

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

FRANK K.C. HERTEL, SR.

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 14 CAA 04 0019

OPINION

CHARACTER OF PROCEEDING:

Appeal from The Court of Common
Pleas, Case No. 00 CRI 11 0361

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

March 26, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

CAROL HAMILTON O'BRIEN
Prosecuting Attorney
140 North Sandusky Street
Delaware, OH 43015

SCOTT WOLF
15 West Winter Street
Delaware, OH 43015
and
FRANK K.C. HERTEL, SR., Pro Se
ADC #276681
ASPC Florence South
P. O. Box 8400
Florence, AZ 85132

Farmer, J.

{¶1} This appeal stems from Appellant's conviction and sentence for three counts of rape and two counts of gross sexual imposition. Appellant entered guilty pleas to these counts and was sentenced to five to twenty-five years on each rape count and two to ten years on each gross sexual imposition count. All sentences were ordered to be served consecutive to one another, but concurrent with a sentence Appellant received for sexual conduct with a minor in Arizona.

{¶2} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth two proposed Assignments of Error. Appellant filed a pro se brief alleging several additional Assignments of Error.

{¶3} In *Anders*, the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and

dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id.*

{¶4} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738. Both counsel and Appellant have raised potential assignments of error as follows:

POTENTIAL ASSIGNMENTS OF ERROR FROM COUNSEL

I.

{¶5} "THE TRIAL COURT ERRED BY NOT GRANTING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR A SPEEDY TRIAL VIOLATION."

II.

{¶6} "THE DEFENDANT WAS [NOT] AFFORDED EFFECTIVE ASSISTANCE AT THE TRIAL LEVEL."

POTENTIAL ASSIGNMENTS OF ERROR FROM APPELLANT, PRO SE

III.

{¶7} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW, DUE TO A DUE PROCESS VIOLATION, WHEN THE HONORABLE JUDGE KRUEGER ABUSED HIS DISCRETION BY NOT GRANTING A STATUTORY SPEEDY TRIAL VIOLATION IN CASE NO. 14CRI010021 BEFORE CONVICTING DEFENDANT IN CASE 00CRI11361 LESS THAN A WEEK LATER."

IV.

{¶8} "DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL PER THE OHIO CONSTITUTION AND THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION DUE TO STATE'S FAILURE IN

TIMELY COMMENCEMENT OF PROSECUTION WHEN THE HONORABLE JUDGE KRUEGER DENIED DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS OF 7/15/13 AND 2/28/14 IN CASE 00CRI11361."

V.

{¶9} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW DUE TO A DUE PROCESS VIOLATION WHEN THE HONORABLE JUDGE KRUEGER ABUSED HIS DISCRETION BY NOT GRANTING A CONSTITUTIONAL SPEEDY TRIAL VIOLATION IN CASE 14CRI010021 ON 2/28/14 BEFORE CONVICTING DEFENDANT ON IDENTICAL CHARGES IN CASE 00CRI11361 ON 3/4/14."

VI.

{¶10} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW. DEFENDANT WAS DENIED DUE PROCESS RIGHTS GUARANTEED UNDER THE OHIO CONSTITUTION AS WELL AS THE 5TH AND 14TH AMENDMENT OF THE U.S. CONSTITUTION DUE TO THE PROSECUTIONS AND TRIAL COURTS NON-ADHERANCE TO THE FEDERAL LAW PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS, O.R.C. § 2963.30, WHEN CASE 14CRI010021 WAS DISMISSED WITHOUT PREJUDICE IN VIOLATION OF ARTICLE III(d) OF R.C. 2963.30, WHICH STIPLIATES THAT IT SHALL BE DISMISSED WITH PREJUDICE. AS BOTH 00CRI11361 AND 14CRI010021 ARE BASED ON THE SAME CONDUCT AND CONTAIN IDENTICAL CHARGES, IF 14CRI010021 WOULD HAVE BEEN PROPERLY DISMISSED WITH PREJUDICE DURING THE HEARING ON MARCH 18, 2014 FROM WHICH BOTH DEFENDANT AND COUNSEL WERE ILLEGALLY

EXCLUDED, THEN THE PREVIOUS CONVICTION AND SENTENCE IMPOSED ON 3/4/14 IN CASE 00CRI11361 MUST BE OVERTURNED AND ALSO DISMISSED WITH PREJUDICE.”

VII.

