[Cite as *State v. Hailes*, 2012-Ohio-3111.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-11-001
Appellee	Trial Court No. 2010CR0245
v.	
Ernell Hailes aka Earnell Hailes	**DECISION AND JUDGMENT**
Appellant	Decided: July 6, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Eric Allen Marks, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Ernell Hailes aka Earnell Hailes, appeals from his conviction entered by the Wood County Court of Common Pleas, in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On May 20, 2010, appellant appeared for a preliminary hearing in the Perrysburg Municipal Court. At the end of the hearing, the court in that matter found probable cause that appellant had violated Ohio law in failing to register as a sex offender and bound appellant over to the Wood County Grand Jury. On June 3, 2010, appellant was indicted by the Wood County Grand Jury on a single count of failure to register, in violation of R.C. 2950.04(E) and R.C. 2950.99(A)(1)(a)(ii), a felony of the first degree.

{¶ 3} On June 15, 2010, appellant entered a plea of not guilty to the charged offense. Bond was set at $50,000, and appellant remained in custody. The trial court scheduled a jury trial to commence on August 12, 2010. On July 13, 2010, appellant's trial was continued from August 12, 2010 to September 27, 2010, based upon a motion filed by defense counsel.

{¶ 4} Trial in the matter took place on September 27, 2010. The following evidence was adduced.

{¶ 5} Appellant was previously convicted of a sexually related offense in the state of Michigan; the offense, as stipulated by the parties, was similar to Ohio's rape statute, a felony of the first degree. Appellant served a ten-year prison term in Michigan for the offense, and was released from prison just months before being arrested and charged with the current offense.

{¶ 6} On May 13, 2010, Sarah Spoerl, a resident of the Brandon Manor Apartments, located in Perrysburg Township, Wood County, Ohio, contacted the Perrysburg Township Police Department regarding an incident that had taken place the

day before, during which appellant entered her apartment uninvited. Patrolman Robert Weber and Sergeant James Gross responded to the call and, as part of their investigation, visited a second, nearby, apartment that was identified as the location at which appellant was seen staying overnight. Weber and Gross identified Kenneth Vawters as one resident in the apartment. Spoerl stated that Vawters was not the man at issue, and that the man at issue "was the other one who was living at the apartment." Weber and Gross subsequently spoke to appellant, who stated that his entering Spoerl's apartment had been an accident and that he had been staying in Vawters' apartment for two weeks. Gross issued appellant a warning and then left the premises.

{¶ 7} Weber, after leaving the apartment complex, received a communication from his Perrysburg dispatcher that appellant was a registered sex offender in Michigan. Weber contacted Gross, and, separately, they returned to the complex. Gross ran a check to see whether appellant had registered in Ohio, and found that he had not.

{¶ 8} Weber testified that while he was in the parking lot waiting for Gross to arrive, he was approached by Vawters, who told him that appellant was down on his luck and had been staying with Vawters for a couple of weeks. Weber and Gross returned to Vawters' apartment, intending to arrest appellant for failing to register in Ohio.

{¶ 9} During the officers' ensuing conversation with appellant, Weber observed an air mattress on the floor of the living room of Vawters' apartment. According to testimony by Vawters, appellant would sleep on the air mattress whenever he would spend the night.

{¶ 10} At the time of appellant's arrest, several female visitors were in Vawters' apartment. Gross testified that following the arrest, appellant asked that the female visitors be informed that his keys were on his bed.

{¶ 11} Appellant maintained throughout the proceedings that he did not live at Vawters' apartment, but at 308 Jarvis Street, in Ypsilanti, Michigan. Vawters, who was appellant's friend since childhood, likewise denied that appellant lived with Vawters; instead, Vawters testified, appellant would come and visit him in Ohio several times a week.

{¶ 12} Witness Desiray Dial, who at the time of trial was carrying appellant's child, also alleged, but could offer no concrete evidence, that appellant had been residing in Michigan, and not in Ohio. Dial's testimony revealed that her contact with appellant involved his visiting her at her home, in Michigan, on an apparently frequent, but random, basis. She admitted that she had never seen appellant's Jarvis Street apartment.

{¶ 13} Witness Mindy Ray, appellant's case coordinator tasked with assisting appellant with his reintegration into society following his release from prison in Michigan, testified that she began working with appellant upon his release from prison in December 2009, and that her agency paid rent for appellant at the Jarvis Street address through the end of March 2010, at which time appellant became noncompliant with his services. Although Ray continued to send mail to appellant at the Jarvis Street address after March 2010, she did not know whether appellant actually received it.

{¶ 14} Witness Spoerl, for her part, testified that she had observed appellant around her Perrysburg Township apartment complex for nearly two months prior to the May 12, 2010 incident, sometimes seeing him several times a day as he would watch her come and go. Spoerl also noticed that appellant's car was at the complex late at night, and was still there early in the morning when she went to work.

{¶ 15} Another witness, Stacy Hallett, who lived across the hall from where appellant was staying, likewise testified that over the same two-month period, appellant would watch her come and go from her apartment, from both inside and outside the apartment building. Hallett further testified that she saw appellant's car parked in different spots in the apartment complex parking lot, that his car would be in the parking lot at night, and that she would see appellant come and go from Vawters' apartment all day long.

{¶ 16} At trial, appellant himself testified that during the period in question, he was in Ohio "visiting for two weeks." Appellant was questioned regarding paperwork he received in Michigan that outlined his responsibilities as a sex offender and his duty to seek out the registration requirements of any state that he would enter. Appellant stated that he believed any registration requirements in Ohio would be the same as those in Michigan.

{¶ 17} During trial, appellant conceded that he did not "spend a lot of time" at his address on Jarvis Street. He added that, because he was never at the Michigan address, he might have seen his roommate in Michigan as little as "once, maybe twice a week."

{¶ 18} After all of the evidence was presented, the jury found appellant guilty as charged. On November 30, 2010, appellant was sentenced to a term of four years imprisonment, and credited with 199 days for time served.

{¶ 19} Appellant timely filed the instant appeal, raising the following assignments of error:

> I. The trial court erred in denying appellant's motion for dismissal for a violation of his right to a speedy trial.
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> II. Appellant's conviction was against the manifest weight of the evidence.
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> III. The trial court lacked authority to enter a conviction against appellant for failure to register.
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> IV. Appellant was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution.

{¶ 20} Appellant argues in his first assignment of error that the trial court erred in denying his motion for dismissal for a violation of his speedy trial rights, because appellant remained in custody for 136 days before being brought to trial.

{¶ 21} Under R.C. 2945.71(C)(2), the state is required to bring a defendant to trial on felony charges within 270 days of arrest. Each day that the defendant is held in jail in lieu of bail on the pending charge is counted as three days in computing this time. R.C. 2945.71(E). The time computation may be tolled by certain events delineated in R.C.

2945.72, including delays necessitated by motions raised by the accused, the period of any continuance requested by the accused, and any reasonable continuance granted other than upon the request of the accused. R.C. 2945.72(E), (H). Motions filed by the defense toll 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. *See State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283.

{¶ 22} On June 29, 2010, appellant's counsel filed a motion to withdraw, noting that he was unavailable due to a scheduled vacation beginning on August 3, 2010 and continuing through August 16, 2010, which time period encompassed the scheduled trial date of August 12, 2010. At the same time that he filed the motion to withdraw, appellant's counsel filed a separate motion to continue the set trial date in the event that the court denied his request to withdraw. On July 13, 2010, the trial court denied the motion to withdraw and granted the motion to continue, setting a new trial date of September 27, 2010.

{¶ 23} Based on the foregoing facts, our initial conclusion is that the trial court's ruling, issued two weeks after its receipt of appellant's motions, was issued within a reasonable period of time and was, therefore, appropriate. *See Sanchez, supra.*

{¶ 24} Next, we must determine whether the trial court's continuance of the trial itself, from the originally-scheduled date of August 12, 2010, until September 27, 2010, was likewise appropriate. It has been held that a defendant's right to be brought to trial within the limits of R.C. 2945.71 may be waived by defense counsel for conflicts in

defense counsel's schedule. *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974, ¶ 13. Defense counsel's power to waive his client's right to a speedy trial is limited, however, to a reasonable period of time or to that length of time which does not constitute ineffective assistance of counsel. *State v. Eager*, 10th Dist. No. 95APA09-1165, 1996 WL 221520 (May 2, 1996); *State v. Jones*, 10th Dist. Nos. 94APA04-457, 94APA04-459, 1994 WL 714478 (Dec. 22, 1994).

{¶ 25} In this case, we conclude that the trial court's continuance of the trial date until after defense counsel's two-week vacation—and until 46 days after the originally scheduled date—was, in fact, reasonable and did not constitute ineffective assistance of counsel.

{¶ 26} Subtracting 270 days (which is the number of days tolled from June 29, 2010 to September 27, 2010, multiplied by 3) from the 408 days that appellant was credited with serving, we find that appellant was tried just 138 days after his arrest, well within the 270 day limit.

{¶ 27} Arguing against this conclusion, appellant complains that no time can properly be tolled in this case, because no waivers were executed. We disagree. As held by the Supreme Court of Ohio in *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, the statutory tolling of speedy trial time under R.C. 2945.72 occurs by operation of statute, whether or not a waiver has been executed. *Id.* at ¶ 18-19. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 28} Appellant argues in his second assignment of error that his conviction was against the manifest weight of the evidence. This court has articulated the applicable standard of review as follows:

> Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Under this standard, this court sits as a "thirteenth juror" and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we decide that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.*
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> Nevertheless, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533. Moreover, we must keep in mind that the credibility of the witnesses who testified at trial is chiefly a matter to be determined by the trier of fact. *State v. McDermott*, 6th Dist. No. L-03-1110, 2005-Ohio-2095, ¶ 25, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. *State v. Terry*, 6th Dist. No. L-06-1298, 2007-Ohio-4088, ¶ 12-13.

{¶ 29} Appellant argues that the testimony elicited from the state's witnesses failed to support his conviction, inasmuch as it did not present strong evidence that he had been in Ohio long enough to create a duty to register.

{¶ 30} R.C. 2950.04(A)(4)(a) relevantly provides that anyone convicted for committing a sexually oriented offense in another state "shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's * * * coming into the county in which the offender resides or temporarily is domiciled for more than three days."

{¶ 31} According to appellant, the testimony presented by the state failed to establish, and the jury subsequently lost its way in finding, that appellant was temporarily domiciled in Perrysburg, Ohio for more than three days. We disagree.

{¶ 32} At the outset, appellant told Perrysburg Township Sergeant Gross that he had been staying in Ohio for about two weeks. In addition, neighbors Spoerl and Hallett explained that over a period of approximately two months they would see appellant multiple times a day at the same apartment and, further, would see appellant's vehicle parked outside the apartment complex late at night and again early in the morning.

{¶ 33} Appellant himself presented no verifiable evidence that he was spending time at his official Michigan address; rather, he admitted that he was "never" at his address. In addition, appellant testified at trial that during the period in question, he was in Ohio "visiting for two weeks."

{¶ 34} Based upon all of the foregoing, we find that there was ample evidence upon which the jury could conclude that appellant was temporarily domiciled in Perrysburg, Ohio for more than three days and, thus, had a duty to register in Ohio. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 35} Appellant argues in his third assignment of error that the trial court lacked authority to enter a conviction against him for failure to register, because he was originally classified as a sexual offender before R.C. 2950.04 was modified as part of S.B. 10, on January 1, 2008. In support of his position, appellant directs this court's attention to cases specifically involving tier reclassification of offenders who had committed sex offenses prior to the enactment of S.B. 10. Because the instant case does not involve the issue of offender reclassification, the authority cited by appellant is inapposite to a determination of this case.

{¶ 36} Here, we are dealing with a new criminal offense that was committed by appellant and requires the application of current law. Prior to the current offense, appellant was put on notice by the state of Michigan that he had to comply with the registration requirements of any state to which he traveled or moved. When appellant became temporarily domiciled in Ohio in May 2010, the new, S.B. 10 version of R.C. 2950.04(A)(4) was already in effect.

{¶ 37} In response to appellant's objection to the fact that S.B. 10 was enacted after his conviction and classification in Michigan, we quote the Supreme Court of Ohio in *State v. Cook*, 83 Ohio St.3d 404, 412, 700 N.E.2d 570, 578 (1998), wherein it stated:

> Except with regard to constitutional protections against *ex post facto* laws * * * *felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.* (Emphasis in original.) *Id*. at 412, quoting *State ex rel. Matz v. Brown*, 37 Ohio St.3d 279, 281-282, 525 N.E.2d 805.

{¶ 38} Although S.B. 10 undoubtedly resulted in increases to registration and notification requirements under R.C. Chapter 2950, such increases are considered civil collateral consequences of conviction and are not viewed as increased punishments for an offense. *See State v. Patterson*, 6th Dist. No. E-08-052, 2009-Ohio-1817, ¶ 31-32.

{¶ 39} For all of the foregoing reasons, appellant's third assignment of error is found not well-taken.

{¶ 40} Appellant argues in his fourth, and final, assignment of error, that he was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution. Specifically, appellant asserts that his counsel's failures included: (1) the presentation of potential exhibits at that last minute that, as a result of the delay in presentation, were not allowed into evidence; (2) a failure to file a pretrial motion to exclude testimony regarding appellant's walking into Spoerl's apartment; and (3) a failure to recognize the dangers associated with putting appellant on the stand.

{¶ 41} In order for a defendant to obtain a reversal of a conviction or sentence based on ineffective assistance of counsel, he must prove "(a) deficient performance

('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable')." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 30, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 42} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at ¶ 31, citing *Strickland, supra*, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." *Id.*

{¶ 43} Appellant's initial complaint involves his counsel's late disclosure to the state of appellant's driver's license and pieces of mail addressed to appellant at his Ypsilanti address. Regarding this late disclosure, defense counsel stated on the record that he had only recently received the items from witness Vawters. Our review of the record reveals that although the items were not admitted as exhibits, the trial court did allow appellant's counsel to ask witness Vawters about them. In addition, appellant himself testified directly about his possessing a Michigan driver's license. In conclusion, we find that because both items were brought out at trial and subject to cross-examination, appellant suffered no prejudice as a result of their not being admitted as physical exhibits.

{¶ 44} Next, we address appellant's concern that his counsel did not file a pretrial motion in limine to exclude testimony about appellant's having entered Spoerl's apartment. According to appellant, such testimony should have been excluded under Evid.R. 403(A), which provides for the mandatory exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 45} Specifically, appellant argues that any testimony regarding the "alleged burglary" the day before his arrest was extremely prejudicial, while being of questionable probative value. Appellant claims that such testimony portrayed him as an "unreformed sexual deviant" who was just released from prison for rape and was attempting to rape another. He further complains that there can be no legitimate trial strategy justifying defense counsel's failure to object to the admission of such evidence.

{¶ 46} Our review of those portions of the record addressing appellant's entry into Spoerl's apartment reveals the following. First, there was testimony by Patrolman Weber, wherein he stated that he "was informed by Miss Spoerl that an individual who had been residing in apartment 51 had walked into her apartment," and that "[t]he individual observed her boyfriend lying on the couch and immediately went out the same door he came in."

{¶ 47} Next, there was testimony by Sergeant Gross, who recounted to the jury the conversation he had with appellant regarding the events from the day before, as follows:

{¶ 48} "I explained to [appellant] that technically under the color of the law that his entry could be construed as burglary. At this time based upon the victim's request we were not filing a charge, had this occurred again or had this become a habitual offense that we would be pursuing a burglary charge in the State of Ohio."

{¶ 49} Witness Spoerl testified that she "was in the bedroom, and [appellant] came into our apartment and turned around and said that he had been mistaken and walked out."

{¶ 50} At no time did the state or any of its witnesses make any statement that appellant was a sexual deviate or about to rape anyone.

{¶ 51} On the basis of the foregoing, we do not find that any of the testimony to which appellant objects was substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. As such, counsel could not have prevented such testimony from being admitted. In failing to object to the admission of this testimony, counsel's performance was not deficient. Nor did it result in any unfair prejudice to appellant.

{¶ 52} Finally, appellant asserts that he was not adequately protected by his trial counsel while on the stand. Specifically, appellant contends that an objection by defense counsel to the state's questioning of appellant on cross-examination about appellant's entry into Spoerl's apartment revealed that "trial counsel did not understand the effect of putting a defendant on the stand; that he could not limit his client's exposure on cross examination by limiting questioning on direct." We disagree.

{¶ 53} As stated by this court in *State v. Ryan*, 6th Dist. No. WD-05-5120, 2006-Ohio-5120:

> * * * Whether or not a defendant testifies is purely a tactical decision. *State v. Bey* (1999), 85 Ohio St.3d 487, 499, quoting *Brooks v. Tennessee* (1972), 406 U.S. 605, 612. Since the advice of an attorney to their client regarding the decision to testify is a tactical decision, it cannot be challenged on appeal on the grounds of ineffective assistance of counsel, unless it is shown that the decision was the result of coercion. *State v. Winchester*, 8th Dist. No. 79739, 2002-Ohio-2130, at ¶ 12, citing *Hutchins v. Garrison* (1983), 724 F.2d 1425, 1436 and *Lema v. United States* (1993), 987 F.2d 48, 52-53. * * *
>
> Furthermore, an attorney does not have a duty to try and dissuade his client from testifying. The ultimate decision of whether a defendant will testify on his own behalf is the defendant's. *State v. Edwards* (1997), 119 Ohio App.3d 106, 109, quoting *Government of the Virgin Islands v. Weatherwax* (1996), 77 F.3d 1425, citing *Jones v. Barnes* (1983), 463 U.S. 745, 751. *Id.* at ¶ 23-24.

{¶ 54} Here, there is no evidence or allegation to suggest that there was any coercion on the part of defense counsel to get appellant to testify. Accordingly, we find that appellant's counsel did not fail in any duty to his client by permitting appellant to take the stand in his own defense.

{¶ 55} For all of the foregoing reasons, appellant's fourth assignment of error is found not well-taken. The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE