[Cite as *State v. Brown*, 2017-Ohio-7239.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103491

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FREDRIC A. BROWN

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-587887-A
Application for Reopening
Motion No. 503100

RELEASE DATE: August 11, 2017

FOR APPELLANT

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EILEEN A. GALLAGHER, P.J.:

{¶1} On December 29, 2016, the applicant, Fredric Brown, pursuant to App.R. 26(B), applied to reopen this court's judgment in *State v. Brown*, 8th Dist. Cuyahoga No. 103491, 2016-Ohio-7221, in which this court affirmed Brown's convictions for two counts of trafficking in persons naming two separate victims.[1] Brown argues that his appellate counsel was ineffective for failing to argue (1) lack of probable cause; (2) ineffective assistance of trial counsel for failing to argue lack of probable cause and for failing to file a motion to suppress; and (3) speedy trial. The state of Ohio filed its brief in opposition on January 25, 2017. For the following reasons, this court denies the application to reopen.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State v. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.

{¶3} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting

[1]The grand jury indicted Brown on two counts of trafficking in persons, two counts of compelling prostitution, and one count of possessing criminal tools. After a bench trial, the judge convicted Brown on all counts but merged the compelling prostitution counts and the possession of criminal tool count into the trafficking counts. The judge sentenced Brown to ten years on the first count and 13 years on the second count to be served concurrently.

for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.

{¶4} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.

{¶5} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶6} Brown argues the police lacked probable cause for stopping his van as he pulled out of a hotel parking lot. He cites the communication between officers before the "traffic stop" to show that the stop was merely pretense. He also argues that the police conducted a warrantless search of their cell phones. Thus, he continues, his trial counsel was ineffective for refusing to file a motion to suppress.

{¶7} During the trial, the two main investigating police officers testified that they had noticed an advertisement on Backpage showing young girls for sex for hire and that the background of the photograph appeared to be a local hotel, an American Best Value Inn. The first officer further testified that he talked to the hotel's desk clerk who said that she thought prostitution was being practiced in two of the rooms. The officer ran the license plate of the subject van and discovered several irregularities. The van was purporting to be a taxi, but it did not have a delivery plate, and the owner's license was expired. The first officer testified he saw a male and three females enter the van. When the van left the hotel parking lot, the driver committed several traffic violations.

He failed to come to a complete stop on private property before pulling out onto the street, and the turn was very wide with the van in both lanes for a few seconds. (Tr. 268-270, 357-360.)

{¶8} Thus, the first officer stopped the van and called the second officer for assistance. Brown was driving the van. His fiancée was in the front passenger seat, and two girls, ages 15 and 16, were in the back seats. When the first officer approached Brown and the van, he noticed the smell of burnt marijuana on Brown. Brown did not produce his driver's license upon request. His answers to the first officer's questions did not "add up." When the second officer arrived, he noticed that the girls in the van appeared to be the girls in the Backpage advertisement. The second officer called the number in the advertisement, and the fiancée's phone began ringing. The second officer repeated the call several times, and the fiancée's phone responded. This was the evidentiary foundation on which Brown wanted his attorney to file a motion to suppress.

{¶9} At a pretrial hearing on the record, Brown, his attorney, the prosecutor, and the judge discussed the issue. Brown's trial attorney opined that the quality and quantity of the evidence would probably not successfully support a motion to suppress and that an unsuccessful suppression hearing would harden the state's position for a plea bargain. (Tr. 30-32, 52-53.) Thus, to keep open the possibility of a favorable plea bargain, trial counsel did not file a motion to suppress. The evidence of the traffic violations would have provided a sufficient basis for the stop and further investigation. *State v. Cozart*, 8th Dist. Cuyahoga No. 91226, 2009-Ohio-489. Also, calling a cell

phone number is not a warrantless search. Following the Supreme Court's admonition, this court will not second-guess either trial or appellate counsel's professional judgment in deciding strategy and tactics.

{¶10} Moreover, Brown's reliance on *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), is misplaced. That case stands for the principle that an attorney has a constitutionally imposed duty to consult with a defendant about taking an appeal when there is reason to think a defendant would want to appeal or showed an interest in filing an appeal. It does not stand for the proposition that an appellate attorney must consult with his client and raise the issues requested by the client, as Brown claims.

{¶11} Brown's final argument is that his speedy trial rights were violated. R.C. 2945.71(C)(2) requires that the state bring a person charged with a felony to trial within 270 days after the person's arrest. Under subsection (E), each day the person is held in jail counts as three days. However, this time period may be waived, extended, or tolled under R.C. 2945.72. Subsection © provides that the time 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." "Any period of delay occasioned by the neglect or improper act of the accused" would also toll the time period. R.C. 2945.72(D). Similarly, any "delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused" tolls the period. R.C.

