

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2010-T-0024</b>
RAYMOND FOY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 00568.

Judgment: Affirmed.

*Dennis Watkins*, Trumbull County Prosecutor and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

*Raymond Foy*, PID: A520-180, Southern Ohio Correctional Facility, P.O. 45699, Lucasville, OH 45699 (Appellant).

MARY JANE TRAPP, P.J.

{¶1} Raymond Foy appeals the judgment of the Trumbull County Court of Common Pleas, which accepted his guilty plea for felonious assault and sentenced him to serve three years in prison consecutive to the sentence he is currently serving for an unrelated crime. Mr. Foy alleges his speedy trial rights were violated and that the indictment was defective in that it failed to state he carried a deadly weapon.

{¶2} We disagree. The trial court sentenced Mr. Foy well within the applicable 270-day time frame required for a felony, and further, by pleading guilty to the

substantive crime of felonious assault, Mr. Foy waived any claim as to a defective indictment. In any case, the indictment was not defective as it clearly stated that Mr. Foy stabbed a fellow inmate with a ballpoint pen. Thus, we affirm.

{¶3} **Substantive and Procedural Facts**

{¶4} A secret indictment was filed on August 17, 2009, charging Mr. Foy with felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2), after he stabbed a fellow inmate four times in the neck with a ballpoint pen.

{¶5} Mr. Foy requested, and was appointed, counsel. Mr. Foy, however, also filed several motions pro se, including a motion to dismiss asserting a violation of his speedy trial rights.

{¶6} The court addressed Mr. Foy's various pretrial motions, as well as the state's motion to strike Mr. Foy's pro se motions, in a judgment entry issued February 8, 2010. The court granted the state's motion, striking all of Mr. Foy's pro se pleadings that were filed after the appointment of his counsel. The court recognized that hybrid representation is not available in Ohio, and noted that notwithstanding the assistance of counsel, the court had allowed Mr. Foy to personally address the court to make certain claims, including those stated in his motions. The court noted that when Mr. Foy's request to be heard was denied, as had happened on multiple occasions, he would explode into a profane tirade. Nonetheless, the court went on to address the substantive merits of Mr. Foy's arguments, denying his motions to dismiss and/or discharge.

{¶7} On February 8, 2010, Mr. Foy signed a plea agreement with the state. In the agreement he agreed to plead guilty to the felonious assault and knowingly waived

his rights. He then waived his right to a pre-sentence investigation. The court issued a judgment entry on February 18, 2010, sentencing Mr. Foy to serve three years in prison, consecutive to his current sentence.

{¶8} Mr. Foy now appeals, raising two assignments of error for our review:

{¶9} “[1.] Trumbull County Common Pleas court Judge A. Logan and Trumbull County Assist. Prosecutor M. Burnett did conspire and knowingly used the sham legal process O.R.C. 2921.52 to deprive Appellant Foy of his speedy trial rights as guaranteed by the Sixth Amendment to the U.S. Constitution; Ohio Const[.] Sec. 10 [Art] I[.] Judge Logan failed to set a date for trial within the 90 day period established by R.C. 2945.71(C)(2)(D[.] Then Judge Logan denied Foy’s motion for discharge per R.C. 2945.73(B).

{¶10} “[2.] Appellants Foy[’s] indictment is unconstitutionally [sic] it lacks the deadly weapon and dangerous elements of felonious assault R.C. 2903(e)(1) thus failure to charge an offense denied notice of charge in violation of Ohio Const. Sec. 10 Art. I 5th 6th 14th Amendments to U.S. Constitution [sic].”

{¶11} **Speedy Trial**

{¶12} In Mr. Foy’s first assignment of error, he contends his speedy trial rights were violated because he was not brought to trial within 90 days of his indictment, and further, that the trial court erred in denying his motion to dismiss when he raised the issue. We disagree because, quite simply, Mr. Foy misinterprets the rules. Mr. Foy was not convicted of a misdemeanor, but a second-degree felony, and as such, the 90-day rule does not apply. The trial court was well within the relevant time period as it had 270 days to bring him to trial for felonious assault.

{¶13} The speedy trial rights guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution are effectuated in Ohio by R.C. 2945.71 – 2945.73. Pursuant to R.C. 2945.71(C)(2), a person charged with a felony must be brought to trial within 270 days of his or her arrest.

{¶14} R.C. 2945.72 sets forth various “tolling events.” In relevant part, R.C. 2945.72(E) provides that: “[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” tolls the speedy trial time period.

