[Cite as *State v. Marbury*, 2010-Ohio-5989.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25158
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CARLTON M. MARBURY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 07 2265(B)

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant, Carlton Marbury, appeals the judgment of the Summit County Court of Common Pleas. We affirm.

BACKGROUND

{¶2} On the afternoon of July 9, 2007, a vehicle driven by John Leonard was pulled over for speeding on Interstate 77 south. Carlton Marbury was the passenger of the vehicle. Mr. Leonard and Mr. Marbury shared an apartment in Canton and were headed south from Cleveland.

{¶3} In the weeks preceding the traffic stop, Canton police were conducting surveillance on Mr. Leonard's activities using a global positioning system that had been mounted on his vehicle. The authorities suspected that Mr. Leonard was supplying drugs to street-level dealers in Canton. A detective with the Canton Police Department was tracking Mr. Leonard on July 9, 2007, and believed that he was going to Cleveland to pick up drugs to bring back to

Canton. The detective contacted an agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("the ATF") working near Cleveland and asked the agent to find and monitor Mr. Leonard, who was in the area with his car. The agent located Mr. Leonard's vehicle and began following it on Interstate 77 south from Independence, Ohio. The detective also contacted the Ohio State Highway Patrol and requested that State Troopers along Interstate 77 be on the lookout for Mr. Leonard's car and initiate a stop if any traffic violations occurred.

{¶4} A trooper observed the vehicle, determined that it was exceeding the speed limit and initiated a traffic stop. The trooper also had his drug-sniffing dog evaluate the vehicle. The dog alerted on the vehicle, law enforcement officers searched the car and found nearly three thousand grams, or over six pounds, of cocaine and a bag of marijuana. Mr. Leonard and Mr. Marbury were arrested and questioned by police. Their apartment and the residences of some of their friends and family were searched.

{¶5} Mr. Marbury was charged with felony trafficking of cocaine, felony possession of cocaine and misdemeanor possession of marijuana. A major drug offender specification was attached to each of the felony charges. A jury found Mr. Marbury not guilty of possession of marijuana, but was unable to reach verdicts on the remaining charges of trafficking and possession of cocaine. Upon retrial, another jury convicted Mr. Marbury of the felony charges and the major drug offender specifications. The trial court sentenced Mr. Marbury to two, mandatory, ten-year sentences in prison, to be served concurrently, and declined to sentence additional incarceration for the major drug offender specifications.

{¶6} Mr. Marbury has appealed and has assigned four errors for our review. Mr. Marbury argues that: (1) trial counsel was ineffective for failing to file a motion to dismiss on speedy trial grounds; (2) trial counsel was ineffective for failing to object to testimony that

violated Mr. Marbury's right to confrontation of witnesses; (3) the trial court erred in its sentencing, and; (4) the cumulative errors of trial counsel deprived Mr. Marbury of the effective assistance of counsel. For ease of analysis, we will combine and rearrange the assignments of error.

INEFFECTIVE ASSISTANCE

{¶7} In his first, second and fourth assignments of error, Marbury claims that various deficiencies in trial counsel's representation resulted in ineffective assistance of counsel.

{¶8} "In Ohio, a properly licensed attorney is presumed competent. The appellant bears the burden of proving that his trial counsel was ineffective." (Internal citation omitted.) *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156. In order to prove that trial counsel was ineffective, an appellant must demonstrate: (1) deficiency in his attorney's representation and, (2) that the deficiencies prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. Deficiency of representation "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. An appellate court must consider "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (Quotations and citations omitted.) *State v. Armstrong*, 9th Dist. No. 03CA0064-M, 2004-Ohio-726, at ¶20. To succeed on his claim, the appellant must establish both elements, because "'[a]n 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.'" *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 691.

{¶9} In examining a claim of ineffective assistance, "[a]n appellate court may analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice." *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83.

Speedy Trial

{¶10} In his first assignment of error, Mr. Marbury contends that his first and second trials were conducted outside of Ohio's statutory speedy trial time limits. Mr. Marbury was arrested on July 9, 2007. Subsequently, Mr. Marbury was indicted on two felonies and a minor misdemeanor. The first trial took place on September 22, 2008. The second trial took place on March 12, 2009.

The First Trial

{¶11} Pursuant to R.C. 2945.71(C)(2), Mr. Marbury had the right to be brought to trial within 270 days. See, also, R.C. 2945.71(D) (governing cases in which the defendant is charged with various offenses of differing degrees). Time is tolled under various circumstances, including "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[,]" R.C. 2945.72(E), and "[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). A continuance on the trial court's own motion may be a tolling event. *State v. Morgan*, 9th Dist. No. 07CA0124-M, 2008-Ohio-5530, at ¶43.

{¶12} As to the first trial that took place on September 22, 2008, Mr. Marbury states that although he filed a motion to suppress, his motion was never heard, never withdrawn and never

ruled upon. He reasons that in the absence of a ruling, his motion to suppress was a nullity and consequently his motion to suppress did not toll speedy trial time.

{¶13} Mr. Marbury has not provided this Court with any legal authority that suggests that his motion to suppress was rendered a nullity and as such, it did not toll any speedy trial time. Although he relies upon *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, his reliance is misplaced because *Sanchez* is factually and procedurally dissimilar to this case. In *Sanchez*, the Supreme Court of Ohio examined the tolling effect of an immigration detainer and a motion in limine. Id. at paragraphs one and two of the syllabus, ¶28. It determined that an immigration detainer that did not purport to hold the defendant in custody did not nullify the triple-count provision of Ohio's speedy trial statute. Id. See, also, R.C. 2945.71(E). The *Sanchez* Court further determined that a motion in limine filed by the defendant tolls the speedy trial time under R.C. 2945.72(E) for a reasonable period to allow the state an opportunity to respond and the court an opportunity to rule. *Sanchez* at paragraph two of the syllabus. With respect to this portion of its holding, the *Sanchez* Court cautioned that:

> "This does not imply that the state may prolong its response time or that a trial court has unbridled discretion in taking time to rule on a defense motion. Although outside time limits for response may be set by local rule, in many cases, the state will not need the entire time. Furthermore, as we have already stated, '[a] strict adherence to the spirit of the speedy trial statutes requires a trial judge, in the sound exercise of his judicial discretion, to rule on these motions in as expeditious a manner as possible.'" Id. at ¶27, quoting *State v. Martin* (1978), 56 Ohio St.2d 289, 297.

{¶14} It is clear that *Sanchez* cannot support Mr. Marbury's argument that his motion to suppress was rendered a nullity. Relevant to this case, *Sanchez* stands for the proposition that a trial court has a duty to rule on a defendant's motion in as expeditious a manner as possible and that a failure to do so can affect the continued tolling of speedy trial time. In this matter, Mr. Marbury filed his motion to suppress on August 31, 2007. At his request, the suppression

hearing was continued to November 27, 2007. The hearing on the suppression motion was again continued to February 13, 2008. On the date of the scheduled suppression hearing, Mr. Marbury, his counsel, and the assistant prosecutor signed an entry, journalized by the trial court, which set a trial date of April 21, 2008. Thus, it appears that the parties elected not to go forward with the suppression hearing. The trial court did not formally rule on the motion to suppress and the record does not disclose that Mr. Marbury withdrew the motion. Additionally, Mr. Marbury has not provided this Court with a transcript of any discussion that may have been held on the record with respect to the motion to suppress and the parties' decision to set a trial date in lieu of proceeding with a hearing on the motion. See App.R. 9(B). The trial date was continued three times, once by journal entry bearing the signatures of Mr. Marbury and his counsel, and finally held on September 22, 2008. In light of these facts, Mr. Marbury has not demonstrated that the trial court was remiss in its duty to expeditiously rule on the motion to suppress and that as a result, the tolling of his speedy trial time by virtue of the filing of the motion to suppress was affected.

{¶15} We further note that Mr. Marbury has not addressed other tolling events that occurred prior to the first trial. For example, on August 2, 2007, the State filed a demand for discovery. However, the record does not contain evidence of Mr. Marbury's response to the discovery request. "The 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)." *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, at paragraph one of the syllabus. On October 22, 2007, Mr. Marbury filed a demand for discovery. This demand also tolled the statutory speedy trial time. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, at ¶26. In addition, as noted above, the trial date was continued at least once based

upon joint request of the State and Mr. Marbury. In light of all of these tolling events that Mr. Marbury has not addressed as well as the issues outlined above concerning the motion to suppress, he has not demonstrated that his speedy trial rights were violated and thus, he has failed to establish that he was prejudiced by his counsel's failure to file a motion to dismiss on speedy trial grounds. *Armstrong* at ¶19 (stating that the appellant bears the burden of demonstrating that counsel was ineffective).

