

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

| | | |
|----------------------|---|------------------------------|
| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 14CA10 |
| | : | |
| vs. | : | |
| | : | |
| WILLIAM S. FLEMING, | : | <u>DECISION AND JUDGMENT</u> |
| | : | <u>ENTRY</u> |
| | : | |
| Defendant-Appellant. | : | Released: 03/04/15 |

APPEARANCES:

Ryan Shepler, Kernen & Shepler, LLC, Logan, Ohio, for Appellant.

Laina Fetherolf, Hocking County Prosecutor, and William L. Archer, Jr.,
Assistant Hocking County Prosecutor, Logan, Ohio, for Appellee.

McFarland, A.J.

{¶1} This is an appeal from a Hocking County Common Pleas Court judgment convicting and sentencing Appellant after he pled guilty to one count of aggravated robbery, a first degree felony in violation of 2911.01(A)(1), one count of tampering with evidence, a third degree felony in violation of R.C. 2921.12(A)(1), and petty theft, a first degree misdemeanor in violation of R.C. 2913.02(A)(1). On appeal, Appellant contends that trial counsel's signing of a time waiver, while Appellant was incarcerated, and without Appellant's co-signing or consent to the filing of a

time waiver, constituted ineffective assistance of counsel which prejudiced him. However, as discussed more fully below, a guilty plea waives any challenge based upon speedy trial grounds and further, counsel may waive speedy trial without a defendant's consent or approval.

{¶2} Additionally, because a speedy trial challenge may not be raised for the first time on appeal, and because a claim of ineffective assistance of counsel in connection with a speedy trial waiver is more properly brought via a petition for post-conviction relief, Appellant's sole assignment is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶3} On August 10, 2012, Appellant was indicted for one count of aggravated robbery, a first degree felony in violation of 2911.01(A)(1), one count of tampering with evidence, a third degree felony in violation of R.C. 2921.12(A)(1), and petty theft, a first degree misdemeanor in violation of R.C. 2913.02(A)(1), allegedly committed in Hocking County. At the time of his indictment, Appellant was already incarcerated as a result of a felony conviction in another county. Appellant was arraigned on the Hocking County indictment on October 10, 2013. Appellant was released from incarceration in the other county on November 27, 2013, and appeared on

the same day in the Hocking County Court of Common Pleas, at which time the court set a cash or surety bond of \$100,000.00.

{¶4} On January 13, 2014, Appellant's appointed counsel signed and filed a time waiver. Appellant claims that he did not sign or consent to the time waiver; however, as pointed out by the State, although Appellant's signature does not appear on the time waiver, the record is devoid of evidence regarding whether Appellant approved the time waiver. Three days later, Appellant's counsel filed a request for a competency evaluation. Appellant was found competent to stand trial on March 4, 2014, and on March 18, 2014, Appellant and his court-appointed counsel both requested that new counsel be appointed. New counsel was appointed and an entry was filed April 18, 2014, stating any delay would be chargeable to Appellant.

{¶5} Although Appellant's counsel filed a motion in limine the day before trial, at no time prior to trial did Appellant's counsel file a motion to dismiss based upon speedy trial grounds. Finally, on June 12, 2014, the morning of the scheduled jury trial, Appellant entered guilty pleas to all three counts contained in the indictment. The trial court then sentenced Appellant to a five-year prison term on count one and a three-year prison term on count two, to be served concurrently. The trial court merged counts

two and three for purposes of sentencing. Appellant now appeals, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

“I. TRIAL COUNSEL'S SIGNING OF A TIME WAIVER, WHILE DEFENDANT WAS INCARCERATED, AND WITHOUT DEFENDANT CO-SIGNING OR CONSENTING TO THE FILING OF A TIME WAIVER, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, WHICH PREJUDICED DEFENDANT.”

LEGAL ANALYSIS

{¶6} In his sole assignment of error, Appellant contends that trial counsel's signing of a time waiver while he was incarcerated and without his co-signing or consenting to the time waiver constituted ineffective assistance of counsel and resulted in prejudice. Appellant essentially argues that trial counsel's waiver of time resulted in Appellant not being brought to trial within the speedy trial limits contained in R.C. 2945.71, and that but for the waiver, the trial court may have been required to discharge him. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466

U.S. 668, 687, 104 S.Ct. 2052; *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 23. The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶7} However, before we reach the merits of Appellant's assignment of error, we must first consider whether Appellant has waived the right to raise an argument based upon speedy trial grounds. In *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph one of the syllabus, the Supreme Court of Ohio held 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)." Citing *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2de 581 (1986). Further, although Appellant cites *State v. Turner*, 168 Ohio App.3d 176, 2006-Ohio-3786, 858 N.E.2d 1249, in favor of his contention that he may still raise an argument of ineffective assistance of counsel on appeal, *Turner* does not support Appellant's contention.

{¶8} Here, Appellant did not file a motion to dismiss based upon speedy trial grounds at the trial court level and instead is raising it for the first time on appeal. *Turner* actually held that "an appellant cannot raise a

speedy-trial issue for the first time on appeal." *Turner* at ¶ 21; citing *Worthington v. Ogilby*, 8 Ohio App.3d 25, 455 N.E.2d 1022 and *State v. Rector*, 5th Dist. Delaware No. 04CAC03022, 2004-Ohio-4549. The *Turner* court reasoned that "[t]he proper approach is the filing of a post-conviction relief petition alleging ineffective assistance of counsel." *Turner* at ¶ 22. The *Turner* court further reasoned that by raising the claim in a petition for post-conviction relief, "both the appellant and the appellee could develop the issue of whether tolling occurred[,]" unlike on direct appeal where the failure to initially raise the question at the trial court level denies the State "the opportunity to establish that tolling of the statute occurred." *Id.* Thus, the *Turner* court reasoned that raising the argument via a petition for post-conviction relief, rather than raising the issue for the first time on appeal, "can develop the appropriate facts." *Id.* at ¶ 27.

{¶9} In light of the record before us, however, we cannot say that a petition for post-conviction relief would be meritorious. The basis of Appellant's ineffective assistance of counsel claim is that Appellant's trial counsel filed a waiver of time without Appellant's consent. This Court has long held that a defendant's statutory right to speedy trial may be waived with or without the defendant's consent, by defendant's counsel. *State v. Sanders*, 4th Dist. Pickaway No. 95CA6, 1996 WL 734666, *11; citing *State*

v. King, 70 Ohio St.3d 158, 637 N.E.2d 903 (1994); *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978); *State v. Dumas*, 68 Ohio App.3d 174, 587 N.E.2d 932; See also *State v. Sabo*, 4th Dist. Athens No. 1273, 1986 WL 9705, *4 (" 'a defendant's right to be brought to trial within the time limits expressed in R.C. 2945.71 may be waived by his counsel for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent.' "); quoting *State v. McBreen*, *supra*.

{¶10} A review of the record indicates that just three days after Appellant's counsel filed a waiver of time, he filed a motion to determine Appellant's competency to stand trial. Following that, Appellant filed a request for discovery, a motion to permit counsel to withdraw, a request for the appointment of new counsel and eventually a motion in limine. Counsel's waiver of time was clearly done for reasons of trial preparation. Thus, Appellant's argument that he received ineffective assistance of counsel because trial counsel filed a waiver of speedy trial time without his consent lacks merit.

{¶11} In light of the foregoing, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking 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 proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier 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 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.

Hoover, P.J. & Harsha, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.