

In the Supreme Court of Ohio

13-0318

Cole Midlam
Defendant-Appellant

C.A. Case No.
2012 CA 25

Vs.
State of Ohio
Plaintiff-Appellee

On Appeal from the
Greene County
Court of Appeals
2nd Appellate District

Motion for Delayed Appeal

Cole Midlam #212507
Branchville Correctional Facility
21390 Old State Rd. 37
Branchville, IN 47514

Nathanial R. Luken #0087864
Assistant Prosecutor
61 Greene St.
Xenia, OH 45385

RECEIVED
FEB 21 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
FEB 21 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Motion for Delayed Appeal

The date of the Court of Appeals decision being appealed is November 30th 2012.

The reasons for not filing on time are that I am currently incarcerated in the Branchville Correctional Facility in Branchville Indiana without access to Ohio law books or the ability to look anything up concerning the appeals process or time lines for Ohio. I was never informed by my public defender or trial court judge about any appeals process. Also I never spoke to the attorney appointed to me by the appellate court. When I found out about appealing to the Ohio Supreme Court I requested a Pro Se packet from the Ohio Public Defenders office, when I received it is when I realized that the time limit had past but I could attempt a Delayed Appeal.

Affidavit of Facts

In the Supreme Court of Ohio

I, Cole Midlam, do hereby state that the facts set forth are true.

I am currently incarcerated in the Branchville Correctional Facility in Branchville Indiana without access to any Ohio law books, so I am unable to look anything up concerning the appeals process, time lines, or any Ohio law. Also I never spoke with the attorney appointed to my case in the appellate court and was never informed by my public defender or trial court judge about any appeals process. Once I did find out about appealing to the Ohio Supreme Court I requested a Pro Se packet from the Ohio Public Defenders office, and when I received it is when I realized the time limit had past for this case but I could attempt a Delayed Appeal.

Cole Midlam
Affiant

Sworn to, affirmed, and subscribed in my presence this
13 day of Feb., 2020.

Karim K. Godwin
Notary Public

My Commission Expires: 01-17-2020.

Certificate of Service

I hereby certify a copy of the foregoing was mailed by regular U.S. Mail to counsel for Appellee, Nathaniel R. Luken #0087864, Assistant Prosecutor, 61 Greene Street, Xenia Ohio 45385 on 2/13/13.

Cole Midlam

Cole Midlam - Appellant

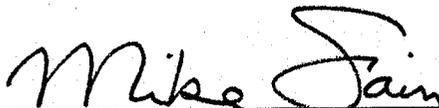
IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2012 CA 25
v. : T.C. NO. 10CR305
COLE MIDLAM : **FINAL ENTRY**
Defendant-Appellant :
:

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Pursuant to the opinion of this court rendered on the 30th day of November, 2012,
the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Greene
County Court of Appeals shall immediately serve notice of this judgment upon all parties and
make a note in the docket of the mailing.



MIKE FAIN, Judge



MARY E. DONOVAN, Judge



JEFFREY E. FROELICH, Judge

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

v.

COLE MIDLAM

Defendant-Appellant

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C.A. CASE NO. 2012 CA 25

T.C. NO. 10CR305

(Criminal appeal from
Common Pleas Court)

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OPINION

Rendered on the 30th day of November, 2012.
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NATHANIAL R. LUKEN, Atty. Reg. No. 0087864, Assistant Prosecutor, 61 Greene Street,
Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

P.J. CONBOY II, Atty. Reg. No. 0070073, 5613 Brandt Pike, Huber Heights, Ohio 45424
Attorney for Defendant-Appellant

COLE MIDLAM, #212-507, 21390 Old State Road 37, Branchville, IN 47514
Defendant-Appellant
.....

FROELICH, J.

{¶ 1} Cole Midlam pled guilty in the Greene County Court of Common Pleas to

aggravated robbery, a first degree felony; as part of the plea agreement, the State dismissed a firearm specification. The trial court imposed an agreed nine-year mandatory sentence, to be served concurrently with ten-year sentences previously imposed in Dearborn County, Indiana (Case No. 15C01-1006-3B-009) and Montgomery County, Ohio (Case No. 2010-CR-1691). Midlam was ordered to pay restitution and court costs. At the time of Midlam's plea and sentencing hearing, he faced similar charges in Highland County, Ohio; he was transported to Highland County following sentencing.

