

[Cite as *State v. Glass*, 2011-Ohio-6287.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-558
v.	:	(C.P.C. No. 10CR01-483)
	:	
Timothy M. Glass,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Timothy M. Glass, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm.

{¶2} On September 12, 2008, a Franklin County Grand Jury indicted appellant on 12 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322 and six counts of illegal use of a minor in nudity oriented material or performance in violation of R.C. 2907.323. Appellant entered not guilty pleas to the

charges and the matter proceeded. Between September 19 and October 17, 2008, appellant filed six pro se motions, seeking inter alia, discovery, dismissal, a continuance, a pretrial, and a bill of particulars. On October 21, 2008, appellant filed an affidavit of indigency and the trial court appointed public defender Norman Anderson to represent appellant. However, on December 9, 2009, the trial court granted Anderson's motion to withdraw as counsel and appointed Joe Scott to represent appellant. After a number of continuances, a jury trial was scheduled to begin on January 25, 2010.

{¶3} On December 16, 2009, appellant filed through counsel a motion to extend time to file motions and requests for discovery and a bill of particulars. On January 6, 2010, appellant filed through counsel a motion for a private investigator at state expense.

{¶4} Prior to the commencement of trial on January 25, 2010, appellant's counsel filed at appellant's specific request, several motions, including a motion to have the charges against him dismissed due to a violation of his speedy trial rights, a motion to dismiss based on selective prosecution, a motion for relief from prejudicial joinder, a motion for an expert witness at government expense, and a witness list. Appellant also informed the trial court that he wanted to represent himself at trial and stated, "I wanted to represent myself during the entire time with Mr. Anderson." (Tr. 13-14.) The trial court told appellant that it did not think appellant was qualified to represent himself and that to do so would be a "dire mistake." (Tr. 15.) Appellant then requested to act as "co-counsel" with his appointed counsel. During their discussions, the following exchange occurred:

The court: Do you understand, Mr. Glass, if I were to do that, that you are bound by the same rules as a lawyer? And you are not -- you just indicated to me a few minutes ago that you

are not trained as a lawyer, but you understand that you'd be bound by the same rules as a lawyer as far as evidentiary matters, objections that may be made by the state. And I'm concerned that you don't have that background and knowledge to do that.

[Appellant]: I do not, your Honor.

The court: And you understand my concern?

[Appellant]: I do, you Honor.

The court: So you're asking to assume that responsibility, but you don't have the background?

[Appellant]: That is correct, your Honor.

(Tr. 26-27.)

{¶5} It was also learned at this hearing that despite the fact appellant did not attend college, he graduated from high school and had "tried cases before," though the record is lacking as to the type of cases and time-frame in which such cases were tried. (Tr. 27.) Appellant then reiterated his desire to act as "co-counsel" with his appointed counsel, and the trial court indicated that it would permit such an arrangement. The plea offers were read into the record, and appellant confirmed that his counsel conveyed the state's offers and that he "was not interested." (Tr. 30.) The trial court then denied the motions filed at appellant's request, with the exception of authorizing funds for a computer expert, and appellant's counsel conducted voir dire that afternoon and the following day.

{¶6} However, on January 27, 2010, a Franklin County Grand Jury rendered a superseding indictment against appellant. Though appellant was re-indicted on the same 18 counts as set forth in his original indictment, the dates had been changed on certain counts. As a result, the trial court entered a nolle prosequi regarding the first indictment.

Appellant indicated his willingness to proceed with arraignment on the new indictment and to waive both reading and service of the same. Appellant again entered pleas of not guilty, a bond was set, and the trial court again appointed Scott to represent appellant. Thereafter, a trial on the superseding indictment was scheduled for March 10, 2010.

{¶7} Motions again were filed at appellant's express request including a motion to dismiss for lack of a speedy trial, a motion to sever the charges, a motion to suppress, and a motion for fees. These motions were argued by counsel on March 10, 2010, and denied from the bench. Additionally, the trial court reconsidered its decision to allow appellant to serve as "co-counsel" with his appointed counsel. The trial court told appellant that, pursuant to Ohio law, he could either represent himself or have appointed counsel. After hearing more warnings about self-representation, appellant again asked to represent himself. The trial court allowed appellant to represent himself, while his former counsel sat at counsel table and served as his "legal advisor."

{¶8} The jury ultimately found appellant guilty of ten counts of pandering sexually oriented matter involving a minor and four counts of illegal use of a minor in a nudity oriented material or performance. The jury found appellant not guilty on the remaining four counts of the indictment. A pre-sentence investigation was ordered and the trial court sentenced appellant accordingly.

{¶9} Appellant now appeals and assigns the following errors:

I. APPELLANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED UNDER OHIO LAW AS WELL AS THE OHIO AND FEDERAL CONSTITUTIONS WHEN NUMEROUS DELAYS OCCURRED PRIOR TO HIS TRIAL.

II. THE TRIAL COURT COMMITS PREJUDICIAL ERROR WHEN IT FAILS TO ADEQUATELY QUESTION AND

INQUIRE OF APPELLANT AS TO WHETHER HE FULLY UNDERSTOOD AND INTELLIGENTLY RELINQUISHED HIS RIGHT TO COUNSEL.

III. OHIO STATUTES R.C. §2907.322 AND R.C. §2907.323 ARE UNCONSTITUTIONALLY OVERBROAD BECAUSE SAID STATUTES REGULATE MORE CONDUCT THAN THE OHIO GENERAL ASSEMBLY CAN LAWFULLY REGULATE THEREBY DENYING APPELLANT'S DUE PROCESS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS. AS SUCH, APPELLANT'S PROSECUTION AND SENTENCE VIOLATES FEDERAL CONSTITUTIONAL LAW UNDER THE TENETS OF *ASHCROFT V. FREE SPEECH COALITION*, 535 U.S. 234 (2002).

IV. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PRE-TRIAL STAGES AND PRIOR TO HIS SELF-REPRESENTATION CONTRA HIS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS.

{¶10} Appellant asserts in his first assignment of error that the trial court erred in denying his motion to dismiss for violations of both his statutory and constitutional rights to a speedy trial. We disagree.

{¶11} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I, Ohio Constitution. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶32. These speedy trial rights are essentially equivalent. *State v. Butler* (1969), 19 Ohio St.2d 55, 57. Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 1996-Ohio-171; *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶10.

{¶12} We first address appellant's statutory claim. R.C. 2945.71(C)(2) requires a criminal defendant against whom a felony charge is pending to be brought to trial within

270 days from his arrest. Appellant was not arrested on these charges; instead, he received a certified summons on September 15, 2008 and was arraigned on September 26, 2008.¹ Therefore, we will begin counting days from September 15, 2008, the day appellant received his summons. *State v. Dillon*, 10th Dist. No. 05AP-679, 2006-Ohio-3312, ¶33, discretionary appeal not allowed, 111 Ohio St.3d 1493, 2006-Ohio-6171; *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, ¶20; *State v. Galluzzo*, 2d Dist. No. 2004 CA 25, 2006-Ohio-309, ¶30; *State v. Shabazz*, 8th Dist. No. 95021, 2011-Ohio-2260, ¶25.

{¶13} Here, 541 days elapsed from September 15, 2008 until appellant's trial began on March 10, 2010. Upon demonstrating that more than 270 days elapsed before trial, a defendant establishes a prima facie case for dismissal based on a speedy trial violation. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶9. Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended. *Id.*; *State v. Butcher* (1986), 27 Ohio St.3d 28, 31. Hence, the proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶32, citing *State v. DePue* (1994), 96 Ohio App.3d 513, 516. In order to meet its burden, the state argues that the speedy trial time was tolled as a result of multiple continuances that delayed appellant's trial. We agree.

¹ Although appellant's original indictment was subsequently dismissed, the counting of days in this analysis does not begin again upon the second indictment, as the charges in that indictment were based on the same facts as set forth in the first indictment. *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, ¶20.

{¶14} Pursuant to R.C. 2945.72(H), the time within which an accused must be brought to trial is extended by "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion."

{¶15} The trial court granted continuances upon appellant's own motion or upon the joint motions of the parties from November 26, 2008 to January 25, 2010. In sum, appellant's trial dates were continued either at his request or by the request of the parties for a total of 425 days. These continuances toll the speedy trial time limits. R.C. 2945.72(H) (continuances on accused's own motion toll time); *Dillon* at ¶35 (continuances granted upon joint motions toll time); *State v. Brown*, 7th Dist. No. 03-MA-32, 2005-Ohio-2939, ¶41-44 (continuances granted on accused's own motion or by joint motions toll time). Thus, for statutory speedy trial purposes, appellant was brought to trial in 116 days²—well within the 270-day time limitation.