{¶11} “THE SENTENCE AS IMPOSED BY TRIAL COURT IS CONTRARY TO LAW PER O.R.C. 2929.41 AND APPEALABLE UNDER O.R.C. 2953.08(A)(4).”

{¶12} We now will address the merits of the potential Assignments of Error.

{¶13} While living in Ohio, rape allegations were made against Appellant which apparently prompted him to move to Arizona. Appellant was indicted for his Ohio conduct in 2000. He was subsequently indicted for sexual conduct with a child in Arizona. Facing charges in two states, Appellant fled to Germany. Appellant was tried in absentia in Arizona resulting in a conviction. Eventually, Appellant was extradited back to the United States to face the Ohio charges. Appellant first pled guilty to the charges but was allowed to withdraw his plea. After the plea was withdrawn, the State then in 2014 re-indicted Appellant on the same charges except the 2014 indictment includes force specifications. After plea negotiations, Appellant pled guilty to the 2000 indictment with the State agreeing to dismiss the 2014 case. It is from the 2000 case number, conviction, and sentence that Appellant has appealed.

I., III., IV., V.

{¶14} Because they are related or the same, we will address Appellant’s first, third, fourth, and fifth assignments of error. All of the errors revolve around the claim that Appellant’s right to a speedy trial was violated.

{¶15} The right to a speedy trial is encompassed within the Sixth Amendment to the United States Constitution. The availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. *State v. Ladd* (1978), 56 Ohio St.2d 197, 383 N.E.2d 579; *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Ohio's Speedy Trial statute codifies the constitutional guarantee of a speedy trial. However, "[t]he general view is that where an accused enters a plea of guilty he waives his right to raise the denial of his right to a speedy trial on appeal." *Village of Montpelier v. Greeno* (1986), 25 Ohio St.3d 170, 495 N.E.2d 581, citing Annotation (1958), 57 A.L.R.2d 302, 343. See, also *State v. Branch* (1983), 9 Ohio App.3d 160, 458 N.E.2d 1287.

{¶16} Because Appellant entered a guilty plea to the charges, the issues raised in the proposed assignments of error regarding speedy trial have been waived.

{¶17} Appellant's first, third, fourth, and fifth Assignments of Error are overruled.

II.

{¶18} In his second potential assignment of error, counsel for Appellant suggests Appellant was deprived effective assistance of counsel, however, counsel has not directed this court to any particular instance which would demonstrate ineffective assistance of counsel.

{¶19} The two-part test for ineffective assistance of counsel is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. "In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and

that, but for counsel's errors, the result of the proceeding would have been different.”
Strickland v. Washington, supra.

{¶20} We have reviewed the record and do not find counsel committed any errors which would have resulted in a different outcome in the proceedings.

{¶21} Appellant's second proposed assignment of error is overruled.

VI.

{¶22} In his sixth proposed Assignment of Error, Appellant argues his conviction and sentence are contrary to law because his 2014 case was not dismissed with prejudice.

{¶23} Appellant was not tried or convicted in the 2014 case. Appellant has not appealed the 2014 case. Whether that case was properly dismissed is not an issue properly before this Court. For this reason, we overrule the sixth assignment of error.

VII.

{¶24} In his seventh assignment of error, Appellant argues the trial court erred in imposing consecutive sentences because the sentencing journal entry states that the sentences were imposed pursuant to R.C. 2929.14(E). The code section cited in the sentencing entry is one which provides possible prison terms for those convicted of certain sex offenses. R.C. 2929.14(C) is the section which refers to consecutive sentences. Nowhere in the sentencing transcript does the trial court refer to R.C. 2929.14(E). Instead, the trial court cites language from R.C. 2929.14(C). It is clear after reading the sentencing transcript that the trial court did not impose consecutive sentences pursuant to R.C. 2929.14(E).

{¶25} “The proper action for the trial court, when faced with a clerical error, is to issue a nunc pro tunc judgment entry that lists the proper Revised Code sections . . .” *State v. Taylor*, 3rd. Dist. Seneca No. 13–10–49, 2011-Ohio-5080, ¶ 53.

{¶26} Because the sentencing journal entry contains a clerical error by the inclusion of R.C. 2929.14(E), this matter will be remanded to the trial court for the purpose of issuing a nunc pro tunc entry deleting the reference to R.C. 2929.14(E).

{¶27} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders*, grant

counsel's request to withdraw, and affirm the judgment of the Delaware County Court of Common Pleas.

By Farmer, P.J.

Delaney, J. and

Baldwin, J. concur.

SGF/as 303