[Cite as *State v. Bratz*, 2011-Ohio-209.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94656

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DOUGLAS BRATZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524136

BEFORE: Rocco, J., Sweeney, P.J., and Jones, J.

RELEASED AND JOURNALIZED: January 20, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Douglas Bratz appeals from his conviction and the sentence imposed after he entered a guilty plea to a charge of aggravated assault.

{¶ 2} Bratz presents three assignments of error. He claims the trial court failed to comply with the terms of the plea agreement in imposing sentence, he was denied his right to a speedy trial, and his trial counsel provided ineffective assistance.

{¶ 3} Upon a review of the record, this court finds the facts of this case similar to those presented in *State v. Dunbar*, Cuyahoga App. No. 87317, 2007-Ohio-3261, but with a crucial difference; this court thus does not feel

constrained to arrive at the same result. Since, therefore, the trial court committed no error in proceeding with sentencing, Bratz's speedy trial had not expired by the time of his plea hearing, and the record does not support a conclusion trial counsel rendered ineffective assistance, Bratz's claims are rejected. Bratz's conviction and sentence are affirmed.

{¶ 4} Bratz was indicted in this case on June 5, 2009, charged with felonious assault, kidnapping, and disrupting public service. At his arraignment, he retained trial counsel to represent him. However, at the end of July, Bratz's attorney filed a motion to withdraw from the case. The trial court granted the request, and appointed a new attorney to represent him.

{¶ 5} Bratz's new counsel filed new discovery motions. The court set Bratz's case for trial on September 16, 2009, but, on September 14, defense counsel filed a motion for a continuance. The trial court also granted this request, rescheduling the case for November 2.

{¶ 6} By this time, Bratz began filing motions with the court pro se; he included a motion to dismiss his case for lack of a speedy trial. On October 30, 2009, defense counsel requested another continuance of the case because he needed additional time for investigation.

{¶ 7} After the court granted this request, Bratz's case had to be rescheduled once more because the trial court became engaged in a lengthy civil matter. Trial was set for January 11, 2010. In the interim, Bratz filed several more motions pro se.

{¶ 8} On that date, the parties notified the trial court that a plea agreement had been reached. According to the prosecutor, in exchange for Bratz's guilty plea to count one, which would be amended to a charge of aggravated assault, "a felony of the 4th degree, subject to 6 to 18 months in prison," the state would dismiss the remaining counts.

{¶ 9} Defense counsel added that he would "be asking, on behalf of Mr. Bratz, for a sentence that's equal to the credit for the time he's already served, the 7 months he has in. It's my understanding that the state has no position on that, but certainly won't object to that request."

{¶ 10} When the court addressed Bratz, he assured the court that "there hasn't been anything promised or anything." The trial court also asked if he understood that the offense to which he was pleading was "punishable by 6 to 18 months in prison," Bratz answered, "Yes, ma'am." At the conclusion of the colloquy, the trial court asked Bratz, "Do you understand there's no promise of a particular sentence?" He responded, "Yes, I do."

{¶ 11} The trial court then asked for Bratz's plea "to count 1, a felony of the 4th degree, punishable by 6 to 18 months in prison, a $5,000 fine and 3 years of post-release control * * * ." Bratz stated, "I'm pleading guilty." The court accepted Bratz's plea, dismissed the other counts, and proceeded to sentencing.

{¶ 12} When the victim addressed the trial court, she indicated she was "afraid" of Bratz. The court told the victim that "one of the things that was talked about was that he would get a sentence of approximately 7 months, which would

mean that the 7-month sentence certainly falls within the range of 6 to 18, and he'd be out today." The victim told the court that such a sentence "scares me."

{¶ 13} A discussion ensued among the persons involved about permitting the victim to obtain a "protection order for 5 years." The trial court decided to continue Bratz's sentencing hearing overnight, stating to Bratz that "if [the court] believe[s] that the sentence of 7 months isn't going to be appropriate, the [court was] not going to journalize [his] plea."

{¶ 14} The court actually called the case for sentencing two days later, on January 13, 2010. At the outset, since the trial court had forgotten Bratz already had entered a guilty plea, the prosecutor reminded the trial court that the plea had not been journalized. The court stated, "You know what, you're correct. I didn't journalize it, so we will be journalizing your plea. Let me - - we're going to proceed to sentencing."

{¶ 15} The court noted that the victim had expressed some concern, and the parties by this time had "stipulated to a five-year protection order." With that decided, the prosecutor notified the court that the victim wanted to make a few additional comments. Defense counsel objected, but the trial court permitted the victim to speak, noting that the court was aware that both Bratz and the victim had been inebriated on the night of the incident.

{¶ 16} The victim proceeded to describe at length her experience. When defense counsel addressed the court, he stated, in part, that "this is not the place to try the case," and that Bratz accepted responsibility for his own actions. Bratz

apologized to the victim.

{¶ 17} In pronouncing sentence, the trial court stated it had reviewed Bratz's criminal record, noting that he had "not been successful in the past on probation." The court further stated its awareness that Bratz had already spent "seven-and-a-half months" in jail. Nevertheless, the court believed that a one-year term was appropriate, and, thus, imposed that sentence "with credit for any time served." The court reminded Bratz about the stipulated protection order, and asked him if he had any questions. Bratz simply thanked the court "for [its] time * * * ."

{¶ 18} Bratz presents three assignments of error for review.

{¶ 19} "I. The trial court committed plain error when it failed to abide by the terms of the court negotiated plea agreement.

{¶ 20} "II. The trial court's failure to grant appellant's motion to dismiss violated his right to a speedy trial.

{¶ 21} "III. Appellant was denied his right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution and Article 10, Section 1 [sic] of the Ohio Constitution."

{¶ 22} Bratz argues in his first assignment of error that the trial court's failure to abide by its promise not to journalize his plea if it determined a 7-month sentence was inappropriate constituted "plain error." He apparently asserts that, since he did not receive the agreed upon sentence as discussed in the plea negotiations, the trial court should have at least permitted him the opportunity to

withdraw his guilty plea before proceeding to sentencing. This court disagrees.

{¶ 23} The following observations pertinent to this issue were made in *Dunbar* at ¶112-115:

{¶ 24} "[A] trial court is vested with sound discretion when implementing plea agreements. *State v. Buchanan*, 154 Ohio App.3d 250, 796 N.E.2d 1003, 2003-Ohio-4772 at ¶13, citing *Akron v. Ragsdale* (1978), 61 Ohio App.2d 107, 399 N.E.2d 119. The court is not obligated to follow the negotiated plea entered into between the state and the defendant. Id. However, once the court approves the plea agreement, its ability to deviate from it is limited. *State v. Allgood* (June 19, 1991), 9th Dist. No. 90CA004903, 90CA004904, 90CA004905, and 90CA004907, * * * citing *U.S. v. Holman* (C.A.6 1984), 728 F.2d 809, certiorari denied (1984), 469 U.S. 983, 105 S.Ct. 388, 83 L.Ed.2d 323.

{¶ 25} "In *Warren v. Cromley* (Jan. 29, 1999), 11th Dist. No. 97-T-0213, * * * referring to the trial court's sound discretion on whether to accept a negotiated plea, the court stated:

{¶ 26} "' * * * the law is somewhat less settled in those cases where the trial court appears to indicate that it accepts the negotiated plea agreement *before the court accepts the defendant's plea*, and then deviates from the recommended sentence or terms contained within the plea agreement at the time of sentencing. The analysis in these scenarios turns to due process concerns over *whether the accused was put on [notice]* that the trial court might deviate from the recommended sentence or other terms of the agreement before the accused

entered his plea and *whether the accused was given an opportunity to change or to withdraw his plea when he received this notice.* See, generally, Katz & Giannelli, Criminal Law (1996) 154-155, Section 44.8. n2' (Emphasis sic.)

{¶ 27} "'A trial court does not err by imposing a sentence greater than 'that forming the inducement for the defendant to plead guilty <u>when the trial court forewarns the defendant</u> of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.' *Buchanan*, supra, at ¶13, citing *State v. Darmour* (1987), 38 Ohio App.3d 160, 529 N.E.2d 208 (Eighth District case holding that 'no abuse of discretion is present when the trial court forewarns a defendant that it will not consider itself bound by any sentencing agreement and defendant fails to change his plea[']). * * * " (Underlining added.)

{¶ 28} With this analysis in mind, the court in *Dunbar* proceeded to review the relevant "facts and circumstances" in ¶129-131 as follows:

{¶ 29} " * * * [T]his court must determine if Dunbar had <u>a reasonable expectation that the trial court would implement the agreed sentence</u>. We conclude, after reviewing the record in its entirety, that Dunbar had a reasonable expectation that he would get community control sanctions.

{¶ 30} "The trial court judge * * * only stressed to Dunbar that if he had any contact with the victim, his bond would be revoked, the plea would be null and void, and that he could receive the full penalty under the law.

{¶ 31} "Thus, * * * Dunbar * * * did not breach any part of the agreement that

he knowingly entered into with the state. Under basic contract principles, which are the basis for plea negotiations, Dunbar knowingly and voluntarily entered into an agreement where he understood that by pleading guilty, he did not have to go to prison. * * * The only condition, as he understood it, was that if he had any contact with the victim, the plea would be null and void. (Emphasis in original, underscoring added.)"

{¶ 32} Upon consideration of the facts and circumstances surrounding the plea hearing in the *Dunbar* case, this court concluded that the trial court abused its discretion when it did not either impose the proposed sentence or allow Dunbar to vacate his plea. Bratz's case presents distinguishing facts and circumstances.

{¶ 33} The trial court informed Bratz during the plea colloquy that it had discretion to depart from the requested 7-month sentence. As Bratz understood it, the benefit he was receiving from the plea bargain was a downgrading of his offense from a second degree felony to fourth degree felony, with the dismissal of a kidnapping charge. He accepted this deal on the understanding only that the state would not oppose a 7-month sentence, not that he would specifically receive it.

{¶ 34} The trial court stated that if it subsequently determined that a 7-month sentence was inappropriate, it would "not journalize" his guilty plea. At this point, Bratz certainly was on notice that the trial court was considering whether to depart from the state's lack of opposition to the sentence he requested. The sentencing hearing did not occur for two days; Bratz had the opportunity to

withdraw his plea within that time.

{¶ 35} As stated in *Dunbar* at ¶140:

{¶ 36} "[W]hen the court decided to deviate from the plea agreement, it should have clearly advised Dunbar of its intentions, and allowed him to reconsider his plea. See, *Allgood*, at 10. If Dunbar had then chosen to still plead guilty, the court could not have been found to have abused its discretion in ordering a two-year prison term, rather than community control, because then Dunbar would have been fully informed as to potential sentences. * * * ."

{¶ 37} Based upon the decision in *Dunbar*, therefore, the trial court in this case committed no error when it failed to impose the term it was considering when Bratz's plea hearing concluded. Bratz still obtained the benefit of his bargain; that he raised no protest at the conclusion of his sentencing hearing indicates his understanding of that fact. Id.; cf., *State v. Vari*, Mahoning App. No. 07-MA-142, 2010-Ohio-1300.

{¶ 38} Bratz's first assignment of error, accordingly, is overruled.

{¶ 39} Bratz next argues he was denied his right to a speedy trial in this case. However, he waived this argument by his guilty plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658. See also, *Dunbar*, ¶157. Even had Bratz not waived it, his argument would be rejected.

{¶ 40} "The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, guarantee a criminally accused the right to a speedy trial of the charges brought against him or her. *State v. Ladd* (1978), 56

Ohio St.2d 197, 200, 383 N.E.2d 579. In Ohio, this right is implemented by statutes which impose a duty on the state to bring a defendant who has not waived the rights, to trial within the times specified. When reviewing the legal issues presented in speedy trial claim, we must strictly construe the relevant statutes against the state. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706.

