

[Cite as *State v. Creech*, 2017-Ohio-6951.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 16CA3730
 :
 vs. :
 :
 SCOTT D. CREECH, : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

Robert Shawn Stratton, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:7-6-17

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that (1) overruled and dismissed a motion to dismiss filed by Scott D. Creech, defendant below and appellant herein, and (2) resentenced appellant pursuant to this court’s order. *See State v. Creech*, 4th Dist. Scioto No. 09CA3291, 2010-Ohio-2553. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING THE DEFENDANT-APPELLANT’S MOTION TO

DISMISS.”

SECOND ASSIGNMENT OF ERROR:

“THE DELAYED RESENTENCING OF MORE THAN FIVE YEARS PREJUDICED THE DEFENDANT-APPELLANT.”

THIRD ASSIGNMENT OF ERROR:

“THE SCIOTO COUNTY PROSECUTOR FAILED TO PROPERLY DECIDE WHICH COUNT(S) THE STATE OF OHIO INTENDED TO PURSUE PRIOR TO HEARING; DENYING DEFENDANT-APPELLANT THE ABILITY TO PREPARE AND HAVE COUNSEL PREPARE ARGUMENTS IN ADVANCE. THE TRIAL COURT ERRED WHEN IT IMPROPERLY SENTENCED DEFENDANT-APPELLANT ON ALLIED OFFENSES.”

FOURTH ASSIGNMENT OF ERROR:

“DEFENDANT’S ATTORNEY, CLAIRE CAHOON, PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO SCHEDULE A HEARING PER THE FOURTH DISTRICT COURT OF APPEALS REMAND FROM JUNE 1, 2010.”

{¶ 2} On April 30, 2008, the Scioto County Grand Jury returned an indictment that charged appellant with (1) the illegal possession of chemicals for the manufacture of drugs, (2) the illegal manufacture of drugs, (3) four counts of having a weapon while under a disability (counts three through six), (4) three counts of unlawful possession of dangerous ordnance (counts seven through nine), (5) illegally manufacturing or possessing explosives, and (6) trafficking in methamphetamine.¹

{¶ 3} The jury found appellant guilty of (1) the illegal possession of chemicals for the manufacture of methamphetamine, (2) the illegal manufacture of drugs, (3) having a weapon (a rifle) while under disability, (4) having a weapon (detonation cord) while under disability, (5) having a

weapon (sensitized ammonium nitrate) while under disability, (6) having a weapon (blasting caps) while under disability, (7) unlawful possession of dangerous ordnance (sensitized ammonium nitrate), (8) unlawful possession of dangerous ordnance (blasting caps), (9) unlawful possession of dangerous ordnance (detonation cord) and (10) illegally manufacturing or processing explosives.

{¶ 4} On October 10, 2008, the trial court sentenced appellant to serve a total of 19 years in prison as follows: (1) five years for the illegal possession of chemicals for manufacture of methamphetamine (count one), (2) six years for the illegal manufacture of drugs (count two), (3) two years for having a weapon (rifle) while under disability (count three), (4) four years on each of the three having a weapon while under disability offenses that involved the detonation cord, the blasting caps, and the sensitized ammonium nitrate (counts four through six), (5) 11 months for each of the offenses of unlawful possession of dangerous ordnance (counts seven through nine), and (6) seven years for illegally manufacturing or processing explosives (count ten). The court ordered (1) the sentences for counts one and two to be served concurrently, (2) the sentence for count three to be served consecutively to counts one and two, (3) the sentences for counts four, five, and six to be served concurrently with each other, but consecutively to counts one and two and to count three, (4) the sentences for counts seven, eight, and nine to be served concurrently with each other and concurrently with counts four through six, and (5) the sentence for count ten to be served consecutively to counts one and two, count three, and counts four, five, and six.²

{¶ 5} On appeal, this court affirmed, in part, and reversed, in part, and remanded.

¹ The trial court later dismissed the trafficking count.

² The facts are taken largely from our decision in *State v. Creech*, 4th Dist. Scioto No. 09CA3291, 2010-Ohio-2553 (*Creech I*).

