

H



95429219

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED

THE STATE OF OHIO
Plaintiff

Case No: CR-09-521238-A

Judge: MICHAEL J RUSSO

2016 AUG 25 A 11:30

ROBERT FALOR
Defendant

INDICT: 2913.02 THEFT; AGGRAVATED THEFT

CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY

SIGNED, ATTACHED, AND ORDERED FILED, OSJ

08/25/2016
CPMBX 08/25/2016 10:58:25

Judge Signature

Date

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CR 521238

STATE OF OHIO)
)
) Plaintiff)
)
 vs.)
)
 ROBERT FALOR)
)
) Defendant)
)

**ORDER GRANTING STATE'S
MOTION TO IMPOSE SENTENCE
FOR VIOLATION OF PLEA
AGREEMENT AND DENYING
DEFENDANT'S MOTION TO
DISMISS INDICTMENT FOR
UNREASONABLE SENTENCING
DELAY**

MICHAEL J. RUSSO, JUDGE:

This matter comes before the court on the "Motion to Impose Sentence for Violation of Plea Agreement" filed by the state of Ohio ("State") on March 22, 2016; the "Brief in Opposition . . . and Motion to Dismiss Indictment for Unreasonable Sentencing Delay or for Other Proper Relief" filed by defendant Robert Falor ("Falor") on April 26, 2016; and, the Brief in Opposition filed by the State on May 3, 2016. For the following reasons, the State's Motion to Impose Sentence is granted and Falor's Motion to Dismiss is denied.

On February 26, 2009, the State indicted Falor for a single count of Theft, in violation of R.C. 2913.02(A)(3), a third-degree felony with a sentence range of one to five years. On March 3, 2011, Falor plead no contest as part of a plea deal. "Instead of the traditional stipulation to a finding of guilt, the state [offered] the court to enter a finding of guilt but hold that sentencing for this 5-year period, at which time this case would either move forward to sentencing or be dismissed." Transcript of Change of Plea at 6. Both Falor and the State agreed at the hearing that "imposition of sentence will be stayed for 5 years." Tr. At 7. *See also* Tr. at 12, 24, 25. It was agreed that if Falor made scheduled restitution payments during the

period of the stay, then the case would be dismissed with prejudice and the plea would be vacated. Tr. at 12, 13, 19, 21, 25. The \$190,000.00 restitution payment schedule required an initial payment within 45 days of the plea, with nine \$10,000.00 minimum payments every six months thereafter. Tr. at 5. The payment schedule provided by the parties required that a balloon payment for any remaining balance be paid on May 6, 2016.

On May 6, 2011, Falor made the first required restitution payment of \$10,000.00. On August 30, 2011, a federal grand jury indicted Falor on three counts of tax evasion and he was detained. Falor has been held continuously in pre-trial detention and federal prison since that time. Falor has made no further payments as required by his plea arrangement. On December 2, 2011, this court issued a *capias* for Falor due to his missed restitution payment on November 6, 2011. The Cuyahoga County Prosecutor and County Sheriff refused to extradite Falor in 2014 after receiving written notice of Falor's imprisonment from the Federal Bureau of Prisons. Falor argues that sentencing him at this time violates his due process rights and his right to a speedy trial.

DUE PROCESS

After a finding of guilt, a "sentence shall be imposed without unnecessary delay." Crim.R. 32(A). Any delay in sentencing must be reasonable in order to be valid. *State v. Mack*, 2009-Ohio-6460 ¶ 14 (8th Dist. 2009). Courts therefore reason that the inverse is true: any unreasonable delay in sentencing invalidates the sentence. *Neal v. Maxwell*, 175 Ohio St. 201 (1963).

Falor argues that the indictment must be dismissed due to the unwarranted and unreasonable delay between his violation of the plea agreement and sentencing pursuant to

Ohio Crim.R. 32(A). Falor reasons that because the State has known his location and that he has been available for disposition of this case since February 2014, the State should have pursued disposition prior to March 22, 2016. By waiting almost 26 months to pursue the sentence, Falor argues, the State has violated his constitutional rights. Falor alleges a detriment because he will be unable to serve concurrent sentences; further, by this point in time he would have completed almost any sentence except for the maximum. Falor also asserts that he will be handicapped in obtaining mitigation and character witnesses because of the delay in sentencing.

The State argues that the facts of this case distinguish it from the case law cited by Falor. In the cases cited by Falor, the courts inexplicitly failed to act; here, however, the State argues that Falor's acceptance of the plea arrangement was the reason for the delay in sentencing. *State v. Culgan*, 2010-Ohio-2992 (2010)(where delay in sentencing due to Defendant's actions was not unreasonable). Further, even if the delay is found to be unreasonable, the proper remedy is to vacate the sentence or remove the court's jurisdiction to impose a sentence rather than to dismiss the charges. *Brown v. State*, 2003-Ohio-1218 (7th Dist. 2003).

The transcript from Falor's change of plea proceedings makes clear that the court, State, and Falor were in agreement that sentencing would not occur until after the five-year period agreed to in the plea arrangement. At least five times during that hearing it was explained explicitly that if Falor made scheduled restitution payments during the period of the stay, then the case would be dismissed with prejudice and the plea would be vacated. An equal number of times it was discussed that should Falor not make restitution, the sentencing would be held in five years. By agreeing to these beneficial terms, Falor chose to delay his sentencing and therefore waived his Due Process rights regarding the delay. The State filed its motion to

impose sentence at the latest time possible, giving Falor the maximum opportunity to pay the remaining balance under the balloon payment clause.

Falor further argues that this delay has precluded his ability to serve his sentence concurrently with his federal sentence. The court, however, has no control over whether the federal government would allow him to serve these sentences concurrently. Additionally, Falor now has the benefit of a change in the Ohio sentencing law that will reduce the length of his sentence. Had he been sentenced in 2011, the sentence would have been one to five years; the possible sentence now is 9-36 months.

Falor also argues that he is prejudiced in obtaining character and mitigation witnesses because the underlying conduct occurred 12 years ago and the plea was entered five years ago. Had Falor been sentenced in 2011, he argues, he would have been able to obtain letters of support and testimony from his family and friends more easily. The court finds this argument unpersuasive. If Falor had lived up to the details of his plea deal, he would not have needed to obtain such letters. Falor also was aware of the possibility of the federal indictment at the time of his plea in this case. Simply put, Falor cannot escape the consequences of this crime because he has had to pay for his commission of another.

The court finds that the delay in sentencing is due to the actions by Falor, and not due to inaction by the State or the court. The court further finds that the delay in sentencing is not unreasonable given the circumstances discussed above.


SPEEDY TRIAL

The arguments Falor makes regarding his speedy trial rights to be sentenced are moot after the ruling of *Betterman v. Montana*, 136 S.Ct. 1609 (2016).

CONCLUSION

For all of the foregoing reasons, Falor's Motion to Dismiss Indictment is denied and the State's Motion to Impose Sentence is granted. A pretrial is scheduled for September 1, 2016 in order to set a sentencing date.

IT IS SO ORDERED.

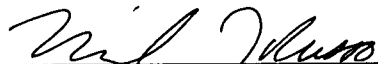

MICHAEL J. RUSSO, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Order Granting State's Motion to Dismiss Sentence for Violation of Plea Agreement and Denying Defendant's Motion to Dismiss Indictment for Unreasonable Sentencing Delay was sent by ordinary U.S. Mail this 25th day of August, 2016 to:

Jason G. Haller, Esq.
Assistant Public Defender
310 Lakeside Avenue, Suite 400
Cleveland, OH 44113
Attorney for Defendant

Paul Soucie, Esq.
Joshua L. Wilczynski, Esq.
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, OH 44113
Attorney for Plaintiff



MICHAEL J. RUSSO, JUDGE