

[Cite as *State v. Kovach*, 2009-Ohio-2892.]
STATE OF OHIO, MAHONING COUNTY

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IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

VS.) CASE NO. 08-MA-125

JAMES KOVACH,)

JAMES KOVACH,) OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 07CR1583

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Pleas of Mahoning County, Ohio
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JUDGMENT: Affirmed in part
Reversed and Remanded in part

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APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

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Hon. Joseph J. Vukovich
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Dated: June 12, 2009

{¶1} Defendant-appellant, James Kovach, appeals from a Mahoning County Common Pleas Court judgment convicting him of attempted burglary and possessing criminal tools following his guilty plea and the resulting sentence.

{¶2} On January 17, 2008, a Mahoning County grand jury indicted appellant on one count of attempted burglary, a third-degree felony in violation of R.C. 2923.02(A) and R.C. 2911.12(A)(1)(C), and one count of possessing criminal tools, a fifth-degree felony in violation of R.C. 2923.24(A)(C). Appellant entered a not guilty plea and counsel was appointed to represent him.

{¶3} Appellant filed a pro se motion requesting in part that the court permit him to act as “co-counsel with appointed counsel and/or to fully defend self.” The trial court denied this request on February 28, 2008.

{¶4} On March 20, 2008, appellant filed a “Motion to Defend Self as defined in Ohio’s Criminal Rules 22 and 44(A)(C).”

{¶5} On March 31, 2008, appellant appeared with his counsel, withdrew his not guilty plea, and entered a guilty plea to the charges. In exchange for his guilty plea, plaintiff-appellee, the State of Ohio, agreed to recommend a two-year sentence.

{¶6} The trial court subsequently held a sentencing hearing. It issued its initial sentencing entry on May 29, 2008, where the court sentenced appellant “to serve a term of two years of incarceration for the crimes of Attempted Burglary, a felony of the third degree; and Possessing Criminal Tools, a felony of the fifth degree.” However, on June 18, 2008, the court issued an amended judgment entry of sentence. The court stated that it was issuing this judgment entry due to a clerical error in the original sentencing judgment entry. In its amended entry, the court ordered that appellant serve a two-year term of incarceration for attempted burglary and 12 months of incarceration for possessing criminal tools with these sentences to be served concurrently.

{¶7} This court granted appellant permission to file his own pro se assignments of error in addition to those assignments of error raised by his counsel.

We will address counsel's assignments of error first and then move on to appellant's pro se assignments of error.

{¶8} Appellant's counsel raises two assignments of error, the first of which states:

{¶9} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S REQUESTS TO PROCEED WITHOUT COUNSEL AS HIS OWN ATTORNEY, THUS COMMITTING PRE [sic.] SE REVERSIBLE ERROR."

{¶10} Appellant argues that the trial court erred by refusing to let him represent himself. He contends that the court should have made an inquiry to determine whether he relinquished his right to counsel instead of summarily overruling his first motion. Appellant further contends that he reiterated his desire to proceed pro se in his second motion but that the court again failed to make further inquiry on the matter. Appellant contends that the trial court committed per se reversible error by not allowing him to represent himself.

{¶11} Under the Sixth Amendment, a criminal defendant has a right to self-representation. *State v. Reed* (1996), 74 Ohio St.3d 534, 535, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525. The denial of the right of self-representation is a per se reversible error that is not subject to the harmless error standard of review. *Id.*, citing *McKaskle v. Wiggins* (1984), 465 U.S. 168, 177, 104 S.Ct. 944, fn. 8.

{¶12} That being said, a guilty plea waives most of a defendant's constitutional rights and most errors on appeal. *State v. Spates* (1992), 64 Ohio St.3d 269, 272. This is because, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process' and the defendant '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. Cain*, 7th Dist. No. 08-MA-123, 2009-Ohio-1015, at ¶11, quoting *Spates*, at 272.

{¶13} This court has explained:

{¶14} “A guilty plea is a complete admission of guilt. Crim.R. 11(B)(1). ‘By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.’ *State v. Barnett* (1991), 73 Ohio App.3d 244, 248, quoting *United States v. Broce* (1989), 488 U.S. 563, 570. Thus, the plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. *Barnett*, quoting *Menna v. New York* (1975), 423 U.S. 61.” *State v. Snyder*, 7th Dist. No. 03-MA-152, 2006-Ohio-3366, at ¶13.

{¶15} Consequently, appellant waived our review of his alleged error concerning his constitutional right to self-representation when he entered a guilty plea to the charges in this case. While the Ohio Supreme Court has not addressed the identical issue at hand here, it has held that a guilty plea raises the presumption of waiver of the right to have counsel appointed. See *Banks v. Maxwell* (1964), 175 Ohio St. 435, 436. Furthermore, other constitutional rights are waived when a defendant enters a guilty plea thus preventing their review on appeal, such as the right to a speedy trial, *State v. Kelly* (1991), 57 Ohio St.3d 127, at paragraph one of the syllabus, and the right to constitutionally effective assistance of counsel, *Snyder*, 7th Dist. No. 03-MA-152, at ¶13.

{¶16} Because appellant waived review of his right to self-representation claim by pleading guilty, the first assignment of error raised by his counsel is without merit.

{¶17} The second assignment of error raised by appellant's counsel states:

{¶18} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT IN A MANNER THAT WAS CONTRARY TO LAW, BY SENTENCING APPELLANT BEYOND THE MAXIMUM SENTENCE FOR A FIFTH DEGREE FELONY.”

{¶19} As part of appellant's plea deal, the state agreed to recommend a sentence of two years in the penitentiary. (Plea Tr. 2; Sentencing Tr. 2).

{¶20} At the sentencing hearing, the court announced the following sentence: “And so it is the order of the court the defendant be taken from here * * * to serve a term of two years and to pay the costs of prosecution.” (Sentencing Tr. 13). The court made no mention of whether this was the sentence for attempted burglary, possessing criminal tools, or both. Nor did the court make any mention of concurrent sentences.

{¶21} In the court’s original sentencing judgment entry, it stated that appellant was “to serve a term of two years of incarceration for the crimes of Attempted Burglary, a felony of the third degree; and Possessing Criminal Tools, a felony of the fifth degree.” (May 29, 2008 judgment entry).

{¶22} A few weeks later, the court issued an amended sentencing judgment entry. In this entry, the court stated that it was issuing this judgment entry due to a clerical error in the original sentencing judgment entry. In the amended entry, the court ordered that appellant serve a two-year term of incarceration for attempted burglary and twelve months of incarceration for possessing criminal tools with these sentences to be served concurrently. (June 18, 2008 judgment entry).

{¶23} Appellant now contends that the trial court sentenced him to two years for possessing criminal tools, a fifth-degree felony for which the maximum sentence is 12 months. He points out that at his sentencing hearing the court simply sentenced him to two years and did not differentiate between the sentences for attempted burglary and possessing criminal tools. Appellant next points out that in the original sentencing judgment entry, the court sentenced him to two years on both offenses. Appellant argues that the court’s amended sentencing entry is a reflection of what the court should have done, but is not a reflection of what the court actually did. Appellant contends that the trial court’s actual decision was to sentence him to two years for attempted burglary and two years for possessing criminal tools and for him to serve the sentences concurrently. For support, appellant points to his notice of commitment, which shows that he is to serve a two-year term for each count concurrently.

{¶24} Our review of felony sentences is now a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. First, we must examine the sentence to determine if it is “clearly and convincingly contrary to law.” *Id.* (O’Conner, J., plurality opinion). In examining “all applicable rules and statutes,” the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id.* at ¶¶13-14. (O’Conner, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court’s discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id.* at ¶17. (O’Conner, J., plurality opinion).

{¶25} Here the trial court sentenced appellant for two offenses: attempted burglary, a third-degree felony; and possessing criminal tools, a fifth-degree felony. The possible sentences for a third-degree felony are one, two, three, four, or five years. R.C. 2929.14(A)(3). The possible sentences for a fifth-degree felony are six, seven, eight, nine, ten, eleven, or twelve months. R.C. 2929.14(A)(5).

{¶26} It appears to this court that the trial court inadvertently sentenced appellant to two years for the fifth-degree felony of possessing criminal tools. This sentence is contrary to law as the maximum sentence for this offense is twelve months. At the sentencing hearing, the court sentenced appellant to a two-year prison term. It did not differentiate appellant’s sentence for attempted burglary from appellant’s sentence for possessing criminal tools. Because the court did not distinguish the two sentences, we are left to conclude that the court sentenced appellant to two years on each offense to be served concurrently. The court’s original sentencing judgment entry reflects this sentence.

{¶27} The court obviously recognized this error and attempted to correct it in its amended sentencing entry. The court had good intentions in issuing the amended entry. But Crim.R. 36 does not provide for this type of amended entry. Crim.R. 36 provides that the court may correct “clerical mistakes in judgments” and “errors in the record arising from oversight or omission” at any time. However, the sentencing error here was more than a clerical error or an error arising from oversight or omission.

{¶28} Crim.R. 43(A) provides that the defendant shall be present at every stage of the trial, including at the imposition of sentence. Because the defendant's presence is required when the court imposes sentence, the trial court errs when its judgment entry of sentence differs from the sentence that it announced at the sentencing hearing in the defendant's presence. *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, at ¶48.

{¶29} Because the sentence in the court's amended sentencing entry is not the same sentence that the court imposed at the sentencing hearing, the amended sentencing entry was improper. While the court likely intended to sentence appellant to two years for attempted burglary and twelve months for possessing criminal tools, to be served concurrently, it did not impose this sentence in appellant's presence. As such, the court imposed a two year sentence for the fifth-degree felony of possessing criminal tools, which is contrary to law.

{¶30} Accordingly, the second assignment of error raised by appellant's counsel has merit.

{¶31} In addition to counsel's assignments of error, appellant filed a pro se "brief." In this filing, appellant does not set out assignments of error or a statement of the issues for our review as is required by App.R. 17(A)(3) and (4).

{¶32} Even though appellant filed his "brief" pro se, he is bound by the same rules and procedures as litigants who proceed with counsel. *Miner v. Eberlin*, 7th Dist. No. 08-BE-21, 2009-Ohio-934, at ¶11. In the interest of justice, however, we will examine appellant's arguments.

{¶33} Appellant makes three arguments. He argues that the court erred in denying his request to represent himself. He argues that his speedy trial rights were violated. And he argues that we must dismiss his case because he pleaded guilty to his original indictment and not to his superseding indictment.

{¶34} We have already addressed appellant's first pro se argument, that the court erred in denying his request to represent himself, as it was also raised by his appellate counsel.

{¶35} Appellant's second pro se argument, that he was denied his right to a speedy trial, has no merit. A defendant's guilty plea waives his right to challenge his or her conviction based on alleged speedy trial violations. *Kelly*, 57 Ohio St.3d at paragraph one of the syllabus.

{¶36} Appellant's third pro se argument, that he never entered a guilty plea, takes a bit more analysis.

{¶37} A grand jury originally indicted appellant on January 17, 2008. The original indictment charged appellant with attempted burglary and possessing criminal tools. The count charging appellant with attempted burglary states that appellant, "did attempt by force, stealth or deception to trespass in * * * an occupied structure * * * when another person other than an accomplice of the offender is present with purpose to commit in the structure * * * any criminal offense." Appellant entered a guilty plea to this indictment on March 25, 2008, and the matter was set for sentencing.

{¶38} On May 8, 2008, a grand jury issued a superceding indictment. The count for possessing criminal tools did not differ from that in the original indictment. The count for attempted burglary, however, added an element that was missing from the original indictment. The count for attempted burglary now included the element that appellant "did knowingly, recklessly or negligently" attempt burglary. On May 20, 2008, appellant entered a not guilty plea to the superceding indictment. Notably, this plea was taken by a magistrate and not the trial court judge who had been presiding over appellant's case. On this judgment entry, the court noted that the case was set for sentencing the next week.

{¶39} On May 28, 2008, the court proceeded with the scheduled sentencing.

{¶40} At the sentencing hearing, appellant voiced no objection to proceeding with sentencing. Nor did he move to withdraw his guilty plea at any time.

{¶41} Appellant has waived any alleged errors with his indictment by pleading guilty. This court has held that by entering a guilty plea, a defendant waives all non-jurisdictional defects with the indictment. *Cain*, 7th Dist. No. 08-MA-123, at ¶13. See

also *State v. Treft*, 6th Dist. Nos. WD-07-085, WD-08-012, 2009-Ohio-1127, at ¶8 (Because a guilty plea precludes subsequent, independent claims relating to the deprivation of constitutional rights that occurred prior to the guilty plea, a guilty plea precludes challenges to the constitutionality of the indictment under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624).

{¶42} Accordingly, appellant's pro se alleged errors are without merit.

{¶43} For the reasons stated above, appellant's conviction is hereby affirmed. Appellant's sentence is reversed and the matter is remanded for resentencing.

Vukovich, P.J., concurs.

Waite, J., concurs.