[Cite as *State v. Gonzales*, 2010-Ohio-22.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-08-064
Appellee	Trial Court Nos. 08 CR 250 08 CR 299
v.	
Jamie R. Gonzales	**DECISION AND JUDGMENT**
Appellant	Decided: January 8, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aram Ohanian, Assistant Prosecuting Attorney, for appellee.

Robert E. Searfoss, III, for appellant; Jamie R. Gonzales, pro se.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Wood County Court of Common Pleas which, following a jury trial, found appellant, Jamie Gonzales, guilty of assault on a peace officer, in violation of R.C. 2903.13(A), a felony of the fourth degree, public indecency, in violation of R.C. 2907.09(A)(1), a misdemeanor of the fourth degree, and resisting arrest, in violation of R.C. 2921.33(A), a misdemeanor

of the second degree. Appellant was sentenced on September 8, 2008,[1] to a term of 18 months incarceration as to the conviction of assault on a peace officer, but the trial court determined that appellant's 139 days time served, at the time of sentencing, satisfied the penalty for the convictions of public indecency and resisting arrest. Appellant was granted leave to file a delayed appeal.

{¶ 2} On March 12, 2009, appellant's counsel filed a request to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. *Anders* and *State v. Duncan* (1978), 57 Ohio App.2d 93, set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. Id. at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Id. Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. Id. Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's

[1]Judgment entry of sentencing was filed and journalized on September 12, 2008.

request to withdraw and dismiss the appeal without violating constitutional requirements or it may proceed to a decision on the merits if state law so requires. Id.

{¶ 3} In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders*, supra. In support of his request, counsel for appellant states that, after reviewing the record of proceedings in the trial court, and after researching the applicable law, he found no meritorious issue to raise on appeal and determined that any issue raised would be frivolous. Although counsel found no meritorious issue to present on appellant's behalf on appeal, counsel addressed the potential for raising assignments of error regarding a violation of appellant's right to speedy trial and ineffective assistance of counsel for failing to request a jury instruction on the lesser included offense of disorderly conduct. Appellant submitted appellate briefs in his own behalf, asserting the same issues for our review. The state responded to appellant's pro se brief.

{¶ 4} The incident in this case occurred on April 21, 2008, and appellant was arrested at 12:15 a.m. on April 22, 2008. Appellant was indicted on May 8, 2008, to one count of assault on a peace officer, and one count of public indecency. Appellant was found to be indigent and was appointed counsel. He was arraigned on May 28, 2008. On June 5, 2008, appellant was indicted on one count of resisting arrest. A warrant was issued for appellant's arrest on the new charge and his counsel was notified. Appellant appeared in court on June 9, 2008; however, defense counsel was not present, and the matter was continued until June 26, 2008, the date of appellant's next scheduled court appearance. Appellant was present in court on June 26, 2008, was arraigned on the

charge of resisting arrest, and the three charges were scheduled for trial. On July 23, 2008, the matter was tried to a jury and appellant was found guilty of all counts.

{¶ 5} As his first assignment of error, appellant argues in his pro se appellate brief that, with respect to the charge of assault, trial counsel was ineffective for failing to request an instruction for the jury to consider the lesser included offense of disorderly conduct, in violation of R.C. 2917.11.

{¶ 6} In Ohio, a properly licensed attorney is presumed competent and the burden is on the appellant to show counsel's ineffectiveness. *State v. Lytle* (1976), 48 Ohio St.2d 391; *State v. Hamblin* (1988), 37 Ohio St.3d 153. Specifically, appellant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense, such that, without the deficient representation, the outcome of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 686.

{¶ 7} Without an explanation on the record regarding why trial counsel did not request a certain jury instruction, the court of appeals would have to guess why counsel did not make the request. *State v. Griffie* (1996), 74 Ohio St.3d 332, 333. As such, the Ohio Supreme Court has held that "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." Id., citing *State v. Clayton* (1980), 62 Ohio St.2d 45, certiorari denied (1980), 449 U.S. 879.

{¶ 8} In this case, counsel argued that appellant had resisted arrest, but that his actions were insufficient to form the intent required for assault and, therefore, he should

be acquitted of that charge. A decision to pursue total acquittal, rather than seek a jury instruction on a lesser included offense, is a tactical choice by defense counsel and does not establish ineffective assistance of counsel. See *State v. White*, 6th Dist. No. L-06-1363, 2008-Ohio-2990, ¶ 62, citing *Griffie* at 333. Accordingly, we find that counsel's failure to request a jury instruction on the lesser included offense of disorderly conduct was a matter of trial strategy and does not form a basis for a claim of ineffective assistance of trial counsel. See id. Appellant's first assignment of error therefore is found not well-taken.

{¶ 9} Appellant argues in his second assignment of error that the trial court denied appellant his right to speedy trial. According to R.C. 2945.71(B)(1) and (2) a person charged with a fourth degree misdemeanor must be brought to trial within 45 days after the person's arrest or the service of summons and a person charged with a second degree misdemeanor must be brought to trial within 90 days after the person's arrest or the service of summons. However, a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest. R.C. 2945.71(C)(2). When multiple charges are pending, whether felonies, misdemeanors, or combinations thereof, all pending charges arising out of the same act or transaction shall be brought to trial within the time period required for the highest degree of offense charged. R.C. 2945.71(D). Each day an accused is held in jail in lieu of bail on the pending charge shall be counted as three days. R.C. 2945.71(E).

{¶ 10} "For purposes of calculating speedy-trial time pursuant to R.C. 2945.71(C), a charge is not pending until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance." *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus. Any subsequent charges made against an accused are subject to the same speedy-trial constraints as the original charges, if additional charges arose from the same facts as the first indictment. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. The time within which an accused must be brought to trial may be extended by "[a]ny period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law." R.C. 2945.72(C).

{¶ 11} Appellant was arrested on April 22, 2008, and brought to trial on July 23, 2008, totaling 92 days from arrest to trial. However, appellant's counsel sought a continuance for the arraignment, as to the assault and public indecency charges, from May 19, 2008 to May 28, 2008. Additionally, on June 9, 2008, appellant's counsel was not present for appellant's arraignment, as to the charge of resisting arrest, and the matter was continued until June 26, 2008, appellant's next scheduled court appearance. Because the continuances were necessitated by appellant's lack of counsel, we find that the nine days from May 19 to May 28, 2008, and the 17 days from June 9 to June 26, 2008, tolled the running of the speedy-time in this case. Accordingly, we find that appellant's right to a speedy trial, as guaranteed by the Sixth Amendment to the United States Constitution,

and Section 10, Article I of the Ohio Constitution, was not violated in this case. Appellant's second assignment of error therefore is found not well-taken.

{¶ 12} Upon our own independent review of the record, we find no other grounds for a meritorious appeal. This appeal is, therefore, found to be without merit and is wholly frivolous. Appellant's counsel's motion to withdraw is found well-taken and is hereby granted. The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE