[Cite as *State v. Brown*, 2012-Ohio-5903.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-292
v.	:	(C.P.C. No. 11CR-05-2898)
Kyle M. Brown,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 13, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

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

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Kyle M. Brown, appeals from a judgment of the Franklin County Court of Common Pleas following his plea of no contest to one count of possession of cocaine. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was arrested on June 22, 2010, after a traffic stop revealed that he was in possession of a substance that police suspected to be crack cocaine. That same day, he was charged with felony drug possession in Franklin County Municipal Court Case No. 2010 CRA-13735. The charges were dismissed for future indictment on July 2, 2010. The substance recovered by police was sent to the Ohio State Highway Patrol Laboratory for

testing. A laboratory report completed on November 2, 2010, confirmed that the substance was cocaine.

{¶ 3} On May 31, 2011, appellant was indicted in the Franklin County Court of Common Pleas for one count of possession of cocaine, a fifth-degree felony, in violation of R.C. 2925.01. Appellant was arraigned on July 18, 2011, where he was granted a recognizance bond. He requested discovery on August 1, 2011, which the state provided on August 29, 2011.

{¶ 4} On October 20, 2011, appellant filed a motion to dismiss the indictment, alleging that the state violated his statutory and constitutional right to a speedy trial. The state filed a memorandum in opposition, and the trial court denied appellant's motion in a decision and entry filed December 15, 2011. The case was continued upon the request of both parties from December 6, 2011 until January 11, 2012, at which time appellant entered a plea of no contest to the count of cocaine possession as indicted. At the sentencing hearing held on February 29, 2012, the trial court sentenced appellant to a two-year period of community control.

II. DISCUSSION

{¶ 5} Appellant now appeals, presenting the following assignment of error for our consideration:

> The trial court erred in failing to grant Appellant's motion to dismiss because the state failed to timely bring Appellant to trial, in violation of R.C. 2945.71, the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.

{¶ 6} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. Ohio's speedy trial statute, R.C. 2945.71, endeavors to comply with constitutional standards by designating specific timetables for which an accused must be brought to trial. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 14.

{¶ 7} Pursuant to R.C. 2945.71(C)(2), a person "against whom a charge of felony is pending" must be brought to trial within 270 days after the person's arrest. " 'A felony charge is not "pending" under [R.C. 2945.71(C)(2)] 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. Juarez-Hernandez*, 10th Dist. No. 12AP-95, 2012-Ohio-4835, ¶ 8, quoting *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶ 39, citing *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus (plurality opinion).

{¶ 8} 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, meaning the accused must be tried within 90 days if he or she is incarcerated. R.C. 2945.71(E); *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 14. The arrest date is not chargeable to the state in computing speedy trial time. *State v. Madden*, 10th Dist. No. 04AP-1228, 2005-Ohio-4281, ¶ 28; Crim.R. 45(A); R.C. 1.14.

{¶ 9} In his sole assignment of error, appellant argues that the state failed to bring him to trial within the time required by R.C. 2945.71(C)(2). He contends that the speedy-trial time should have included the period of time between the dismissal of the complaint in municipal court on July 2, 2011, and the filing of the indictment on May 31, 2011. Although no charges were "pending" during this time period, as required for operation of R.C. 2945.71(C)(2), appellant maintains that this time should have counted against the state for purposes of the statute. We disagree.

{¶ 10} Generally, " 'when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.' " *State v. Adams*, 43 Ohio St.3d 67, 68 (1989), quoting *State v. Clay*, 9 Ohio App.3d 216 (11th Dist.1983). However, "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." *State v. Baker*, 78 Ohio St.3d 108 (1997), syllabus; *see also State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, ¶ 19. The holding in *Baker* is disjunctive and identifies two scenarios in which the state is not held to the speedy-trial timetable of an initial complaint or indictment: (1) when additional criminal charges arise

from different facts, or (2) when the state did not know of these facts at the time of the initial indictment. *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658, ¶ 30.

{¶ 11} Here, the parties dispute whether the November 2010 laboratory report confirming the existence of cocaine constituted an additional fact not known to the state at the time of the original charges. This court addressed a similar question in *Mohamed*. We cited holdings from several appellate districts for the proposition that "laboratory results that were not known at the time of the original indictment constituted 'additional facts,' which warranted the triggering of a new speedy trial clock." *Id.* at ¶ 42. "The Second, Fourth, Ninth, Eleventh, and Twelfth District Courts of Appeals have all held that a subsequent indictment which was dependent upon a lab analysis that was not available to the state at the time of the original indictment starts the running of a new speedy trial clock." *Id*. Additionally, we recognized that the length of time the state was in possession of the laboratory results was immaterial. *Id.* at ¶ 45. Finding that "the results of the lab analysis constituted a new fact that was not available to the state at the time of the original arrest and/or indictment," we concluded that the defendant's "speedy trial clock was triggered anew" by the subsequent indictment. *Id.* at ¶ 52.

{¶ 12} We followed *Mohamed* in *State v. Scott*, 10th Dist. No. 09AP-611, 2009-Ohio-6785, a case virtually indistinguishable from the present. In *Scott*, the defendant was charged in municipal court with misdemeanor traffic offenses and a felony count of possession of cocaine. The cocaine count was dismissed for future indictment in June 2007, and, after a September 2007 laboratory report confirmed that the substance was cocaine, a felony indictment was filed in March 2008. *Id.* at ¶ 22. We rejected the defendant's reliance on the Eighth District's decision in *State v. Rutkowski*, 8th Dist. No. 86289, 2006-Ohio-1087 (the case upon which appellant heavily relies here) and held that "[b]ecause the lab results were facts not known to the state at the time of defendant's traffic stop, the time period at issue is not included in the speedy trial calculations under R.C. 2945.71. Instead, the speedy trial clock began to run again on the date defendant was re-arrested on the felony indictment." *Scott* at ¶ 22.

{¶ 13} We find this case to be indistinguishable from *Mohamed* and *Scott*. Although the arresting officer suspected that the seized contraband was cocaine, the subsequent laboratory report confirming those suspicions was nevertheless an additional

fact not known to the state at the time the original charges were filed. *See State v. Armstrong*, 9th Dist. No. 03CA0064-M, 2004-Ohio-726 (the state was not subject to the statutory speedy-trial timeframe applicable to the original charges where the subsequent indictment depended on confirmation from a lab report that the white powder seized was cocaine); *State v. Skinner*, 4th Dist. No. 06CA2931, 2007-Ohio-6320; *State v. Clark*, 11th Dist. No. 2001-P-0031, 2004-Ohio-334 (noting that even though the state may have suspected the confiscated substance was cocaine prior to its analysis, the speedy-trial time did not apply from the date of the first indictment because the lab analysis results were not received until after the first indictment). Moreover, while the second indictment was filed over six months before the subsequent indictment was filed, this period of delay is immaterial for speedy-trial purposes. *See State v. Dalton*, 2nd Dist. No. 2003 CA 96, 2004-Ohio-3575, ¶ 14; *Scott* at ¶ 43. Because the laboratory results were facts not known to the state at the time the original charges were filed, the time period between the dismissal of those charges and the subsequent indictment in the present case is excluded from the speedy-trial calculation.

{¶ 14} Additionally, it is well-settled 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." *State v. Vickers*, 10th Dist. No. 10AP-318, 2010-Ohio-6178, ¶ 33, citing *State v. Broughton*, 62 Ohio St.3d 253 (1991); *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶ 21-22. As noted by the *Broughton* court, this principle serves the interests of both the public and the accused:

> " '* * * After the Government's dismissal of the complaint against him appellant * * * was no longer under any of the restraints associated with arrest and the pendency of criminal charges against him. He was free to come and go as he pleased. He was not subject to public obloquy, disruption of his employment or more stress than any citizen who might be under investigation but not charged with a crime. Unless and until a formal charge was filed against him, neither he nor the public generally could have any legitimate interest in the prompt processing of a nonexistent case against him.' "

Broughton at 258, quoting *State v. Bonarrigo*, 62 Ohio St.2d 7, 11 (1980), quoting *United States v. Hillegas*, 578 F.2d 453, 457-58 (2d Cir.1978).

{¶ 15} Upon review of the record and after excluding the period between the dismissal in municipal court and the subsequent indictment in common pleas court, we find no statutory speedy-trial violation. At most, 33 days elapsed between appellant's arrest and the dismissal of the charges in municipal court.[1] The speedy-trial clock resumed on July 18, 2011 when appellant was arraigned on the felony indictment and granted a recognizance bond. After this date, only 66 days counted against the state for speedy-trial purposes. The remaining time was tolled by various delays attributable to appellant. For instance, appellant's August 1, 2011 discovery request tolled time until the state provided discovery on August 29, 2011. *See State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus ("A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)."); *see also State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶ 36 (32-day delay between discovery request and state's reply was a tolling period under R.C. 2945.72(E)). The filing of appellant's motion to dismiss on October 20, 2011, tolled time until the trial court denied the motion on December 15, 2011. *See Juarez-Hernandez* at ¶ 14. Finally, the joint request for a continuance tolled time until appellant entered his plea of no contest on January 11, 2012. *See* R.C. 2945.72(H) (time may be tolled for "[t]he period of any continuance granted on the accused's own motion[.]"); *Juarez-Hernandez* at ¶ 14. After accounting for the pertinent tolling periods, we find that appellant pleaded no contest well within 270 days as required by R.C. 2945.71(C)(2). Accordingly, we find appellant's statutory speedy-trial challenge to be without merit.

{¶ 16} Appellant also claims that he was deprived of his constitutional right to a speedy trial. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), 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

[1] While not entirely clear, the record indicates that appellant may have been held in jail for up to 11 days while the municipal court case was pending; however, the parties dispute whether appellant was being held solely on those charges so as to warrant operation of the triple-count provision in R.C. 2945.71(E).

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).

{¶ 17} 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; *Doggett v. United States*, 505 U.S. 647, 651 (1992). Generally, delay is presumptively prejudicial as it approaches one year. *State v. Glass*, 10th Dist. No. 10AP-558, 2011-Ohio-6287, ¶ 20, citing *State v. Miller*, 10th Dist. No. 04AP-285, 2005-Ohio-518, ¶ 12.

{¶ 18} In this case, however, the period of time between the dismissal of appellant's charges in municipal court and his subsequent indictment cannot be considered part of the delay for constitutional speedy-trial purposes. "Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation." *United States v. MacDonald*, 456 U.S. 1, 8-9 (1982). "Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *Id.* at 7. "[W]hen defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986). After excluding this interim period from our speedy trial calculation, the combined delay from the municipal court and common pleas court cases was under seven months, and, in our view, fails to rise to the level of presumptive prejudice.

{¶ 19} Regardless, even if we were to find presumptive prejudice, the remaining *Barker* factors weigh against appellant's constitutional speedy-trial claim. The second factor focuses on the reasons for the delay and is concerned with whether the government or the defendant is more to blame for the delay. *Doggett*, 505 U.S. at 651. Here, as explained above, the majority of the delay was attributable to motions filed by appellant rather than the state. Thus, this factor weighs against appellant's claim.

{¶ 20} The next factor concerns whether appellant asserted his right to a speedy trial in due course. Appellant did file a motion to dismiss the charges based on his speedy

trial rights; however, he did so three months after he was arraigned on the felony indictment. This delay does not weigh in appellant's favor. *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶ 31 (defendant's "two-month delay must be weighted, at least to some extent, against defendant's claim of a serious deprivation of his right to a speedy trial").

{¶ 21} 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; *Walker* at ¶ 32. Here, appellant fails to identify any specific prejudice resulting from the delay, and, upon review of the record, we find none. Appellant did not spend any time in jail while the felony indictment was pending. Additionally, as we stated in *Glass*, "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." *Glass* at ¶ 25.

{¶ 22} After careful consideration of the *Barker* factors, we conclude that the delay in this case did not violate appellant's constitutional right to a speedy trial.

{¶ 23} Accordingly, appellant's sole assignment of error is overruled.

III. CONCLUSION

{¶ 24} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.