

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Case No. 14CA3439
JENA M. SWEAT,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
		RELEASED 06/30/2015

APPEARANCES:

Timothy Young, Ohio Public Defender, and Eric M. Hedrick, Assistant Ohio Public Defender, Columbus, Ohio, for Appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Cynthia G. Schumaker, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Jena M. Sweat appeals from her conviction and sentence in the Ross County Common Pleas Court following her no contest plea to one count of possessing heroin.

{¶ 2} In her sole assignment of error, Sweat contends that her trial counsel provided ineffective assistance by failing to argue for a dismissal of the charge on the grounds that her constitutional speedy-trial rights were violated. Because the record and a weighing of the pertinent factors do not establish that Sweat’s constitutional speedy-trial rights were violated, we decline to find ineffective assistance of counsel for failing to raise the issue. Accordingly, we overrule Sweat’s sole assignment of error and affirm the trial court’s judgment.

{¶ 3} The record reflects that Sweat was arrested on June 20, 2012, in Ross County, Ohio. The following day, a criminal complaint charging Sweat with fourth-degree felony

possession of heroin was filed and she was arraigned in Chillicothe Municipal Court. Sweat pleaded not guilty and bond was set at \$5,000, with a ten-percent provision. Sweat's mother posted bond and Sweat was released from custody on June 21, 2012. The municipal court filings listed an address on Anderson Station Road, Chillicothe, Ohio, as Sweat's residence. On June 29, 2012, Sweat waived her preliminary hearing and was bound over to the Ross County Common Pleas Court. On August 24, 2012, Sweat filed a notice of change of address with the common pleas court listing her address as "The Georgie Harris House, 196 East Emmitt Avenue, Waverly, Ohio 45690."

{¶ 4} On October 24, 2012, the common pleas court *sua sponte* dismissed Sweat's case without prejudice due to the State's failure to bring the case before a Grand Jury. At that time, the common pleas court also released bond. Sweat was finally indicted on December 21, 2012, on a single fifth-degree felony count of possession of heroin.¹ The indictment was based on her June 20, 2012 arrest. That same day a summons on indictment was issued. The summons directed that Sweat be served at the Georgie Harris House in Waverly, Ohio, by the Pike County Sheriff's Office. The summons was returned unserved on January 22, 2013, with the handwritten notation: "No Service - Not a resident there." Subsequently, and at the State's request, a warrant for Sweat's arrest was issued on February 6, 2013. Meanwhile, a second summons directing the Pike County Sheriff's Office to serve Sweat with the indictment at the Bridgehaven Homeless Shelter in Waverly, Ohio, was returned unserved on February 8, 2013. It included the handwritten notation: "No Service - Does not stay or work here."

¹ The case was assigned a new case number following the December 21, 2012 indictment. However, appellate counsel sought, and we granted, a motion to supplement the record in this case with the original papers and transcripts of hearings from the prior municipal court/bound over common pleas case. Consequently, we may now properly consider these proceedings to determine Sweat's speedy trial arguments.

{¶ 5} On July 30, 2013, Sweat was arrested on the February 6, 2013 warrant. She was arraigned, pleaded not guilty, and was released on her own recognizance the next day. At the arraignment, it was revealed that Sweat was residing with her mother and two children at “25 Deerpath Road”, “Chillicothe, Ohio.” Sweat’s trial counsel filed a discovery demand on August 6, 2013, and a motion to dismiss for a violation of Sweat’s speedy-trial rights on August 15, 2013. In the motion to dismiss, trial counsel cited both a violation of constitutional and statutory speedy-trial rights, but in the memorandum in support, counsel argued exclusively under Ohio’s statutory speedy-trial framework.

{¶ 6} The State filed a memorandum contra to Sweat’s motion to dismiss, along with a motion for leave to file instante, on September 20, 2013. The trial court granted the motion for leave to file instante and accepted the memorandum contra.

{¶ 7} A hearing on the motion to dismiss was held on December 30, 2013. No witnesses were called at the hearing. Following argument from both parties, the trial court stated that the motion was overruled. On January 7, 2014, the trial court filed a decision and entry denying the motion. Shortly thereafter, Sweat pleaded no contest to the indictment. The trial court accepted Sweat's plea, found her guilty of the offense charged and sentenced her in April 2014. Sweat then filed a timely notice of appeal.

