[Cite as *State v. Brown*, 2023-Ohio-2909.]

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

STATE OF OHIO Appellee v. KEVIN BROWN Appellant	C.A. No. 21CA011739 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 15CR091255

DECISION AND JOURNAL ENTRY

Dated: August 21, 2023

CARR, Judge.

{¶1} Defendant-Appellant, Kevin Brown, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 12, 2015, Brown was arrested and indicted on five counts of rape. His case did not go to trial until February 8, 2022. While awaiting trial, Brown was in jail part of the time and out on bond part of the time. He had six different attorneys over the course of the proceedings, five of whom withdrew from representation. The trial court also had to continue the matter and issue warrants for Brown's arrest on three occasions when he failed to appear at scheduled pretrials. Brown filed numerous motions, and further delays occurred due to the global pandemic. Although Brown repeatedly asked the trial court to dismiss his case based on a violation of his speedy trial rights, the court refused to do so.

{¶3} A jury ultimately found Brown guilty on all counts. The trial court sentenced him to a total of twenty years to life in prison and classified him as a tier III sexual offender.

{¶4} Brown now appeals from his convictions and raises one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> MR. BROWN WAS PREJUDICED AND DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO ASSERT HIS STATUTORY SPEEDY TRIAL RIGHTS.

{¶5} In his sole assignment of error, Brown argues he received ineffective assistance of counsel. According to Brown, he sustained prejudice when his attorneys failed to assert his statutory speedy trial rights. We do not agree.

{¶6} To prevail on a claim of ineffective assistance of counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance." *State v. Reynolds*, 80 Ohio St.3d 670, 674 (1998), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith*, 79 Ohio St.3d 514, 534 (1997), citing *Strickland* at 687. Second, the defendant must show that, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Strickland* at 694. When a defendant argues his counsel was ineffective for failing to assert his speedy trial rights, "'the defendant must show there was a valid basis for moving to dismiss based on a speedy trial violation and that such a motion would have affected the outcome.'" *State v. Phillips*, 9th Dist. Summit No. 27661, 2016-Ohio-4687, ¶ 5, quoting *State v. Morgan*, 9th Dist. Medina No. 07CA0124-M, 2008-Ohio-5530, ¶ 42.

{¶7} A defendant charged with a felony must be brought to trial within 270 days of his arrest. R.C. 2945.71(C)(2). Certain events may toll a defendant's speedy trial time. R.C. 2945.72. A defendant also may choose to waive his speedy trial rights, "so long as the waiver is knowingly and voluntarily made." *State v. Bray*, 9th Dist. Lorain No. 03CA008241, 2004-Ohio-1067, ¶ 8. If a written waiver "fails to specify an expiration date, it constitutes an unlimited waiver." *State v. Brown*, 9th Dist. Lorain No. 20CA011618, 2021-Ohio-2540, ¶ 10. "Furthermore, when a waiver fails to include a specific date as the starting point for the tolling of time, the waiver is deemed to be effective from the date of arrest." *Bray* at ¶ 8.

{¶8} Once a defendant executes an unlimited waiver, he "is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial * * *." *State v. O'Brien*, 34 Ohio St.3d 7 (1987), paragraph two of the syllabus. If an accused succeeds in withdrawing his unlimited waiver, "the strict requirements of R.C. 2945.71 [are] no longer applicable * * *." *State v. Brewer*, 9th Dist. Lorain No. 14CA010608, 2016-Ohio-5366, ¶ 10. Instead, the State must bring the defendant to trial "within a reasonable time." *O'Brien* at paragraph two of the syllabus. A delay in excess of one year is presumptively prejudicial and triggers a four-part balancing test. *State v. Skorvanek*, 9th Dist. Lorain No. 08CA009399, 2009-Ohio-3924, ¶ 26-27, citing *O'Brien* at 10. To determine reasonableness, a court must "look at four factors: 'the length of the delay, reason for the delay, assertion of the right, and resulting prejudice.'" *State v. Fields*, 9th Dist. Wayne No. 12CA0045, 2013-Ohio-4970, ¶ 13, quoting *State v. Lee*, 9th Dist. Lorain No. 93CA005671, 1994 WL 122337, *3 (Apr. 13, 1994). "The court must weigh these factors together with any other relevant circumstances." *Skorvanek* at ¶ 26.