The Second Trial

{¶16} Mr. Marbury also argues that his right to a speedy trial was violated by the delay between the 2008 trial that resulted in a mistrial on his felony charges and the eventual re-trial of those charges held in March 2009. Again, he asserts that trial counsel was ineffective for failing to assert his speedy trial rights in light of the passage of an additional 172 days.

{¶17} Although the Ohio Revised Code outlines the time period during which an offender must be brought to trial to preserve the offender's constitutional right to a speedy trial, see R.C. 2945.71 et seq., this statutory scheme is not applicable to retrials. *State v. Bigley*, 9th Dist. No. 02CA0017-M, 2002-Ohio-4149, at ¶21, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 21. Instead, we must determine whether the delay was constitutionally reasonable. Id. In so doing, we consider: (1) length of the delay; (2) reason for the delay; (3) circumstances concerning the defendant's assertion of the right to a speedy trial, and; (4) any prejudice to the defendant. *Barker v. Wingo* (1972), 407 U.S. 514, 530; *State v. O'Brien* (1987), 34 Ohio St.3d 7, 10 (adopting *Barker v. Wingo*).

{¶18} Mr. Marbury fails to develop an argument with respect to the amount of time between his two trials. Mr. Marbury makes no argument as to whether the delay between the conclusion of the first trial in September 2008 and the beginning of the second trial in March

2009 was constitutionally reasonable. See *Bigley* at ¶21, citing *Fanning*, 1 Ohio St.3d at 21. Instead, he suggests that he was denied effective assistance of counsel due to the passing of 658 days beginning from the date of his arrest in July 2007 to the date of the second trial in March 2009. However, in light of the different standard applicable to the right to a speedy trial in the context of a retrial, Mr. Marbury was required to separately analyze whether the period between the first and second trials was constitutionally reasonable.

{¶19} The record reveals that Mr. Marbury and his counsel signed each of the journal entries rescheduling the trial and that at least one continuance was at Mr. Marbury's request. Because Mr. Marbury has not addressed all of the factors to be considered in determining whether the delay between his two trials was constitutionally reasonable, we cannot say that Mr. Marbury's counsel was ineffective in failing to assert his speedy trial rights prior to the second trial.

{¶20} In light of the above analysis, Mr. Marbury's first assignment of error is overruled.

Confrontation Clause

{¶21} Next, Mr. Marbury contends that trial counsel was ineffective because counsel failed to object to the admission of improper testimony at Mr. Marbury's March 2009 trial on the felony drug charges. Mr. Marbury argues that a statement testified to by the agent from the ATF violated Mr. Marbury's right to confront witnesses against him pursuant to the rule announced in *Bruton v. United States* (1968), 391 U.S. 123. In that case, Bruton was tried with a co-defendant for armed postal robbery. Id. at 124. At trial, a postal inspector testified that while he was interrogating the co-defendant, the co-defendant admitted that he and Bruton committed the robbery. Id. The Supreme Court held that a curative jury instruction is insufficient to remedy

the threat posed to a defendant's right to confront witnesses when statements that a co-defendant made during interrogation inculpating the defendant are admitted at the defendants' joint trial. Id. at 126. Rather, the appropriate remedy is to reverse the conviction and remand for a new trial. Id.

{¶22} Mr. Marbury quotes the following statement in his brief: "'* * * he was going to Cleveland, possibly to purchase drugs to take back to Canton for sale.'" According to Mr. Marbury, the ATF agent testified that Mr. Leonard, Mr. Marbury's co-defendant, made the statement to the agent while the agent was interrogating Mr. Leonard after his arrest. Further, that Mr. Leonard made the statement to explain his trip to Cleveland on July 9, 2007. Mr. Marbury interprets this statement as implicating him in the crime.

{¶23} Upon examination of the trial transcript, it is clear that the agent attributed the above-quoted statement to the detective with the Canton police, not to Mr. Leonard. Further, the agent made the statement during his testimony when he was explaining how he became involved with the surveillance of Mr. Leonard on July 9, 2007. The agent stated that he received a call from the detective who had been working on the investigation of Mr. Leonard and that the detective told him that he suspected that Mr. Leonard was travelling to Cleveland to buy drugs to sell in Canton. Because the agent was not testifying as to a statement made by Mr. Marbury's co-defendant, *Bruton* does not apply. Because the aforementioned testimony does not implicate *Bruton*, Mr. Marbury cannot demonstrate prejudice and therefore has failed to establish that his counsel was ineffective for failing to object to the testimony.