{¶ 2} Midlam's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after thoroughly examining the record and the law, he found no potentially meritorious issues for appeal. Counsel set forth one potential assignment of error, namely that the trial court should not have imposed a mandatory prison sentence. By entry, we informed Midlam that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. Midlam filed a pro se brief raising additional issues for review.

{¶ 3} Pursuant to our duty under *Penon v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), we have conducted an independent review of the entire record, and we have found no potential assignments of error having arguable merit. Accordingly, the judgment of the trial court will be affirmed.

{¶ 4} As an initial matter, Midlam raises whether the State violated his right to a speedy trial. He states that his plea hearing was delayed beyond 90 days, and he was told that "Greene County could take as much time [as] they wanted" because there was still a holder from Highland County.

{¶ 5} Midlam cannot challenge his conviction due to alleged violations of his speedy

trial rights. "Any claim for relief based directly upon Speedy Trial grounds is barred by [Midlam's] guilty plea, since a plea of guilty effectively waives any defenses that could have been raised at, or prior to, trial." *State v. Hurt*, 2d Dist. Miami No. 95-CA-43, 1996 WL 221753, *1 (May 3, 1996); *State v. Moore*, 2d Dist. Clark No. 2007 CA 123, 2008-Ohio-5376, ¶ 9.

{¶ 6} Even if Midlam had not waived his speedy trial rights, his plea and sentence were timely. The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989). Ohio's speedy trial statute, R.C. 2945.71, "was implemented to incorporate the constitutional protection of the right to a speedy trial" provided in the United States and Ohio Constitutions: *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 661 N.E.2d 706 (1996). As such, that statute must be strictly construed against the State. *Id.*

{¶ 7} Under R.C. 2945.71(C)(2), the State must bring a felony defendant to trial within 270 days of arrest. "Each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three, pursuant to the triple-count provision of R.C. 2945.71(E). This 'triple-count' provision would reduce to 90 days the time for bringing to trial an accused who is incarcerated the entire time preceding trial." (Citation omitted.) *State v. Dankworth*, 172 Ohio App.3d 159, 2007-Ohio-2588, 873 N.E. 2d 902, ¶ 31 (2d Dist.).

{¶ 8} However, Ohio's speedy trial provisions do not apply to a person who is incarcerated in another state pending extradition, who is unavailable due to other criminal proceedings against him (within Ohio or otherwise), or who is unavailable pending extradition to Ohio. R.C. 2942.72(A). Furthermore, once the speedy trial provisions do

apply, an accused is only entitled to the triple-count provision when he is held in jail solely on the pending charge. *State v. Kaiser*, 56 Ohio St.2d 29, 381 N.E.2d 633 (1978), paragraph two of the syllabus. An accused's speedy trial times runs on a one-to-one basis when he or she is also being held on a holder. *State v. Wellman*, 2d Dist. Miami No. 2006 CA 42, 2007-Ohio-6896, ¶ 17.

{¶ 9} Midlam was indicted for aggravated robbery with a firearm specification in June 2010. At the time, Midlam was incarcerated in Indiana. Midlam was returned to Ohio at the request of the Montgomery County Prosecutor, and the record reflects that Midlam was to be prosecuted first in Montgomery County, then Greene County, followed by Highland County. Midlam was sentenced in Montgomery County on August 30, 2011, and he was transported to Greene County following that proceeding.

{¶ 10} Midlam was held on a holder from Highland County during his proceedings in Greene County. Accordingly, Greene County had 270 days from August 30, 2011 in which to try him. Midlam's plea and sentencing occurred on December 6, 2011, within the statutory time period.

{¶ 11} Midlam further raises that the severity of his crime was "less than what usually constitutes [the] offense" of aggravated robbery, and asserts that mitigating factors should have been taken into account. Midlam emphasizes his general non-violent nature and that he used a toy gun, not one capable of inflicting harm, during the robberies.

{¶ 12} To the extent that Midlam is arguing that his conviction was against the manifest weight of the evidence or based on insufficient evidence, those arguments are precluded by his guilty plea. *State v. Dalton*, 2d Dist. Montgomery No. 24953, 2012-Ohio-3386, ¶ 7 ("By entering a guilty plea, a defendant waives his right to present manifest-

weight-of-the-evidence or sufficiency-of-the-evidence attacks against his convictions.”). Midlam’s guilty plea “left nothing for the State to prove because a guilty plea is a complete admission of guilt.” *Id.*, citing Crim.R. 11(B)(1).

{¶ 13} To the extent that Midlam’s argument challenges the severity of his sentence, we also find no arguable reversible error. R.C. 2953.08(D)(1) provides: “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” We have held many times that agreed sentences authorized by law are not reviewable on appeal. *See, e.g., State v. Rammel*, 2d Dist. Montgomery Nos. 24871 and 24872, 2012-Ohio-3724, ¶ 32; *State v. DeWitt*, 2d Dist. Montgomery No. 24437, 2012-Ohio-635, ¶ 13; *State v. Turner*, 2d Dist. Montgomery No. 24421, 2011-Ohio-6714.

{¶ 14} The trial court’s nine-year sentence was within the permissible range for a first degree felony, and both the State and Midlam agreed to that sentence.

{¶ 15} Midlam and his appellate counsel both raise whether the trial court was authorized to impose a mandatory prison sentence based on the existence of a prior first degree felony conviction. Midlam states that all of the robberies occurred around the same time in May 2010 and “were all part of the same common scheme or plan of continuing conduct uninterrupted by an arrest.” He further asserts that the only reason why he had a prior first degree felony conviction “is the chronological order in which I went to each county for sentencing.” He notes that Highland County, the last court to sentence him, did not impose a mandatory prison sentence.

{¶ 16} Under R.C. 2929.13(F)(6), the trial court must impose a prison sentence for

a first or second degree felony if the offender had previously been convicted of or pled guilty to any first or second degree felony or “an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses.” We recently rejected Midlam’s suggestion that R.C. 2929.13(F)(6) requires that the first degree felony upon which his mandatory sentence was based actually occur before the aggravated robbery at issue in this case. *State v. Hawes*, 2d Dist. Montgomery No. 24986, 2012-Ohio-5409, ¶ 20. We stated:

R.C. 2929.13(F)(6) is unambiguous: a previous *conviction* for any of the specified offenses triggers a mandatory sentence in a subsequent case involving conviction of a first-or second-degree felony. There is no basis for us to interpret the statute to include a requirement that the *offenses* for which a defendant was previously convicted occurred prior to the offenses at issue in the latter case.

(Emphasis added.) *Id.*, citing *State v. Jordan*, 10th Dist. Franklin No. 11AP-679, 2012-Ohio-954, ¶ 7.

{¶ 17} Midlam does not dispute that he was convicted of aggravated robbery in Montgomery County prior to the resolution of his case in Greene County. And, with the agreement of defense counsel, the trial court sentenced Midlam without having a presentence investigation conducted. At the Greene County sentencing hearing, defense counsel indicated that Midlam was serving ten-year sentences for both Indiana and Montgomery County. The prosecutor had previously informed the court during the plea hearing that Midlam had a prior conviction for a first degree felony, and Midlam did not dispute that statement. The trial court told Midlam, both at the plea hearing and at

sentencing, that Midlam's sentence would be mandatory due to the prior first degree felony conviction. "[A] defendant's decision to waive a presentence investigation, not to object to the court's statement that the sentence would be mandatory because of a prior conviction, to acknowledge his prior conviction, and to agree to a * * * mandatory sentence are sufficient facts for the court to impose sentence pursuant to R.C. 2929.13(F)(6)." *State v. Kelley*, 2d Dist. Montgomery No. 25014, 2012-Ohio-4623, ¶ 7.

{¶ 18} Finally, Midlam suggests that his convictions "should be treated as one" due to similar nature of his conduct and the close timing of the offenses. However, it is clear that Midlam committed separate instances of aggravated robbery with separate victims in several counties. Accordingly, his offense in Greene County is separate and does not merge with the offenses committed in other Ohio counties and Indiana.

{¶ 19} Upon review of the entire record, we agree with appellate counsel that there are no issues having arguable merit.

{¶ 20} The trial court's judgment will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

Nathaniel R. Luken
Patrick J. Conboy, II
Cole Midlam
Hon. Stephen A. Wolaver