{¶15} If the accused’s speedy trial rights have been violated, R.C. 2945.73(A) mandates that the trial court dismiss the charge.

{¶16} In order to determine whether an appellant’s speedy trial rights have been violated, the standard of review is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71. *State v. Hadden*, 11th Dist. No. 2008-T-0029, 2008-Ohio-6999, ¶19, citing *State v. Niebauer*, 11th Dist. No. 2007-A-0097, 2008-Ohio-3988, ¶34, quoting *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶17.

{¶17} Mr. Foy was indicted on August 17, 2009. He then pled guilty to felonious assault on February 10, 2010. Notwithstanding his motions to dismiss and requests for discovery, only 177 days passed between the date of his indictment and his guilty plea.

{¶18} Even less time has passed when one considers the tolling events of Mr. Foy’s notice for discovery, filed September 1, 2009, as well as his motion for discharge/dismiss, filed January 19, 2010. See *Hadden* at ¶21-22, citing *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus; *State v. Sanchez*, 110 Ohio St.3d 274, 2006-

Ohio-4478, ¶25. Furthermore, the “triple count” provision of R.C. 2945.71(E), which provides that “each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days,” does not apply as Mr. Foy was not incarcerated in lieu of bail but was already serving a previously imposed sentence.

{¶19} As it is clear that Mr. Foy’s speedy trial rights were not violated because he was brought to trial well within 270 days, his first assignment is without merit.

{¶20} **Deadly Weapon**

{¶21} In his second assignment of error, Mr. Foy contends the indictment failed to charge an offense because, in his estimation, a ballpoint pen is not a deadly or dangerous weapon. We disagree. It is not the item itself that is crucial to this determination, but rather, how it is wielded with the requisite intent and force -- such as in this case where Mr. Foy stabbed a fellow inmate four times in the neck. Moreover, Mr. Foy waived any claims as to a defective indictment when he pled guilty to the substantive crime of felonious assault.

{¶22} “[W]hen a defendant enters a guilty plea and thereby admits that he is in fact guilty of the charged offenses, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *State v. Fitzpatrick*, 11th Dist. No. 2009-L-030, 2010-Ohio-710, ¶27, citing *State v. Banks*, 11th Dist. No. 2008-L-177, 2009-Ohio-6856, ¶21, citing *State v. Smith*, 2d Dist. No. 08CA0060, 2009-Ohio-5048, ¶24, citing *State v. Spates* (1992), 64 Ohio St.3d 269, 272, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267; see, also, *State v. Dudas*, 11th Dist. Nos. 2007-L-140 and 2007-L-141, 2008-Ohio-3262, ¶29 (when a criminal defendant admits in open court that he is guilty of an offense, he may not

thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea).

{¶23} Thus, Mr. Foy's guilty plea to the substantive crime of felonious assault waived any alleged defect in the indictment.

{¶24} As an aside, Mr. Foy's indictment was not defective in that it clearly identified a deadly or dangerous weapon, to wit, a ballpoint pen.

{¶25} R.C. 2923.11 defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶26} The definition of a deadly weapon has two parts: (1) the device must be capable of causing death and (2) it must be designed or specially adapted for use as a weapon, or is carried, possessed or used as a weapon. *In re Smith* (2001), 142 Ohio App.3d 16, 24, citing Staff Notes to R.C. 2923.11.

{¶27} In holding that a ballpoint pen can be a deadly weapon in *Smith*, the Eighth Appellate District Court noted that: "[a]n item does not have to be one that kills in order to be a deadly weapon. No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause death when it is wielded with the requisite intent and force." *Id.*, citing *State v. Deboe* (1977), 62 Ohio App.2d 192, 193-194. "A reasonable trier of fact could find the ballpoint end of a pen sufficiently sharp that it could pierce the human body, and if used on a particularly vulnerable spot, could cause death." *Id.* See, also, *State v. Moody*, 5th Dist. No. 09 CA 90, 2010-Ohio-3272, ¶42 (beer mug); *State v. Hicks* (1984), 14 Ohio App.3d 25, 26 (toy gun capable of inflicting death because of its possible use as a bludgeon); *State v. Joof*, 10th Dist. No. 04AP-

579, 2005-Ohio-3275, ¶13 (two toothbrushes and a pencil wrapped together as a “shank” and fashioned to a sharp point constituted a deadly weapon).

{¶28} Mr. Foy’s second assignment of error is without merit.

{¶29} The judgment of the Trumbull County Court of Common Pleas is affirmed.

COLLEEN MARY O’TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.