[Cite as *State v. Crosby*, 2012-Ohio-6202.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-348 (C.P.C. No. 11CR-10-5352)
v.	:	(REGULAR CALENDAR)
Brian G. Crosby,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 28, 2012

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

Yeura R. Venters, Public Defender, and *Timothy Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Brian G. Crosby, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a no-contest plea, of importuning, which is a violation of R.C. 2907.07 and a fifth-degree felony, and attempted unlawful sexual conduct with a minor, which is a violation of R.C. 2907.04 and a fourth-degree felony.

{¶ 2} From November 1 to December 21, 2010, appellant engaged in internet "chats" with persons he believed to be a 36-year-old woman and her 15-year-old daughter. In reality, a Franklin County Sheriff's Office detective was posing as the woman and girl. After appellant indicated he wished to engage in sexual activity with the supposed 15-

year-old girl, he agreed to meet with the woman and girl at a designated location. When appellant appeared at the location, he was arrested.

{¶ 3} On December 21, 2010, appellant was arrested and charged in the Franklin County Municipal Court with felony counts of attempted unlawful sexual conduct with a minor and importuning. Appellant was jailed for three days and then released on bond. On December 30, 2010, the state of Ohio, plaintiff-appellee, dismissed the case for future indictment.

{¶ 4} On October 7, 2011, appellant was indicted in the Franklin County Court of Common Pleas on the same charges of unlawful sexual conduct with a minor and importuning based upon the same events forming the basis of the original charges on December 21, 2010.

{¶ 5} On February 10, 2012, appellant filed a motion to dismiss the indictment based upon speedy trial grounds. After a hearing on the matter on April 10, 2012, the trial court denied the motion to dismiss. Appellant then entered a no-contest plea. The trial court then entered a judgment, finding appellant guilty of both charges and sentencing him to a suspended 15-month term of incarceration. The court also placed appellant on community control for two years, imposed a $500 fine, designated him as a Tier II sex offender, and credited him with three days of jail-time credit. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> 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.

{¶ 6} Appellant argues in his sole assignment of error that the trial court erred when it denied his motion to dismiss based upon speedy trial grounds. The standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *State v. Gonzalez*, 10th Dist. No. 08AP-716, 2009-Ohio-3236, ¶ 9. 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 statutes,

R.C. 2945 .71 et seq., enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55 (1996); *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 10.

{¶ 7} Pursuant to R.C. 2945.71(C)(2), the state must bring a defendant arrested on felony charges to trial within 270 days of his arrest. If the defendant is held in jail in lieu of bail on the pending charge, each day counts as three days. R.C. 2945.71(E); *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 14. If an accused is not brought to trial within the speedy trial time limits, the court, upon motion, must discharge the defendant. R.C. 2945.73(B); *Id*. A defendant establishes a prima facie case for dismissal based upon a speedy trial violation when the defendant demonstrates that more than 270 days elapsed before trial. "Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended." *Id*. at ¶ 15, citing *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9; *State v. Butcher*, 27 Ohio St.3d 28, 31 (1986). "[T]he time period in which to bring a defendant to trial may be extended for any of the reasons enumerated in R.C. 2945.72." *Carmon* at ¶ 14.

{¶ 8} In the present case, appellant argues that the running of the speedy trial period commenced upon his initial arrest on December 21, 2010, and was not tolled when those charges were dismissed for future indictment. Thus, appellant contends that his speedy trial time was still running during the period between the dismissal of the municipal court complaint on December 30, 2010, and the indictment on October 7, 2011. The state counters that the speedy trial time does not include this period because, during this time, there was no charge pending against appellant. Both appellant and the state cite several Supreme Court of Ohio cases and several appellate cases from this district and others in support of their differing views.

{¶ 9} Our analysis will focus upon several decisions from the Supreme Court, as well as two decisions from this appellate district, as we believe these decisions resolve the present matter. With regard to the Supreme Court decisions, both appellant and the state discuss *State v. Broughton*, 62 Ohio St.3d 253 (1991). In *Broughton*, on November 17, 1988, the defendant was arrested and charged. The trial court dismissed the case due to a defective indictment on July 18, 1989. On October 19, 1989, the defendant was again indicted based upon the same facts underlying the first indictment. On March 22, 1990,

the defendant filed a motion to dismiss based upon the running and expiration of the speedy trial statute, which the trial court granted. That ruling was affirmed by the appellate court.

{¶ 10} The Supreme Court reversed, finding that the trial court had not performed the proper calculation under the speedy trial statute. As pertinent to the present case, the court analyzed the period from July 19, 1989 (the first day defendant was not under any indictment for the crimes he allegedly committed) to October 18, 1989 (the last day before defendant was indicted for the second time). The court concluded in paragraph one of its syllabus:

> For purposes of computing how much time has run against the state under R.C. 2945.71 et seq., the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I).

Thus, the court found that the total number of days which ran against the state, pursuant to R.C. 2945.71, from July 19 through October 18, 1989, was zero. The court stated this result was premised on the fact that no charges were "pending" during this time period; therefore, there were no restraints placed on the defendant that are usually associated with arrest and the pendency of criminal proceedings.

{¶ 11} It would appear that *Broughton* is directly on point and resolves the question before this court. However, appellant contends that despite *Broughton*, the Supreme Court has since adopted the analyses in *State v. Adams*, 43 Ohio St.3d 67 (1989), and *State v. Baker*, 78 Ohio St.3d 108 (1997), for cases in which the felony filings were dismissed and the defendant was later re-indicted. In *Adams*, the defendant was arrested on July 12, 1986. On October 22, 1986, the trial court entered a nolle prosequi as to the original charge brought against the defendant. On October 23, 1986, a subsequent complaint was filed against the defendant based upon the same set of facts and circumstances as found in the original July 12, 1986 complaint. The defendant filed a motion to dismiss on December 31, 1986, based upon the speedy trial statute, which the court denied. On April 15, 1987, the defendant pled no contest and was sentenced. On

appeal, the appellate court affirmed the trial court's judgment. Upon further appeal, the Supreme Court found that, because the second charge brought against appellant on October 23, 1986 stemmed from the original set of facts that gave rise to the charge issued on July 12, 1986, the same speedy trial period applied to the second charge.

{¶ 12} Appellant also cites *Baker* to support his claim that the Supreme Court has adopted a different view than that in *Broughton*. In *Baker*, on June 10, 1993, the defendant was arrested and the state seized records from two pharmacies the defendant owned. One week after his arrest, the defendant was indicted on drug-trafficking charges.

{¶ 13} By August and September 1993, authorities had finished their audit of the defendant's business records, and, as a result of such audits, a second indictment was filed on June 1, 1994, charging the defendant with drug trafficking and Medicaid fraud. The defendant filed a motion to dismiss, alleging that his right to a speedy trial had been violated because the state was required to bring him to trial on the second indictment within the same period as the first. The trial court denied the motion. The appellate court reversed the conviction under the second indictment, finding the defendant's speedy trial rights were violated. Upon further appeal, the Supreme Court, citing *Adams*, found that, 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 as the original charge.

{¶ 14} However, we reject appellant's contention insofar as he claims the Supreme Court has abandoned *Broughton* in favor of the analyses in *Adams* and *Baker* for cases similar to the present case. Since *Adams* and *Baker*, the Supreme Court has cited and followed the above-cited propositions from *Broughton* in *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, and *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, thereby contradicting appellant's claim that the Supreme Court has somehow abandoned the view in *Broughton*. The circumstances in *Myers*, like those in *Broughton*, are similar to the circumstances in the present case. In *Myers*, on August 8, 1988, the grand jury indicted the defendant on one count of aggravated murder. On February 1, 1991, the prosecuting attorney entered a nolle prosequi on the murder indictment. On February 12, 1993, Myers was arraigned upon re-indictment on a charge identical to that declared nolle prosequi in

February 1991. The trial court denied several defense motions to dismiss the case on speedy trial grounds. The defendant was eventually found guilty.

{¶ 15} On appeal before the Supreme Court, the defendant argued that his speedy trial rights were violated by the delay after the nolle prosequi was entered in 1991. The Supreme Court disagreed. In doing so, the court in *Myers* reaffirmed the holding in *Broughton* that "[t]he period between a dismissal of charges without prejudice and the filing of a subsequent indictment premised upon the same facts is not counted for purposes of computing the speedy-trial time period set forth in R.C. 2945.71 et seq." *Myers* at ¶ 36, citing *Broughton*.

