

[Cite as *State v. Geraci*, 2015-Ohio-2699.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101946 and 101947

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW GERACI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577402-A

BEFORE: E.A. Gallagher, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEY FOR APPELLANT

Gregory T. Stralka
6509 Brecksville Road
P.O. Box 31776
Independence, Ohio 44131

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Daniel Cleary
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, defendant-appellant Andrew Geraci appeals his convictions and the trial court's denial of his motion to withdraw his guilty pleas to one count of involuntary manslaughter in violation of R.C. 2903.04(A) and one count of aggravated robbery in violation of R.C. 2911.01(A)(1). Geraci contends that he was denied effective assistance of trial counsel based upon the violation of his speedy trial rights. Finding no merit to his appeal, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} On January 22, 2013, Geraci and a friend, Michael MacGillis, contacted Donovan Owens, an acquaintance of MacGillis, and arranged to meet him in Rocky River under the pretext of purchasing heroin from him. Instead of purchasing heroin, Geraci and MacGillis allegedly attempted to rob Owens. When they met up with Owens, Geraci and MacGillis entered Owens's vehicle and MacGillis placed a knife to Owens' throat. Owens grabbed a gun he had in the vehicle and started shooting at Geraci and Owens. Geraci was shot several times before he fled the vehicle, MacGillis was killed.

{¶3} The Cuyahoga County Grand Jury indicted Geraci on nine counts— one count of murder in violation of R.C. 2903.02(A), two counts of murder in violation of R.C. 2903.02(B), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), one count of aggravated robbery in violation of R.C. 2911.01(A)(3), two counts of felonious assault in violation of R.C. 2903.11(A)(1), one count of felonious assault in

violation of R.C. 2903.11(A)(2) and one count of kidnapping in violation of R.C. 2905.01(A)(2). The murder counts and one of the felonious assault counts also contained one- and three-year firearm specifications.

{¶4} Geraci was arrested on September 11, 2013 and thereafter pled not guilty to all counts. Although he was represented by counsel throughout the proceedings, on January 13, 2014, Geraci filed a pro se motion to dismiss the charges against him based upon alleged violations of his statutory and constitutional rights to a speedy trial. The trial court did not rule on the motion.¹ On January 29, 2014, Geraci pled guilty to an amended count of involuntary manslaughter in violation of R.C. 2903.04(A) and an amended count of aggravated robbery in violation of R.C. 2911.01(A)(1). Prior to accepting Geraci's pleas, the trial judge conducted a thorough plea colloquy in which she informed Geraci of, and confirmed that Geraci understood, the nature of the charges to which he was pleading guilty, the maximum penalties involved, the effect of his guilty pleas and the constitutional rights he was giving up by pleading guilty. Geraci denied that anyone had made him any promises or threatened him in any way to induce his pleas.

The trial judge also inquired whether Geraci was satisfied with the services provided by his attorney and whether trial counsel had done everything Geraci had asked him to do. Geraci responded affirmatively. Concluding that Geraci entered his pleas knowingly, voluntarily and with a full understanding of his rights, the trial court accepted his pleas.

¹ "When a criminal defendant is represented by counsel, a trial court may not entertain a defendant's pro se motion." *Turner v. McGinty*, 8th Dist. Cuyahoga No. 102074, 2015-Ohio-529, ¶ 4.

In exchange for Geraci's guilty pleas, the firearm specifications were deleted from the counts to which he pled guilty and the remaining counts were dismissed. On February 4, 2014, the trial court sentenced Geraci to six years in prison on each count, to be served concurrently, and five years of mandatory postrelease control.

{¶5} More than six-and-a-half months later, Geraci filed a pro se motion to withdraw his guilty pleas arguing that his trial counsel was ineffective for failing to seek a dismissal of the case on speedy trial grounds and that, as a result, manifest injustice existed warranting the withdrawal of his pleas. In support of his motion, Geraci submitted an affidavit in which he averred (1) that counsel had advised him that "speedy trial rights don't apply to me for my type of case," (2) that "I believed my attorney that speedy trial did not apply in my case" and (3) that trial counsel's statement regarding that issue "is what made me make a plea." The trial court denied the motion without a hearing. Geraci appealed the trial court's order. In addition, this court granted Geraci's request for leave to file a delayed appeal of his convictions. The two appeals were consolidated for briefing, hearing and disposition pursuant to Loc.App.R. 3(C).

{¶6} Geraci raises the following single assignment of error for review:

Trial court erred by denying appellant[']s motion to withdraw plea (post-conviction) [where] manifest injustice was demonstrated by obvious Ohio and United States [c]onstitutional right to a speedy trial violation along with ineffective assistance of counsel.

Law and Analysis

Withdrawal of Guilty Pleas

{¶7} The withdrawal of a guilty plea is governed by Crim.R. 32.1,² which states:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

{¶8} Thus, pursuant to Crim.R. 32.1, Geraci had the burden of establishing “manifest injustice” warranting the withdrawal of his guilty pleas. *State v. Nicholson*, 8th Dist. Cuyahoga No. 97873, 2012-Ohio-4591, ¶ 15; *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

²Although this consolidated appeal involves both a direct appeal of Geraci’s convictions (Appeal No. 101946) and an appeal of the trial court’s denial of Geraci’s postsentence motion to withdraw his guilty pleas (Appeal No. 101947), here we consider only whether the trial court abused its discretion in denying Geraci’s motion to withdraw his guilty pleas. Geraci’s sole assignment of error is limited to the trial court’s ruling on his motion to withdraw his guilty pleas. Further, Geraci’s argument supporting this assignment of error relies on evidence outside of the record — i.e., an affidavit detailing the improper legal advice Geraci allegedly received from trial counsel and its purported effect on his guilty pleas — which is not properly considered on a direct appeal. *See, e.g., State v. Johnson*, 8th Dist. Cuyahoga No. 99377, 2015-Ohio-96, ¶ 53 (ineffective assistance of counsel claim that would require proof outside of the record “is not appropriately considered on a direct appeal”), quoting *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000); *see also State v. Woody*, 8th Dist. Cuyahoga No. 99774, 2014-Ohio-302, ¶ 13 (where issues could not have been raised on direct appeal because they relied on matters outside the record, they were properly the subject of a postconviction motion to withdraw guilty plea), citing *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 43 (8th Dist.); *State v. Pruitt*, Cuyahoga Nos. 86707 and 86986, 2006-Ohio-4106, ¶ 11 (appellant’s arguments that counsel provided ineffective assistance in counseling appellant to enter into plea agreement were necessarily based on evidence outside the record of appellant’s plea and sentencing and, therefore, could not be considered by appellate court on direct appeal).

{¶9} A motion made pursuant to Crim.R. 32.1 “is addressed to the sound discretion of the trial court,” and the good faith, credibility and weight of the defendant’s assertions in support of the motion are matters to be resolved by that court. *Smith*, paragraph two of the syllabus. We, therefore, review a trial court’s decision to deny a defendant’s postsentence motion to withdraw a guilty plea under an abuse of discretion standard. *State v. Britton*, 8th Dist. Cuyahoga No. 98158, 2013-Ohio-99, ¶ 17, citing *Smith* at paragraph two of the syllabus, and *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist.1980). Unless it is shown that the trial court acted unreasonably, arbitrarily or unconscionably in denying a defendant’s motion to withdraw his pleas, there is no abuse of discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶10} Manifest injustice is a “‘clear or openly unjust act,’ * * * ‘an extraordinary and fundamental flaw in the plea proceeding.’” *Nicholson* at ¶ 15, quoting *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502, ¶ 13. It “‘comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.’” *Nicholson* at ¶ 15, quoting *Sneed* at ¶ 13. “Manifest injustice is an ‘extremely high standard’; a defendant may withdraw a guilty plea only in ‘extraordinary cases.’” *State v. Rogers*, 8th Dist. Cuyahoga No. 99246, 2013-Ohio-3246, ¶ 27, quoting *State v. Beachum*, 6th Dist. Sandusky Nos. S-10-041 and S-10-042, 2012-Ohio-285, ¶ 23. The requisite showing of manifest injustice must be

