the authority to bind Clark County.

{¶18} In *State v. Petitjean* (2000), 140 Ohio App.3d 517, we explained that, even when *Miranda* warnings are given, a defendant's confession is involuntary and therefore procured in violation of his Fifth Amendment right "if on the totality of the circumstances the 'defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Id.*, at p. 526, quoting *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405. Among those circumstances are those that were involved in *State v. Arrington* (1984), 14 Ohio App.3d 111, wherein the court held:

{¶19} "Where an accused's decision to speak was motivated by

police officers' statements constituting 'direct or indirect promises' of leniency or benefit and other representations regarding the possibility of probation which were misstatements of the law, his incriminating statements, not being freely self-determined, were improperly induced, involuntary and inadmissible as a matter of law." *Id.* at syllabus.

{¶20} In *Arrington*, a defendant who was indicted for aggravated murder was told by officers that he might receive a sentence of probation if he confessed, and that if you "talk to us . . . you don't have to worry about no additional charges." *Id.* at 113. Those promises of a benefit were held to have rendered his resulting confession involuntary. We made the same point in *Petitjean*, and prior to that in *State v. Hopfer* (1996), 112 Ohio App.3d 521, wherein we held:

{¶21} "Promises of leniency by the police, such as probation upon conviction, are improper and render an ensuing confession involuntary. * * * However, 'admonitions to tell the truth directed at a suspect by police officers are not coercive in nature.' *Id.* at 547-548, citing *State v. Wiles* (1991), 59 Ohio St.3d 71, and *State v. Cooley* (1989), 46 Ohio St.3d 20."

{¶22} *Petitjean* and *Arrington* both relied on the rationale of a California case, *People v. Flores* (1983), 144 Cal. App.3d 492, 192 Cal. Rptr. 772, which drew the following distinction between two kinds of promises:

{¶23} "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police

activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear.' (Emphasis added.)" (Quoting *People v. Hill* (1967), 66 Cal.2d 536, 549, 58 Cal.Rptr. 340 [348], 426 P.2d 908, [916].) *Arrington, supra*, at 115.

{¶24} Both Detective Winters and Defendant in their testimony on the motion to suppress made one thing very clear; the Defendant's primary and overriding concern was to avoid being charged with a felony. He wished to be charged with a misdemeanor instead. His concern was that if he was charged with a felony his prior theft convictions would then expose him to more onerous punishments. The trial court's finding that Detective Winters promised Defendant that if he confessed a misdemeanor charge would be filed in Kettering, in Montgomery County, was given by him and accepted by Defendant on the basis of that concern.

{¶25} The difficulty is in the court's further findings that the promise didn't preclude a felony charge filed in Clark County arising out of the conduct to which Defendant confessed. That finding necessarily posits the existence of an unexpressed reservation or condition, which by its nature renders the (otherwise unambiguous) promise equivocal, and an equivocal promise

is not a basis for a knowing, intelligent, and voluntary waiver of the Fifth Amendment right. The finding also posits that the force of the promise, while it might bind authorities in Montgomery County, cannot bind authorities in Clark County. That view ignores the fact that the promise is binding on the State of Ohio with respect to any charges which are filed in its name, irrespective of what representative of the State files them or in what court of the State they are filed.

{¶26} The trial court erred when it found that, notwithstanding the promise that Detective Winters made, Defendant's confession could be used against him in the proceedings before the court on a felony charge involving the conduct to which Defendant confessed. That application renders Defendant's waiver of his Fifth Amendment right less than knowing, intelligent, and voluntary in this case. The trial court therefore erred when it overruled Defendant's motion to suppress evidence.

{¶27} The first assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

{¶28} "THE APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HIS LIBERTY WAS RESTRICTED WITHOUT TIMELY HEARING OR TRIAL."

{¶29} Defendant attacks the validity of the APA detainer, arguing that it issued contrary to regulations governing issuance of such detainers by the department of rehabilitation and correction published in the Ohio Administrative Code. See O.A.C. 5120:1-1-31(F). If the detainer was invalid, it might not constitute an independent basis for incarceration that denies an accused the benefit of the triple-count provisions of R.C.

2945.71(E). However, Defendant failed to raise this particular issue by way of a timely objection filed in the trial court. Therefore, it is waived for purposes of appeal. Crim.R. 12(H).

{¶30} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶31} "THE APPELLANT WAS DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO SPEEDY TRIAL WHEN HE WAS HELD ON DETAINER FOR ALLEGED FIFTH DEGREE FELONY CHARGES WITHOUT A PROMPT PAROLE VIOLATION HEARING AS MANDATED BY OHIO LAW AND REGULATIONS."

{¶32} Defendant argues that, because the APA detainer was invalid for reasons argued under the third assignment of error, the trial court erred when it took account of the detainer to deny him the triple-count benefit of R.C. 2945.71(E) for the time he was incarcerated after the detainer was filed, and then found that his speedy trial rights were not violated. However, Defendant's motion to dismiss for violation of his speedy trial rights raised no issue concerning the validity of the APA detainer. Again, because this issue was not raised, the defense or objection is waived. Crim.R. 12(H).

{¶33} The fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶34} "THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND HELD AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT DID NOT CREDIT APPELLANT WITH THE TIME SERVED FROM HIS DETENTION IN GREENE COUNTY PRIOR TO HIS TRANSFER TO CLARK COUNTY."

{¶35} The trial court made no mention of the fifteen days

Defendant was subject to a Clark County holder on these charges while he was incarcerated in the Greene County jail. Defendant is entitled to the credit for that time for speedy trial purposes, but as straight time and not triple-time per R.C. 2945.71(E). However, whether those days are accounted as straight-time or triple-time, their addition to the time he was incarcerated in Clark County does not produce a statutory speedy trial violation, at least so long as the trial court was correct when it found that Defendant was not entitled to triple-count for the time he was incarcerated after the APA detainer was filed. Defendant does not attack that aspect of the trial court's ruling, except with respect to the validity of the APA detainer. Any error in that regard has been waived.

{¶36} The fifth assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶37} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THEREFORE CONSTITUTIONAL DUE PROCESS OF LAW."

{¶38} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must demonstrate that, were it not for counsel's errors, the result of the trial would have been different. *Id.*, *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶39} Defendant argues that his appointed counsel failed to take action on his behalf until long after his indictment, and that this inattention prompted another attorney from the public defender's office to request a continuance of his trial date, contrary to Defendant's express instructions to not do anything to compromise his speedy trial rights. Defendant further argues that when he filed his motion to dismiss for violation of his speedy trial rights he was required to represent himself, for all practical purposes, because his attorney had moved for leave to withdraw as Defendant's attorney. Finally, Defendant argues that his attorney failed to attack the validity of the APA detainer in a habeas corpus proceeding.

{¶40} Defendant's contentions concerning his attorney's failure to act on his behalf relate to the prejudice to his speedy trial rights resulting from the continuance that was sought. However, it is not unusual that a busy attorney must seek a continuance because of the press of other representations. And, public defender attorneys are notoriously overburdened.

{¶41} The fact that an attorney seeks a continuance, even though it may toll a client's speedy trial time, doesn't necessarily portray a violation of counsel's duty of representation, even when, as Defendant claims, requesting a continuance was contrary to the client's instructions. The client's preferred defense strategies do not necessarily govern his counsel's decisions.

{¶42} Neither do we find that Defendant was required to represent himself because his appointed attorney requested leave to

withdraw. That request was apparently prompted by Defendant's contentions in his pro se motion to dismiss that his attorney was constitutionally ineffective for much the same reason he argues here. However, counsel appeared and prosecuted the motion to dismiss on Defendant's speedy trial time claims. After that, the court denied counsel's motion to withdraw. Again, we find no prejudice.

{¶43} Finally, with regard to counsel's failure to attack the validity of the APA detainer in a habeas corpus proceeding, we cannot find on this record that such a proceeding would have succeeded.

{¶44} The State offered evidence that the APA detainer was received by the Clark County jail by fax transmission. That suggests that the detainer was "immediately filed" upon Defendant's indictment on the fifth degree felony, which is prohibited by O.A.C. 5120:1-1-31(F). Indeed, the retainer was filed two days after the indictment.

{¶45} Nevertheless, the alternative procedures, whereby the detainer may be filed by the supervising parole after consultation with his or her unit supervisor, followed by other internal procedures, may have been employed. The record does not show that it was not. Therefore, we cannot find that Defendant was prejudiced.

{¶46} The second assignment of error is overruled.

{¶47} Having sustained the first assignment of error, we will reverse and vacate Defendant-Appellant's conviction and sentence

and remand the matter to the trial court for further proceedings
consistent with this opinion

FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. Gerald F. Lorig