{¶24} Mr. Marbury also asserts that the trial court found that the agent's testimony concerning the purpose of Mr. Leonard's trip to Cleveland was "'absolutely inadmissible.'"

However, the statement of the trial court quoted by Mr. Marbury relates to other testimony that Mr. Marbury has not challenged on appeal.

{¶25} Mr. Marbury's second assignment of error is overruled.

Cumulative Error

{¶26} Finally, Mr. Marbury urges this Court to determine that trial counsel's alleged errors, taken together, demonstrate that counsel was ineffective, thereby depriving Mr. Marbury of his constitutional rights. Specifically, Mr. Marbury points to trial counsel's failure to file a motion to dismiss on speedy trial grounds and failure to object to the admission of testimony that violated Mr. Marbury's right to confront witnesses against him. As we have determined above that Mr. Marbury has not effectively shown that he was prejudiced by the alleged errors of counsel, we therefore conclude that the doctrine of cumulative error does not apply. *State v. Wade*, 9th Dist. No. 02CA0076-M, 2003-Ohio-2351, at ¶55. Mr. Marbury's fourth assignment of error is overruled.

SENTENCING

{¶27} In his third assignment of error Mr. Marbury claims that the trial court erred by declining to exercise its discretion to disregard the jury's finding that Mr. Marbury was guilty of the major drug offender specifications. Mr. Marbury argues that the major drug offender finding is an issue for the court, not the jury, to determine. Mr. Marbury asserts that he was prejudiced when the trial court imposed a ten-year prison sentence because the court could have exercised its discretion to impose a lesser sentence.

{¶28} When an offender is convicted of possession or trafficking of cocaine and the amount of the drug involved exceeds one thousand grams, the offender is classified as a major drug offender pursuant to statute. R.C. 2925.11(C)(4)(f); R.C. 2925.03(C)(4)(g). The Revised

Code further provides that "the court *shall impose* as a mandatory prison term the maximum prison term prescribed for a felony of the first degree[.]" (Emphasis added.) Id. The maximum prison term for a first-degree felony is ten years. R.C. 2929.14(A)(1). Further, the ten-year term may not be reduced pursuant to judicial release, pardon, parole, probation, or on the authority of the department of corrections. R.C. 2929.14(D)(3)(a). Finally, the trial court has discretion to impose additional penalties upon a person classified as a major drug offender. R.C. 2925.11(C)(4)(f); R.C. 2925.03(C)(4)(g).

{¶29} In the instant matter, the testimony at trial demonstrated that Mr. Marbury was in possession of almost three thousand grams of cocaine. The jury convicted Mr. Marbury of felony possession and trafficking of cocaine and found that the amount of cocaine involved was in excess of one thousand grams. In light of the jury's findings, Mr. Marbury was classified as a major drug offender and the trial court was required by statute to impose a mandatory prison sentence of ten years. Id. The trial court ordered a ten-year sentence for each conviction, ordered that the sentences would run concurrently, and declined to order additional time for the major drug offender specification. Contrary to Mr. Marbury's argument, the Revised Code does not grant the trial court discretion with respect to sentencing for felony possession and trafficking of cocaine when the jury determines that the offender is a major drug offender. See id. The Revised Code, however, does grant the trial court discretion with respect to imposing additional prison time upon the determination that the offender is a major drug offender. Id. The trial court exercised that discretion in the case at bar and "[found] it unnecessary to sentence [Mr. Marbury] to additional time for the Major Drug Offender Specifications."

{¶30} Mr. Marbury cites R.C. 2941.1410(B) for the proposition that the trial court had discretion to disregard the jury's finding that Mr. Marbury was a major drug offender. However,

the jury did not find that Mr. Marbury was a major drug offender. The jury determined that the amount of cocaine involved in Mr. Marbury's crimes was in excess of one thousand grams. Pursuant to statute, upon the jury's finding of the amount of cocaine present, the trial court was required to consider Mr. Marbury to be a major drug offender and impose a ten-year sentence. R.C. 2925.11(C)(4)(f); R.C. 2925.03(C)(4)(g). As explained supra, the trial court lacked discretion to adjust this sentence.

{¶31} Mr. Marbury has not shown that the trial court erred. We overrule Mr. Marbury's third assignment of error.

CONCLUSION

{¶32} Upon thorough review of the record and the parties' arguments, we overrule each of Mr. Marbury's assignments of error. Accordingly, we affirm the judgment of the Summit County Court of Common Pleas.

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.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.