

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150533
Plaintiff-Appellee,	:	TRIAL NO. B-1406842
vs.	:	<i>JUDGMENT ENTRY.</i>
MIQUEL ANGEL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following his plea of guilty, defendant-appellant Miquel Angel appeals from his conviction for a single count of cocaine trafficking, punishable as a third-degree felony. Angel and two codefendants had originally been charged with three first-degree felonies for cocaine trafficking and possession.

In his first assignment of error, Angel now contends that his two trial attorneys were ineffective and thus his plea was not knowingly, intelligently, or voluntarily entered because counsel should not have permitted him to waive his right to appeal the trial court's denial of his speedy-trial motion. He asserts that but for his trial counsels' deficient performance with respect to his speedy-trial rights, he would not have pled guilty to the single, reduced felony charge, and that his involuntary plea should be set aside so that he can challenge the trial court's adverse speedy-trial ruling on appeal.

The entry of a guilty plea generally waives the right to mount an appellate challenge to the effectiveness of trial counsel, except to the extent that the ineffectiveness rendered the plea less than voluntary or intelligent. *See State v. Morgan*, 181 Ohio App.3d 747, 2009-Ohio-1370, 910 N.E.2d 1075, ¶ 25 (1st Dist.); *see also State v. Barnett*, 73 Ohio App.3d 244, 248, 596 N.E.2d 1101 (2d Dist.1991). When, as here, a defendant seeks to withdraw his guilty plea on the ground that the plea was the involuntary product of counsel's ineffectiveness, he must demonstrate first that his counsel's performance was deficient, and second, that there is a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see also State v. Fitzpatrick*, 1st Dist. Hamilton No. C-030804, 2004-Ohio-5615, ¶ 38.

With that standard in mind, we must determine whether counsels' alleged errors in arguing the speedy-trial motion amounted to ineffective assistance of counsel. A criminal defendant's right to a speedy trial is guaranteed by the federal and state constitutions. *State v. Ladd*, 56 Ohio St.2d 197, 200, 383 N.E.2d 579 (1978). R.C. 2945.71 through 2945.73 set forth the time within which a defendant must be brought to trial. For Angel, an accused felon who remained incarcerated before trial, the state was required to bring him to trial within 90 days of arrest. *See R.C. 2945.71*.

Speedy-trial time may be extended only for the reasons set forth in R.C. 2945.72(A) through (I). In particular, R.C. 2945.72(H) provides that speedy-trial time may be tolled for "[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." "Reasonable" delays sought by the state are not chargeable to the state. *See R.C. 2945.72(H)*; *see also State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 33.

Here, Angel was arrested on December 3, 2014. Angel's discovery demand tolled time until March 18, 2015, at which point only 16 days were chargeable against the state. Despite an admitted lack of familiarity with court procedures, Angel's counsel appeared in open court on March 18 and waived time until April 29, largely to allow for the preparation of a translated transcript. While this continuance was not journalized until August 28, at the subsequent hearing on Angel's speedy-trial motion, counsel ratified that he had waived time on March 18.

On April 29, Angel again requested a continuance until June 9. A pretrial hearing was held on June 16, by which date 23 days were chargeable against the state. Plea negotiations were underway. The transcript of that hearing reveals that several of Angel's codefendants waived time. But Angel's counsel did not expressly waive time. Thus the days between that hearing and the next hearing on August 10 were not chargeable to Angel. *See Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, at ¶ 22. Counting other motions, by August 10, 74 days were chargeable to the state.

On that day, the state was granted a continuance until September 8 on what the trial court had determined to be the reasonable grounds of the unavailability of police officer witnesses. *See R.C. 2945.72(H)*. On August 24, Angel's counsel filed a motion to dismiss the action on speedy-trial grounds. Following a hearing at which both of Angel's trial counsel presented cogent arguments for dismissal, made in reliance on case law, the trial court denied the motion. On September 8, Angel accepted the state's plea deal and entered a guilty plea to a single, third-degree charge of trafficking in cocaine.

As can be seen from a review of the pretrial proceedings, the trial court properly denied the speedy-trial motion as not more than 74 days of pretrial delay were chargeable to the state. Since Angel cannot show either a speedy-trial violation or that his trial counsels' performance was deficient, he also cannot show that there was a reasonable

probability that but for counsel's deficient performance, he would have insisted on going to trial to preserve appeal of the trial court's ruling. *See Hill*, 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203; *see also State v. Davis*, 7th Dist. Mahoning No. 08 MA 80, 2009-Ohio-4639, ¶ 32. Therefore, we overrule the first assignment of error.

We do find merit, however, in Angel's second assignment of error. As the state concedes, the trial court erred in modifying Angel's sentence outside of his presence. *See Civ.R. 43*. The trial court did not notify Angel at the sentencing hearing that he was ineligible for transitional control or an intensive supervision program and that he was to pay his public defender attorney fee. Yet the court's judgment entry included these provisions.

This court has long held that "[w]hen a sentence pronounced in open court is subsequently modified and the judgment entry reflects the modification, the modification must have been made in the defendant's presence." *See State v. Carpenter*, 1st Dist. Hamilton No. C-950889, 1996 Ohio App. LEXIS 4434, *4 (Oct. 9, 1996); *see also State v. Railey*, 2012-Ohio-4233, 977 N.E.2d 703, ¶ 21 (1st Dist.). The second assignment of error is sustained.

Accordingly, we vacate Angel's sentence, and remand this cause to the trial court for resentencing in accordance with law. We affirm the trial court's judgment in all other respects.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on September 30, 2016
per order of the court _____.

Presiding Judge