

[Cite as *State v Asadi-Ousley*, 2017-Ohio-937.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104714 and 105103

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ASA J. ASADI-OUSLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597885-A

BEFORE: E.A. Gallagher, J., Keough, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: March 16, 2017

FOR APPELLANT

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EILEEN A. GALLAGHER, J.:

{¶1} In this consolidated appeal, defendant-appellant Asa Asadi-Ousley, pro se, appeals from (1) the trial court’s order denying his petition for postconviction relief pursuant to R.C. 2953.21 (Appeal No. 104714) and (2) the trial court’s order denying his motion for relief from judgment pursuant to Civ.R. 60(B) (Appeal No. 105103). Asadi-Ousley contends that his convictions should be vacated because (1) his speedy trial rights under R.C. 2941.401 were violated, and (2) he was denied effective assistance of counsel based on trial counsel’s failure to seek a dismissal of the indictment due to the alleged violation of his speedy trial rights. For the reasons that follow, we affirm the trial court’s rulings.

Factual and Procedural Background

{¶2} On March 23, 2015, while Asadi-Ousley was serving a six-year prison term arising out of his convictions in three unrelated Cuyahoga County Common Pleas Court cases (Case Nos. CR-10-537412, CR-10-537780 and CR-10-540397), he filed, pro se, a “motion for speedy disposition of (all) outstanding criminal charges; indictments; informations; or complaints via R.C. § 2941.401” (“motion for speedy disposition”) in Case No. CR-10-537412. In his motion, Asadi-Ousley “demand[ed] speedy disposition of any criminal charges per 2941.401” and stated that he did not consent to the waiver of his R.C. 2941.401 rights by any attorney.

{¶3} On July 29, 2015, a Cuyahoga County Grand Jury indicted Asadi-Ousley in CR-15-537412 on two counts of rape with sexual predator specifications, two counts of aggravated robbery, one count of felonious assault and two counts of kidnapping — one of which included a sexual motivation specification and sexual predator specification. The charges arose out of a December 31, 2008 sexual assault in which Asadi-Ousley allegedly held a knife to the victim’s neck, pushed her into an alley, hit her on the head and raped her. Asadi-Ousley was arraigned on August 11, 2015 and pled not guilty to the charges against him.

{¶4} The case proceeded to a jury trial that commenced on January 4, 2016. The jury was impaneled and sworn on January 5, 2016.¹ The following day, the parties presented opening statements and the state began calling its witnesses. On or about January 11, 2016, the jury returned its verdict. The jury found Asadi-Ousley guilty on the two rape counts, the felonious assault count and the two kidnapping counts, including the accompanying sexual motivation specification. The jury found him not guilty on the two aggravated robbery counts. Asadi-Ousley waived a jury trial on the sexual predator specifications and the trial court found him guilty.

¹ We note that there are some discrepancies between the dates of proceedings reflected in the trial transcript and those stated in the trial court’s journal entries. For example, according to the trial transcript, voir dire was completed and the jury was impaneled and sworn on January 4, 2016. However, the trial court’s journal entry indicates that the jury was impaneled and sworn on January 5, 2016. Likewise, according to the trial transcript, the verdicts were returned on January 8, 2016. However, the trial court’s journal entry indicates that the verdicts were returned on January 11, 2016. Because a trial court speaks through its journal entries (and those dates are arguably more favorable to the defendant), we reference the dates listed in the journal entries here.

{¶5} The convictions on the two rape counts and the convictions on the two kidnapping counts merged for sentencing. On February 17, 2016, the trial court conducted a sentencing hearing at which it sentenced Asadi-Ousley to life with the possibility of parole after 15 years for rape, 8 years for felonious assault and life with the possibility of parole after 15 years for kidnapping. The trial court ordered all of the sentences to be served concurrently to each other and concurrently to the six-year prison sentence Asadi-Ousley was already serving. Asadi-Ousley was also sentenced to five years mandatory postrelease control. The trial court entered its sentencing journal entry imposing these sentences on February 22, 2016. Asadi-Ousley appealed his convictions and sentences (Appeal No. 104267).

{¶6} On April 5, 2016, Asadi-Ousley filed, pro se, a “petition for post conviction relief via R.C. 2953.21-.23.” Asadi-Ousley argued that his speedy trial rights under R.C. 2941.401 had been violated because 335 days had elapsed between the date he allegedly mailed his motion for speedy disposition (March 19, 2015) and the date the trial court entered its sentencing journal entry (February 22, 2016). He argued that as a result of the violation of his speedy trial rights, the trial court lacked jurisdiction to convict him and that his judgment of conviction was void. Asadi-Ousley also claimed that he was denied effective assistance of trial counsel because trial counsel allegedly advised Asadi-Ousley that he could not file a motion to dismiss the indictment in this case because Asadi-Ousley had filed his motion for speedy disposition under the wrong case number. In support of his petition, Asadi-Ousley attached copies of his motion for

speedy disposition and a certified mail receipt reflecting service on the Cuyahoga County Prosecutor's office dated March 25, 2016. He also attached an affidavit in which he attested to the facts set forth in his petition and claimed that trial counsel had told him that it was "not wise to file a motion to dismiss the indictment for lack of speedy disposition, because the Judge would be mad and would go hard on me during sentencing." Asadi-Ousley claimed that he told trial counsel to file the motion to dismiss anyway but that trial counsel failed to do so.

{¶7} On June 10, 2016, the trial court denied Asadi-Ousley's petition for postconviction relief. As set forth in its findings of fact and conclusions of law, the trial court determined that — not including any tolling events — less than 180 days² had elapsed between the date of Asadi-Ousley's indictment in this case and the commencement of trial and that, therefore, Asadi-Ousley's speedy trial rights under R.C. 2941.401 had not been violated.

{¶8} Asadi-Ousley appealed the trial court's denial of his petition for postconviction relief (Appeal No. 104714), raising the following two assignments of error for review:

Assignment of Error One: Appellant's trial court lost jurisdiction to enter judgment and sentence, prior to trial court[']s speedy disposition of appellant['s] case, rendering sentence and judgment null and void via Ohio Const., Art. I §§ 1, 2, 10, 16 in conjunction with the United States Const., Amends. 1st, 5th, 6th, 14th, because he's imprisoned without a judgment or sentence.

² Specifically, the trial court found that 166 days had elapsed between the date of Asadi-Ousley's indictment and the commencement of trial. It is not clear from the record how the trial court made this calculation.

Assignment of Error Two: Trial counsel provided ineffective assistance by not moving the trial court to dismiss the complaint and indictment, where 330 days [e]lapsed via R.C. § 2941.401 and appellant requested that counsel request such dismissal, which violates his right to effective counsel via Ohio Const., Art. I §§ 10, 16, and United States Const., Amends. 5th, 14th.

{¶9} On July 11, 2016, Asadi-Ousley filed a “motion for relief after judgment via Civ.R. 60,” attaching a copy of a subpoena summoning him to appear before a Cuyahoga County grand jury, dated March 3, 2015 (the “grand jury subpoena”). Asadi-Ousley argued that the grand jury subpoena is “proof and evidence that a complaint * * * for these charges was pending” at the time he allegedly mailed his motion for speedy disposition on March 19, 2015, and that the trial court’s findings to the contrary in its June 10, 2016, denial of his petition for postconviction relief were erroneous. He requested that his “void judgment of conviction entered without jurisdiction” be vacated. On October 5, 2016, the trial court denied Asadi-Ousley’s Civ.R. 60(B) motion.

{¶10} Asadi-Ousley appealed the trial court’s denial of his Civ.R. 60(B) motion (Appeal No. 105103), raising the following assignment of error for review:

The common pleas court lacked jurisdiction to enter judgment, verdict, sentence, or conviction, because the common pleas court lost jurisdiction by holding of proceedings after the lapse of 180 days allowed by R.C. 2941.401 rendering appellant’s imprisonment in violation of the United States Constitution 5th, 6th, 14th Amendments[.] See *Frank v. Mangum*, 237 U.S. 309, at headnote three.

{¶11} Asadi-Ousley's assignments of error are interrelated and will be addressed together.

Law and Analysis

{¶12} Asadi-Ousley argues that his motion for speedy disposition, filed after he was subpoenaed to testify before a grand jury, but before he was indicted in this case, was sufficient to trigger the 180-day period set forth in R.C. 2941.401 within which to bring him to trial in this case. He further contends that his speedy trial rights under R.C. 2941.401 were violated because more than 180 days elapsed between the filing of his motion for speedy disposition and the verdicts on January 11, 2016, and as the trial court's entry of his judgment of conviction on February 22, 2016.

{¶13} This case involves the interpretation and application of R.C. 2941.401. The interpretation of a statute and the application of a statute to the facts are issues of law, we review de novo. *See, e.g., State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 6; *Cleveland Clinic Found. v. Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 25. R.C. 2941.401 provides, in relevant part:

When a person has entered upon a term of imprisonment in a correctional institution of this state, and *when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter*, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant

any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the warden or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time served and remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner.

The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.

The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof. * * *

*If the action is not brought to trial within the time provided, subject to continuance allowed pursuant to this section, no court any longer has jurisdiction thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice. * * **

(Emphasis added.)

{¶14} The paramount goal in construing a statute is to ascertain and give effect to the legislature's intent in enacting the statute. *Antoon v. Cleveland Clinic Found.*, Slip Opinion No. 2016-Ohio-7432, ¶ 20; *In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, 978 N.E.2d 164, ¶ 17. Where a statute is ambiguous, we must interpret the statute to determine the legislature's intent. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11-13. Where, as here, a statute is unambiguous and definite, we need not interpret it; we must simply apply the plain meaning of the statute as written. *Id.*; see also *Antoon* at ¶ 20 (“An unambiguous statute must be applied in a

manner consistent with the plain meaning of the statutory language * * *.’”), quoting *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997).

{¶15} Under the plain language of the statute, R.C. 2941.401 applies only when “any untried indictment, information, or complaint” is “pending” against the prisoner at the time he files a request for final disposition. Contrary to Asadi-Ousley’s argument, the March 3, 2015 grand jury subpoena is not a “complaint.” Nor is the fact that he was called to testify before the grand jury an indication that a “complaint” had been filed or that charges were otherwise pending against him at that time. Although the offenses that underlie the charges in this case were under investigation when Asadi-Ousley filed his motion for speedy disposition on March 23, 2015, the record is clear that there was no “indictment, information, or complaint” pending against Asadi-Ousley in this case at that time. Accordingly, the 180-day period in R.C. 2941.401 could not have commenced, as Asadi-Ousley claims, at the time he filed his motion for speedy disposition. *See, e.g., State v. Williams*, 4th Dist. Highland No. 12CA12, 2013-Ohio-950, ¶ 8-13. Further, R.C. 2941.401 specifies the time within which a defendant must be “brought to trial” not, as Asadi-Ousley contends, the time within which the defendant’s trial must be completed, the verdicts returned or the defendant sentenced.

{¶16} Asadi-Ousley was indicted in this case on July 29, 2015. Even if we were to use that date as the “triggering date” from which the 180-day period in R.C. 2941.401 began to run, *see Williams* at ¶ 21, Asadi-Ousley’s right to be tried within 180 days was not violated. In this case, only 159 days elapsed between July 29, 2015, when

Asadi-Ousley was indicted, and January 4, 2016, when the trial commenced.³ Only 160 days elapsed until the jury was impaneled and sworn and witness testimony commenced. Further, the record reflects that the trial court granted multiple requests by Asadi-Ousley for continuances that arguably tolled the running of Asadi-Ousley's speedy trial time under R.C. 2941.401. *See, e.g., State v. James*, 4th Dist. Ross No. 13CA3393, 2014-Ohio-1702, ¶ 26-31 (citing cases from multiple districts in support of the proposition that the tolling provisions of R.C. 2945.72 apply to R.C. 2941.401's 180-day speedy trial time limit). Accordingly, Asadi-Ousley's claims that his speedy trial rights under R.C. 2941.401 were violated are meritless.

{¶17} Asadi-Ousley also contends that he was denied effective assistance of counsel because his trial counsel failed to file a motion to dismiss the indictment against him for a violation of his speedy rights pursuant to R.C. 2941.401. Once again, this argument is meritless.

{¶18} To prevail on a claim of ineffective assistance of trial 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.

³The record reflects that jury selection began on January 4, 2016. Even if Asadi-Ousley were deemed not to have been "brought to trial" until some later point in the trial process, there would still be no speedy trial issue under R.C. 2941.401 given that the verdicts in this case were returned well within the 180-day period.

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. To show that counsel provided ineffective assistance of counsel by failing to file a motion to dismiss, a defendant must demonstrate that the motion would have been successful. See, e.g., *State v. Mango*, 8th Dist. Cuyahoga No. 103146, 2016-Ohio-2935, ¶ 18, citing *Cleveland v. White*, 8th Dist. Cuyahoga No. 99375, 2013-Ohio-5423, ¶ 7; *James*, at ¶ 21. “‘Counsel cannot be [ineffective] for failing to file a fruitless motion.’” *Mango* at ¶ 18, quoting *State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶ 8.

{¶19} As detailed above, Asadi-Ousley was brought to trial within 180 days as required under R.C. 2941.401. Because Asadi-Ousley’s speedy trial rights under R.C. 2941.401 were not violated, had trial counsel filed a motion to dismiss, it would not have been successful. Asadi-Ousley’s trial counsel, therefore, could not have been ineffective for failing to file a motion to dismiss the indictment based on an alleged violation of R.C. 2941.401. See, e.g., *James*, 4th Dist. Ross No. 13CA3393-2014-Ohio-1702, at ¶ 31; see also *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 29.

{¶20} Accordingly, the trial court did not err in denying Asadi-Ousley’s petition for postconviction relief pursuant to R.C. 2953.21 or his motion for relief from judgment pursuant to Civ.R. 60(B). Asadi-Ousley’s assignments of error are overruled.

{¶21} Judgment affirmed.

It is ordered that appellee recover from appellant the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
TIM McCORMACK, J., CONCUR