[Cite as *State v. Vickers*, 2010-Ohio-6178.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-318 (C.P.C. No. 08CR-04-3176)
Jamison S. Vickers,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 16, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, State of Ohio ("appellant" or "the State"), appeals from the March 11, 2010 decision and judgment entry of the Franklin County Court of Common Pleas granting defendant-appellee, Jamison S. Vickers' ("appellee") motion to dismiss indictment for speedy trial violations. For the reasons that follow, we affirm the judgment granting appellee's motion to dismiss, but we affirm for reasons other than those stated by the trial court.

{¶2} On July 15, 2007, the Capital Area Humane Society ("CAHS") began investigating a complaint alleging animal abuse and neglect at a residence located at 1150 Olney Drive, in Columbus, Ohio. Appellee resided at that address. On that date, and as a result of the investigation, CAHS removed several dogs from the premises. Based upon their observations, CAHS agents had reason to believe that some violation of law had occurred or that there was evidence of dogfighting at that address.

{¶3} On July 17, 2007, CAHS filed five misdemeanor charges of prohibitions concerning companion animals against appellee. The date of those offenses was listed as July 15, 2007. The next day, on July 18, 2007, agents obtained and executed a search warrant at appellee's residence. During the execution of the search warrant, appellee returned home and was arrested. On that same date, a felony complaint was filed in municipal court charging appellee with one count of dogfighting. The complaint alleged the date of the offense as July 18, 2007.[1] On July 27, 2007, that felony complaint was dismissed for future indictment.

{¶4} On August 8, 2007, a third complaint was filed in municipal court. This complaint charged appellee with 12 additional misdemeanor charges, ranging from failure to license, failure to immunize, failure to confine vicious dogs, and failure to insure vicious dogs. The date of those offenses was July 15, 2007. Subsequently, on November 14, 2007, appellee entered pleas of guilty to several of the misdemeanor counts arising out of the two complaints. On December 19, 2007, appellee was sentenced to a period of probation as a result of those convictions.

[1]After appellee was indicted, the State requested to amend the date of several of the offenses from July 18, to July 15, 2007. (Tr. 7-8.)

{¶5} On April 28, 2008, a ten-count indictment was filed in the Franklin County Court of Common Pleas against appellee charging him with four counts of dogfighting, one count of possessing criminal tools, four misdemeanor counts of prohibitions concerning companion animals, and one count of possession of cocaine. A summons was issued to appellee the following day via certified mail at the address provided by appellee at the time of his arrest on July 18, 2007. The summons was returned "unclaimed" (R. at 9) or "not served" because appellee no longer resided at that address. (Tr. 8.) Ordinary mail issued May 21, 2008 was also returned as "attempted – not known" and "unable to forward." (R. at 12.)

{¶6} Appellee failed to appear for his felony arraignment and as a result, a capias was issued for his arrest on May 29, 2008. In August 2009, after learning of the outstanding capias, appellee appeared before the common pleas court and requested that the capias be set aside. The capias was set aside on August 21, 2009 and appellee was arraigned and entered pleas of not guilty to all charges.

{¶7} On August 28, 2009, appellee filed his first request for discovery, to which the State filed its response on September 16, 2009. Pursuant to a continuance entry filed September 29, 2009, appellee waived his speedy trial rights for the period from October 22, 2009, until the next trial date, which was re-scheduled for November 16, 2009.

{¶8} On November 9, 2009, counsel for appellee filed a motion to suppress the evidence seized from appellee's residence. On November 16, 2009, counsel for appellee filed a motion to dismiss on speedy trial grounds, alleging appellee's statutory and constitutional speedy trial rights had been violated. On January 7, 2010, the trial court

held a hearing on both motions.[2] On March 11, 2010, the trial court issued a decision and entry granting appellee's motion to dismiss on the basis that appellee's statutory and constitutional speedy trial rights had been violated. The State now raises the following assignment of error for our review:

> THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION TO DISMISS.

{¶9} In its sole assignment of error, appellant contends the trial court erred in finding that a speedy trial violation occurred and therefore erred in dismissing the indictment. Appellant argues there is no speedy trial violation because: (1) the trial court erred in calculating statutory speedy trial time by including within its calculation the period of time during which an arrest warrant had been issued but not executed, due to appellee's failure to appear at his arraignment; and (2) the primary reason for the delay was attributable to appellee's failure to appear for arraignment and furthermore, appellee did not demonstrate he suffered any prejudice as a result of the delay.

{¶10} In reviewing a defendant's claim that he was denied his right to a speedy trial, an appellate court reviews questions of law de novo and applies the clearly erroneous standard to questions of fact. *State v. Yuen*, 10th Dist. No. 03AP-513, 2004-Ohio-1276, citing *State v. Auterbridge* (Feb. 25, 1998), 9th Dist. No. 97CA006702. Therefore, we give due deference to the trial court's findings of fact if supported by competent, credible evidence, but we independently review whether the trial court properly applied the law to the facts of the case. *State v. Fultz*, 4th Dist. No. 06CA2923, 2007-Ohio-3619, citing *State v. Kuhn* (June 10, 1998), 4th Dist. No. 97 CA 2307. Furthermore, in reviewing the legal issues presented in a speedy trial claim, we strictly

[2] This appeal addresses only the motion to dismiss on speedy trial grounds.

construe the relevant statutes against the State. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996-Ohio-171.

{¶11} "[F]or purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 *et seq*. and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." *State v. O'Brien* (1987), 34 Ohio St.3d 7, 9. "[T]he constitutional guarantees may be found to be broader than [the] speedy trial statutes in some circumstances." Id.

{¶12} We begin by determining whether or not a statutory speedy trial violation occurred.

{¶13} Under R.C. 2945.71(C)(2), an individual against whom a felony charge is pending shall be brought to trial within 270 days after arrest. A felony charge is not considered to be "pending" "until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance." *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus. When computing the time for purposes of applying R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail solely on the pending charge shall be counted as three days. R.C. 2945.71(E). Additionally, R.C. 2945.71(D) requires a defendant who is facing a combination of both felony and misdemeanor charges to be brought to trial within 270 days of arrest. *State v. Gonzales*, 10th Dist. No. 08AP-716, 2009-Ohio-3236.

{¶14} Pursuant to R.C. 2945.73, upon a motion made at or prior to the commencement of trial, a person who is charged with an offense shall be discharged if he is not brought to trial within the required time frame. See *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357. Once the statutory limit has expired, the defendant has

established a prima facie case for dismissal. *State v. Butcher* (1986), 27 Ohio St.3d 28; *State v. Howard* (1992), 79 Ohio App.3d 705. At that point, the burden shifts to the State to demonstrate that certain acts or events were chargeable to the defendant and thus sufficient time was tolled or extended pursuant to R.C. 2945.72. *State v. Geraldo* (1983), 13 Ohio App.3d 27; *Butcher* at 31.

{¶15} As noted, the time frame within which to bring the accused to trial can be extended for the reasons set forth in R.C. 2945.72. Specifically, R.C. 2945.72(D) permits an extension of the time for "[a]ny period of delay occasioned by the neglect or improper act of the accused[.]" R.C. 2945.72(E) allows an extension of time for "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" Additionally, R.C. 2945.72(H) permits an extension of time 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[.]"

{¶16} Therefore, in reviewing a speedy trial claim, we must count the days of delay chargeable to either side and determine whether the accused was properly brought to trial within the time limits set forth in R.C. 2945.71. *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶8; *State v. Scott*, 10th Dist. No. 09AP-611, 2009-Ohio-6785, ¶11. The statutory speedy trial provisions are mandatory and require strict compliance by prosecutors, as well as strict enforcement by the courts. *Gonzales* at ¶8, citing *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶16.

{¶17} Contrary to the determination of the trial court, appellant argues that the charges set forth in the April 28, 2008 indictment arise from facts which are distinct from

those which formed the basis of the prior misdemeanor complaints. As a result, appellant submits the State is not required to bring appellee to trial here within the same statutory time period as the time period during which the misdemeanors were pending. Alternatively, but without conceding this, appellant asserts that if the time period during which the misdemeanors were pending is required to be included in this statutory speedy trial calculation, the speedy trial clock stopped on November 14, 2007 when appellee entered guilty pleas to several misdemeanor counts in municipal court.

{¶18} More importantly, the State asserts the primary issue to be determined here is whether the trial court correctly included within its statutory speedy trial time calculation the time period during which a warrant for appellee's arrest had been issued but not executed, based upon appellee's failure to appear at his arraignment. Appellant contends the trial court erred in counting this time against the State and in dismissing the indictment on the grounds that appellee was not brought to trial within the statutory speedy trial limits.

{¶19} In support of its argument, appellant submits it is well-established that a defendant's failure to appear tolls statutory speedy trial time. Appellant cites to numerous cases which stand for the proposition that failure to appear at events such as an arraignment, a status conference, and a preliminary hearing tolls speedy trial time. Among those cited is a case from this court, *Dublin v. O'Brien*, 10th Dist. No. 07AP-695, 2008-Ohio-1105.

{¶20} Appellant further submits that a defendant has a duty to provide a suitable address where he can be contacted, and he cannot benefit from his failure to appear at subsequent proceedings when he failed to make himself readily available. Where the

accused is the cause for the delay, such as because he has failed to provide a suitable address where he can be contacted, appellant asserts his neglect and/or improper act tolls speedy trial, pursuant to R.C. 2945.72(D). Appellant cites to *State v. Davis* (Jan. 30, 1992), 8th Dist. No. 59678, and *State v. Jones* (Feb. 17, 1994), 8th Dist. No. 64674, as authority.

{¶21} We begin by addressing the time period between appellee's arrest on July 18, 2007, which was immediately followed by the filing of the felony complaint in municipal court, and the filing of the indictment in common pleas court on April 28, 2008. During this time period, we calculate that 286 days expired.

{¶22} Appellee asserts this entire period of time should be counted against the State, arguing that all of the charges arose out of the same set of facts, and that the State was aware of all of the information it needed to prosecute the felonies at the time the misdemeanors were prosecuted. Appellee cites to *State v. Baker* (1997), 78 Ohio St.3d 108, *State v. Adams* (1989), 43 Ohio St.3d 67, *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, and *State v. Rutkowski*, 8th Dist. No. 86289, 2006-Ohio-1087, as authority supporting his position.

{¶23} Rather than charging all of that time against the State, the trial court instead relied on *State v. Broughton* (1991), 62 Ohio St.3d 253, and determined that time was tolled between July 27, 2007 and April 28, 2008, due to the fact that the felony complaint was dismissed for future indictment. Because no charges were pending after July 27, 2007, the trial court found only nine days should be charged against the State during the July 18, 2007 to April 28, 2008 time period. Yet, the trial court also determined the offenses asserted against appellee in the April 28, 2008 indictment arose out of the same

facts as those which supported the filing of the prior misdemeanor complaints, but also noted that the issue of whether the additional charges were distinct was moot in light of its prior findings.

{¶24} Appellant, on the other hand, agrees with the trial court's determination that nine days of speedy trial time should be charged to the State. However, appellant argues that the felony indictment was based upon facts which are distinct and separate from those supporting the original misdemeanor charges, and that the State was unaware of those facts at the time the original complaints were filed. Therefore, appellant argues the felony indictment need not be brought within the same statutory time period as the original charges.

{¶25} In *Adams*, the Supreme Court of Ohio determined that where new and additional charges arise from the same set of facts as those found in the original charge, and the state knew of those facts at the time of the initial indictment, the time frame within which the new charge is to be tried is subject to the same statutory limitations period as that which is applied to the original charge.

{¶26} Later, in *Baker*, the Supreme Court of Ohio established that, where additional charges arose from the same facts as the facts supporting the original indictment, the subsequent charges are subject to the same speedy trial constraints as the original charges. But, "in issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." Id. at 110.

{¶27} The Supreme Court of Ohio, in *Parker*, went on to decide "the holdings of *Baker* and *Adams* * * * combined, stand for the proposition that speedy-trial time is not tolled for the filing of later charges that arose from the facts of the criminal indictment that led to the first charge." Id. at ¶20. Therefore, under *Parker*, the time would count against the state if the subsequent indictment arose from the same facts as those that made up the original indictment. However, *Baker* does provide for two scenarios in which the state is not held to the speedy trial time clock of the initial indictment: (1) when additional criminal charges arise from new facts not present at the time the original charges were filed, or (2) when the state did not know of these facts at the time of the initial indictment. "The holding in *Baker* is disjunctive and specifically sets forth two scenarios, either of which will reset the speedy-trial timetable for charges arising from a subsequent indictment." *State v. Thomas*, 4th Dist. No. 06CA825, 2007-Ohio-5340, ¶17.

{¶28} Here, we find that the charges in the felony indictment arose from the same set of facts as those found in the original complaints, and that the State knew of those facts at the time the complaints were filed in municipal court. The State failed to introduce any evidence or testimony which could support its assertion that it later became aware of new evidence or facts giving rise to additional charges. The only evidence upon which it relies is the evidence discovered pursuant to the July 15, 2007 visit and the resulting July 18, 2007 search, which clearly gave rise to the misdemeanor and felony complaints filed in municipal court. This is the very same evidence appellant intended to use at trial. The State has pointed to no new evidence which was obtained subsequent to that and appellant has failed to demonstrate that it was unaware of certain facts at the time the charges were filed in municipal court. Furthermore, appellant has failed to show how the

subsequent criminal charges arose from facts which are distinct from those supporting the original charge.

{¶29} While the State did note during the motion hearing that a veterinarian from the humane society had to examine the dogs to determine whether or not their injuries were consistent with dogfighting (Tr. 22), there is nothing in the record to suggest that such an examination produced some new evidence or new facts of which it was unaware at the time the initial charges were filed. In fact, the prosecution was uncertain as to whether that examination took place on the date the dogs were seized or whether it occurred at a later date. (Tr. 24.)

{¶30} Additionally, although the State briefly referenced the fact that the drugs discovered during the July 18, 2007 search had to be tested (Tr. 22), the State offered no evidence as to *when* these test results became available to the State. Appellant did not demonstrate that those test results produced new facts which were unknown or which were not available to the prosecution until some later date.

{¶31} Furthermore, we also reject appellant's contention that the offenses did not arise from the same facts because the first misdemeanor complaint was filed on July 17, 2007, which was one day before the July 18, 2007 search. However, the July 18, 2007 search was based upon the investigation and removal of the dogs on July 15, 2007. As the trial court noted, the CAHS officer testified that she saw evidence during the July 15, 2007 visit that caused her to believe that dogfighting was occurring. Additionally, the record reflects that the prosecution requested to amend some of the charges in the indictment to reflect an offense date of July 15, 2007, rather than the originally charged date of July 18, 2007. (Tr. 7-8.)

{¶32} Based on the foregoing, we find the April 28, 2008 indictment and the complaints filed in municipal court arose out of the same set of facts and that such facts were known to the State at the time the original charges were filed. This brings us to our next inquiry: does a finding that all of the offenses arose out of the same facts require us to find that the speedy trial clock ran continuously from July 18, 2007 to April 28, 2008? If we answer this affirmatively, then we must further find that more than 270 days had elapsed by the time appellee was indicted, and as a result, his speedy trial rights were violated.

{¶33} It is well-established that the period between the dismissal of an original indictment without prejudice and the filing of a subsequent indictment which is premised upon the same facts shall not be counted against the State unless the defendant is held in jail or released on bail. See *Broughton* at 259-60; *Bayless* at ¶21; *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658; and *City of Westlake v. Cougill* (1978), 56 Ohio St.2d 230, 233. Appellant has argued, in the alternative, that this concept is also applicable to the instant case. By applying this concept here, appellant submits that the speedy trial clock ran from appellee's arrest on July 18, 2007, until he entered pleas of guilty to several misdemeanor offenses on November 14, 2007, at which time the speedy trial clock stopped because charges were no longer pending. During that time period, 122 days of speedy trial time were chargeable against the State.

{¶34} From that point until appellee's indictment on April 28, 2008, 164 days passed. The State submits the speedy trial clock stopped after appellee pled guilty on the misdemeanors, but began running again when appellee was indicted on April 28, 2008. However, appellant has failed to cite to any authority which applies the *Broughton*

concept to a case which is factually similar to this one. Furthermore, our own independent review has also failed to reveal definitive authority applying this concept to a situation like this. But see *State v. Gonzales*, 10th Dist. No. 08AP-716, 2009-Ohio-3236 (plea of no contest stopped the speedy trial clock and tolled it for the remainder of the first municipal case because defendant was subsequently allowed to withdraw his plea and consolidate that charge into the second case, which was ultimately dismissed when defendant was indicted in common pleas court).

{¶35} On the other hand, cases such as *Adams*, *Baker*, and *Parker*, as well as *Rutkowski* and *Thomas*, supra, seem to support the position that the speedy trial clock would not be stopped upon the entering of guilty pleas in the municipal court cases, since all of the offenses arose out of the same facts and were known to appellant at the time the original charges were filed.

{¶36} In *Rutkowski*, the Eighth District dismissed the felony charges filed more than a year after the defendant had entered no contest pleas in municipal court for misdemeanor offenses which the court determined arose out of the same facts or evidence used in the misdemeanor prosecution. Thus, the *Rutkowski* court seems to have determined that the speedy trial clock ran continuously from the time of the initial arrest. However, we have previously rejected the analysis set forth in that decision, albeit for different reasons. See *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658.

{¶37} However, in *Thomas*, the defendant was arrested for a misdemeanor drug possession offense and a felony offense of having weapons under disability. After pleading guilty to the possession charge three days after his arrest, he was indicted on the weapons offense over a year later. The Fourth District determined that the weapons

offense was a subsequent charge based on the same facts as the original charge and that the speedy trial clock had started running on the date of the initial arrest. Therefore, the court dismissed the weapons offense due to the speedy trial violation. Id at ¶13.

{¶38} In applying the rationale of *Adams*, *Baker*, and *Parker*, as applied in *Thomas,* we find the 164 days which expired during the time period when no charges were pending would not be tolled under *Broughton*. As a result, 286 days of speedy trial time expired by the time appellee was indicted. Consequently, because more than 270 days expired before appellee was brought to trial, appellee's statutory speedy trial rights were violated and dismissal is warranted.

{¶39} While a trial court's failure to bring a defendant to trial within the time limitations set forth in R.C. 2945.71 does not necessarily result in a violation of his constitutional right to a speedy trial under *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182 (see *State v. Moffo*, 2d Dist. No. 2005 CA 131, 2006-Ohio-5764), because we have determined appellee's discharge from prosecution was proper, we need not conduct a constitutional analysis.

{¶40} Accordingly, appellant's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.

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