[Cite as *State v. Mixon*, 2009-Ohio-5024.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-51
v.	:	(M.C. No. 2008 CRB 29424)
Marcus W. Mixon,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 24, 2009

Richard C. Pfeiffer, *Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias*, and *Zachary Huffman*, for appellant.

Yeura R. Venters, Public Defender, *John W. Keeling*, and *Timothy E. Pierce*, for appellee.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, the state of Ohio ("appellant" or "the state"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court granting a motion to dismiss filed by appellee, Marcus W. Mixon ("appellee"), on the grounds that the state

failed to bring appellee to trial within the time frame set forth in R.C. 2945.71. For the reasons that follow, we reverse.

{¶2} On November 26, 2008, appellee was charged with one count of domestic violence in violation of R.C. 2919.25(C), and one count of menacing in violation of R.C. 2903.22, both misdemeanors of the fourth degree. Appellee was arraigned on November 29, 2008, and requested a speedy trial. Pursuant to R.C. 2945.71(B), the state had 45 days from the date of appellee's arrest within which to bring him to trial.

{¶3} The case was scheduled for a pre-trial conference on January 5, 2009. On that date, appellee made a motion to dismiss the charges due to the state's failure to bring him to trial within the required time frame. The parties and the trial court agreed that January 5, 2009 was the last date upon which appellee could be brought to trial in compliance with R.C. 2945.71.[1] The state announced that it was prepared to go to trial that day in order to satisfy the speedy trial provision, but defense counsel asserted that she had only prepared for a pre-trial conference, and was not prepared to go to trial that day. The trial court granted appellee's motion and dismissed the charges.

{¶4} The state then filed this appeal, asserting a single assignment of error:

> The trial court erred when it dismissed Defendant's charges for lack of speedy trial.

{¶5} Speedy trial issues present mixed issues of law and fact. *State v. Madden*, 10th Dist. No. 04AP-1228, 2005-Ohio-4281, citing *State v. Hiatt* (1997), 120 Ohio App.3d 247. Thus, we must accept any factual findings made by the trial court if they are based

[1] January 5, 2009 was more than 45 days after appellee's arrest when the days are counted, including the triple count provision for the days between appellee's arrest and his arraignment, but the 45th day fell on a weekend; therefore, January 5 was the last day upon which appellee could be brought to trial within the time frame required by R.C. 2945.71.

on some competent, credible evidence, but freely review the application of the law to those facts. Id. Generally, review in speedy trial cases requires the appellate court "to simply count the days as directed in R.C. 2945.71 *et seq.*" *State v. DePue* (1994), 96 Ohio App.3d 513, 516.

{¶6} When a defendant moves for dismissal on the basis that the state has failed to bring him to trial within the time frame set forth in the speedy trial statutes, the initial burden lies with the defendant to make a prima facie showing that he is entitled to the dismissal. *State v. Price* (1997), 122 Ohio App.3d 65. Once that prima facie showing has been made, the burden shifts to the state to prove that some provision of the speedy trial statutes extended the time in which the state was required to bring the defendant to trial. Id.

{¶7} Appellant argues that the trial court's dismissal of the case on speedy trial grounds was premature because the motion was made prior to the expiration of the speedy trial time. In *State v. Johnson*, 2d Dist. No. 21381, 2006-Ohio-4650, the Second District Court of Appeals concluded that a trial court improperly dismissed a case on speedy trial grounds where the defendant's motion to dismiss was filed on the last day of the speedy trial period.

{¶8} In *State v. D.M. Pallet Serv., Inc.* (Nov. 15, 1994), 10th Dist. No. 94APC02-195, we concluded that it was proper for a trial court to dismiss a case on speedy trial grounds when the motion to dismiss was filed on the last day of the speedy trial period. In reaching that conclusion, we stated:

> Arguably, of course, the state still benefited from a few hours in which to bring the case to trial. The state of the record before us, however, clearly indicates that this was a remote

> possibility at best; due to transfer of the case to the environmental division and other delays, it is apparent that on the date the motion to dismiss was filed, the case had not even progressed to the point of a pretrial hearing.

{¶9} In this case, as in *D.M. Pallet*, the state arguably had the rest of the day of January 5 in which to bring appellee to trial. However, in this case, the case had proceeded to a pre-trial, and the assistant prosecuting attorney stated that the prosecution was prepared to commence trial on January 5, and there is nothing else in the record before us that would suggest that there was either no, or at best a remote, possibility that the case could have proceeded to trial that day. The trial court failed to consider the state's argument that it could have started trial that day, and defense counsel offered no information to the court that would have indicated that there was no possibility that it could have.

{¶10} Because the trial court granted appellee's motion to dismiss on speedy trial grounds before the expiration of the time for speedy trial, and because nothing in the record shows that appellee could not have been brought to trial within the required time, appellee did not make the required prima facie showing that his speedy trial rights had been violated. Thus, we must conclude that the trial court erred when it granted appellee's motion to dismiss.

{¶11} The dissent argues that the time for bringing appellee to trial within the speedy trial timeframe had already expired, because the date of appellee's arrest counts toward the calculation of the time period. However, we have consistently held that it does not. See *Madden*. Moreover, appellee has consistently argued, both before the trial court and in briefing here, that January 5, 2009 was the last day for appellee to be brought to

trial within the speedy trial period, and has never argued that the time had already expired on that date.

{¶12} We note that the state in briefing set forth a number of arguments regarding possible actions the trial court could have taken in order to balance appellee's right to a speedy trial comporting with R.C. 2945.71 and his constitutional right to a fair trial. We need not address those arguments, as those issues must necessarily be addressed by the trial court for the first time on remand.

{¶13} Thus, we sustain appellant's assignment of error, reverse the judgment of the Franklin County Municipal Court, and remand this case to allow the trial court to determine in the first instance whether trial on January 5, 2009 would have violated appellee's right to a fair trial, and, depending on resolution of that issue, to either dismiss the charges or proceed to trial.

Judgment reversed;
cause remanded with instructions.

BRYANT, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶14} On November 26, 2008, Marcus W. Mixon was arrested on charges of menacing, a misdemeanor of the fourth degree, and domestic violence, also a misdemeanor of the fourth degree under the facts alleged in the complaint. No bond was initially set.

{¶15} On November 29, 2008, a demand for a jury trial was filed on Mixon's behalf and he requested that he be tried within the time allotted by R.C. 2945.71 et seq. Since the charges were misdemeanors of the fourth degree, he needed to be tried within

45 days. Since he was in custody, the time for his trial was reduced. Each day he was in custody solely on the pending charges counted as three days toward the 45 days allotted. See R.C. 2945.71(E).

{¶16} On November 29, 2008, bond was set at $2,500 cash or surety. The bond was posted and he was released from custody on that day. He was in custody solely on the pending charges for four days, allowing him 12 days of credit toward the 45 days for trial and leaving 33 days for his trial date.

{¶17} The case was set for a pretrial conference on January 5, 2009. At the conference, the trial court dismissed the charges. The January 5, 2009 date was the 37th day after Mixon posted bond. The time for trial had clearly expired. Friday, January 2, 2009 was the last date to commence the trial. The 33rd and last day to commence the trial was January 1, 2009. Since January 1, 2009 was a holiday, the trial could have commenced on January 2, 2009 without violating the requirements of R.C. 2945.71 et seq. The January 5th date set for a court proceeding was beyond the allowable time.

{¶18} Given the clear facts, the trial court was correct to dismiss the charges on January 5, 2009. Since the majority concludes otherwise, I respectfully dissent.

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