based on specific facts contained in the record or supplied through affidavits submitted with the motion. *Cleveland v. Dobrowski*, 8th Dist. Cuyahoga No. 96113, 2011-Ohio-6071, ¶ 14, citing *State v. Gegia*, 157 Ohio App.3d 112, 2004-Ohio-2124, 809 N.E.2d 673, ¶ 8 (9th Dist.); *State v. Barrett*, 10th Dist. Franklin No. 11AP-375, 2011-Ohio-4986, ¶ 15. A self-serving affidavit by the moving party is generally insufficient to demonstrate manifest injustice. *Richmond Hts. v. McEllen*, 8th Dist. Cuyahoga No. 99281, 2013-Ohio-3151, ¶ 14, citing *State v. Simmons*, 8th Dist. Cuyahoga No. 91062, 2009-Ohio-2028, ¶ 30.

Ineffective Assistance of Counsel

{¶11} Geraci argues that he was denied effective assistance of counsel because his trial counsel (1) improperly advised Geraci that the right to a speedy trial did not apply in this case “due to the nature of the situation” and (2) failed to “protect his right to a speedy trial” either by filing his own motion to dismiss on speedy trial grounds or by “pursuing” the motion to dismiss Geraci filed pro se.

{¶12} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel’s performance fell below an objective standard of reasonable representation, and (2) that counsel’s errors prejudiced the defendant, i.e., a reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

“Reasonable probability” is “probability sufficient to undermine confidence in the outcome.” *Strickland* at 694. Where a defendant challenges trial counsel’s performance in connection with a guilty plea, the defendant can establish the prejudice necessary for an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel’s deficient performance, he would not have pled guilty to the offense at issue and would have insisted on going to trial. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Wright*, 8th Dist. Cuyahoga No. 98345, 2013-Ohio-936, ¶ 12.

{¶13} Geraci asserts that but for trial counsel’s deficient performance with respect to his speedy trial rights, he would not have pled guilty to the offenses at issue and that withdrawal of his guilty pleas was, therefore, necessary to correct a manifest injustice. The state responds that Geraci waived any violation of his right to a speedy trial with his guilty pleas.

{¶14} When a defendant enters a guilty plea, he generally waives all appealable errors that may have occurred unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Jabbaar*, 8th Dist. Cuyahoga No. 98218, 2013-Ohio-2897, ¶ 5; *State v. Milczewski*, 8th Dist. Cuyahoga No. 97138, 2012-Ohio-1743, ¶ 5; *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus. Thus, a claim of ineffective assistance of counsel is

waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing and voluntary. *Williams*, 2014-Ohio-3415 at ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Milczewski* at ¶ 5 (“A failure by counsel to provide advice [which impairs the knowing and voluntary nature of the plea] may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea. Accordingly, a guilty plea waives the right to claim that the accused was prejudiced by constitutionally ineffective counsel, except to the extent the defects complained of caused the plea to be less than knowing and voluntary.”), quoting *United States v. Broce*, 488 U.S. 563, 574, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

{¶15} Likewise, a guilty plea generally waives a defendant's right to challenge his or her conviction on statutory speedy trial grounds. *Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 at paragraph one of the syllabus; *Montpelier v. Greeno*, 25 Ohio St.3d 170, 172, 495 N.E.2d 581 (1986); *State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-1890, ¶ 14-15; *State v. Goodwin*, 8th Dist. Cuyahoga No. 93249, 2010-Ohio-1210, ¶ 10. Thus, when a defendant pleads guilty, he or she also generally waives the right to claim that his or her counsel was ineffective based upon statutory speedy trial issues. *See, e.g., State v. Logan*, 8th Dist. Cuyahoga No. 99471, 2014-Ohio-816, ¶ 20, citing *State v. Bohanon*, 8th Dist. Cuyahoga No. 98217,