{¶16} Appellant argues that the continuances should not toll the time period because they were not reasonable. We disagree. R.C. 2945.72(H) does not require that a continuance granted upon the accused's own motion be reasonable for the time period to be tolled. Additionally, any continuances granted by a joint motion or agreement of the parties also toll the statutory time period. *Dillon* at ¶35; *State v. Canty*, 7th Dist. No. 08-MA-156, 2009-Ohio-6161, ¶83; *State v. Brime*, 10th Dist. No. 09AP-491, 2009-Ohio-6572, ¶13 (tolling time for continuance requested by both the state and defense counsel); *State v. Barbour* (May 6, 2008), 10th Dist. No. 07AP-841, ¶17 (distinguishing

² 541 - 425 days = 116 days

continuances requested by state versus those requested by defendant or on joint motion). The only continuances that must be reasonable in order to toll the statutory time limits are those requested by the state or sua sponte ordered by the trial court. *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶35. None of the continuances granted in this case fall under either of those categories.

{¶17} Appellant also argues that these continuances should not toll the time period because he did not consent to them. Again, we disagree. It is well-established that a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections. *State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶37, citing *State v. McBreen* (1978), 54 Ohio St.2d 315.

{¶18} In the present case, the 425 days of continuances either requested by appellant or the parties toll the speedy trial time limits. Accordingly, appellant was tried within the statutory speedy trial time limits.

{¶19} Having found that appellant's statutory right to a speedy trial was not violated, we must next address whether his constitutional right to a speedy trial was violated. In *Barker v. Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, the United States Supreme Court set forth four factors to consider when evaluating whether an appellant's right to a speedy trial was violated: (1) whether the delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay. These factors are balanced in a totality of the circumstances setting with no one factor controlling. *Id.* The

Supreme Court of Ohio has also adopted this test to determine if an individual's constitutional speedy trial rights have been violated. *State v. Selvage*, 80 Ohio St.3d 465, 467, 1997-Ohio-287.

{¶20} The first of these factors, the length of the delay, "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 430 U.S. at 530, 92 S.Ct. at 2192; *Doggett v. United States* (1992), 505 U.S. 647, 651, 112 S.Ct. 2686, 2690-91. Therefore, the *Barker* analysis is only triggered once a "presumptively prejudicial" delay is shown. *Doggett*, 505 U.S. at 651-52, 112 S.Ct. at 2690-91; *State v. Yuen*, 10th Dist. No. 03AP-513, 2004-Ohio-1276, ¶10. Generally, delay is presumptively prejudicial as it approaches one year. *State v. Miller*, 10th Dist. No. 04AP-285, 2005-Ohio-518, ¶12. Here, appellant's trial began much longer than one year after his indictment. Therefore, we will consider the other *Barker* factors to determine if appellant's constitutional speedy trial rights were violated.

{¶21} The second factor focuses on the reasons for the delay. This factor is concerned with whether the government or the defendant is more to blame for the delay. *Doggett*, 505 U.S. at 651, 112 S.Ct. at 2690. Here, a large portion of the delay—252 days—occurred as a result of continuances requested solely by appellant's trial counsel. Another 173 days were the result of continuances that appellant's trial counsel agreed to. The state did not solely request any of the continuances and the trial court never sua sponte continued the trial for any reason. Thus, it appears that most of the blame for the delay lies with appellant. Hence, this factor does not weigh in appellant's favor.

{¶22} The next factor concerns appellant's assertion of his rights to a speedy trial. Appellant did file a motion to dismiss the charges based on his speedy trial rights. However, he did not file such motion until well after a year had passed after he was re-indicted on these charges. Thus, while this factor weighs in appellant's favor because he did assert his right to a speedy trial, it is not a persuasive factor in our consideration. *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶31 (weighing defendant's two-month delay in filing motion to dismiss against defendant's claim).

{¶23} The final factor is prejudice. In assessing prejudice in this context, we consider the specific interests the right to a speedy trial was designed to protect: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defendant's defense will be impaired by dimming memories and loss of exculpatory evidence. *Doggett*, 505 U.S. at 654, 112 S.Ct. at 2692; *Walker* at ¶32.

{¶24} Pretrial incarceration is not implicated because appellant did not spend any time in jail awaiting trial on these charges. Instead, appellant argues that the delay caused him anxiety and concern and led to the potential for diminished memories and credibility of the witnesses to the events. We find neither of these considerations weigh in favor of appellant's claim of prejudice.

{¶25} Despite his claim that the delay may have caused memories to fade, he does not point to any particular witness who has claimed a loss of memory, nor does he claim that any of his witnesses died or otherwise became unavailable because of the delay. *Walker* at ¶34; *State v. Scott*, 10th Dist. No. 09AP-611, 2009-Ohio-6785, ¶28. Additionally, we note that the delay in this case would have equally weakened the memories of both the appellant's and the state's witnesses; appellant does not

demonstrate how the passage of time particularly prejudiced his ability to prepare and try his case. *State v. Stamper*, 4th Dist. No. 05CA21, 2006-Ohio-722, ¶29 (appellant failed to demonstrate particular trial prejudice resulting from delay); *Walker*.

{¶26} Lastly, although facing criminal charges for an extended period of time necessarily entails some level of anxiety and concern, appellant's bare allegation of anxiety and concern presents no particular reason for this factor to weigh heavily in our consideration. See *State v. Eicher*, 8th Dist. No. 89161, 2007-Ohio-6813, ¶33 ("blanket statement" of anxiety caused by delay was insufficient to establish prejudice).

{¶27} After carefully considering the *Barker* factors, we conclude that the delay in this case between indictment and trial does not violate appellant's constitutional right to a speedy trial.

{¶28} Finding that neither appellant's statutory right nor constitutional right to a speedy trial was violated in this case, we overrule appellant's first assignment of error.

{¶29} In his second assignment of error, appellant claims that the trial court failed to make a sufficient inquiry into his decision to waive his right to counsel and represent himself at trial.

{¶30} As recently reiterated by the Supreme Court of Ohio, a criminal defendant has a constitutional right to represent himself at trial. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶89, citing *Faretta v. Cal.* (1975), 422 U.S. 806, 95 S.Ct. 2525. A defendant may proceed without counsel if the defendant has made a knowing, voluntary, and intelligent waiver of the right to counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶24; see also Crim.R. 44(A) (defendant may forgo counsel after being fully advised, knowingly, intelligently, and voluntarily waives right to counsel).

{¶31} To establish an effective waiver of the right to counsel, the trial court must make a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right. *Johnson* at ¶89, quoting *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph two of the syllabus; *Martin* at ¶39. However, the United States Supreme Court has not prescribed a precise formula or script that must be read to a defendant who indicates that he desires to proceed without counsel. *Johnson* at ¶101. Instead, to be valid, a waiver of the right to counsel must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Martin* at ¶40, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 323; *State v. Suber*, 154 Ohio App.3d 681, 2003-Ohio-5210, ¶15. A trial court must make a defendant aware "of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *State v. Montgomery*, 10th Dist. No. 02AP-927, 2003-Ohio-2888, ¶14, quoting *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541.

{¶32} On January 25, 2010, prior to trial on the initial indictment, appellant informed the trial court that he wanted to represent himself in this matter. Appellant told the trial court that he made his decision to represent himself "of my own free will." (Tr. 105.) Additionally, the trial court repeatedly warned appellant of the dangers of self-representation. On appeal, appellant contends that because the trial court failed to advise him of the nature of the charges, possible penalties, and possible defenses to the charges before he made that decision, the waiver of counsel was not validly entered.

