

IN THE SUPREME COURT OF OHIO

15-1013

Frank K.C. Hertel, Sr. : On Appeal from the Delaware County
Appellant : Court of Appeals
v. : FIFTH Appellate District
State OF OHIO : Court of Appeals
Appellee : Case No. 14CAA 040019

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT FRANK K.C. HERTEL, Sr.

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a Showing that appellant's counsel provided Appellant adequate opportunity to file a prose brief must be made before a court of Appeals can dismiss the appeal and grant a motion to withdraw to Appellate counsel.

Proposition of Law No. 4 :

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Did the state of Ohio violate the Interstate Agreement on Detainers contract signed by the State of Ohio and the State of Arizona in Appellant's case?

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Explanation of why this case involves both a felony and a substantial Constitutional question.

The FIFTH District Court of Appeals Opinion of March 26, 2015 states on page 2 that Case 14CAA040019 involves a felony.

The Substantial Constitutional Questions to be determined by this Court are:

A. Was Appellant deprived of constitutionally adequate representation on appeal by the Ohio Court of Appeals' failure to follow the procedures set forth in Anders v. California, 386 U.S. 738?

B. Does a plea of guilty waive Appellant's Constitutional Speedy trial rights?

C. Does a plea of guilty waive the Contractual Provisions of the Interstate Agreement on Detainers between the State of Ohio and the State of Arizona?

D. Did the State of Ohio violate the Interstate Agreement on Detainers (IAD) contract with the State of Arizona specifically Article III and V in Appellants cases 00CRI110361 as well as the subsequent identical case 14CRI010021?

As an Anders brief was filed by Appellant's Appointed Appellate Counsel on July 14, 2014 the Central Constitutional question before this court is whether Appellant's Counsel and/or the Court of appeals followed the provisions set forth by the U.S. Supreme Court in Anders v. California 386 U.S. 738 or if, by failing to do so, the Court of Appeals deprived Appellant of constitutionally adequate representation on Appeal.

Anders sets forth specific provisions for Appellate Counsel, before Counsel can withdraw from the case, and additional provisions have to be followed by the Court of Appeals before an Anders case can be dismissed.

Counsel specifically has to: I) Thoroughly review the record and transcript before determining the appeal to be frivolous, II.) File a brief raising potential assignments of error, III.) Provide Appellant adequate opportunity to file a Pro Se brief.

As Counsel filed his Anders brief on July 14, 2014, then filed a "motion to supplement the official record with additional transcripts", which was granted by the Court of Appeals on December 2, 2014, then clearly he did not "thoroughly review the record and transcript," per I) above, at the time of the filing of his Anders brief because at that time of filing the record was incomplete!

Counsel was further deficient under III, above as Counsel did not provide the transcripts to Appellant until several days after the December 12, 2014 deadline to file his Pro Se brief was past. See Court of Appeals Judgement entry of Nov. 24, 2014 setting deadline of Dec. 12, 2014 while specifying "No further extensions will be granted."

Finally, neither Counsel, nor the Clerk of Courts, nor the prosecutor, nor the Judge provided Appellant with the critical transcript of Feb. 28, 2014, which would be the basis of arguing Speedy trial violations which were among the assignments of error in Counsel's Anders brief.

Appellant requested the Feb. 28, 2014 Speedy trial motions hearing transcript multiple times, starting on September 2, 2014 - see Request for transcript of proceeding Sept. 2, 2014.

- see Appellant's motion for writ of Mandamus, Court of Appeals Case 15CAD 04 0032 filed April 14, 2015. In this writ of Mandamus Appellant seeks to compel production of, among others, the missing transcript of 2/28/2014 which, as of today, still has not been provided to appellant, precluding him from effectively arguing Speedy trial issues denied on that day's motion hearing. Thus, the record of case 14CAA040019 is still incomplete and Counsel obviously could not have argued or effectively presented "the following potential assignments of error: (1) whether the trial court erred by not granting the Defendant-Appellant's motion to dismiss for a

speedy trial violation..." - Counsel Anders brief pg. 4, 7/14/2014 without the transcript of a speedy trial motion hearing held on Feb. 28, 2014. Counsel thus also precluded the Court of Appeals from reviewing the record concerning a speedy trial violation by not making the 2/28/2014 hearing transcript part of the record in case 14CAA040019.

The Court of Appeals is required under Anders to "conduct a full examination of all the proceedings and permit withdrawal if its separate inquiry reveals no nonfrivolous issue..." Person v. Ohio 488 U.S. 75 (1988) at 75. The court of appeals inquiry revealed no non-frivolous issues in that Court's opinion. However, in its 3/26/15 opinion the Court held that a plea of guilty waives Appellant's Constitutional Speedy trial rights, clearly in opposition to the Eighth District Court of Appeals holding in Ohio v. King 184 Ohio App. 3d 226, 2009-Ohio-4551, and the Ohio Supreme court's holding in State v. Wilson 58 Ohio St. 2d 52 (Ohio 1979) which is based on a similar holding in Menna v. New York (1975), 423 U.S. 61 Fn. 2 at 62-63 stating that a plea of guilty waives only constitutional violations which pertain to the issue of factual guilt and which do not go to the ability of the state to prosecute, such as a Constitutional Speedy trial violation obviously does. Thus this is another substantial constitutional issue to be decided by this Court upon granting Appellant Jurisdiction, in this case.

Finally the last Substantial Question is whether Appellants rights under the Interstate Agreement on Detainers were violated, a question that was dismissed without Comment by the Court of Appeals Judgment of May 19, 2015, which responded to Appellants Application for Reconsideration filed April 10, 2015 in the instant case. The IAD issue is fully discussed in Appellants Application of April 10, 2015 under B.) 1.) on pages 3-8 citing a plethora of IAD violations under Article V and III of the IAD.

The State of Ohio's memorandum in opposition to the Appellants Application for Reconsideration of April 20, 2014 did not argue against the IAD Breach of Contract issue under Article V of the IAD that Appellant raised for the first time in his Application for Reconsideration, thus conceding the argument.

Statement of the Case and facts

Appellant would ask this Court to consider the record in this case, as the Docket search makes the facts quite clear. Appellant was indicted in Case OOCRI 110361 on November 17, 2000. the next entry after 11/17/2000 is 2/11/2013(!) as the state of Ohio made no effort to serve the 11/17/2000 warrant to Appellants known ~~ON~~ address, and no evidence as to why the State of Ohio did not attempt to serve this warrant has ever been presented. On 12/12/2012 Appellant initiated his own return to Ohio under Article III of the IAD after being made aware of pending Ohio

charges for the first time. Arraignment was on 3/18/2013. On a motion hearing on 5/24/2013 appellants trial Counsel was dismissed and immediately following the dismissal, Appellant was prompted by the Prosecutor and the Court to give up his Statutory Speedy trial rights under R.C. 2945.71. Appellant did not affirm to give up his Constitutional Speedy trial rights, and the 180 day IAD Speedy trial rights were not even discussed at the hearing, so those rights were not given up by appellant. Appellant's new trial Counsel asked for a motion of Continuance on 5/31/2013, which was improperly granted on 5/31/2013 in violation of Article III(a) of the IAD as it was not done "... in open court, the prisoner or his counsel being present..." As the continuance was improperly granted, OOCRI 110361 was out of time to be tried under Article III(a) of the IAD in June, 2013. Continuances filed on 7/17/2013 and 2/3/2014 were also not granted per Article III(a) of the IAD, a violation of Article V(c) of the IAD occurred, breaching the contract under the IAD and stipulating dismissal of the Case with prejudice. Appellant's trial counsel was ineffective for not arguing upon Article V of the IAD, so a plain error review should be done by this Court. On 1/17/2014 Appellant was indicted in Case 14CRI010021. All court filings and discovery in Case OOCRI 110361 were transferred upon State's motion to Case 14CRI010021. State's motion to consolidate, of Feb. 27, 2014, in Cases OOCRI 110361 and 14CRI010021 states unequivocally that, "Both Cases involve the same transactions," which places 14CRI010021 under the IAD provisions per Article V(d).