Specifically, we held that the convictions for having a weapon while under disability that stemmed from explosive materials (detonation cord, blasting caps, and sensitized ammonium nitrate) were required to be merged into the having a rifle while under disability count. Because the trial court sentenced appellant on each of these three offenses, we reversed the trial court's judgment on counts four, five, and six and remanded the matter for resentencing. We further reversed and remanded the trial court's judgment of conviction and sentence for counts seven, eight, and nine, concluding that the three unlawful possession counts were also required to be merged. *State v. Creech*, 4th Dist. Scioto No. 09CA3291,2010-Ohio-2553, ¶ 26 and 37 (jurisdiction denied, *State v. Creech*, 146 Ohio St.3d 1492, 2016-Ohio-5585, 57 N.E.2d 1171). (*Creech I*)

{¶ 6} On June 1, 2011, appellant filed a motion "to strike and vacate the supposed" jury verdicts and sentencing entry. On July 4, 2011, appellant also filed a motion for leave to file "delayed petition for postconviction relief." On July 5, 2012, the trial court overruled the motion to vacate and denied leave of court to file a postconviction relief petition out of rule. This court affirmed the judgment of the trial court. *State v. Creech*, 4th Dist. Scioto No. 12CA3500, 2013-Ohio-3791. (*Creech II*)

{¶ 7} On November 19, 2015, appellant filed a pro se motion to dismiss based on alleged due process and speedy trial violations. The trial court held a hearing on December 21, 2015 on the resentencing, and on December 23, 2015, the court overruled and dismissed the motion to dismiss. As for the remand, the court ordered:

"that the original sentence, as it pertains to Counts 1, 2, 3, and 4 shall remain in full force and effect. The Court ran Counts 1 and 2 concurrent for a total of 6 years mandatory on Count 2. The Court imposed a sentence of 2 years on Count 3, Weapon While Under Disability. The Court imposed a sentence of 7 years on Count 10 for Illegal Manufacturing of Drugs. All of these counts were run consecutive in

the defendant's original sentence. This Court now finds that Counts 4, 5, and 6 shall merge and the defendant shall be sentenced on Count 4 of Having a Weapon While under Disability. It is the Order of this Court on Count 4 the defendant is assessed no fine but is ordered to pay costs of prosecution and is sentenced to 4 years in the custody of the Ohio Department of Rehabilitation and Correction. It is ordered that Count 4 run consecutive to Counts 2, 3, and 10.

It is the further Order of this Court, Counts 8 and 9 shall merge into Count 7, and the defendant shall be sentenced on Count 7 to 11 months in the custody of the Ohio Department of Rehabilitation and Correction. It is ordered Count 7 shall run concurrent to all other counts. It is the intent of this Court to impose a sentence of 19 years in the custody of the Ohio Department of Rehabilitation and Correction. This Court finds that consecutive sentences are necessary to protect the public and to punish the offender and are not disproportionate to the conduct or to the danger that the offender poses. The Court further finds that the harm is so great or unusual that no single term adequately reflects the seriousness of the conduct.”

{¶ 8} This appeal followed.

I & II

{¶ 9} Because assignments of error one and two are related, we address them together. In his first assignment of error, appellant asserts that the trial court erred and abused its discretion by denying appellant's motion to dismiss. Appellant contends that the five-year delay in resentencing caused numerous prejudices. Appellant's argument is grounded in Crim.R. 32(A) and the Sixth Amendment. In his second assignment of error, appellant argues that the delayed resentencing prejudiced him because he alleges that his resentencing was based on *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 rather than *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, which was the law of the land at the time of the remand.

A

STANDARD OF REVIEW

{¶ 10} When reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Brewer*, 2014–Ohio–1903, 11 N.E.3d 317, (4th Dist.) “[W]hen the

General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that ‘[t]he appellate court’s standard of review is not whether the sentencing court abused its discretion.’ ” *Id.* at ¶ 33. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that “the record does not support the sentencing court’s findings” under the specified statutory provisions or “the sentence is otherwise contrary to law.” *See State v. Campbell*, 4th Dist. Adams No. 15CA1012, 2016-Ohio-415, ¶ 11.

{¶ 11} In making such a determination, it is “important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative.” *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013–Ohio–1891, ¶ 21. “It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court’s findings.” *Id.* The language in R.C. 2953.08(G)(2) establishes an “extremely deferential standard of review” for “the restriction is on the appellate court, not the trial judge.” *Id.* *See also, State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315.

B

CRIM.R. 32(A)

{¶ 12} Crim.R. 32(A) states that a sentence “shall be imposed without unnecessary delay.” The Supreme Court of Ohio has recognized that delay for a reasonable time does not invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St.201, 202, 192 N.E.2d 782. However, some appellate districts have recognized that Crim.R. 32(A) does not apply in cases when an offender must be resentenced. *See State v. Huber*, 8th Dist. Cuyahoga No. 85082, 2005-Ohio-2625, *State v.*

Craddock, 8th Dist. Cuyahoga No. 94387, 2010-Ohio-5782, *State v. Coleman*, 8th Dist. Cuyahoga No. 94866, 2011-Ohio-341, *State v. Harris*, 8th Dist. Cuyahoga No. 95010, 2011-Ohio-482, *State v. Culgan*, 9th Dist. Medina No. 09CA0060-M, 2010-Ohio-2992, *State v. Spears*, 9th Dist. Summit No. 24953, 2010-Ohio-1965, *State v. Jones*, 9th Dist. Summit No. 25032, 2010-Ohio-4455, *State v. Banks*, 9th Dist. Summit No. 25279, 2011-Ohio-1039, *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892 (8th Dist.).