{¶33} Indeed, the Supreme Court of Ohio concluded in *Martin* that the defendant did not effectively waive his right to counsel based in part because the trial court failed to explain the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation or other facts essential to a broad understanding of the whole matter. *Id.* at ¶43, citing *Von Moltke*, 332 U.S. at 724, 68 S.Ct. at 323. However, two years later, the Supreme Court decided *Johnson*, a case in which the defendant faced the death penalty. In *Johnson*, the court concluded there was a valid waiver of the right to counsel where the defendant elected to represent himself for a portion of his trial. The court in *Johnson* distinguished *Martin* in two ways: (1) the defendant in *Martin* conducted his whole defense by himself, whereas the defendant in *Johnson* had counsel until the close of the state's case; and (2) the warnings in *Martin* were inadequate due to the defendant's confusion about self-representation, whereas the defendant in *Johnson* "displayed no confusion about what he wanted or what self-representation meant." *Johnson* at ¶97. Notably, *Johnson* makes no mention of the trial court informing the defendant of the nature of the charges, lesser-included offenses, the range of allowable punishments, possible defenses or mitigation, but, rather, *Johnson* focused on the defendant's knowledge of the charges and that he faced the death penalty, as well as the defendant's insistence of forgoing his right to counsel during trial.

{¶34} Here, like the defendant in *Johnson*, despite being given repeated warnings about the dangers of self-representation, appellant displayed no confusion about wanting to proceed without counsel. In fact, appellant was unequivocal in his desire to represent himself and forgo his right to counsel and repeatedly requested that the trial court permit him to represent himself, beginning on January 25, 2010 and continuing until the start of

trial on the superseding indictment on March 10, 2010. Prior to starting trial on March 10, the court again discussed with appellant his desire to represent himself and the court again expressed its opinion that appellant have Scott represent him:

The court: You're acting as your counsel. I have given you that opportunity. If you wish, I will give you a chance to confer with Mr. Scott during recesses, and during intervals, at recesses. Do you understand that?

[Appellant]: Yes, your Honor.

The court: But we are not going to go back and forth after every question or a situation should arise. We're not going to do that.

[Appellant]: Yes, your Honor. Thank you, your Honor.

The court: Okay. That is the reason, Mr. Glass, I have said it once and I have said it twice, I have said it more than three times, that is the reason I have -- Mr. Glass, give me your attention.

[Appellant]: I'm sorry, your Honor.

The court: That is the reason I have suggested so strongly that Mr. Scott represent you. That is the reason I have -- I can't say it any more explicit than that.

[Appellant]: Yes, your Honor.

The court: You don't just want that to happen; is that correct?

[Appellant]: Yes, your Honor.

The court: And you have made this decision?

[Appellant]: I have made this decision of my own free will, yes, your Honor.

(Tr. 104-05.)

{¶35} In addition to being made aware of the dangers and disadvantages of self-representation, for a defendant's waiver of the right to counsel to be valid, the waiver must be made with an understanding of the nature of the charges, the range of allowable punishments, the possible defenses, any mitigating circumstances, and the dangers of self-representation. *Gibson* at 377. "However, the United States Supreme Court 'ha[s] not * * * prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election * * * will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.' " *Johnson* at ¶101, quoting *Iowa v. Tovar* (2004), 541 U.S. 77, 88, 124 S.Ct. 1379, 1387.

{¶36} In the case before us, appellant was indicted on September 12, 2008, and immediately filed, pro se, a motion to dismiss, a request for discovery, and a request for bill for particulars. The substance of the motions demonstrates an appreciation and understanding of the legal process as it pertains to the matter herein. Shortly thereafter, Anderson was appointed to represent appellant and this representation lasted until December 9, 2009, at which time Anderson withdrew and the trial court appointed Scott to represent appellant. Trial on the charges contained in the initial indictment commenced on January 25, 2010, and Scott conducted voir dire. However, the matter was dismissed due to the re-indictment of the charges with amended dates. Thus, by the time appellant went to trial on the re-indictment, he had been represented by two different attorneys and had been represented until the completion of voir dire proceedings in the initial trial. See *Johnson* at ¶101, quoting *Maynard v. Meachum* (C.A.1, 1976), 545 F.2d

273, 279 ("it may be proper to presume that the defense counsel who represented [defendant] * * * had discussed all relevant aspects of the case with him").

