

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 80
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
KEYLAN DAVIS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 06CR1108.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains  
Prosecuting Attorney  
Attorney Ralph Rivera  
Assistant Prosecuting Attorney  
21 West Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney Timothy Young  
Ohio State Public Defender  
Attorney Spencer Cahoon  
Assistant Ohio State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215

JUDGES:

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

Dated: August 31, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Keylan Davis appeals from his conviction in the Mahoning County Common Pleas Court of two counts of aggravated robbery, one count of complicity to commit aggravated robbery, one count of felonious assault, one count of complicity to commit felonious assault and the firearm specifications attached to each of the above five counts. Davis entered a guilty plea to the above and now contends that trial counsel was ineffective and thus his plea was not knowingly, intelligently, or voluntarily entered into because counsel should not have permitted him to waive his right to speedy trial and enter a guilty plea when his speedy trial time had already expired. For the reasons expressed below, we find that trial counsel was not ineffective because at the time the waiver was executed Davis' speedy trial time had not expired. As such, Davis' argument that his plea was not entered into knowingly, intelligently and voluntarily because of trial counsel's alleged ineffectiveness has no merit. The judgment of the trial court is affirmed.

#### STATEMENT OF CASE

¶{2} In order to avoid repetition an in depth recitation of the date of filings is not discussed at this point; instead the statement of the case addresses only the charges against Davis and the charges to which he pled guilty.

¶{3} On May 17, 2006, Davis, a juvenile, was arrested for three separate aggravated robberies that he allegedly committed. Deaunte Riley and Deondray Robinson, both adults, were purportedly Davis' accomplices. Since Davis was a juvenile he was charged in juvenile court for the robberies – case numbers 06JA663, 06JA760, and 06JA761. On September 25, 2006, Davis was bound over to the Mahoning County Common Pleas Court for those case numbers. The Mahoning County Grand Jury issued a five count indictment against him on October 19, 2006. Counts one and three were for aggravated robbery, violations of R.C. 2911.01(A)(1)(C), first degree felonies; count two was for felonious assault, a violation of R.C. 2903.11(A)(2)(D), a second degree felony; count four was for complicity to commit aggravated robbery, a violation of R.C. 2923.03(A)(2)(F) and R.C. 2911.01(A)(1)(C), a

first degree felony; and the fifth count was for complicity to commit felonious assault, a violation of R.C. 2923.02(A)(2)(F) and R.C. 2903.11(A)(2)(D), a second degree felony. All counts contained firearm specifications, violations of R.C. 2941.145(A). Counts one and two also contained body armor specifications, violations of R.C. 2941.1411(A).

¶{4} After numerous motions and delays, Davis entered into a Crim.R. 11 plea agreement with the state and a hearing in accordance with that agreement was held on April 7, 2008. In exchange for Davis entering a guilty plea, the state agreed to dismiss the body armor specifications attached to counts one and two and to amend one of the firearm specifications from a violation of R.C. 2941.145(A) to a violation of R.C. 2945.141(A). The state also stipulated that some of the firearm specifications required merger and thus for all five firearm specifications Davis could receive a total sentence of seven years. The state then agreed that it would recommend that Davis receive a seven year sentence for each count in the indictment and that those sentences should run concurrent with each other, but consecutive to the seven year sentence for the firearm specifications. Thus, in all, the state was recommending an aggregate sentence of 14 years.

¶{5} The trial court amended the indictment according to the agreement and Davis entered a guilty plea to all counts and specifications in the amended indictment. The trial court, after going through a Crim.R. 11 colloquy, accepted the guilty plea and the case proceeded to sentencing. The trial court followed the state's recommendation and sentenced Davis to an aggregate sentence of 14 years. Davis timely appeals from that conviction and sentence.

#### ASSIGNMENT OF ERROR

¶{6} "CRIMINAL DEFENDANTS ARE ENTITLED TO THE EFFECTIVE ASSISTANCE OF COUNSEL. MR. DAVIS' TRIAL COUNSEL FAILED TO RAISE AN ISSUE THAT WOULD PREVENT CONVICTION UPON A FACTUAL FINDING OF GUILT, AND MR. DAVIS' SUBSEQUENT GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY. TR. AT 11-12."

¶{7} As explained above, Davis entered a guilty plea to the indictment. We have previously explained that:

¶{8} “A guilty plea represents a break in the chain of events that preceded it in the criminal process; thus, a defendant, who admits his guilt, waives the right to challenge the propriety of any action taken by a trial court or trial counsel prior to that point in the proceedings unless it affected the knowing and voluntary character of the plea.” *State v. Doak*, 7th Dist. Nos. 03CO15 and 03CO31, 2004-Ohio-1548, ¶55, quoting *State v. Madeline* (Mar. 22, 2002), 11th Dist. No.2000-T-0156. See, also, *State v. Kelley* (1991), 57 Ohio St.3d 127, paragraph one of the syllabus, (stating a valid guilty plea to the indicted charges waives any right to challenge a conviction on statutory speedy trial grounds).

¶{9} Here, Davis does not directly challenge his conviction on statutory speedy trial grounds, but rather challenges the knowing nature of the plea by asserting that trial counsel was ineffective for failing to properly argue for dismissal of the charges on speedy trial grounds and by permitting him to waive his speedy trial rights after the statutory time had expired. Thus, his argument is effectually an ineffective assistance of counsel claim.

¶{10} Generally, in order to establish an ineffective assistance of counsel claim, Davis would be required to show that: (1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. However, “[i]n ineffective-assistance claims in guilty-plea cases, ‘the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.’” *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶89, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59. See, also, *State v. McQueen*, 7th Dist. No. 08MA24, 2008-Ohio-6589, ¶16 and *State v. Bean*, 11th Dist. No. 2008-G-2839, 2009-Ohio-682, ¶11.

¶{11} With that standard in mind, we now turn to whether counsel's alleged errors in arguing the speedy trial motion and in allowing Davis to waive his speedy trial rights could amount to ineffective assistance of counsel which would render the guilty plea invalid.

¶{12} The Second District has held that trial counsel's failure to file a timely motion to dismiss on speedy trial grounds and permitting the defendant to waive

his/her speedy trial rights before the motion to dismiss was filed constituted ineffective assistance of counsel. *State v. Gray*, 2d Dist. No. 20980, 2007-Ohio-4549, ¶21 (case went to trial and defendant was found guilty of domestic violence). In holding as such, the *Gray* court focused on the fact that had a timely motion to dismiss on speedy trial grounds been made prior to the defendant waiving his speedy trial rights, it would have resulted in the dismissal of the charge. *Id.* Thus, the prejudice prong of the ineffective assistance of counsel test was met. As can be seen, the crux of that holding is a speedy trial violation.

¶{13} The *Gray* holding could possibly lend support for a finding that in this case trial counsel was ineffective for inadequately arguing the motion to dismiss and for allowing Davis to execute a waiver of his speedy trial time, **if** the speedy trial time had actually expired either when the motion to dismiss was made or when the waiver was executed. Thus, our analysis turns to whether the speedy trial time had expired.

¶{14} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. Our standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71. *State v. Hergenroder*, 7th Dist. No. 07CO17, 2008-Ohio-2410, ¶9, citing *State v. High* (2001), 143 Ohio App.3d 232, 241-242. When reviewing the legal issues presented in a speedy trial claim, an appellate court must strictly construe the relevant statutes against the state. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57.

¶{15} Davis was charged with felonies, thus, pursuant to R.C. 2945.71(C)(2), he was required to be brought to trial within 270 days of his arrest. However, the state concedes that R.C. 2945.71(E), known as the triple count provision, is applicable to Davis and thus he was required to be brought to trial within 90 days of his arrest.

¶{16} Davis was arrested on May 17, 2006, however, at that time he was subject to the jurisdiction of the juvenile court. Despite his instance to the contrary, R.C. 2945.71 et seq. and speedy trial time limits did not apply to him at that time. We have previously explained that “speedy trial time periods found in R.C. 2945.71 do not apply to a case initiated in juvenile court until the day after the court relinquishes jurisdiction and properly binds the case over to the adult division of the court.” *State v.*

*Moore*, 7th Dist. No. 06MA15, 2008-Ohio-1190, ¶129. See, also, *In re S.J.K.*, 9th Dist. No. 22721, 2008-Ohio-1223, ¶7-9, citing *State ex rel. Williams v. Court of Common Pleas* (1975), 42 Ohio St.2d 433, 434-435; *State v. Banks*, 8th Dist. No. 89677, 2008-Ohio-1717, ¶12, citing *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 67.

¶{17} Therefore, considering the above, since Davis was bound over to the adult court on September 25, 2006, his statutory speedy trial time did not begin to run until September 26, 2006. The first possible tolling event occurred when the state filed its November 6, 2006 motion to join Davis' case with his co-defendant's Riley and Robinson's cases. That motion was granted two days after it was filed. 11/08/06 J.E. Case law does not clearly indicate that the state's motion to join would act as a tolling event in calculating speedy trial time. For the purposes of determining speedy trial time in this case, it is assumed, without deciding, that it does not toll the speedy trial time.

¶{18} The next motion filed is Davis' November 9, 2006 motion to continue. 11/15/06 J.E. It is well-established that the speedy trial time is tolled by the period of any continuance granted on the defendant's own motion. R.C 2945.72(H). Thus, from September 26, 2006 until November 9, 2006, 44 days had elapsed.

¶{19} When the trial court granted Davis' motion to continue, it reset the matter for December 14, 2006. Yet, prior to the case proceeding on that date, Davis moved for another continuance, which was granted and the matter was reset until February 2, 2007. 01/10/07 J.E. Then on February 2, 2007, Davis again moved for a continuance which was granted and the matter was reset for trial for March 19, 2007. 02/12/07 J.E. Clearly from November 9, 2006 until at least March 19, 2007, the speedy trial time was tolled.

¶{20} Davis contends that the next filing on the record was a May 14, 2007 Notice of Appearance and Motion to Continue filed by Attorney Zena, Davis' new counsel. Therefore, Davis concludes, there was a chargeable period of 57 days, plus 44 days which had previously accrued, which resulted in a violation of his right to a speedy trial by at least 11 days.

¶{21} The state disagrees with Davis' contention and asserts that prior to the trial date of March 19, 2007, Davis' co-defendant Deaunte Riley, with whom Davis was

being jointly tried, filed a motion to continue which tolled the speedy trial time for Davis. The state, in accordance with App.R. 9, moved to supplement the record with the judgment entry from Riley's case showing when the motion was granted and that the matter was rescheduled. 12/11/08 State's Motion to Supplement the Record. We granted the motion to supplement. 01/13/09 J.E.

¶{22} That supplemented judgment entry states:

¶{23} "Upon Motion of Attorney James S. Gentile and for good cause shown, the hearing in this matter is hereby rescheduled for the 16th day of May, 2007 \* \* \*." 03/16/07 J.E.

¶{24} Thus, prior to the scheduled trial date of March 19, 2007, Riley filed a motion to continue. We have previously held that, "[a] motion by a co-defendant may operate to extend the speedy trial time for another co-defendant." *State v. Deltoro*, 7th Dist. No. 07MA90, 2008-Ohio-4815, ¶23, citing *State v. Smith*, 2d Dist. No. 2003CA93, 2004-Ohio-6062, ¶20. Likewise, R.C. 2945.72(H) states that the time is tolled for any reasonable continuance, other than on the accused own motion.

¶{25} Our *Deltoro* case's specific use of the word **may** indicates that a co-defendant's motion does not always extend the speedy trial time of another co-defendant. It is a case by case determination that depends not only on the type of motion involved, but also, pursuant to R.C. 2945.72(H), on the length of delay that the motion causes. It is also plausible that other factors may also become relevant in determining whether the motion tolls, such as whether the co-defendant continually objects to the other co-defendant's continuances.

¶{26} Here, like *Deltoro*, the co-defendant simply moved for a continuance; this was not a motion for suppression or a more involved motion that would require responses and a hearing. Furthermore, the trial court found good cause for the continuance and the delay caused by the continuance was not unreasonable. In this instance, those facts alone are sufficient to conclude that the co-defendant's motion did toll the speedy trial time. Thus, Davis' speedy trial time was tolled until at least May 16, 2007.

¶{27} However, it did not even begin to run on that date, but continued to toll well beyond that date because of continuance motions filed by Davis. On May 16,

2007, Davis moved for a continuance which was granted and the case was reset for May 22, 2007. 05/18/07 J.E. Then on the May 22, 2007 date, Davis moved again for a continuance and the matter was reset for June 5, 2007. 05/24/07 J.E. On June 5, 2007, Davis filed another continuance motion and the case was rescheduled for trial for September 24, 2007. 06/13/07 J.E.

¶{28} Prior to the trial date, on July 9, 2007, Davis filed a motion to dismiss based on speedy trial grounds and the state responded to that motion on August 1, 2007. A motion to dismiss based on a speedy trial violation stops the speedy trial clock until the motion is resolved. *State v. Nottingham*, 7th Dist. No. 05BE39, 2007-Ohio-3040, ¶14.

¶{29} The record does not contain a judgment entry denying or granting the motion to dismiss. However, on September 20, 2007, there was a judgment entry from the trial court indicating that its previous order of joinder in this case and in Davis' co-defendants' cases were vacated and separate trials were ordered. The order also indicated that Davis' trial was set for September 25, 2007. 09/20/07 J.E. While that judgment entry does not expressly state that the motion to dismiss is overruled, it can be concluded that it was because trial was set for September 25, 2007. This date is one day later than was originally indicated in the June 13, 2007 judgment entry that granted Davis' June 6, 2007 motion to continue and reset the trial for September 24, 2007. Thus, while the motion to dismiss was resolved, the time still was tolled due to the June 13, 2007 continuance ruling.

¶{30} However, the time did not begin to run at the end of September since on September 24, 2007, Davis filed a motion to continue because his counsel had to have emergency oral surgery. 09/25/07 J.E. The trial court granted the continuance and stated that Davis' trial would follow his co-defendants Robinson and Riley's trials. 09/25/07 J.E.

¶{31} The docket for Robinson indicates that his trial was set for September 26, 2007, but was continued so that he could take a polygraph test. The dockets of Riley and Robinson's cases indicate that neither co-defendant had gone to trial when



Davis executed his waiver of speedy trial time on November 16, 2007.<sup>1</sup> Thus, the speedy trial time was still tolled on that date.

¶{32} As can be seen from a recitation of the filing dates, the speedy trial time had not expired when the motion to dismiss was filed or when the waiver of speedy trial time was executed. Since Davis' argument of ineffective assistance of counsel is premised on the fact that the speedy trial time had run when the motion to dismiss was filed or at the latest when he executed the waiver, his argument fails. Or in other words, as he cannot show a speedy trial violation, he cannot show that but for counsel's error he would have insisted on going to trial instead of pleading guilty. Thus, we do not find that the plea was not knowingly entered.

¶{33} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.  
Waite, J., concurs.

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<sup>1</sup> In a judgment entry dated March 28, 2008, the court indicated that it was informed that a plea agreement had been reached in Robinson's case and that a plea hearing was scheduled for April 2008. The docket for Riley indicated that on the February 11, 2008 trial date, the court was informed that a plea agreement had been reached and that a plea hearing was scheduled for April 2008. 02/13/08 J.E.