{¶9} Brown claims he received ineffective assistance of counsel because his attorneys never moved to dismiss his case based on a violation of his statutory speedy trial rights. According

to Brown, he never waived his speedy trial rights and routinely asserted them himself throughout the proceedings. To the extent he signed preprinted time waivers on certain journal entries, Brown argues, he always verbally indicated his desire to maintain and exercise his speedy trial rights. Moreover, even if he did waive his rights by signing preprinted entries, Brown claims the trial court still failed to bring him to trial within a reasonable time. Had his attorneys moved to dismiss his case, Brown argues, the trial court would have had no choice but to grant that motion and dismiss his indictment. Thus, he argues the result of the proceedings would have been different.

{¶10} Following his arrest on March 12, 2015, Brown was incarcerated, and his appointed counsel filed motions for discovery, a bill of particulars, and a bond modification. Brown signed two journal entries following pretrials that occurred on March 25, 2015, and April 16, 2015. Each entry contained a preprinted line reading: "DEFENDANT WAIVES STATUTORY TIME FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 et seq." In both the March 25th and April 16th entries, Brown handwrote the words "DOES NOT" above the preprinted line, circled those words, and used a carrot to insert them so that the preprinted sentence would read: "DEFENDANT DOES NOT WAIVE[] STATUTORY TIME * * *." Yet, on April 21, 2015, Brown signed a journal entry and did not include the words "DOES NOT" above the preprinted time waiver line. He continued to sign journal entries without adding that language at six separate pretrials between June 2, 2015, and December 18, 2015. Moreover, at a pretrial that occurred on February 8, 2016, his counsel confirmed for the trial court the fact that Brown had waived his speedy trial time. Brown was present for that exchange. Although he personally addressed the trial court several times during that pretrial, he never challenged his counsel's assertion that he had waived his speedy trial time.

{¶11} The record does not support Brown's claim that he never waived his speedy trial rights. He waived those rights by repeatedly signing time waivers at multiple pretrials. His attorney also confirmed his time waiver on the record before the court at a pretrial. Because the waivers Brown signed did not include either starting points or ending points, they constituted unlimited waivers that were effective from the time of his arrest. *See Brown*, 2021-Ohio-2540, at ¶ 10; *Bray*, 2004-Ohio-1067, at ¶ 8.

{¶12} On February 29, 2016, the trial court discussed the speedy trial issue with Brown at another pretrial hearing. Brown insisted that he never waived his speedy trial rights and that his first appointed counsel chose that course of action against his wishes. After listening to Brown, the trial court construed his argument as a request to withdraw his speedy trial waiver. The court notified Brown that, once his waiver was withdrawn, it was required to schedule his trial "as promptly as possible, within a reasonable amount of time." Brown verbally acknowledged that he understood. Following the hearing, the trial court issued a journal entry. The journal entry, dated March 3, 2016, confirmed that Brown had withdrawn his speedy trial waiver.

{¶13} Once the trial court permitted Brown to withdraw his speedy trial waiver, R.C. 2945.71 no longer applied. *Brewer*, 2016-Ohio-5366, at ¶ 10. The State simply had to bring him to trial within a reasonable time. *O'Brien*, 34 Ohio St.3d 7, at paragraph two of the syllabus. Almost six years elapsed between the time Brown withdrew his waiver and the day his trial commenced. Because that delay was presumptively prejudicial, it triggered the four-part test outlined in *O'Brien*. *See Skorvanek*, 2009-Ohio-3924, at ¶ 26-27. *Accord State v. Davilla*, 9th Dist. Lorain No. 03CA008413, 2004-Ohio-4448, ¶ 6. Upon review, the record reveals Brown's own conduct as well as circumstances beyond the trial court's control were responsible for the

delay that occurred herein. *See Skorvanek* at ¶ 27, quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992).

{¶14} First, the trial court had to appoint Brown counsel on four separate occasions due to a breakdown in the attorney-client relationship. Those attorneys were unable to continue representing Brown because they could not effectively communicate with him. At one pretrial, the trial court specifically informed Brown that one of his former attorneys had described how "every time he met with you, you would yell at him * * *." Each time the trial court had to appoint new counsel, the trial was further delayed so newly appointed counsel could prepare and file any necessary motions. Brown also actively opposed the appointment of new counsel on several occasions, demanding to be released on bond so that he might research attorneys and select his own appointed counsel. Brown's actions regarding his appointed attorneys contributed significantly to the delay in the proceedings. *See Skorvanek* at ¶ 27, quoting *Doggett* at 651.

{¶15} Second, the trial court had to continue the trial several times because Brown missed scheduled pretrials while out on bond. On three separate occasions, the trial court had to issue a capias for his arrest. The first time Brown failed to appear he was not arrested for almost four weeks. The second time he failed to appear he was not arrested for over five weeks. The third time he failed to appear he was not arrested for over nine weeks. Brown's repeated failures to appear caused several delays in the proceedings. *See Skorvanek* at ¶ 27, quoting *Doggett* at 651.

{¶16} Third, Brown filed a significant number of motions both through appointed counsel and pro se. Because several of his pro se motions alleged ineffective assistance of counsel, the trial court refused to strike them. The court's consideration of those motions further contributed to the delay in Brown's trial, as did an affidavit of disqualification he eventually filed. Brown's affidavit led to the trial judge recusing himself and the case being reassigned to another judge's

docket. Brown's affidavit of disqualification, the trial judge's recusal, and the reassignment of the matter to a different trial judge caused a delay of several months.

{¶17} Fourth, significant delays ensued due to Covid-19. As a result of the onset of the pandemic and later surges in Covid-19 cases, the trial court was forced to continue the matter several times beginning in April 2020.

{¶18} While the delay that occurred herein was presumptively prejudicial, the record reflects Brown was responsible for a significant amount of that delay. *See Skorvanek*, 2009-Ohio-3924, at ¶ 27, quoting *Doggett*, 505 U.S. at 651. He also has not explained why it was unreasonable for the trial court to order continuances in light of the global pandemic. *See In re Disqualification of Fleegle*, 161 Ohio St.3d 1263, 2020-Ohio-5636, ¶ 7 (recognizing the reasonableness of continuances ordered during a pandemic state of emergency). Given the extensive number of items that justifiably caused delays in this matter, the attorneys who represented Brown at various stages of the proceedings may well have determined that a motion to dismiss on speedy trial grounds was unlikely to succeed. *See State v. Lee*, 9th Dist. Summit No. 29597, 2020-Ohio-4970, ¶ 31. Attorneys need not raise every possible constitutional claim and "'may limit the number of arguments raised in order to focus on those most likely to bear fruit.'" *Bray*, 2004-Ohio-1067, at ¶ 18, quoting *State v. Caulley*, 10th Dist. Franklin No. 97AP-1590, 2002-Ohio-7039, ¶ 4. Moreover, even assuming one or more of Brown's attorneys engaged in deficient performance by not moving to dismiss his case on speedy trial grounds, he has not established resulting prejudice. *See Phillips*, 2016-Ohio-4687, at ¶ 5, quoting *Morgan*, 2008-Ohio-5530, at ¶ 42.

{¶19} The record reflects Brown filed several of his own motions to dismiss based on a violation of his speedy trial rights and criticized the delay in his trial at a significant number of pretrials. On several occasions, the trial court set out the reasons for the delay, including the

number of new attorneys it had to appoint, the arrest warrants it had to issue, and the number of motions Brown and/or his attorneys had filed. Brown has not explained how another motion to dismiss filed by one of his attorneys would have changed the court's analysis with respect to its conclusion that the delays herein were reasonable under the circumstances. Moreover, he has made no attempt to explain how those delays affected his ability to defend himself. *See Skorvanek*, 2009-Ohio-3924, at ¶ 30. Brown's prejudice argument is limited to an assertion that, had one of his attorneys moved to dismiss, the trial court would have granted that motion and dismissed his indictment. Because the record does not support that conclusion, we reject his argument to the contrary.

{¶20} For the reasons set forth above, Brown has not shown that he received ineffective assistance of counsel. Accordingly, his sole assignment of error is overruled.

III.

{¶21} Brown's sole assignment of error is overruled. The judgment of the Lorain 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 Lorain, 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(C). 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.

DONNA J. CARR
FOR THE COURT

SUTTON, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

DENISE G. WILMS, Attorney at Law, for Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.