2945.72(E). Finally, subsection (H) provides that the period is tolled by "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." Thus, any continuance granted at the defendant's request tolls the period. *State v. Brelo*, 8th Dist. Cuyahoga No. 79580, 2001-Ohio-4245, and *State v. Ferrell*, 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882. The court further notes that defense counsel's actions in waiving the time period is attributable to the defendant, even if the defendant did not consent to the waiver. *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978).

{¶12} Brown never made bail, so each day is subject to the triple-count provisions. If he can establish that more than 90 days elapsed after allowing for all waivers and extensions, his claim may have merit. The time for speedy trial begins to run when the accused is arrested, but the actual day of arrest is not counted. *State v. Canty*, 7th Dist. Mahoning No. 08-MA-1565, 2009-Ohio-6161.

{¶13} Brown was arrested on July 28, 2014. The grand jury indicted him on August 5, and his arraignment was on August 8, 2014, at which time counsel moved for discovery and a bill of particulars, both of which toll speedy trial time for a reasonable period while the requests are fulfilled. Thus, through

August 8, 2014, 11 speedy trial days elapsed.

{¶14} On August 20, 2014, within the time tolled by the discovery requests, the court conducted a pretrial. The next pretrial was set for

September 2, 2014, at defendant's request, as shown by the docket. Thus, no speedy trial time elapsed between August 8 and September 2, 2014.

{¶15} At the September 2 pretrial, defendant requested a bond reduction hearing set for September 15, 2014, and continued the pretrial to October 2, 2014, at the request of the defendant. At the October 2, 2014 pretrial, trial was set for December 9, 2014, at defendant's request. Thus, no more speedy trial time would elapse until at least December 9, 2014. On that date, trial was rescheduled to December 16, 2014, at defendant's request.

{¶16} On December 15, 2014, Brown, through his lawyer, moved for a continuance of the trial. Thus, the trial was rescheduled to January 7, 2015, at defendant's request. On that day, trial was rescheduled to January 28, 2015, at defendant's request. Therefore, no speedy trial time elapsed from August 8, 2014, to January 28, 2015.

{¶17} On January 28, 2015, before the trial began, Brown announced his dissatisfaction with his retained attorney, and the judge released counsel from his representation and allowed Brown 14 days to retain another attorney. Trial was to be reset when the new attorney filed his notice of appearance. Furthermore, the judge ruled that the time for this delay would be charged to the defendant for speedy trial calculations. (Tr. 73.) On February 24, 2015, the judge held another hearing on the record concerning Brown's attorney. Brown indicated that he had reconciled with his originally retained attorney, that the fee situation was being resolved, and that he wanted

the original attorney. The judge was prepared to appoint an attorney, but took the matter under advisement after Brown reasserted his right to chose his own attorney. On March 11, 2015, the original counsel filed his notice of appearance, and the trial judge issued an entry acknowledging the original counsel as Brown's attorney. The entry also stated that a pretrial was set for March 18, 2015, at defendant's request.

{¶18} The 42 days from January 28 to March 11, 2015, may be problematic for purposes of speedy trial. Under R.C. 2945.72(C), at least some of this time, if not all, is waived by Brown for his desire to seek new counsel. Indeed, as stated by the trial judge, it would be proper to charge all of the time to Brown, because he caused the problem and the trial court diligently pursued the issue of ensuring that Brown had an attorney. The trial judge was prepared to appoint an attorney for Brown, but Brown invoked his right to select his own attorney. Thus, it is proper to consider that all 42 days were waived for purposes of speedy trial. Even assuming arguendo, that all 42 days ran for purposes of speedy trial, only 53 of the 90 days had elapsed.

{¶19} At the March 18, 2015 pretrial, the trial was set for May 6, 2015, at the request of the defendant. At an April 17, 2015 pretrial, trial was rescheduled to May 12, 2015, at the request of the defendant. Thus, no more speedy trial days would elapse until May 12, 2015.

{¶20} On May 12, 2015, the trial court and counsel resolved various matters, including Brown's waiver of jury, and trial was rescheduled to May 13, 2015, at defendant's request. The trial began on May 13, 2015. Thus, viewing the record in the

light most favorable to Brown only 53 of the 90 speedy trial days had elapsed. His speedy trial claim is meritless, and appellate counsel properly rejected that issue.

{¶21} Accordingly, this court denies the application to reopen.

EILEEN A. GALLAGHER, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR