[Cite as *State v. Baldwin*, 2009-Ohio-3324.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-140
	)	
DANIEL R. BALDWIN,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 05CR98
JUDGMENT:	Reversed and Remanded
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Rhys Cartwright-Jones Assistant Prosecutor 21 West Boardman Street – 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney Douglas A. King Hartford, Dickey & King Co., LPA 91 West Taggart Street, P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

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

Dated: June 29, 2009

[Cite as *State v. Baldwin*, 2009-Ohio-3324.]
DONOFRIO, J.

{¶1} Defendant-appellant Daniel R. Baldwin appeals his conviction and sentence in the Mahoning County Common Pleas Court for operating a vehicle under the influence (OVI). His appellate counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, setting forth three proposed assignments of error concerning sentence, speedy trial, and effectiveness of trial counsel, but concluding that each is without merit.

{¶2} As a result of a vehicle accident that occurred on December 23, 2004, an Ohio State Highway Patrol trooper issued a citation and filed a complaint charging Baldwin with felony OVI. What followed is a long and protracted procedural history. Appearing with retained counsel Attorney Heidi Hanni, Baldwin appeared for arraignment in Mahoning County Court #3 on December 28, 2004. No plea was accepted. Rather, Baldwin signed a written waiver of his right to a speedy trial and requested an indefinite continuance. He also waived his right to have a preliminary hearing within the time limits of Crim.R. 5.

{¶3} Mahoning County Court #3 conducted a preliminary hearing on January 25, 2005. At that hearing, Baldwin waived his right to the hearing and consented to have the case presented to the Mahoning County Grand Jury. The court found probable cause and bound the case over to the grand jury.

{¶4} On February 17, 2005, the Mahoning County Grand Jury indicted Baldwin for fourth offense OVI in violation of R.C. 4511.19(A)(1)(a)(G), a fourth-degree felony. The indictment also contained a specification stating that within the past six years Baldwin had been convicted of three DUI offenses.

{¶5} Baldwin failed to appear for his March 1, 2005 arraignment in Mahoning County Common Pleas Court and the court issued a bench warrant. Baldwin was arrested on April 9, 2005 and on April 12, 2005, a judgment entry was filed in which Baldwin acknowledged receipt of the indictment and pleaded not guilty. Baldwin was released on a $25,000.00 bond. On April 19, 2005, and again on June 8, 2005, Baldwin, along with his counsel, signed a written waiver of speedy trial.

{¶6} Baldwin's counsel filed a motion to continue an August 18, 2005 pretrial hearing. The trial court granted the motion and reset the hearing for September 27, 2005. Baldwin failed to appear for that hearing and the court issued a bench warrant.

{¶7} On April 26, 2006, Atty. Hanni filed a motion to withdraw as counsel. Atty. Hanni alleged that differences had arisen between her and Baldwin that rendered her unable to adequately represent him. She also noted Baldwin's failure to appear for the September 27, 2005 hearing and maintained that she was unable to contact him by mail or phone.

{¶8} Baldwin was arrested on May 8, 2006. On May 24, 2006, the trial court granted Atty. Hanni's motion to withdraw, found Baldwin indigent, and appointed Attorney Louis Defabio to represent him. Atty. Defabio filed a request for discovery and a Crim.R. 11(F) plea offer was noted at a September 19, 2006 pretrial hearing.

{¶9} On October 26, 2006, Atty. Defabio filed a motion to reinstate or set Baldwin's bond. Apparently in an attempt to address his previous failure to appear, Baldwin asserted that Atty. Hanni had failed to notify him about the September 27, 2005 pretrial for which he did not appear and that his present counsel informed him of his duty to attend all future court hearings. Also, Baldwin stated that he needed to be with his mother who had been diagnosed with advanced, incurable pancreatic cancer. On November 16, 2006, the trial court allowed Baldwin to be released from jail on $25,000.00 bond with the condition that he be placed on electronically monitored house arrest (EMHA) with no occupational privileges. Two months later and upon a motion filed by Atty. Defabio, the trial court granted Baldwin occupational privileges while he remained on EMHA.

{¶10} On January 19, 2007, the trial court filed a judgment entry in response to its frustration that three different criminal matters, including Baldwin's, had all been scheduled for trial on the same day, February 12, 2007. In addition to ordering that the other two cases would proceed in order before Baldwin's, the court stated:

{¶11} "It is further the Order of this Court that the Mahoning County Prosecutor refrain from further verbage (sic) concerning his efforts to impress others

and the media of personal feelings concerning the obligations of Mahoning County prosecutor in their efforts to prepare for trial when scheduled. Certainly the office of the Mahoning County Prosecutor can devote more time to organization within his own office than lecturing the Court on the necessity to prevent a wasting of time and tax dollars.

{¶12} "The Court further calls to the attention of the Mahoning County Prosecutor and requests forthwith, the names of two prosecutors who are assigned to this Court to facilitate reduction of this Court's docket, one of whom was hired in an effort to accomplish same.

{¶13} "A review of the cases referred to herein will reveal at least five different names of at least five different assistant prosecutors over a three year period being involved in 'negotiations'.

{¶14} "Certainly the taxpayers of Mahoning County deserve more than confusion and disorganization in an office deemed pertinent to attempting criminal justice." (Docket 31.)

{¶15} On February 12, 2007, the other two cases were solved by plea or continuance and Baldwin's case, by agreement of the parties, was reset to August 6, 2007.

{¶16} On April 18, 2007, Baldwin too apparently became frustrated with the slow progress of his case and filed two separate pro se motions. In the first, he asked for appointment of new counsel. He complained that the case had dragged on so long that it was creating a hardship for himself and his family, and asked for an earlier "court" date. He maintained his innocence, stating his belief that there was no probable cause to support his arrest and that he had no intention of accepting a plea bargain. In the second motion, he again complained about the length of delays and asked to be taken off EMHA.

{¶17} Following a violation of his EMHA condition, the trial court issued a bench warrant for Baldwin on May 8, 2007. Baldwin was apprehended over eight

months later on January 25, 2008, and pretrial was held on February 6, 2008. Jury trial was reset for April 7, 2008.

{¶18} Meanwhile, on March 31, 2008, Atty. Defabio filed a combined motion in limine and motion to suppress. He sought to prohibit any reference at trial to Baldwin's inability or refusal to submit to a blood alcohol test following his arrest and argued that even if a blood alcohol test would have been performed it would have fallen outside the two limits set forth for that test in the Revised Code.

{¶19} Finally, on April 7, 2008, the parties reached a Crim.R. 11 plea agreement. Baldwin pleaded guilty to a reduced charge of third offense OVI, an unclassified misdemeanor. In reaching that decision, the state noted the age of the case and evidentiary issues. Baldwin was then released on his own recognizance.

{¶20} Inexplicably and two years after she was granted withdrawal from the case, Atty. Hanni filed two separate motions on May 28 and 30, 2008 – one to continue and the other to withdraw because Baldwin had filed a grievance against her with the Mahoning County Bar Association.

{¶21} Sentencing was held on May 30, 2008. The state recommended community control and victim restitution. Concerning restitution, the victim informed the state that she incurred a deductible and co-pays totaling $757.00. Baldwin expressed his frustration with the length of the case and stated that he just wanted the case to "go away." (05/30/2008 Sentencing Tr. 11.) The trial court noted Baldwin's extensive criminal history and proceeded to sentence him to one year in jail with credit for 315 days served. If Baldwin was transferred to Columbiana County for prosecution in another matter, the remaining 50 days was suspended. If Baldwin was not transferred, then he was to serve the remaining 50 days in Mahoning County's jail. The court also sentenced Baldwin to two years community control, ordered $757.00 restitution, suspended his driver's license for four years with disabling device and restricted plates to follow, and ordered alcohol treatment.

{¶22} Baldwin filed a timely notice of appeal, and new counsel was appointed to represent him on appeal. On November 3, 2008, Baldwin's appointed appellate

counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, setting forth three proposed assignments of error concerning sentence, speedy trial, and effectiveness of trial counsel, but concluding that each is without merit. On November 19, 2008, this court provided Baldwin thirty days to file his own brief, but he did not do so.

{¶23} Appellate counsel's *Anders* brief is similar to what has been termed a *Toney* brief in this appellate district pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.E.2d 419. Relying on *Anders*, in *Toney* this court recognized an indigent defendant's constitutional right to court-appointed counsel for direct appeal of their conviction. Id., at paragraph one of the syllabus. After a conscientious examination of the record, counsel should present any assignments of error which could arguably support the appeal. Id., at paragraph two of the syllabus. If instead counsel determines that the defendant's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, then counsel should inform the appellate court and the defendant of that by brief and ask to withdraw as counsel of record. Id., at paragraph three and four of the syllabus. The defendant is then given the opportunity to raise, pro se, any assignments of error he chooses. Id., at paragraph four of the syllabus. The appellate court then is duty bound to examine the record, counsel's brief, and any pro se arguments, and determine if the appeal is wholly frivolous. Id., paragraph five of the syllabus. If after determining that the appeal is wholly frivolous, then the appellate court should permit counsel to withdraw and affirm the judgment of conviction and sentence. Id., at paragraph seven of the syllabus.

{¶24} Baldwin's first proposed assignment of error states:

{¶25} "THE IMPOSITION OF THE MAXIMUM SENTENCE BY THE TRIAL COURT TOGETHER WITH A COMMUNITY CONTROL SANCTION IS CONTRARY TO LAW."

{¶26} Baldwin's counsel maintains that since Baldwin has already served the maximum sentence permitted for the offense, there is no prejudice in the trial court's

imposition of two years community control sanction. In other words, if Baldwin were to violate community control, the court would be without authority to incarcerate him for any further length of time.

{¶27} Baldwin pleaded guilty to a third offense OVI. Sentencing for that offense is addressed under R.C. 4511.19(G)(1)(c)(i), which provides for a mandatory thirty-day jail term, a maximum possible jail term of one year, a fine of between $550 and $2,500, mandatory license suspension, criminal forfeiture of the offender's vehicle, and participation in an alcohol addiction program. It does not provide for a community control sanction. According to his appellate brief, Baldwin has already served the mandatory thirty day jail term and a maximum term of one year (the 315 days which he had already served at the time of sentencing plus the remaining 50 days he was sentenced to Mahoning County's jail). Therefore, even if Baldwin violated community control, his appellate counsel maintains that Baldwin could not be returned to jail on that basis.

{¶28} Nonetheless, R.C. 4511.19(G)(1)(c)(i) does not authorize the trial court to impose a community control sanction. Consequently, the trial court's imposition of a community control sanction is without statutory support and constitutes plain error. Given the unique circumstances of this case in that Baldwin has served all of the incarceration portion of his sentence, upon remand the trial court is instructed to enter a new sentencing entry, nunc pro tunc to the date of the judgment of conviction, omitting the imposition of a community control sanction.

{¶29} Accordingly, Baldwin's first proposed assignment of error has merit.

{¶30} Baldwin's second proposed assignment of error states:

{¶31} "DEFENDANT/APPELLANT WAS DENIED A SPEEDY TRIAL."

{¶32} Because Baldwin waived his right to a speedy trial, his appointed appellate counsel contends there was no violation of that right.

{¶33} "Following an express, written waiver of unlimited duration by an accused of his right to speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and

demand for trial, following which the state must bring the accused to trial within a reasonable time." *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218, paragraph two of the syllabus. In this case, Baldwin signed an express, written waiver of his right to a speedy trial on three separate occasions – at his arraignment on December 28, 2004, and again on April 19, 2005, and June 8, 2005. While Baldwin did subsequently file pro se motions expressing his dissatisfaction with the slow progress of the case, he never filed a formal written objection and demand for trial as is required by *O'Brien*. Thus, his speedy trial waiver remained in effect.

{¶34} Accordingly, Baldwin's second proposed assignment of error is without merit.

{¶35} Baldwin's third proposed assignment of error states:

{¶36} "DEFENDANT/APPELLANT'S COUNSEL WAS INEFFECTIVE."

{¶37} Baldwin's appointed appellate counsel does not believe that trial counsel was ineffective given Baldwin's waiver of speedy trial, the delays caused by Baldwin himself, and the plea bargain reached.

{¶38} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley,* 42 Ohio St.3d at paragraph three of the syllabus.

{¶39} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 714 N.E.2d 905. In Ohio, a licensed attorney is presumed competent. Id.

{¶40} In the year and over three months Baldwin's first, retained counsel represented him, she did not file a single substantive pretrial motion to move the case

forward – no motion for a bill of particulars, no motion for discovery, and no motion to suppress – and instead only filed motions to extend or continue the case. However, once Baldwin's second, appointed counsel took over the case, he did file a motion for discovery and a combined motion in limine and motion to suppress. His appointed counsel also was able to get him released on EMHA. More importantly, his appointed counsel was able to reach a plea bargain whereby Baldwin's charge was reduced from a felony to a misdemeanor. Thus, it cannot be said that Baldwin's second, appointed counsel was ineffective or that he was prejudiced.

{¶41} Accordingly, Baldwin's third proposed assignment of error is without merit.

{¶42} The judgment of the trial court is hereby reversed and remanded with instructions to enter a new sentencing entry, nunc pro tunc to the date of the judgment of conviction, omitting the imposition of a community control sanction.

Vukovich, P.J., concurs.

Waite, J., concurs.