

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24665

Appellee

v.

GEORGE M. HOWES

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 10 3526

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, George Howes, appeals from the judgment of the Summit County Court of Common Pleas, denying his motion to discharge and his motion for a mistrial. This Court affirms.

I

{¶2} This case stems from a series of events that occurred during the late evening hours of October 22, 2008 and the early morning hours of October 23, 2008. During that timeframe, an individual later identified as Howes: (1) attempted to break into the Circle K on Norton Avenue in Barberton; (2) crossed the street to the Rocky's Drive-Thru and robbed the owner at gunpoint; (3) led police officers on a car chase in a stolen vehicle; and (4) ran from officers on foot after they successfully stopped the vehicle.

{¶3} Howes was arrested on October 23, 2008 and indicted on November 4, 2008 for the following offenses: (1) failure to comply with the order or signal of a police officer, in

violation of R.C. 2921.331(B); (2) receiving stolen property, in violation of R.C. 2913.51(A); (3) driving under suspension, in violation of R.C. 4510.11; (4) obstructing official business, in violation of R.C. 2921.31(A); and (5) reckless operation, in violation of R.C. 4511.20. The grand jury filed a supplemental indictment on November 10, 2008, charging Howes with aggravated robbery, in violation of R.C. 2911.01(A)(1)/(3); robbery, in violation of R.C. 2911.02(A)(1)/(A)(2); and two firearm specifications, in violation of R.C. 2941.145. The trial court arraigned Howes on his initial indictment on November 7, 2008 and arraigned him on his supplemental indictment on November 18, 2008. The court set a November 18, 2008 date for Howes' pretrial. Howes remained incarcerated in lieu of posting bond.

{¶4} On November 13, 2008, the State filed a demand for discovery. Thereafter, the trial court set another pretrial for November 25, 2008 and continued the pretrial until December 2, 2008. On December 5, 2008, the court issued an order setting Howes' final pretrial for January 20, 2009 and his trial for January 29, 2009. The court subsequently moved Howes' pretrial date to January 27, 2009 and moved his trial date to January 30, 2009. On January 29, 2009, Howes filed a motion to discharge pursuant to Ohio's speedy trial statutes. The court denied Howes' motion, and the matter proceeded to trial. The jury found Howes guilty of failure to comply, receiving stolen property, aggravated robbery, and robbery, and the court sentenced Howes to a total of fifteen and a half years in prison.

{¶5} Howes now appeals from the judgment of the court and raises three assignments of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED WHEN IT FAILED TO BRING DEFENDANT TO TRIAL WITHIN NINETY DAYS UNDER OHIO’S SPEEDY TRIAL STATUTES.”

{¶6} In his first assignment of error, Howes argues that the trial court erred by trying him in violation of Ohio’s speedy trial statutes. We disagree.

{¶7} “The right of an accused to a speedy trial is recognized by the Constitutions of both the United States and the state of Ohio.” *State v. Pachay* (1980), 64 Ohio St.2d 218, 219. Ohio’s speedy trial statute provides that a person charged with a felony must be brought to trial within two hundred seventy days of his arrest. R.C. 2945.71(C)(2). Yet, “each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E). Accordingly, if a person charged with a felony remains in jail in lieu of posting bond, that person must be brought to trial within ninety days of his arrest. *Id.* “Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.” R.C. 2945.73(B). Under certain conditions, however, the time within which an accused must be brought to trial can be tolled. *State v. Dalton*, 9th Dist. No. 09CA009589, 2009-Ohio-6910, at ¶21. Speedy trial time can be tolled for “[t]he period of 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.” R.C. 2945.72(H). Additionally, speedy trial time can be tolled for “[a]ny period of delay necessitated by reason of a *** motion, proceeding, or action made or instituted by the accused.” R.C. 2945.72(E).

{¶8} Howes was arrested on October 23, 2008 and remained in jail in lieu of posting bond. Accordingly, absent a tolling event, the trial court was required to bring Howes to trial on or before January 21, 2009. R.C. 2945.71(E). Howes' trial did not begin until January 30, 2009. Howes concedes that he sought one continuance in the amount of seven days (from November 25, 2008 to December 2, 2008) and that his continuance amounted to a tolling event. A seven day tolling period would have extended the date by which Howes' trial had to begin to January 28, 2009. Howes argues that no other tolling events occurred, so the trial court violated his speedy trial rights by beginning his trial on January 30, 2009.

{¶9} The record reflects that at least two tolling events occurred in this case. Howes appeared before the court with his counsel on November 18, 2008. November 18, 2008 was the day of Howes' scheduled pretrial on his initial indictment, but also happened to be the day that the court arraigned Howes on the charges in his supplemental indictment. In addressing the court on November 18, 2008, Howes' counsel stated: "On behalf of my case, Your Honor, I ask the matter be set for a second pretrial next Tuesday[.]" Accordingly, Howes' counsel specifically requested another pretrial to be set November 25, 2008. When a pretrial is scheduled at the defendant's request within a reasonable timeframe, the time taken to provide the defendant with a pretrial can be a tolling event for purposes of the speedy trial statute. *State v. Gowe* (1983), 13 Ohio App.3d 358, 358-59. See, also, R.C. 2945.72(E) (providing that speedy trial time may be tolled for "[a]ny period of delay necessitated by reason of a *** motion, proceeding, or action made or instituted by the accused"). Pursuant to his counsel's request, the court scheduled Howes for a second pretrial on November 25, 2008, thereby extending the matter for another seven days. The pretrial did not occur until December 2, 2009, however, because Howes then requested a continuance until that later date. Thus, one tolling event

occurred from November 18, 2008 to November 25, 2008 based on Howes' request for a second pretrial, and a second tolling event occurred from November 25, 2008 to December 2, 2008 based on Howes' request for a continuance. Because at least fourteen days worth of tolling events occurred, the trial court had until February 4, 2009 to bring Howes to trial. Howes' trial began January 30, 2009. Consequently, his argument that the court erred by denying his motion to discharge lacks merit.

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN ADMITTING RECORDS, WHICH WERE NOT PRODUCED TO THE DEFENDANT AT OPEN FILE DISCOVERY.”

{¶10} In his second assignment of error, Howes argues that the trial court erred by admitting evidence that the prosecutor willfully withheld during discovery. The record reflects that Howes did not object to the evidence that he takes issue with. Rather, he moved for a mistrial on the basis that the State did not provide him with the evidence during discovery. As such, we limit our review to determining whether the trial court erred by denying Howes' motion for a mistrial.

{¶11} “The essential inquiry on a motion for mistrial is whether the substantial rights of the accused are adversely affected.” *State v. Wooden*, 9th Dist. No. 21138, 2003-Ohio-1917, at ¶33, quoting *State v. Damberger* (Aug. 30, 2000), 9th Dist. No. 3024-M, at *2. “Great deference is afforded to a trial court’s decision regarding a motion for mistrial[.]” *State v. McKinney*, 9th Dist. No. 24430, 2009-Ohio-2225, at ¶20. Accordingly, “[t]his Court reviews the denial of a motion for mistrial for an abuse of discretion.” *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶6. An abuse of discretion is more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Howes moved for a mistrial after the State questioned its witness, Officer Joseph Sidoti, as to Exhibit 11. The State did not move to admit Exhibit 11 as an exhibit at the end of trial, but used it to question Officer Sidoti on direct examination. Exhibit 11 consisted of a computer printout from police dispatch, indicating the time that dispatch received a 911 call from the Circle K in Akron, the time officers were dispatched, and the time officers arrived on scene. Howes argues that he never received Exhibit 11 in open file discovery and suffered prejudice as a result of its admission. Before the State introduced Exhibit 11, Howes had argued that he could not have been the individual who tried to break into the Akron Circle K because only one minute elapsed from the time when officers received the dispatch call to Circle K until the time Officer Kevin Evans saw Howes driving eight blocks away from the Circle K. Howes relied upon Officer Evans' investigative report, which indicated that he received a dispatch to the Akron Circle K at 12:05 a.m., but then saw Howes eight blocks away from the Circle K at 12:06 a.m. Exhibit 11 indicated that several minutes elapsed from the time the 911 call came through to the time that Officer Evans spotted Howes. Specifically, Exhibit 11 indicated that dispatch received a 911 call from the Circle K at 12:02 a.m. and dispatched officers several minutes later. Accordingly, Exhibit 11 contradicted Howes' theory that he would not have had sufficient time to attempt a break-in at the Akron Circle K and then drive to the location where Officer Evans spotted him in a stolen vehicle.

{¶13} Howes argues that the State should not have been permitted to rely upon Exhibit 11 because it constituted "new evidence" that the State never provided him in discovery. Howes avers that "[a]s there is open file discovery [Exhibit 11] should have been in the file and clearly was a willful violation of the State's open file discovery procedures." Howes further argues that

he was prejudiced by Exhibit 11's introduction because it showed that "he argued matters in the course of the trial that d[id] not have a basis in fact."

{¶14} This Court derives no merit from Howes' unsupported assertion that a potentially useful document's absence from the State's file means that the prosecutor willfully withheld the document. Moreover, we are not convinced that Howes suffered prejudice as a result of not reviewing Exhibit 11 during the discovery period. Howes' charges stemmed from his receiving a stolen vehicle, leading the police on a dangerous car chase, driving under suspension, and using a firearm to rob the owner of Rocky's Drive-Thru in Barberton. None of his charges stemmed from the attempted break-in at the Circle K in Akron, so the issue of whether or not he had time to commit that additional offense was irrelevant. While Exhibit 11 might have debunked one of the arguments Howes made at trial, there is no evidence that its introduction adversely affected his substantial rights. *Wooden* at ¶33. Consequently, the trial court did not abuse its discretion by denying his motion for a mistrial. Howes' second assignment of error is overruled.

Assignment of Error Number Three

"DEFENDANT'S COUNSEL WAS INEFFECTIVE IN FAILING TO RESPOND TO THE STATES (sic) WRITTEN DEMAND FOR DISCOVERY."

{¶15} In his third assignment of error, Howes argues that his trial counsel was ineffective for failing to timely respond to the State's discovery request. Specifically, Howes argues that his counsel's error tolled his speedy trial time such that, absent the error, the trial court would have granted his motion for discharge. We disagree.

{¶16} To prove an ineffective-assistance claim, Howes must show two things: (1) that counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. To

demonstrate prejudice, Howes must prove that “there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. Furthermore, this Court need not address both *Strickland* prongs if an appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶17} The State filed a demand for discovery on November 13, 2008, but Howes’ counsel never responded. In *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, paragraph one of the syllabus, 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[.]” The State relied upon *Palmer* and Howes’ failure to respond to discovery as one instance of a tolling event in the court below. Howes argues that, if not for his counsel’s failure to comply with the State’s discovery demand, the trial court would have had to grant his motion to discharge. As set forth in Howes’ first assignment of error, however, two other separate tolling events occurred. Even discounting the tolling period under *Palmer*, Howes’ trial took place before his speedy trial time expired. Consequently, Howes has not demonstrated prejudice as a result of his counsel’s failure to respond to the State’s discovery demand. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. Howes’ third assignment of error is overruled.

III

{¶18} Howes’ assignments of error are overruled. The judgment of the Summit County

Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

SCOT A. STEVENSON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.