Under the IAD Article III(a) the State has 180 days to try Appellant. At the time of the indictment and arraignment in Case 14CRI010021 more than double that time had already passed, necessitating the dismissal of Case 14CRI010021 with prejudice per the motion to dismiss filed in both Cases on 2/21/2014 by Appellant's trial Counsel. This motion was denied by the trial court in a hearing on 2/28/2014, the transcript of which Appellant still does not have in spite of multiple requests to the Clerk of Court, Appellate Counsel, the prosecutor and/or trial Judge, which is the subject of Appellant's writ of mandamus to the Court of Appeals in Case 15CAD040032 / 14CAA040019 / 14CAA090060.

Upon denial of motion to dismiss on Feb 28, 2014, Appellant pled guilty and was sentenced in Case 00CRI110361 on 3/4/14.

Case 14CRI010021 was dismissed without Appellant or Counsel present, not in open court, on March 18, 2014. As dismissal was without prejudice, this was in clear violation of IAD Article III(d) which demands that "the Court shall enter an order dismissing the same with prejudice." Appellant was assigned Appellate Counsel for Case 00CRI110361 / 14CAA040019 and on March 20, 2014 Appellant ordered his Counsel to Appeal Case 14CRI010021 in a Letter hand delivered - see affidavit. Appellant Counsel did not file notice of Appeal in Case 14CRI010021, only in Case 00CRI110361, depriving appellant of his right to appeal as delayed appeal was denied by the Court of Appeals in Case 14CRI010021 on Oct. 17, 2014 - See this Courts Case 2015-0319 and 2014-2247, the Appeal of the 10/17/14

decision. Appellate Counsel filed his Anders Brief on 7/14/2014. Appellant ordered the missing trial transcripts of case DOCKET 110361 on Sept. 2, 2014 from the Delaware County Clerk of Courts, specifically the transcript of the Speedy trial motions hearing of 2/28/2014. Appellant Counsel did not file a motion to supplement the record with that transcript, instead supplementing the record with 3 other necessary transcripts on Dec. 2, 2014. Appellant received no new transcripts in time to file his Pro Se brief and still has no access to the transcript of 2/28/14. Appellant was denied relief on his Anders and Pro Se briefs on March 26, 2015, and was again denied Relief in his motion for Reconsideration on May 19, 2015, as well as his motion to certify a conflict on the same day.

Argument in Support of propositions of Law

Proposition of Law No. 1:

"Constitutional violations which go to the ability of the State to prosecute, regardless of factual guilt, may be raised on appeal from a guilty plea."

The above is the holding of this court in State v. Wilson (1979) 58 Ohio St. 2d 52 at I., which goes on to state, "In holding so we rely on Menna v. New York (1975) 423 U.S. 61."

The U.S. Supreme court in Menna Fr. 2 at 423 U.S. 62-63 noted that a plea of guilty establishes the defendant's guilt, and operates as a waiver of only those constitutional violations which pertain

to factual guilt. "Here, however, the claim is that the state may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore does not bar the claim."

The opinion of the Court of appeals of March 26, 2015 is in direct opposition to this Courts holding in Wilson and the U.S. Supreme Court's holding in Menna, stating on page 6, ¶ 16, that "Because Appellant entered a guilty plea to the charges, the issues raised in the proposed assignments of error regarding speedy trial have been waived." This allowed the Court to circumvent ruling on the merits of the issue of a series of Constitutional Speedy trial violations in Appellant's Assignment of errors one, four, and five. This further allowed the Court to find that there are no non-frivolous issues, finally dismissing Appellate Counsel and affirming the Judgement of the Court of Common Pleas per Anders.

Appellant asks that this Court reverse the Judgement of the Court of appeals, as Constitutional speedy trial violations can be argued upon guilty plea, which qualifies as a non-frivolous argument per Anders.

Proposition of Law No. 2:

In an Appellate Case filed pursuant to Anders v. California (1967) 386 U.S. 738, a showing must be made that Counsel thoroughly reviewed the transcript before dismissing Counsel, and the appeal. Person v. Ohio, 488 U.S. 75 (1988) held that:

"Petitioner was deprived of constitutionally adequate representation on appeal by the Ohio Court of Appeals' failure to follow the procedures set forth in Anders v. California, 386 U.S. 738, for allowing appointed counsel for an indigent criminal defendant to withdraw from first appeal as of right on the basis that the appeal is frivolous. Under those procedures, counsel must first conduct a "conscientious examination" of the case and support a request to withdraw with a brief referring to anything in the record that might arguably support the appeal, and the court must then conduct a full examination of all the proceedings and permit withdrawal if its separate inquiry reveals no nonfrivolous issue, but must appoint new counsel to argue the appeal if such an issue exists."

In the Docketing Statement filed on April 2, 2014, Appellate Counsel under "B. Probable issues for review:", wrote "Sentence; pretrial motions to dismiss; ineffective assistance of Counsel; speedy trial"

Then inexplicably Counsel did not file an order for the transcript of the motions hearing of Feb. 28, 2014 which addressed the issue of "speedy trial" and "motions to dismiss", nor did he order the transcript of the dismissal of counsel hearing of 5/24/2013 which dealt with "ineffective assistance of counsel"

Instead Counsel's order for transcript of April 2, 2015

only included "the change of plea hearing completed on March 3, 2014, and of the sentencing hearing held on March 5, 2015." Counsel then, on July 14, 2014, filed "Brief of Defendant-Appellant Filed pursuant to Anders v. California (1967) 386 U.S. 738" in which Counsel presented the following assignments of error: "(1) whether the trial court erred by not granting the Defendant-Appellant's motion to dismiss for a speedy trial violation and (2) whether the Defendant was afforded effective assistance of counsel at the trial level." Counsel then ordered an additional 3 transcripts for the record on 10/16/2014, after Appellant was denied 4 requests for transcripts on 9/2/2014 for his Pro Se brief. Inexplicably the transcript of 2/28/14, ordered by Pro Se Appellant on 9/2/2014, was again not included, nor was it made part of the record on Dec. 2, 2014 even though Appellant's Pro Se motions to extend time of 9/17/2014, 10/20/2014, and 11/7/2014 addressed the missing transcripts.

The Court of Appeals Judgement entry of Nov. 24, 2014 forced appellant to "File his Pro Se brief on or before December 12, 2014. No further extensions will be granted."

Appellant did not receive the 3 transcripts ordered by Counsel until after December 12, 2014, filing his Pro Se brief under protest - see Pro Se brief page iv. Furthermore the critical transcript of 2/28/14 is still not in Appellant's possession.

As Counsel's Appellate brief was filed on an incomplete record, Counsel obviously could not have "thoroughly reviewed all proceedings" before filing his brief, thus depriving Appellant of constitutionally adequate representation on appeal.

Proposition of Law No. 3:

In an appellate case filed pursuant to Anders v. California (1967), 386 U.S. 738, a showing that appellant's Counsel provided Appellant adequate ~~minimum~~ opportunity to file a pro se brief must be made before a court of appeals can dismiss the appeal and grant a motion to withdraw to Appellate Counsel.

Clearly, per Proposition of Law No. 2 above, Appellant was given an immutable deadline by the court of Appeals and Counsel did not provide Appellant with either the 3 transcripts added to the record on Dec. 2, 2014, or the (still) missing transcript of the motions hearing of 2/28/2014 before the Dec. 12, 2014 date of the deadline. As such, Appellant's Pro se brief was deficient, as Counsel did not provide adequate opportunity for Appellant to study the transcripts of Proceedings. References in Appellant's Pro Se brief "shall be to the pages of the parts of the record involved: e.g., ... transcript p. 231", Per Ohio Appellate Rule 16(A)(6) and Rule 16(D). Without the transcripts, Appellant could not file an adequate brief.

Moreover, by failing to include the 2/28/14 transcript which specifically dealt with motions to dismiss for Constitutional and IAD speedy trial violations in both Case 14CRI010021 and 00CRI110361, counsel deprived the Court of Appeals of an adequate basis from which to conduct a review whether or not a speedy trial violation did indeed occur.

Furthermore, by failing to recognize that Case 00CRI110361 and Case 14CRI010021 were merged under No. 14CRI010021 and thus contain identical charges per the motion to consolidate of 2/27/14, Appellate Counsel did not make the connection that a dismissal for Speedy trial violation in Case 14CRI010021 would simultaneously mean a dismissal of those identical charges in Case 00CRI110361.

By failing to appeal Case 14CRI010021 per Appellant's Letter of March 20, 2014, Counsel deprived Appellant of the arguments and additional transcripts in that case which would have resulted in a vacation of sentence and conviction in Case 00CRI110361, as 14CRI010021 was out of time to be tried under Article III of the IAD.

- see Appellant's memorandum in Support of Jurisdiction in Ohio Supreme Court Cases 2015-0319 and 2014-2247 as well as Appellant's pro se brief in the instant case, assignments of errors one, three and four as well as page 6, statement of facts.

Proposition of Law No. 4:

Did the State of Ohio violate the Interstate Agreement on Detainers Contract signed by the State of Ohio and the State of Arizona in Appellant's case?

Appellant's Pro Se "Application for Reconsideration" filed on Apr. 10, 2015, on pages 3-8 details the following breaches of the IAD contract by the State of Ohio, which were not addressed and thus conceded by the State of Ohio's memorandum of April 20, 2015:

- 1.) ALL continuances made at the trial level in Appellant's case were in violation of Article III(a)
- 2.) ODCRI 110361 was out of time to be tried per Article III(a), causing a violation of Article V(c).
- 3.) 14CRI010021 was not dismissed with prejudice per Article III(d)
- 4.) 14CRI010021 was out of time to be tried per Articles III(a) and V(c)
- 5.) IF, as the State of Ohio contends, the IAD does not apply to case 14CRI010021, then Article V(d) was violated in Case ODCRI 110361.

These violations are significant as Form II of the IAD, signed by the State of Arizona in Appellant's Case clearly states that:

"Failure to take action in accordance with the Agreement on Detainers, to which your State is committed by law, will result in the invalidation of the indictments, informations or complaints."

As case ODCRI 110361 would be required to be dismissed for any of the above reasons, Proposition 4 is clearly non-frivolous and arguable per Anders. The Court of Appeals erred in not finding these issues non-frivolous, depriving Appellant of Constitutionally adequate representation.

Conclusions

As shown above, Counsel's filing of his Anders brief on 7/14/14 predates the supplementation of the record with additional transcripts on Dec. 2, 2014, so the Anders brief did not take into account the full transcript of the case, violating Anders when counsel was dismissed by the Court of appeals on March 26, 2015.

Similarly, Counsel did not provide Appellant opportunity to file an adequate Pro Se brief as counsel: 1. Failed to provide transcripts to Appellant in time for the mandated 12/12/14 filing deadline.

2. Failed to file notice of appeal in case 14CRI010021, under which case 00CRI110361 was filed from Feb. 20, 2014 to March 3, 2014, which deprived Appellant the opportunity to use the transcripts and arguments of case 14CRI010021 in case 00CRI110361 because of identical transactions.

Counsel failed to provide an adequate basis for review to the Court of Appeals due to the missing transcript of 2/28/14. The court of Appeals erred in finding the issues of Constitutional Speedy trial violations and IAD breach of contract frivolous as a showing of either would mean vacation of conviction and sentence in Case 00CRI110361.

Appellant asks this Court to accept Jurisdiction in this Case. Appellant asks this honorable court to vacate the Court of Appeals Judgement of March 26, 2014 based on Constitutionally Inadequate representation of Counsel on appeal. Additionally Appellant asks this Court to compel the Court of appeals to reopen Appellate proceedings in Case 14CRI010021 as Appellate Counsel's failure to file notice of Appeal in that case will cause a miscarriage of Justice in Case 00CRI110361 as both cases were filed under 14CRI010021.

Certificate of Service

I certify that a copy of the foregoing was sent to
Counsel of record for Appellee, the State OF OHIO,
Carol O'Brien Delaware County Prosecutor
140 N. Sandusky St.
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by ordinary mail on this 12 day of June, 2015
and that the original and 8 copies of the foregoing were
sent to:

Clerk of the Supreme Court
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Respectfully Submitted, this 12 day of June, 2015

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

FRANK K.C. HERTEL, SR.

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 14 CAA 04 0019

OPINION

CHARACTER OF PROCEEDING:

Appeal from The Court of Common
Pleas, Case No. 00 CRI 11 0361

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2015 MAR 26 AM 10:40
JAN ANTONOPLOS
CLERK

Court of Appeals
Delaware Co., Ohio

I hereby certify the within be a true
copy of the original on file in this office.

Jan Antonoplos, Clerk of Courts
By MM Clins Deputy

Farmer, J.

{¶1} This appeal stems from Appellant's conviction and sentence for three counts of rape and two counts of gross sexual imposition. Appellant entered guilty pleas to these counts and was sentenced to five to twenty-five years on each rape count and two to ten years on each gross sexual imposition count. All sentences were ordered to be served consecutive to one another, but concurrent with a sentence Appellant received for sexual conduct with a minor in Arizona.

{¶2} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth two proposed Assignments of Error. Appellant filed a pro se brief alleging several additional Assignments of Error.

{¶3} In *Anders*, the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. *Id.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and

dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id.*

{¶14} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738. Both counsel and Appellant have raised potential assignments of error as follows:

POTENTIAL ASSIGNMENTS OF ERROR FROM COUNSEL

I.

{¶15} "THE TRIAL COURT ERRED BY NOT GRANTING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR A SPEEDY TRIAL VIOLATION."

II.

{¶16} "THE DEFENDANT WAS [NOT] AFFORDED EFFECTIVE ASSISTANCE AT THE TRIAL LEVEL."

POTENTIAL ASSIGNMENTS OF ERROR FROM APPELLANT, PRO SE

III.

{¶17} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW, DUE TO A DUE PROCESS VIOLATION, WHEN THE HONORABLE JUDGE KRUEGER ABUSED HIS DISCRETION BY NOT GRANTING A STATUTORY SPEEDY TRIAL VIOLATION IN CASE NO. 14CRI010021 BEFORE CONVICTING DEFENDANT IN CASE 00CRI11361 LESS THAN A WEEK LATER."

IV.

{¶18} "DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL PER THE OHIO CONSTITUTION AND THE 6TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION DUE TO STATE'S FAILURE IN

TIMELY COMMENCEMENT OF PROSECUTION WHEN THE HONORABLE JUDGE KRUEGER DENIED DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS OF 7/15/13 AND 2/28/14 IN CASE 00CRI11361."

V.

{¶19} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW DUE TO A DUE PROCESS VIOLATION WHEN THE HONORABLE JUDGE KRUEGER ABUSED HIS DISCRETION BY NOT GRANTING A CONSTITUTIONAL SPEEDY TRIAL VIOLATION IN CASE 14CRI010021 ON 2/28/14 BEFORE CONVICTING DEFENDANT ON IDENTICAL CHARGES IN CASE 00CRI11361 ON 3/4/14."

VI.

{¶10} "DEFENDANT'S CONVICTION AND SENTENCE ARE CONTRARY TO LAW. DEFENDANT WAS DENIED DUE PROCESS RIGHTS GUARANTEED UNDER THE OHIO CONSTITUTION AS WELL AS THE 5TH AND 14TH AMENDMENT OF THE U.S. CONSTITUTION DUE TO THE PROSECUTIONS AND TRIAL COURTS NON-ADHERANCE TO THE FEDERAL LAW PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS, O.R.C. § 2963.30, WHEN CASE 14CRI010021 WAS DISMISSED WITHOUT PREJUDICE IN VIOLATION OF ARTICLE III(d) OF R.C. 2963.30, WHICH STIPLIATES THAT IT SHALL BE DISMISSED WITH PREJUDICE. AS BOTH 00CRI11361 AND 14CRI010021 ARE BASED ON THE SAME CONDUCT AND CONTAIN IDENTICAL CHARGES, IF 14CRI010021 WOULD HAVE BEEN PROPERLY DISMISSED WITH PREJUDICE DURING THE HEARING ON MARCH 18, 2014 FROM WHICH BOTH DEFENDANT AND COUNSEL WERE ILLEGALLY

EXCLUDED, THEN THE PREVIOUS CONVICTION AND SENTENCE IMPOSED ON 3/4/14 IN CASE 00CRI11361 MUST BE OVERTURNED AND ALSO DISMISSED WITH PREJUDICE.”

VII.

{¶11} “THE SENTENCE AS IMPOSED BY TRIAL COURT IS CONTRARY TO LAW PER O.R.C. 2929.41 AND APPEALABLE UNDER O.R.C. 2953008(A)(4).”

{¶12} We now will address the merits of the potential Assignments of Error.

{¶13} While living in Ohio, rape allegations were made against Appellant which apparently prompted him to move to Arizona. Appellant was indicted for his Ohio conduct in 2000. He was subsequently indicted for sexual conduct with a child in Arizona. Facing charges in two states, Appellant fled to Germany. Appellant was tried in absentia in Arizona resulting in a conviction. Eventually, Appellant was extradited back to the United States to face the Ohio charges. Appellant first pled guilty to the charges but was allowed to withdraw his plea. After the plea was withdrawn, the State then in 2014 re-indicted Appellant on the same charges except the 2014 indictment includes force specifications. After plea negotiations, Appellant pled guilty to the 2000 indictment with the State agreeing to dismiss the 2014 case. It is from the 2000 case number, conviction, and sentence that Appellant has appealed.

I., III., IV., V.

{¶14} Because they are related or the same, we will address Appellant’s first, third, fourth, and fifth assignments of error. All of the errors revolve around the claim that Appellant’s right to a speedy trial was violated.

{¶15} The right to a speedy trial is encompassed within the Sixth Amendment to the United States Constitution. The availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. *State v. Ladd* (1978), 56 Ohio St.2d 197, 383 N.E.2d 579; *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Ohio's Speedy Trial statute codifies the constitutional guarantee of a speedy trial. However, "[t]he general view is that where an accused enters a plea of guilty he waives his right to raise the denial of his right to a speedy trial on appeal." *Village of Montpelier v. Greeno* (1986), 25 Ohio St.3d 170, 495 N.E.2d 581, citing Annotation (1958), 57 A.L.R.2d 302, 343. See, also *State v. Branch* (1983), 9 Ohio App.3d 160, 458 N.E.2d 1287.

{¶16} Because Appellant entered a guilty plea to the charges, the issues raised in the proposed assignments of error regarding speedy trial have been waived.

{¶17} Appellant's first, third, fourth, and fifth Assignments of Error are overruled.

II.

{¶18} In his second potential assignment of error, counsel for Appellant suggests Appellant was deprived effective assistance of counsel, however, counsel has not directed this court to any particular instance which would demonstrate ineffective assistance of counsel.

{¶19} The two-part test for ineffective assistance of counsel is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. "In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and

that, but for counsel's errors, the result of the proceeding would have been different.”

Strickland v. Washington, supra.

{¶20} We have reviewed the record and do not find counsel committed any errors which would have resulted in a different outcome in the proceedings.

{¶21} Appellant's second proposed assignment of error is overruled.

VI.

{¶22} In his sixth proposed Assignment of Error, Appellant argues his conviction and sentence are contrary to law because his 2014 case was not dismissed with prejudice.

{¶23} Appellant was not tried or convicted in the 2014 case. Appellant has not appealed the 2014 case. Whether that case was properly dismissed is not an issue properly before this Court. For this reason, we overrule the sixth assignment of error.

VII.

{¶24} In his seventh assignment of error, Appellant argues the trial court erred in imposing consecutive sentences because the sentencing journal entry states that the sentences were imposed pursuant to R.C. 2929.14(E). The code section cited in the sentencing entry is one which provides possible prison terms for those convicted of certain sex offenses. R.C. 2929.14(C) is the section which refers to consecutive sentences. Nowhere in the sentencing transcript does the trial court refer to R.C. 2929.14(E). Instead, the trial court cites language from R.C. 2929.14(C). It is clear after reading the sentencing transcript that the trial court did not impose consecutive sentences pursuant to R.C. 2929.14(E).

{¶25} “The proper action for the trial court, when faced with a clerical error, is to issue a nunc pro tunc judgment entry that lists the proper Revised Code sections . . .” *State v. Taylor*, 3rd. Dist. Seneca No. 13–10–49, 2011-Ohio-5080, ¶ 53.

{¶26} Because the sentencing journal entry contains a clerical error by the inclusion of R.C. 2929.14(E), this matter will be remanded to the trial court for the purpose of issuing a nunc pro tunc entry deleting the reference to R.C. 2929.14(E).

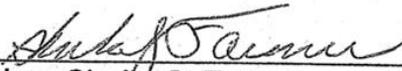
{¶27} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders*, grant

counsel's request to withdraw, and affirm the judgment of the Delaware County Court of
Common Pleas.

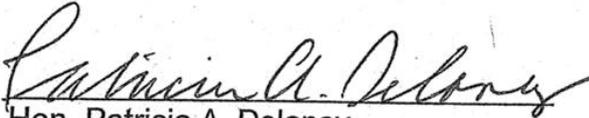
By Farmer, P.J.

Delaney, J. and

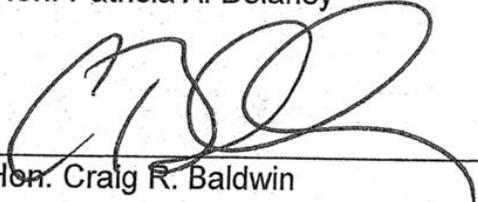
Baldwin, J. concur.



Hon. Sheila G. Farmer



Hon. Patricia A. Delaney



Hon. Craig R. Baldwin

SGF/as 303

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

FRANK K.C. HERTEL, SR.

Defendant - Appellant

JUDGMENT ENTRY

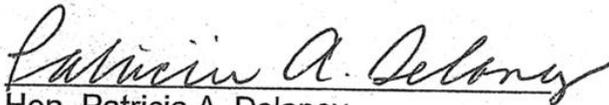
CASE NO. 14 CAA 04 0019

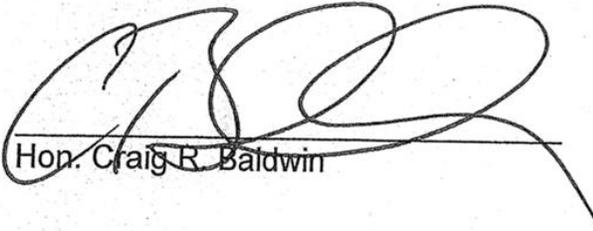
For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. This cause is remanded to the trial court for the purpose of having the trial court issue a nunc pro tunc entry excluding the reference to R.C. 2929.14(E).

Cost to Appellant.

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2015 MAR 26 AM 10:40
JAN ANTONOPLOS
CLERK


Hon. Sheila G. Farmer


Hon. Patricia A. Delaney


Hon. Craig R. Baldwin

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

FRANK K.C. HERTEL SR.

Defendant - Appellant

Case No. 14 CAA 04 0019

JUDGMENT ENTRY

This matter came before the Court upon Appellant's "Application for Reconsideration" filed on April 10, 2015 requesting this Court to reconsider our opinion filed March 26, 2015. Appellee has filed a response in opposition. Initially, we note the motion is untimely pursuant to App.R. 26.

Upon consideration, the motion is denied.

MOTION DENIED.

IT IS SO ORDERED.

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2015 MAY 19 AM 10:14
JAN ANTONOPLOS
CLERK

Shula Palmer
JUDGE

Patricia A. Delaney
JUDGE

[Signature]
JUDGE

Court of Appeals
Delaware Co., Ohio
I hereby certify the within be a true
copy of the original on file in this office.
Jan Antonoplos, Clerk of Courts
By *[Signature]* Deputy