2013-Ohio-261, ¶ 8; *Jabbaar*, 2013-Ohio-2897 at ¶ 5; *State v. Miller*, 8th Dist. Cuyahoga No. 94790, 2011-Ohio-928, ¶ 16; *Goodwin* at ¶ 10.³

{¶16} Geraci attempts to overcome this hurdle by asserting in an affidavit that he would not have entered his guilty pleas were it not for counsel’s alleged statement to him that speedy trial rights did not apply in this case arguing that his guilty pleas, therefore, were not knowing and voluntary. *See Miller* at ¶ 24. *See State v. Johnson*, 8th Dist. Cuyahoga No. 61904, 1993 Ohio App. LEXIS 1263, *9 (Mar. 4, 1993) (trial counsel’s failure to assert right to speedy trial did not cause defendant’s plea to be less than knowing and voluntary). Geraci’s argument is meritless.

{¶17} There is nothing in the record that supports Geraci’s claims other than Geraci’s self-serving affidavit. The trial court, therefore, could properly find that the affidavit lacked sufficient credibility. *See, e.g., State v. Knowles*, 8th Dist. Cuyahoga No. 95239, 2011-Ohio-1685, ¶ 23, quoting *State v. Yearby*, 8th Dist. Cuyahoga No. 79000,

³ The state’s waiver argument is limited to Geraci’s statutory right to a speedy trial; the state does not address Geraci’s constitutional right to a speedy trial. This court has held that although a defendant generally waives his statutory right to a speedy trial by pleading guilty, a defendant’s constitutional right to a speedy trial is not waived by a guilty plea. *See State v. Kutkut*, 8th Dist. Cuyahoga No. 98479, 2013-Ohio-1442, ¶ 9, citing *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 1999 Ohio App. LEXIS 5458, *4 (Nov. 18, 1999), citing *State v. Branch*, 9 Ohio App.3d 160, 162, 458 N.E.2d 1287 (8th Dist. 1983); *State v. King*, 184 Ohio App.3d 226, 2009-Ohio-4551, 920 N.E.2d 399, ¶ 10 (8th Dist.); *State v. Ennist*, 8th Dist. Cuyahoga No. 90076, 2008-Ohio-5100, ¶ 13. *But see State v. Johnson*, 2d Dist. Greene No. 2013-CA-1, 2013-Ohio-4077, ¶ 4-5 (observing that “Ohio courts have reached different conclusions” as to whether a guilty plea waives alleged constitutional speedy trial violations). We need not address this issue further because even if Geraci did not waive his constitutional right to a speedy trial by pleading guilty, he has not established a basis for the withdrawal of his guilty pleas for the reasons discussed *infra*.

2002 Ohio App. LEXIS 199 (Jan. 24, 2002) (When a defendant asserts that his guilty plea was involuntary, “a record reflecting compliance with Crim.R. 11 has greater probative value than a petitioner’s self-serving affidavit.”); *State v. Bonner*, 8th Dist. Cuyahoga No. 95244, 2011-Ohio-843, ¶ 11 (“[a] trial court may discount self-serving affidavits from the [defendant] or his family members”), quoting *State v. Moore*, 99 Ohio App.3d 748, 651 N.E.2d 1319 (8th Dist.1994). Furthermore, even if Geraci did not waive any alleged violation of his speedy trial rights by entering his guilty pleas, his ineffective assistance of counsel claim would still lack merit because the record reflects that there was no violation of Geraci’s speedy trial rights and there is no evidence that Geraci’s guilty pleas were otherwise not knowingly and voluntarily made.

Speedy Trial Rights

{¶18} A defendant is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 51, citing *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. Pursuant to its authority to prescribe reasonable periods in which a trial must be held that are consistent with these constitutional requirements, Ohio enacted R.C. 2945.71 which sets forth the specific time requirements within which the state must bring a defendant to trial. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 14.

{¶19} Under R.C. 2945.71(C)(2), the state is required to bring a defendant to trial on felony charges within 270 days of arrest. Under the “triple count provision” contained in R.C. 2945.71(E), each day a defendant is held in jail in lieu of bail counts as three days in the speedy trial time calculation. Thus, a defendant held in jail without bail pending a felony charge must be tried within 90 days. Speedy trial time may, however, be tolled by certain events delineated in R.C. 2945.72, including continuances at the defendant’s request and where the defendant’s actions or neglect causes delay. R.C. 2945.72(D), (E), and (H).

Once the statutory time limit has expired, the defendant has established a prima facie case for dismissal. *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431, ¶ 18, citing *State v. Howard*, 79 Ohio App.3d 705, 607 N.E.2d 1121 (8th Dist.1992). The burden then shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Steele* at ¶ 18, citing *State v. Geraldo*, 13 Ohio App.3d 27, 468 N.E.2d 328 (6th Dist.1983).

{¶20} When reviewing a speedy trial issue, the appellate court counts the days and determines whether the number of days not tolled exceeds the time limits for bringing the defendant to trial as set forth in R.C. 2945.71. *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 15; *State v. Shepherd*, 8th Dist. Cuyahoga No. 97962, 2012-Ohio-5415, ¶14-16, citing *State v. Barnett*, 12th Dist. Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 7. If the state has violated a defendant’s right to a speedy trial, then upon motion made at or prior to trial, the defendant “shall be discharged,” and further

criminal proceedings based on the same conduct are barred. R.C. 2945.73(B); *State v. Torres*, 7th Dist. Jefferson Nos. 12 JE 30 and 12 JE 31, 2014-Ohio-3683, ¶ 18.

{¶21} Geraci was arrested on September 11, 2013. Because Geraci was incarcerated while awaiting trial, the state had 90 days within which to bring him to trial. The statutory speedy trial period begins to run on the date the defendant is arrested; however, the date of arrest is not counted when calculating speedy trial time. *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 44. Accordingly, the speedy trial countdown began on September 12, 2013, the day following Geraci's arrest, and would have expired, if not extended, on December 11, 2013. Geraci entered his guilty pleas on January 29, 2014 — 49 days later.

{¶22} From September 12 until September 16, 2013, four speedy trial days ran. From September 16 to September 17, 2013, speedy trial time was tolled based on Geraci's request for a continuance. R.C. 2945.72(H). From September 17 until September 18, 2013, an additional day of speedy trial time ran, for a total of five days. On September 18, 2013, Geraci filed motions for discovery and a bill of particulars. A defendant's demand for discovery tolls the speedy trial time until the state responds to the discovery or for a reasonable time, whichever is sooner. *State v. Shabazz*, 8th Dist. Cuyahoga No. 95021, 2011-Ohio-2260, ¶ 26, 31; R.C. 2945.72(E). The state served its responses to Geraci's discovery requests on September 20, 2013. Accordingly, speedy trial time was tolled from September 18 to September 20, 2013.

{¶23} On September 20, 2013, the state also served its own demand for discovery pursuant to Crim.R. 16. Geraci never responded to the state’s reciprocal discovery requests. In *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, the Ohio Supreme Court held that “[t]he failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D).” *Id.* at paragraph one of the syllabus; *see also Gibson*, 2014-Ohio-3421 at ¶ 23. The tolling of statutory speedy trial time based on a defendant’s failure to respond to the state’s reciprocal discovery requests within a reasonable time is not dependent upon the filing of a motion to compel by the state. *Palmer* at paragraph two of the syllabus. What constitutes a reasonable amount of time by which a defendant should have responded to a reciprocal discovery request is for the trial court to determine “based on the totality of facts and circumstances in the case.” *Id.* at paragraph three of the syllabus. Geraci does not address this tolling event in his brief. There is nothing in the record that indicates why Geraci failed to respond to the state’s demand for reciprocal discovery.