{¶ 13} Appellant cites *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, 786 N.E.2d 492, ¶ 20 (7th Dist.) and *Willoughby v. Lukehart*, 39 Ohio App.3d 74, 76, 529 N.E.2d 206 (11th Dist.1987) in support of his argument that his resentencing delay is unreasonable. However, both *Brown* and *Willoughby* involve original sentencing, not resentencing, and they are thus inapplicable. Moreover, appellant cites *State v. Collier*, 8th Dist. Cuyahoga No. 61318, 1991 WL 221986 (Oct. 24, 1991), and *State v. Crosier*, 5th Dist. Tuscarawas No. 87 AP 12-0098, 1988 WL 59531 (May 31, 1988) in support of his argument that Crim.R. 32(A) applies to resentencing. While *Collier* does cite Crim.R. 32(A) in its analysis of a resentencing, the court does not apply it, and finds that there was no evidence that the trial court abused its discretion in its resentencing. The *Crosier* court, in holding that a delay of 14 months was unreasonable, noted that it had previously vacated the relevant portion of the sentence, and concluded that the “action by the trial court was not a ‘resentencing’ so as to remove the procedure from the mandate of the Criminal Rules. The sentencing was a ‘sentencing’ within the meaning of Crim.R. 32(A)(1).” *Id.* Nevertheless, to the extent that it conflicts with our ruling today, we decline to follow *Crosier* and we hold that the requirement under Crim.R. 32(A) that a sentence be imposed without unnecessary delay does not apply to resentencing.

C

SPEEDY TRIAL & DUE PROCESS

{¶ 14} Appellant also argues that he was deprived of his right to speedy trial and/or his right to due process of law because of the trial court's delay in complying with this court's mandate. The Sixth Amendment to the U.S. Constitution guarantees, inter alia, the rights of criminal defendants, including "the right to a speedy and public trial." Appellant cites to the four-factor test set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). However, as the state explains, *Barker* applies to the Sixth Amendment right to speedy trial and there is no Sixth Amendment speedy trial protection regarding a resentencing on remand.

{¶ 15} Appellant also contends that his right to due process of law was violated. Although appellant sets forth no argument to support this claim, we nonetheless address it in the interest of justice. Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law. A delay in resentencing after remand can "run afoul of due process guarantees." *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir.2006). "[A]fter a conviction has been affirmed on appeal, and a case is remanded solely for resentencing, the question of whether any delay in imposing the sentence violates the defendant's right to due process can be answered by looking to: (1) the reasons for the delay; and (2) what prejudice the defendant has suffered as a result of the delay." *Id.* (applying the due process framework set out in *United States v. Lovasco* (1977), 421 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752, for preindictment delay to postremand sentencing delay).

{¶ 16} The reasons for the delay in the case sub judice are unknown to this court. Turning to the prejudice prong of the *Lovasco* analysis, "[t]his court, in reviewing a delay in resentencing, must

consider whether the delay prejudiced the defendant.” See, *State v. McQueen*, 8th Dist. Cuyahoga No. 91370, 2009-Ohio-1085, ¶ 5. Whether the defendant suffered prejudice as a result of the delay depends on the facts of the case. *Id.* After our review of the facts and circumstances present in this case, we conclude that no prejudice occurred.

{¶ 17} Appellate courts have generally held that when the defendant has been incarcerated during the length of the delay, and would not have been eligible for release during that time period, no prejudice exists. In *State v. Huber*, 8th Dist. Cuyahoga No. 85082, 2005-Ohio-2625, the court held that because Huber was incarcerated for a sentence longer than the delay between remand and resentencing, no prejudice existed when a nearly one-year delay occurred between remand and resentencing. *Huber* at ¶ 10. Further, in *State v. Bolton*, 8th Dist. Cuyahoga No. 103628, 2016-Ohio-5706, the court did not find prejudice when a 27-month delay between remand and resentencing occurred. Moreover, in *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892 (8th Dist.), the court held that when no allegation or finding that the government purposely delayed the defendant’s sentencing or acted in bad faith, and the record did not support a finding that the defendant delayed the hearing in anyway, the court viewed the delay as a “serious administrative lapse.” However, the court concluded that the 68-month delay, despite being lengthy, did not prejudice the defendant as he could not have been released during the delay. *Nia* at ¶ 33-34.