{¶37} The record also reflects appellant was extensively involved in his own defense as not only did appellant file a number of pro se motions, but, also, appellant explicitly requested that Scott file a number of pretrial motions, including a motion for expert witness at government expense, a motion to dismiss based on selective prosecution based on the allegation that not all of the participants in this matter had been charged, a motion to dismiss the indictment for alleged constitutional violations, and a motion to sever the charges. On January 25, 2010, prior to trial's commencement, appellant argued his motion for selective prosecution, stating, in part:

And then you have me, who they are saying is showing these pictures to other people. And it just seems rather unfair that you have four people who have all committed the same offense or could fall into under the statute, two of which have admitted that they knew how old they were, and that they took the pictures. And the third person who admits that he did transfer the pictures; but yet, the prosecution has said we're not going to prosecute these other three people. We're only going to prosecute Mr. Glass.

(Tr. 36-37.)

{¶38} Thus, not only the substance of his motions, but also his arguments to the court, demonstrate an understanding of the law upon which he was charged. Additionally, appellant understood he would be held to the same standard as that for all lawyers, he provided Scott with a witness list naming 35 persons, and appellant discussed discovery that he thought "would be helpful in [his] defense." (Tr. 102.) The record also reflects that Scott had "gone over the previous indictment" with appellant, and

appellant admitted he understood the indictment such that he waived a reading of the same. (Tr. 61.)

{¶39} We note the record itself is devoid of any discussion regarding the range of potential sentences. However, the record does indicate that two different plea offers were extended to appellant and put on the record, and, appellant confirmed he was "not interested" in them. (Tr. 30.) Accordingly, we believe it proper under these facts, and with no argument or evidence presented to the contrary, to presume that when discussing the plea offers, appellant's counsel discussed with him the range of allowable punishments. *Johnson* at ¶92, quoting *Maynard* (in a case where a defendant has been represented by counsel for a portion of the proceedings, "it may be proper to presume that the defense counsel who represented [defendant] * * * had discussed all relevant aspects of the case with him' "). In our view, the above mentioned case-specific factors affirmatively demonstrate appellant's understanding of the concepts deemed important in *Martin*, i.e., the nature of the charges, the offenses included within them, possible defenses, and the range of allowable punishments.

{¶40} After reviewing the record in its entirety, including appellant's conduct throughout these proceedings, we conclude, as did the court in *Johnson*, that the inquiry of appellant was sufficient and that the circumstances presented here did not demand additional examination by the trial court. *State v. Tierney*, 8th Dist. No. 78847, 2002-Ohio-2607 (more thorough examination not required where the record reflects the defendant made a knowing and intelligent choice to represent himself).

{¶41} Finding that the record herein establishes that the trial court made a sufficient inquiry to determine that appellant knowingly, intelligently, and voluntarily waived his right to counsel, we overrule appellant's second assignment of error.

{¶42} In his third assignment of error, appellant challenges the constitutionality of R.C. 2907.322 and 2907.323. Specifically, appellant contends said provisions of the Ohio Revised Code are unconstitutionally overbroad under *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389.³

{¶43} We begin our analysis of this assignment of error by noting that appellant did not previously challenge the constitutionality of R.C. 2907.322 and 2907.323. The failure to challenge the constitutionality of a statute or its application at the trial court level, when the issue is apparent at the time of trial, waives the issue and departs from Ohio's orderly procedure. *State v. Curtis*, 10th Dist. No. 09AP-1199, 2011-Ohio-3298, ¶43, citing *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741, ¶28. As a result, the issue need not be heard for the first time on appeal. *Id.* See also *In re D.T.*, 10th Dist. No. 07AP-853, 2008-Ohio-2287, ¶19; *In re N.W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

³ *Ashcroft* examined "virtual child pornography," meaning pornography that depicts children through images that are either entirely computer-generated or that are created using only adults. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶18. The challenge in *Ashcroft* was to the Child Pornography Prevention Act of 1996, that broadened the definition of child pornography to include sexually explicit images that appeared to depict minors, but were actually produced without using any real children. *Id.* at ¶19. The *Ashcroft* court found unconstitutionally overbroad the prohibition of "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." *Id.* Also found to be unconstitutionally overbroad was the definition of child pornography that included a sexually explicit image that conveyed "the impression it depicts a minor engaging in sexually explicit conduct." *Id.*

{¶44} Nonetheless, even had this argument not been waived, case law is clear that appellant would not prevail on the arguments contained in his third assignment of error.