{¶24} We are aware that certain panels of this court have held that where a defendant fails to promptly respond to the state’s demand for reciprocal discovery, the speedy trial clock is tolled for a reasonable response time, i.e., 30 days, rather than for the time period following the reasonable response time until the defendant responds to the state’s request. *See, e.g., State v. Walker*, 8th Dist. Cuyahoga No. 99239, 2013-Ohio-3522, ¶ 22 (where defendant responded to state’s reciprocal discovery request

58 days after it was served, “speedy trial clock was tolled for the reasonable response time of 30 days”); *State v. Winn*, 8th Dist. Cuyahoga No. 98172, 2012-Ohio-5888, ¶ 29 (where defendant never responded to state’s discovery request, “speedy trial clock is tolled for a ‘reasonable time,’” i.e., 30 days); *see also In re D.S.*, 8th Dist. Cuyahoga No. 97757, 2012-Ohio-2213, ¶ 32, 36-37 (holding that defendant’s failure to respond to state’s discovery request did not toll speedy trial time, distinguishing *Palmer* on the grounds that state’s discovery request was made several months before speedy trial rights started to run while the case was pending only as a juvenile case, the defendant never responded to the state’s discovery request as opposed to simply responding in an untimely manner and there was no indication in the record that the state was delayed in its preparation for trial by the defendant’s failure to respond to discovery).

{¶25} Under *Palmer*, it is the period of time that constitutes *neglect by the defendant*, i.e., the period of time *after* the reasonable response time, not the period of time that constitutes the reasonable response time itself, that is properly tolled. *Palmer* at ¶ 23 (holding that the trial court “did not abuse its discretion in tolling the running of speedy trial time *after* 30 days had passed from service of the state’s request,” where the trial court had determined that it was reasonable to allow the defendant 30 days to provide its response to the state’s demand for reciprocal discovery) (emphasis added). This is consistent with R.C. 2945.72(D), which provides that “[t]he time within which an accused must be brought * * * in the case of felony, to preliminary hearing and trial, may be extended [by] * * * [a]ny period of delay occasioned by the neglect or improper act of the

accused.” Thus, where a defendant fails to respond to the state’s request for reciprocal discovery, speedy trial time is tolled after a “reasonable time” for the defendant’s responses has passed. *Gibson*, 2014-Ohio-3421, ¶ 23 (“[W]e note that * * * the state requested discovery from Gibson that was never responded to by Gibson. This alone would have tolled the time for trial for all but 30 days.”); *State v. Mitchell*, 8th Dist. Cuyahoga No. 88977, 2007-Ohio-6190, ¶ 33-35 (where defendant never responded to state’s discovery request, statutory speedy trial time remained tolled until the time of trial); *see also State v. Jenkins*, 8th Dist. Cuyahoga No. 95006, 2011-Ohio-837, ¶ 28-29 (where “record contained no indication that defendant responded to the State’s October 31, 2008 demand for discovery, * * * following a ‘reasonable time,’ i.e., 30 days, or after November 30, 2008, tolling would occur” but finding that state’s request for continuance thereafter “stopped the tolling that was impliedly occurring by reason of the defendant’s failure to respond to the state’s demand for discovery”); *In re D.S.*, 2012-Ohio-2213 at ¶ 43 (S. Gallagher, J., dissenting) (“[T]olling, for failure to respond to the state’s discovery, is not limited to 30 days. Tolling could extend for the life of the pretrial stages of a case if the defendant fails to respond.”); *State v. Saultz*, 4th Dist. Ross No. 09CA3133, 2011-Ohio-2018, ¶ 4, 11-16 (where trial court determined that defense counsel should have responded to the state’s reciprocal discovery request within 30 days, defendant’s speedy trial time tolled from December 14, 2007, 30 days after request served, until March 18, 2008 when defense counsel responded); *State v. McCallister*, 4th Dist. Scioto No. 13CA3558, 2014-Ohio-2041, ¶ 21 (speedy trial clock was tolled

beginning on August 31, 2012, the 31st day after the state’s discovery request, because of defendant’s neglect and remained tolled until May 1, 2013, when defendant eventually responded to the state’s discovery request); *State v. Miller*, 11th Dist. Trumbull No. 2010-T-0018, 2010-Ohio-5795, ¶ 52-59 (speedy trial time tolled beginning 30 days after the state filed its request for discovery; defendant “cannot ignore the state’s request for reciprocal discovery and then allege that he was tried in an untimely manner”).

{¶26} Under most circumstances, this court has generally considered 30 days to be a “reasonable” response time when applying R.C. 2945.72. *See, e.g., State v. Byrd*, 8th Dist. Cuyahoga No. 91433, 2009-Ohio-3283, ¶ 9; *State v. Barb*, 8th Dist. Cuyahoga No. 90768, 2008-Ohio-5877, ¶ 9; *Shabazz*, 2011-Ohio-2260 at ¶ 26. Geraci does not argue that he could not have reasonably responded to the state’s discovery request within 30 days and there is nothing in the record that suggests otherwise, particularly given that the state responded to Geraci’s discovery requests in two days. Using 30 days as a reasonable response time, Geraci’s speedy trial time ran again from September 20, 2013 (when the state served its demand for discovery) until October 20, 2013 (when Geraci reasonably should have responded to the state’s demand for discovery) for a total of 35 speedy trial days.⁴ The speedy trial time was thereafter tolled due to Geraci’s neglect in

⁴ As to what occurred after September 20, 2013 until Geraci entered his pleas on January 29, 2014, the record reflects that several pretrials were held and continuances granted. Pursuant to R.C. 2945.72(H), “any continuance granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion” may toll speedy trial time. However, in order for a continuance “granted other than upon the accused’s own motion” to toll the speedy trial time, the record must affirmatively demonstrate that the

failing to respond to the state’s demand for reciprocal discovery. *Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, at paragraph one of the syllabus; *Gibson*, 2014-Ohio-3421 at ¶ 23. Accordingly, there was no statutory speedy trial violation.

{¶27} We also find that Geraci’s constitutional right to a speedy trial was not violated. Whether a defendant’s constitutional right to a speedy trial has been violated is determined by applying the balancing test set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530-533, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The factors to be considered include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his speedy trial right; and (4) prejudice to the defendant. *State v. Castro*, 2014-Ohio-2398, 13 N.E.3d 720, ¶ 22 (8th Dist.), citing *Barker* at 530. However, a defendant must meet the “threshold requirement” of a “presumptively prejudicial” delay in order to trigger a *Barker* analysis. *Shepherd*, 2012-Ohio-5415 at ¶ 31, citing *Duncan*, 2012-Ohio-3683 at ¶ 8. ““Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go

continuance was reasonable. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 30-34; *Jenkins*, 2011-Ohio-837 at ¶ 22. This usually requires that the trial court’s reason or reasons for granting the continuance be set forth in the applicable journal entry. *Ramey* at ¶ 32; *Jenkins* at ¶ 22. With the exception of one continuance granted at the request of the defendant from January 13 to January 22, 2014, which tolled the speedy trial time for nine days, the record is silent as to why these continuances were granted. Because the court’s journal entries do not explain the reasons for the continuances and there is nothing else in the record that otherwise explains why the continuances were granted, there is no basis upon which this court could find the continuances to be reasonable. *Jenkins* at ¶ 30. Accordingly, these other continuances would not have extended the speedy trial time had it not already been tolled by Geraci’s failure to respond to the state’s discovery request.

into the balance.” *Duncan* at ¶ 8, quoting *Barker* at 530-531. Courts have generally held that “a delay approaching one year becomes ‘presumptively prejudicial.’” *Winn*, 2012-Ohio-5888 at ¶ 44, quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), fn. 1.

{¶28} In this case, the period from the time of Geraci’s arrest on September 11, 2013 until the time he entered his guilty pleas on January 29, 2014 was a little over four-and-a-half months. During this time period, discovery and plea negotiations were ongoing. Because Geraci has failed to make a threshold showing of a “presumptively prejudicial” delay, an analysis of the other *Barker* factors is unnecessary.⁵ *Winn* at ¶ 43-44; *Shepherd* at ¶ 31. Geraci’s constitutional speedy trial rights have not been violated. *See, e.g., State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 61 (finding no constitutional violation of defendant’s speedy trial rights based on seven-month delay where defendant did not make the threshold showing that delay was presumptively prejudicial); *Shepherd* at ¶ 31 (no violation of constitutional speedy trial