{¶ 41} "A person charged with a felony shall be brought to trial within 270 days of the date of the arrest. R.C. 2945.71(C)(2). If that person is held in jail in lieu of bail, then each day of custody is counted as three days, and thus, must be brought to trial within ninety days. R.C. 2945.71(E). *State v. Palmer*, 112 Ohio St.3d 457, 860 N.E.2d 1011, 2007-Ohio-374, at ¶ 11, citing *State v. Sanchez*, 110 Ohio St.3d 274, 853 N.E.2d 283, 2006-Ohio-4478, at ¶ 7. * * *

{¶ 42} "'The standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits * * *.' *State v. Blumensaadt*, 11th Dist. No. 2000-L-107, 2001-Ohio-4317, at ¶16." *Dunbar*, ¶158-161.

{¶ 43} R.C. 2945.71(C)(2) requires a defendant charged with a felony to be brought to trial within two hundred and seventy days after his arrest. R.C. 2945.71(E) computes each day that a defendant is held in jail in lieu of bail as three days.

{¶ 44} In this case, Bratz was arrested on May 12, 2009. He remained in jail until he was released on bond on May 22, i.e., pursuant to R.C. 2945.71(E), 30

days. The record reflects his retained attorney filed discovery motions on June 2, 2009. These motions tolled the speedy trial time, which had by then become 40 days.

{¶ 45} On June 19, 2009, Bratz was arraigned on the charges brought by the grand jury. His bond was increased, he could not post the bond, so he remained in jail. The state filed an initial response to Bratz's discovery motions on June 24, 2009, but did not respond to Bratz's other motions until July 9.

{¶ 46} In the meantime, on June 30, 2009, the trial court conducted a pretrial hearing. Bratz requested a continuance until July 14, and then until July 28. On that date, Bratz's retained attorney filed a motion to withdraw. The court granted the motion on July 29, and set the next pretrial hearing for August 7, "at defendant's request."

{¶ 47} On August 7, Bratz's attorney requested the case to be continued until August 18 and trial to be set for September 16. Although the trial court granted this request, new defense counsel filed his own discovery motions on August 14. The state responded on September 4.

{¶ 48} On September 14, 2009, Bratz filed a request to continue trial. On September 17, the trial court granted the motion and rescheduled the case for trial on November 2. Thus, in this entire period, only three days were added to the 40 already expended.

{¶ 49} The case was called for trial as scheduled, but Bratz requested a continuance until November 16. The court granted his request, but the docket

reflects the court was required to continue Bratz's case on November 16 "until January 11, 2010" because it was already engaged in a civil trial.

{¶ 50} Bratz's case came on for trial as scheduled, but his trial counsel had arranged a plea agreement. Since, pursuant to the relevant statutory provisions, only 43 days had passed, Bratz was not denied his right to a speedy trial. See *Dunbar*, ¶176-179; see also, *State v. Goodwin*, Cuyahoga App. No. 93249, 2010-Ohio-1210, fn. 2; *State v. Hilyard*, Vinton App. No. 05CA598, 2005-Ohio-4957. Bratz's second assignment of error, accordingly, is overruled.

{¶ 51} In his third assignment of error, Bratz argues his trial counsel rendered ineffective assistance for failing to object to the trial court's decision to impose a longer sentence than it originally considered, and for failing to object to the time required to bring Bratz's case to a conclusion.

{¶ 52} The standard for establishing ineffective assistance of counsel is set forth in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. The appellant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and, in addition, prejudice arose from counsel's performance. In order to show prejudice, the appellant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different.

{¶ 53} In this case, with respect to Brantz's assertion that counsel should have objected to the longer sentence, his assertion is rejected. Counsel obtained

for Bratz an excellent deal, since Bratz was convicted of only a fourth degree felony, viz., aggravated assault. In light of the circumstances underlying this conviction, counsel obtained this deal actually in the *absence* of any "aggravating factor," at least on the victim's part. *State v. Nicholson*, Cuyahoga App. No. 82825, 2004-Ohio-2394, ¶12.

{¶ 54} With respect to his other assertion, Brantz cannot demonstrate that counsel fell below an objective standard of reasonable representation. A review of the record, as set forth previously, shows that the statutory time for speedy trial had not expired; therefore, counsel cannot be deemed ineffective for failing to raise this issue. *Hilyard*, ¶30-31.

{¶ 55} Based upon the foregoing, Bratz's third assignment of error also is overruled.

{¶ 56} Brantz's conviction and sentence are affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, P.J., and
LARRY A. JONES, J., CONCUR