{¶45} In *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, the Supreme Court of Ohio was asked "to determine whether the portions of R.C. 2907.322 and 2907.323 that ban possession of child pornography are unconstitutionally overbroad in light of *Ashcroft*." Id. at ¶1. The court stated, "[w]e hold that R.C. 2907.322 and 2907.323 are not overbroad." Id. at ¶2. In so holding, the court reiterated that while the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protects freedom of speech, "obscenity and child pornography are two categories of unprotected speech." Id. at ¶8.

{¶46} Appellant contends the pictures at issue here cannot be considered pornographic because they depict only non-criminal, consensual sex acts, i.e., an adult engaging in consensual sex acts with 16-17 year old females. However, as aptly pointed out by the state, though the conduct depicted may not be defined as illegal under Ohio law, the photographs' contents do constitute child pornography that is not considered protected speech under the First Amendment. As such, the state may criminalize possession of the same. *Tooley* at ¶11. The statutes challenged by appellant are not overbroad as they do not have within their reach a prohibition against constitutionally protected conduct. Id. at ¶29.

{¶47} Accordingly, we overrule appellant's third assignment of error.

{¶48} In his fourth assignment of error, appellant contends that during the time he was represented, his trial counsel was ineffective. In Ohio, a properly licensed attorney is

presumed competent. *State v. Davis*, 10th Dist. No. 09AP-869, 2010-Ohio-4734, ¶12, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *Id.*, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343.

{¶49} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069.

{¶50} In analyzing the first prong under *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. *Id.*, 466 U.S. at 692, 104 S.Ct. at 2067. To meet

that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, "a trial whose result is reliable." *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶51} Specifically, appellant contends his counsel was ineffective for failing to notify the trial court of its failure to sufficiently inquire as to whether appellant validly waived his right to counsel. Appellant also contends his counsel was ineffective for failing to challenge the constitutionality of R.C. 2907.322 and 2907.323.

{¶52} We have determined in our disposition of appellant's second assignment of error that the trial court conducted a sufficient inquiry to determine that appellant fully understood and intelligently relinquished his right to counsel such that an effective waiver of the right to counsel was established. Further, we determined in our disposition of appellant's third assignment of error that there is no merit to appellant's assertion that R.C. 2907.322 and 2907.323 are unconstitutionally overbroad under *Ashcroft*. Therefore, even assuming arguendo that appellant has demonstrated that his counsel was ineffective for failing to take such actions, appellant is unable to demonstrate any resulting prejudice therefrom, and his claim based upon ineffective assistance of counsel fails. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067.

{¶53} Accordingly, we overrule appellant's fourth assignment of error.

{¶54} Based on the foregoing, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH, J., concurs.
KLATT, J., dissents.

KLATT, J., dissenting.

{¶55} Because I do not believe that appellant's waiver of his right to counsel was effective, I respectfully dissent from the majority opinion.

{¶56} There is little doubt that appellant freely made the decision to represent himself despite a number of admonitions from the trial court. However, the issue here is whether the trial court made sufficient inquiry to determine if appellant fully understood and intelligently relinquished that right. The record reflects that the trial court failed to make any inquiry to assess appellant's level of knowledge and understanding prior to accepting his waiver of right to counsel.

{¶57} A criminal defendant has a constitutional right to represent himself at trial. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶89. A defendant may proceed without counsel if the defendant has made a knowing, voluntary, and intelligent waiver of the right to counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶24; see also Crim.R. 44(A) (defendant may forego counsel after, being fully advised, knowingly, intelligently, and voluntarily waives right to counsel).

{¶58} To establish an effective waiver of the right to counsel, the trial court must make a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right. *Johnson* (quoting *State v. Gibson* (1976), 45 Ohio

St.2d 366, paragraph two of the syllabus); *Martin* at ¶39. " 'To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.' " *Id.* at ¶40 (quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 324); *State v. Suber*, 154 Ohio App.3d 681, 2003-Ohio-5210, ¶15. A trial court must make a defendant aware of the "dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *State v. Montgomery*, 10th Dist. No. 02AP-927, 2003-Ohio-2888, ¶14 (quoting *Faretta v. Cal.* (1975), 422 U.S. 806, 835, 95 S.Ct. 2525, 2541).

{¶59} Appellant told the trial court, after a lengthy hearing, that he made his decision to represent himself "of my own free will." (Tr. 105.) Although the trial court clearly and repeatedly warned appellant of the dangers of representing himself, the trial court made no inquiry of appellant's understanding of the nature of the charges, possible penalties, or potential defenses before appellant waived his right to counsel. The majority opinion, apparently conceding this omission, presumes that appellant had sufficient information to effectively waive his right to counsel. However, courts are to indulge in every reasonable presumption against waiver of a constitutional right, including the right to have the assistance of counsel in a criminal proceeding. *State v. Haines*, 10th Dist. No. 05AP-55, 2005-Ohio-5707, ¶24 (citing *Brewer v. Williams* (1977), 430 U.S. 387, 404, 97 S.Ct. 1232, 1242).

{¶60} Here, appellant waived his right to counsel before his trial started. Therefore, he was not represented by counsel during any stage of the trial. Although appellant was previously represented by counsel during his initial trial, that representation lasted only through voir dire. Thus, this case is factually distinguishable from *Johnson*. Because *Johnson* was represented by counsel throughout much of his trial, the court presumed his knowledge of certain aspects of his case. *Id.* at ¶¶92-93. In fact, to highlight this important factor, the *Johnson* court analyzed another case in which a court excused the trial court's failure to properly inquire about the defendant's understanding of the consequences of his decision to represent himself, in part because the defendant waived his right to counsel after having been represented by counsel for 12 days of trial. *Id.* at ¶¶93 (citing *United States ex rel. Konigsberg v. Vincent* (C.A.2, 1975), 526 F.2d 131). Based on that experience, the court concluded that such inquiry would not be necessary because the defendant had "full knowledge of his right to counsel and of the importance of having counsel[.]" *Id.* (quoting *Konigsberg*).

{¶61} Despite the fact that appellant was not represented during any stage of his trial, the majority opinion presumes appellant's knowledge and understanding of the relevant aspects of his case based upon appellant's: (1) plea negotiations when he was still represented by counsel; (2) submission to trial counsel of a list of potential defense witnesses and instructions for counsel to file certain motions; (3) admission that he had discussed his previous indictment with counsel and that he understood the second indictment; and (4) his previous experience with the courts. Although these are legitimate factors that should be considered, I do not believe they are sufficient by themselves to satisfy the standard articulated in *Martin* and *Johnson*.

{¶62} Although the record reflects that prior to the commencement of appellant's first trial, he and his trial counsel met and discussed a potential plea bargain offered by the state, trial counsel indicated only that he "conveyed" the offer to appellant and that appellant "was not interested." (Tr. 30.) There is no indication that appellant's trial counsel reviewed the nature of the charges, possible defenses, possible penalties, and the strengths and weaknesses of his case. *Montgomery* at ¶20. Appellant's admission that he understood the contents of the second indictment and that he was active in planning his defense does indicate that appellant had some understanding of the charges he faced. Nevertheless, we cannot presume that he had other information essential to a broad understanding of the whole matter, such as lesser included offenses and possible penalties. Lastly, although appellant may have "tried cases before," the record does not indicate the subject matter of those cases or how that experience would substitute for the court's failure to inquire about his understanding of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Martin* at ¶40; *State v. Smith*, 9th Dist. No. 23006, 2007-Ohio-51, ¶13 (rejecting state's claim that previous trial experience could substitute for trial court's failure to properly advise defendant); *State v. Mootispaw*, 4th Dist. No. 09CA33, 2010-Ohio-4772, ¶53-54 (same).

{¶63} I recognize that the trial court went to great lengths to advise appellant of the folly of self-representation. Nevertheless, the record does not indicate that appellant made that decision with the information deemed essential in *Martin*; see also *State v. Cline*, 164 Ohio App.3d 228, 2005-Ohio-5779, ¶76 (concluding that although trial court

properly warned defendant of the danger of self-representation, it failed to advise defendant of the facts deemed essential in *Martin*). Because the trial court made no inquiry regarding appellant's understanding of this essential information, I cannot conclude that appellant waived his right to counsel "with his eye's open." *Faretta*. Therefore, I would sustain appellant's second assignment of error, reverse the trial court's decision, and remand the matter for a new trial. I would also find that sustaining appellant's second assignment of error renders moot appellant's third and fourth assignments of error. Because the majority has reached a different conclusion, I respectfully dissent.