⁵Although Geraci asserts that his constitutional right to a speedy trial was violated, his argument focuses solely upon his statutory speedy trial rights; he fails to make any argument relating to the *Barker* factors in his motion below or in his brief on appeal. For this reason alone we could overrule Geraci’s assignment of error to the extent it is based upon an alleged violation of his constitutional right to a speedy trial. *See State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 55-56 (where defendant briefly asserted that he had been denied his constitutional right to a speedy trial in his pro se motions but his arguments below and on appeal focused upon his statutory speedy trial rights and he failed to address the *Barker* factors on appeal an analysis under *Barker* was unnecessary because defendant “did not develop” the issue regarding his constitutional right to a speedy trial), citing App.R. 12(A)(2), App.R. 16(A) and *State v. Stokes*, 193 Ohio App.3d 549, 2011-Ohio-2104, 952 N.E.2d 1192, ¶ 9 (12th Dist.).

right because seven-month delay was not presumptively prejudicial); *Duncan* at ¶ 9-10 (six-month time frame from beginning of the case until plea was not presumptively prejudicial; therefore, defendant was not deprived of his constitutional right to a speedy trial).

{¶29} Because there was no statutory or constitutional violation of Geraci's speedy trial rights, trial counsel was not ineffective for failing to seek the dismissal of the charges against Geraci on speedy trial grounds. *See, e.g., State v. Andrews*, 8th Dist. Cuyahoga No. 92695, 2010-Ohio-3499, ¶ 49-50 (where right to speedy trial was not violated, defense counsel's decision not to file a motion to dismiss based upon the expiration of the speedy trial time was sound trial strategy and did not support claim of ineffective assistance of counsel).

{¶30} Geraci's assertion that he would have been discharged due to a violation of his speedy trial rights and, therefore, would not have entered his guilty pleas were it not for the allegedly improper advice he received from trial counsel is pure speculation and does not (1) establish a reasonable probability that, but for counsel's deficient performance, Geraci would not have pled guilty to the offenses at issue and would have, instead, insisted on going to trial or (2) support the conclusion that withdrawal of Geraci's guilty pleas was necessary to correct a manifest injustice. *See State v. Rocha*, 8th Dist. Cuyahoga No. 99826, 2014-Ohio-495, ¶ 7-12 (rejecting defendant's argument that he was denied effective assistance of counsel based on trial counsel's delay in responding to the state's discovery requests that tolled speedy trial time and precluded a dismissal on

speedy trial grounds as “pure speculation” because it improperly assumed that trial court would not have rescheduled trial within speedy trial period to prevent expiration of speedy trial time if speedy trial time had not otherwise been tolled by defendant’s failure to respond to state’s discovery requests); *see also Saultz*, 2011-Ohio-2018 at ¶ 20-22 (observing that to conclude that counsel was ineffective for not filing a response to a reciprocal discovery request, thereby tolling the speedy trial time under *Palmer*, would require “an underlying presumption that neither the [s]tate nor the trial court would have realized the defendant’s speedy trial rights were about to be violated and taken action,” which the court declined to make), citing *State v. Miller*, 9th Dist. Medina No. 07CA0037-M, 2008-Ohio-1002, ¶ 14-15; *Johnson*, 2013-Ohio-4077 at ¶ 5-6, 11 (where defendant could not establish reasonable probability that trial court would have sustained a motion to dismiss on constitutional speedy trial grounds if trial counsel had raised the issue, defendant could not establish claim for ineffective assistance of counsel based on counsel’s alleged failure to advise him of constitutional speedy trial violation).

{¶31} Upon our review of the record and for the reasons detailed above, we find nothing that suggests that withdrawal of Geraci’s guilty pleas was necessary to correct a manifest injustice. Accordingly, the trial court did not abuse its discretion in denying Geraci’s motion to withdraw his guilty pleas. Geraci’s assignment of error is overruled.

{¶32} The trial court’s judgment is 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 convictions 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANITA LASTER MAYS, J., CONCUR