{¶ 18} Finally, in a case with a far longer lapse between remand and resentencing than the case sub judice, in *State v. Holly*, 8th Dist. Cuyahoga No. 102764, 2015-Ohio-4771, the court did not find prejudice when a 15-year delay occurred in resentencing. “There is no doubt that the 15-year delay in resentencing was a serious failure by the criminal justice system. However, Holly had remained lawfully incarcerated during the delay, due to the length of his sentence * * *. Therefore,

although the delay in resentencing here was extraordinary, we do not find that Holly was actually prejudiced.” *Holly* at ¶ 9.

{¶ 19} During the delay in the case sub judice, appellant remained lawfully incarcerated, and still has several years remaining on his sentence. Appellant’s only assertion of prejudice is a change in case law during his time of incarceration regarding the Supreme Court of Ohio’s decisions in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, and its impact upon the court’s prior holding in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. However, both cases involve the mandatory imposition of post-release control and void sentences. The Supreme Court of Ohio highlighted that: “[o]ur decision today is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control.” *Fischer*, at ¶ 31. As such, *Bezak* and *Fischer* appears to have no application to the case sub judice.

{¶ 20} Therefore, we conclude that no prejudice exists due to the delay in appellant’s resentencing, and we cannot clearly and convincingly find either that the record fails to support the sentencing court’s finding or that the sentence is otherwise contrary to law.

{¶ 21} Accordingly, we overrule appellant’s first and second assignments of error.

III

{¶ 22} In his third assignment of error, appellant asserts that the prosecutor failed to properly decide which count(s) the state intended to pursue prior to the resentencing hearing, thereby denying appellant the ability to prepare arguments in advance.

{¶ 23} In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, the Supreme Court of Ohio considered a case involving allied offenses and held that “[t]he state retains the right

to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal. *Id.*, at paragraph one of the syllabus. *Whitfield* makes no mention of any due process rights of a defendant pertaining to the state's right to elect which offenses to pursue on remand. The state concedes that in this case, the trial court did not inquire regarding the state's election. However, the state contends that the trial court properly merged the allied offenses in question and no prejudice resulted by the choice of the allied offenses for the court for resentencing. We agree.

{¶ 24} Accordingly, we overrule appellant's third assignment of error.

IV

{¶ 25} In appellant's final assignment of error, he asserts that his attorney during his direct appeal was ineffective for failing to inquire into a new hearing date for resentencing after remand. Once again, appellant argues that he was prejudiced by being denied review under *Bezak* instead of *Fischer*. Again, we note that neither case has any application to this case.

{¶ 26} The state contends that appellant's ineffective assistance of counsel claim is barred by res judicata because he previously raised the issue. However, the allegation in the case at bar relates to a different issue, that of why appellant was not resentenced for five years, which he attributes to his counsel. Thus, we conclude that the issue is not barred by res judicata.

{¶ 27} *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, sets forth the standard for judging ineffective-assistance claims. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. Further, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989) paragraphs two and three of the syllabus.

{¶ 28} As the Supreme Court of Ohio instructed in *State v. Sanders*, 94 Ohio St.3d 150, 2002-Ohio-350, 761 N.E.2d 18, “*Strickland* charges us to ‘[apply] a heavy measure of deference to counsel’s judgments,’ 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and to ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,’ *id.* at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. * * * [W]e note that courts must ‘judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.’ *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.” *Sanders* at ¶ 3-5.

{¶ 29} In *Creech II*, we noted, “no doubt exists that the case sub judice has been fraught with procedural irregularities and mishaps.” *Creech II* at ¶27 (citing to the fact that the trial court used two different case numbers for filings during the trial). Likewise, in applying *Strickland*, we do question counsel’s attentiveness in failing to prompt the trial court to schedule the resentencing hearing. However, we cannot conclude that a reasonable probability exists that, but for counsel’s errors, the result of the proceeding would have been different. Because defendant remained lawfully incarcerated during the time of the delay between remand and resentencing, we find no prejudice.

{¶ 30} Accordingly, we overrule appellant’s fourth assignment of error and we affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that the appellee recover of appellant 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 Scioto 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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said 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. The stay as herein continued will terminate at the expiration of the sixty-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Supreme Court of Ohio in the forty-five day 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 said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, 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.