[Cite as *State v. Foden*, 2009-Ohio-6532.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 CO 44
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
MARK E. FODEN	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio
Case No. 2008 CR 99

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Robert Herron
Columbiana County Prosecutor
Atty. Tammie Riley Jones
Assistant Prosecuting Attorney
105 South Market Street
Lisbon, Ohio 44432

For Defendant-Appellant:

Atty. Bryan H. Felmet
1100 Jackson Place
Steubenville, Ohio 43952

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 8, 2009

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WAITE, J.

{¶1} Counsel for Appellant Mark E. Foden has filed a no merit brief and a request to withdraw as counsel pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.Ed.2d 419. For the following reasons, counsel's motion to withdraw is sustained and Appellant's conviction and sentence are affirmed.

{¶2} Appellant was arrested on March 21, 2008, for robbing the Giant Eagle grocery store in downtown East Liverpool, Ohio. He was notified of his Miranda rights and was interviewed by Detective Dan Morgan of the East Liverpool Police Department. During the interview, Appellant admitted to the robbery. Appellant was indicted on May 2, 2008, on two counts of robbery, R.C. 2911.02(A)(2), second degree felonies. One count involved the robbery at Giant Eagle. The other count in the indictment referred to an earlier robbery on March 14, 2008, at a drive-through beverage store in East Liverpool. Counsel was appointed to represent Appellant. On June 10, 2008, counsel filed a motion to suppress two statements Appellant had made confessing to the crime. This motion also sought to prevent the state from using two photo array identifications that had been conducted by the East Liverpool Police Department. The court held a hearing on the motion, and denied both prongs on June 13, 2008. On July 25, 2008, counsel filed a motion to dismiss on speedy trial grounds, which was denied on August 8, 2008. Trial was reset for August 19, 2008.

{¶3} On August 17, 2008, Appellant escaped from the Columbiana County Jail. The court revoked and forfeited Appellant's bond and issued a bench warrant.

Appellant was rearrested on August 21, 2008, and trial was rescheduled for October 15, 2008.

{¶4} On September 26, 2008, Appellant entered into a Crim.R. 11 plea agreement. A change of plea hearing was held, at which Appellant agreed to plead no contest to the two felony robbery charges, and the state agreed to recommend six-year prison terms on each count to be served concurrently. They also agreed that Appellant would preserve the right to appeal any issues that arose prior to the plea. The court filed its judgment entry accepting the plea on September 29, 2008. The sentencing hearing took place on November 10, 2008 and the sentencing entry was filed the same day. The court sentenced Appellant to two prison terms of six years, to be served concurrently. This appeal followed on December 5, 2008.

{¶5} The trial court appointed Attorney Bryan Felmet to represent Appellant on appeal. Four transcripts were ordered. Counsel filed a no-merit brief on March 23, 2009, along with a motion to withdraw as counsel. On April 10, 2009, we issued an order granting Appellant 30 days to file any additional pro se assignments of error. Nothing additional has been filed in this case.

{¶6} Counsel is asking to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, and pursuant to this Court's ruling in *Toney*, supra. " 'It is well settled that an attorney appointed to represent an indigent criminal defendant on his or her first appeal as of right may seek permission to withdraw upon a showing that the appellant's claims have no merit. To support such a request, appellate counsel must undertake a conscientious examination of the case

and accompany his or her request for withdrawal with a brief referring to anything in the record that might arguably support the appeal. The reviewing court must then decide, after a full examination of the proceedings, whether the case is wholly frivolous.' " (Citations omitted.) *State v. Odorizzi* (1998), 126 Ohio App.3d 512, 515, 710 N.E.2d 1142.

{¶7} In *Toney*, this Court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶8} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶9} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶10} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶11} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purposes of appeal should be denied.

{¶12} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." *Toney*, supra, at syllabus.

{¶13} A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. In order to ensure that a plea in a felony case is being made knowingly, intelligently and voluntarily, Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that are being waived and to discuss the consequences of the plea. Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty or no contest plea in a felony case: the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶19. A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising the defendant of the constitutional rights that are waived in entering a felony plea. Id. at syllabus. Prejudice is presumed if the court fails to inform the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c). Id. at ¶29. A trial court's acceptance of a guilty or no contest plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights, "in a manner reasonably intelligible to that

defendant." *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph two of the syllabus; see also *Veney*, supra, at ¶27.

{¶14} The nonconstitutional requirements of Crim.R. 11 are subject to review for substantial compliance rather than strict compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶11-12. "Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Furthermore, "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *Griggs*, supra, at ¶12.

{¶15} In this case, the court conducted an extensive colloquy with Appellant, explaining all of his constitutional and nonconstitutional rights as set forth in Crim.R. 11(C). The court specifically reviewed the five constitutional rights being waived in Crim.R. 11(C)(2)(c), and also explained the various nonconstitutional issues, including the effect of entering a no contest plea.

{¶16} Appellant particularly wished to preserve his right to appeal the speedy trial issue raised by motion on July 25, 2008. In the motion he argued that the state was required by R.C. 2945.71(C)(2) to bring Appellant to trial within 90 days because he had been continuously incarcerated since the day of his arrest on March 21, 2008. The state responded to the motion, a hearing was held, and the court overruled the motion. It is clear from the record that any argument that Appellant might make on appeal would be frivolous.

{¶17} The Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 10, Article I, Ohio Constitution, guarantee a criminal defendant the right to a speedy trial by the state. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 8, 516 N.E.2d 218. In addition to these constitutional protections, R.C. 2945.71(C)(2) provides that, for a person charged with a felony, a trial must be conducted within 270 days after arrest or the service of summons. Each day that the defendant is held in jail in lieu of bond on the pending charge is counted as three days for purposes of speedy trial computations. R.C. 2945.71(E). The three-for-one provision only applies if the defendant is held in jail in lieu of bond solely on the pending charge. *State v. McDonald* (1976), 48 Ohio St.2d 66, 2 O.O.3d 219, 357 N.E.2d 40, paragraph one of the syllabus.

{¶18} The date of arrest is not included when calculating the time in which an accused must be brought to trial. *State v. Steiner* (1991), 71 Ohio App.3d 249, 250-252, 593 N.E.2d 368; see also R.C. 1.14, Crim.R. 45.

{¶19} Appellant was not held in jail solely on the pending robbery charges during at least a portion of the time he was incarcerated prior to the filing of his motion to dismiss on speedy trial grounds. He was also serving a 146-day jail sentence for a probation violation beginning on April 14, 2008. This period of time does not qualify for the triple-count provision of R.C. 2945.71(E). Even if no other tolling factor is considered (and there were many, including Appellant's filing of various motions and requests for discovery), when the triple-count provision is eliminated for the period of April 15 (the first day of incarceration) to June 8 (when his

incarceration for the probation violation was temporarily suspended), Appellant was brought to trial within the period mandated by statute. The prosecutor presented this information to the trial court in response to Appellant's motion to dismiss, and the record confirms the prosecutor's calculations are correct. Appellant has no reasonable speedy trial issue to raise on appeal, and any attempt to raise it would be frivolous.

{¶20} The other two issues that might have been raised are the confessions and photo arrays. There were two confessions that Appellant attempted to suppress. The first was a written statement he gave at the police station. We note that the motion to suppress that Appellant filed was a boilerplate form and did not contain any specific references to the facts or circumstances of Appellant's case. Instead, the motion cited general law regarding Miranda rights, waiver and custodial interrogation.

{¶21} A person must be advised prior to custodial interrogation that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. These rights may be waived. Id. The state bears the burden of establishing, by a preponderance of the evidence, that the defendant knowingly, intelligently, and voluntarily waived his Miranda rights based on the totality of the circumstances surrounding the investigation. *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, 653 N.E.2d 253. The record contains a written waiver of Miranda rights form signed by Appellant, and the written statement also signed by Appellant. There was nothing

presented at the suppression hearing indicating any type of coercion or challenge to the validity of the written waiver of Miranda rights.

{¶22} Appellant attempted to establish that he might have been under the influence of drugs when he gave his written confession. The presence of drugs or alcohol in a person's system will not, by itself, make a confession inadmissible. *State v. Daniel* (Dec. 31, 1990), 11th Dist. No. 89-T-4214. The evidence must show that the drugs or alcohol sufficiently impaired the confessor's ability to reason. *Townsend v. Sain* (1963), 372 U.S. 293, 306-308, 83 S.Ct. 745, 9 L.Ed.2d 770; *United States v. Brown* (C.A.8, 1976), 535 F.2d 424, 427. In the instant case, Appellant's written confession states that he was "high on crack" cocaine when he committed the crime, but does not state that he was "high" or impaired when he gave the confession. (6/12/2008 Tr., State's Exh. 2.) The officer who took the confession testified that at no point was he concerned that Appellant might be impaired to the point that he was not able to understand or properly waive his rights. (6/12/08 Tr., pp. 11, 29-30.) The confession itself is coherent and clearly written, showing no obvious indications of impairment. Any challenge of the written confession would be frivolous.

{¶23} Appellant also gave an oral confession to the police. While Appellant was handcuffed in the police station, he requested a glass of water. Patrolman Steven Adkins brought Appellant a glass of water, and as he handed him the water, Appellant mumbled some words. (6/12/2008 Tr., p. 36.) The officer asked Appellant what he had said, and Appellant stated: "I did it. I robbed Giant Eagle." (6/12/2008 Tr., p. 36.) Any attempt to argue that Appellant had been induced to give a

confession under police interrogation without first receiving and waiving his Miranda rights would be frivolous. *Miranda v. Arizona* does not bar a person from giving voluntary statements to the police: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, supra, 384 U.S. at 478, 86 S.Ct. 1602, 16 L.Ed.2d 694. There is no indication from the record that any type of interrogation was taking place when Appellant made his comment about robbing Giant Eagle, and thus, there can be no Miranda error.

{¶24} Appellant also attempted to prevent the state from relying on two photo arrays used to identify Appellant as the perpetrator of the crimes. A photo array is one possible element in the identification of a criminal defendant, and, "[t]he focus, under the 'totality of the circumstances' approach, is upon the reliability of the identification, *not* the identification procedures." (Emphasis in original.) *State v. Jells* (1990), 53 Ohio St.3d 22, 27, 559 N.E.2d 464. One of the victims knew appellant by sight and identified him as a customer who had been in the Giant Eagle store frequently. (6/12/2008 Tr., p. 15.) This type of direct evidence establishing

identification is sufficient to overcome any problems regarding a photo array identification. See *State v. Williams* (1995), 73 Ohio St.3d 153, 163, 652 N.E.2d 721. The photos were selected using a computer program and there is nothing about the photos themselves that indicates that the identification was biased or unreliable. See *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819. Appellant did attempt to argue that his mullet hairstyle was somehow suggestive in the photo arrays. Since one of the victims knew Appellant by sight as a regular customer, the presence or absence of a specific hairstyle in a photo would not affect the reliability of identifying Appellant. The victims were also instructed prior to being shown the photo array that the suspect may or may not be in the array, and they were told not to make an identification based on hairstyle because each person's hairstyle might have changed from the time the photo was taken. (6/12/2008 Tr., p. 30.) Any alleged errors regarding the photo arrays would be frivolous.

{¶25} With respect to sentencing, there are no errors which could arguably be presented as issues for appeal. Felony sentences are reviewed to determine whether the sentence is clearly and convincingly contrary to law and whether the trial court abused its discretion in imposing the sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14. Appellant pleaded guilty to two counts of robbery, both second degree felonies and both subject to possible eight-year prison terms. Appellant and his counsel were permitted to give statements at the sentencing hearing. The court considered the purposes and principles of the felony sentencing statutes. The record indicates that Appellant had an extensive criminal

record and that Appellant was on probation when the robberies occurred. The prosecutor recommended a six-year prison term, and this was the sentence imposed by the court. The court gave Appellant credit for 235 days of jail-time already served. The court did not impose maximum or consecutive sentences, and the sentence was within the range of sentences for second degree felonies established by R.C. 2929.14(A)(2). The court advised Appellant regarding post release control. The court did not base its sentence on any felony sentencing statutes that have been ruled unconstitutional by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and related cases. Based on the entirety of the record, we find no errors of law or abuse of discretion in the sentence imposed by the trial court.

{¶26} This appeal is wholly frivolous, and therefore, counsel is permitted to withdraw and the judgment of conviction and sentence is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.