{¶ 8} Sweat assigns the following error for our review:

Assignment of Error:

Trial counsel rendered ineffective assistance in violation of Ms. Sweat’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution. (Criminal Compl., June 21, 2012; Cash Appearance Bond, June 21, 2012; Entry, June 29, 2012; Journal Entry, Oct. 24, 2012; Indictment, Dec. 21, 2012; Arraignment Tr.; Summons on Indictment, Jan. 22, 2013; Summons on Indictment, Feb. 8, 2013; Mot. to Dismiss, Aug. 15, 2013.)

{¶ 9} In her sole assignment of error, Sweat contends that she was denied her right to effective counsel because her trial attorney failed to seek dismissal of the indictment on the grounds that her constitutional speedy-trial rights were violated. Specifically, Sweat contends (1) her constitutional speedy-trial rights were violated by the delay between her initial arrest and service of the indictment, and (2) her trial attorney provided ineffective assistance by not seeking dismissal of the charge against her based on the speedy-trial violation prior to her no contest plea. Sweat further argues that she was prejudiced by the alleged deficient performance because the charge against her would have been dismissed if the appropriate argument were raised.²

{¶ 10} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14; *State v. Stout*, 4th Dist. Gallia No. 07CA5, 2008–Ohio–1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). “In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.” *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95. “Failure to establish either element is fatal to the claim.” *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14.

² We reiterate that while trial counsel filed a motion to dismiss for violation of speedy-trial rights, trial counsel's argument was focused entirely on Ohio's statutory speedy-trial framework and did not address Sweat's constitutional speedy-trial rights.

{¶ 11} “When considering whether trial counsel’s representation amounts to deficient performance, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ ” *State v. Walters*, 4th Dist. Washington Nos. 13CA33, 13CA36, 2014–Ohio–4966, ¶ 23, quoting *Strickland* at 689. “Thus, ‘the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.’ ” *Id.*, quoting *Strickland* at 689. “ ‘A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.’ ” *Id.*, quoting *State v. Taylor*, 4th Dist. Washington No. 07CA1, 2008–Ohio–482, ¶ 10. “Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel’s errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment.” *Id.*

{¶ 12} As set forth above, Sweat claims the approximately thirteen-month delay between her initial arrest on June 20, 2012, and service of the indictment on July 30, 2013, violated her constitutional right to a speedy trial.³

{¶ 13} The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial in all criminal prosecutions. That guarantee is applicable to the states through the Fourteenth Amendment Due Process Clause. *Klopfer v. North Carolina*, 386 U.S. 213, 222-223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Similar protection is afforded under Section 10, Article I of the Ohio Constitution. *See State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971), paragraph one of the syllabus (“The provisions of Section 10, Article I of the Ohio Constitution and of the Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, guarantee to a defendant in a criminal case the right to a speedy trial.”). Furthermore, Ohio law also includes a statutory speedy-trial right. *See R.C.*

³ In her appellate brief, Sweat inaccurately refers to the delay as being “over 20 months”.

2945.71 et seq. However, the statutory and constitutional rights are separate and distinct from one another. *State v. Hilyard*, 4th Dist. Vinton No. 05CA598, 2005-Ohio-4957, ¶ 7.

{¶ 14} The United States Supreme Court has recognized that delays are unavoidable in the criminal justice system, and has determined that whether a prosecution has been constitutionally speedy depends upon the particular facts and circumstances of each case. *See Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Accordingly, to determine whether a constitutional speedy-trial violation exists, “it is necessary to balance and weigh the conduct of the prosecution and the defendant by examining four factors: (1) the length of the delay; (2) the reason for the delay; (3) [d]efendant’s assertion of his speedy trial rights; and (4) the prejudice to [d]efendant as a result of the delay.” *State v. Ferguson*, 2d Dist. Clark No. 08CA0050, 2011-Ohio-4285, ¶ 72, citing *Barker* at 530; *see also Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). None of the four factors, however, is individually determinative of whether the defendant’s constitutional speedy-trial rights has been violated. Rather, the factors must be considered collectively. *Barker* at 533. Moreover, courts need not even consider the factors where there is no showing that the delay is presumptively prejudicial; that is, the delay must be presumptively prejudicial in order to trigger the balancing test analysis. *Id.* at 530; *Doggett* at 651-652. The *Doggett* Court also noted that a delay approaching one year generally becomes “presumptively prejudicial.” *Doggett* at 652, fn. 1.

{¶ 15} Here, the thirteen-month delay is presumptively prejudicial so as to trigger consideration of the *Barker* factors. However, because Sweat entered a no contest plea, the record contains few facts to aid in our determination of whether a constitutional speedy-trial claim would have prevailed below. Furthermore, we note that a presumptively prejudicial delay, while adequate to trigger review of the other *Barker* factors, may nonetheless be entitled to

“negligible” weight where the delay does not implicate extended pretrial incarceration or disruption by unresolved charges. *State v. Owens*, 2d Dist. Montgomery No. 23623, 2010-Ohio-3353, ¶ 9, quoting *State v. Triplett*, 78 Ohio St.3d 566, 569, 679 N.E.2d 290 (1997).

{¶ 16} In the case sub judice, the other *Barker* factors do not weigh in Sweat’s favor. For instance, while Sweat filed a motion to dismiss on the grounds of a speedy-trial violation (third factor-timely assertion of her rights), the arguments supporting the motion focused entirely on Ohio statutory speedy-trial framework and did not raise the constitutional issue. Moreover, the record does not reveal the reason for the delay; and we see nothing to indicate that the delay was attributable to any government action or lack thereof.

{¶ 17} In her appellate brief, Sweat argues that the State was negligent in its attempts to locate her and serve her with the indictment. She points to the fact that upon her July 30, 2013 arrest on the warrant, she was living with her mother at the same address that her mother provided when she posted bond the year prior. Sweat, however, ignores the fact that following her release on bond she filed with the common pleas court a notice of change of address listing the Georgie Harris House in Waverly, Ohio, as her address. The State attempted to serve summons of the indictment on Sweat at the Georgie Harris House, but the summons was returned unserved. There is also evidence in the record that the State tried to serve summons of the indictment at another Waverly address but it too was returned unserved. Other than these two attempts to serve summons of the indictment, nothing is known in regards to the State’s efforts to locate Sweat. Furthermore, the record reveals three different addresses for Sweat that spans two counties. We also note that Sweat was eventually arrested on the warrant at a fourth address. Thus, it appears Sweat lived a nomadic lifestyle that may have contributed to the delay.

{¶ 18} With regards to the fourth *Barker* factor, actual prejudice, we note that three types exist: (1) pretrial incarceration on the charges at issue, (2) anxiety and concern about the charges, and (3) the possibility of an impaired defense due to fading memories and the loss of evidence. *Owens*, 2010-Ohio-3353, at ¶ 15. Here, Sweat was incarcerated for approximately two days on the charges: on the day of the initial arrest, and for one day when she was arrested on the warrant following indictment. Bond was also released against Sweat upon the initial dismissal of the case by the common pleas court. Sweat's trial counsel also admitted at her arraignment on the indictment that "the first she knew about this case coming back was yesterday when she was picked up [on the warrant] on Dayton Street." [Tr. of 7/31/2013 Arraignment at 3.] So from the time that the original charge was dismissed, October 24, 2012, to the time Sweat was finally served the indictment, July 30, 2013, she suffered no anxiety or concern. Finally, nothing from the record suggests any impairment to her defense. In response to the State's reciprocal discovery request, Sweat listed no defense witnesses other than herself and she has shown no loss of recollection of pertinent facts or loss of evidence necessary to mount an effective defense. [See Record Doc. No. 20.]

{¶ 19} In sum, the period of delay in this case is approximately thirteen-months, which barely reaches the threshold needed to trigger a full *Barker* analysis. While this delay weighs in Sweat's favor, its weight is negligible because Sweat was not jailed for an extended period of time awaiting trial and her life was not otherwise disrupted waiting resolution of the case. Moreover, the record does not establish that the delay was caused by the State or that any actual prejudice resulted from the delay. Finally, while Sweat asserted her speedy-trial right in the court below, she failed to raise the constitutional argument that she now makes on appeal. Given this

limited record, and after having reviewed the *Barker* factors, we conclude that Sweat's constitutional speedy-trial right was not violated.

{¶ 20} Having found no merit to Sweat's constitutional speedy-trial argument, we further find that trial counsel's failure to raise the issue in the trial court was not ineffective. *See Hilyard*, 2005-Ohio-4957, at ¶ 31 ("Counsel's failure to raise a meritless issue does not constitute ineffective assistance."). Put another way, Sweat was not prejudiced by counsel's failure to raise the issue because we do not find a reasonable probability that the trial court would have sustained a motion to dismiss on constitutional speedy-trial grounds. Accordingly, Sweat's ineffective assistance of counsel claim is without merit.

{¶ 21} Based upon the reasoning set forth above, we overrule Sweat's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure](#).

Harsha, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.