{¶ 16} Although the focus in *Azbell* was different than that in the present case, in that it addressed when a charge is considered "pending" for purposes of calculating speedy trial time pursuant to R.C. 2945.71(C), the Supreme Court clearly reaffirmed its continued adherence to *Broughton*, finding: " 'For purposes of computing how much time has run against the state under R.C. 2945.71 *et seq*., the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted.' " (Emphasis sic.) *Azbell* at ¶ 17, quoting *Broughton* at paragraph one of the syllabus. Therefore, based upon *Azbell* and *Myers*, we find that the holding in *Broughton* applies with full force to the present case.

{¶ 17} This appellate district followed *Broughton* in *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶ 21. In *Bayless*, the defendant was arrested and charged on felony counts in municipal court on October 5, 2000. On October 13, 2000, the municipal court judge dismissed the case without prejudice. On August 15, 2001, the defendant was indicted on counts resulting from the same transactions upon which the original complaint was based. On October 30, 2001, the defendant filed a motion to dismiss for lack of a speedy trial, which the trial court denied.

{¶ 18} On appeal, the essence of this dispute was whether the period between the October 2000 dismissal and the August 2001 indictment counted toward the defendant's speedy trial time. We reiterated the conclusion in *Broughton* that the period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment is excluded from the calculation of speedy trial time. Thus, based upon

Broughton, we found in *Bayless* that, because no charge was pending against the defendant between the dismissal of the original complaint and the subsequent indictment, the speedy trial time was tolled during this period.

{¶ 19} In support of his view that his speedy trial time continued to run during the period between the dismissal of the municipal court complaint and the subsequent indictment, appellant cites our decision in *State v. Vickers*, 10th Dist. No. 10AP-318, 2010-Ohio-6178. In *Vickers*, on July 15, 2007, the area humane society removed several dogs from the defendant's premises, believing that they were being used in dog fighting. On July 17, 2007, a complaint was filed against defendant alleging five misdemeanor charges. On July 18, 2007, a felony complaint was filed in municipal court charging defendant with one count of dog fighting. On July 27, 2007, that felony complaint was dismissed for future indictment.

{¶ 20} On August 8, 2007, a third complaint was filed in municipal court, charging the defendant with 12 misdemeanor charges. On November 14, 2007, the defendant entered pleas of guilty to several of the misdemeanor counts arising out of the two complaints, and he was sentenced on December 19, 2007. On April 28, 2008, a ten-count indictment was filed in the common pleas court against the defendant. The defendant filed a motion to dismiss on speedy trial grounds, which the trial court granted.

{¶ 21} On appeal, we first found that 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. Therefore, we then found the pertinent inquiry was whether a finding that all of the offenses arose out of the same facts required the court to find that the speedy trial clock ran continuously from July 18, 2007 to April 28, 2008.

{¶ 22} Citing *Broughton* and *Bayless* at ¶ 21, we acknowledged that 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 included in the speedy trial calculation unless the defendant was held in jail or released on bail. *Vickers* at ¶ 33. Based upon the concept in these cases, the state argued in *Vickers* that the speedy trial clock ran from the defendant's arrest on July 18, 2007, until he entered pleas of guilty to the misdemeanor offenses on November 14, 2007,

at which time the speedy trial clock tolled because charges were no longer pending, but began running again when appellee was indicted on April 28, 2008.

{¶ 23} However, we concluded in *Vickers* that the state failed to cite any authority that applied *Broughton* to a case "factually similar" to *Vickers*. *See Vickers* at ¶ 34. We also noted that our own independent review also failed to reveal authority applying the *Broughton* concept to a "situation" like *Vickers*. *Id*. We found that cases such as *Baker* and *Adams* supported the conclusion that the speedy trial clock would not be stopped upon the entering of guilty pleas in the municipal court cases because all of the offenses arose out of the same facts and were known to the state at the time the original charges were filed. Thus, we found the time that expired during the period when no charges were pending would not be tolled.

{¶ 24} However, we find *Vickers* factually distinguishable from the present case. In *Vickers*, misdemeanor cases were still pending even after the first felony complaint was dismissed for future indictment, whereas, in the present case, there were no cases pending between the dismissal of the original complaint and the subsequent re-indictment on the same charges. Importantly, in arriving at our conclusion in *Vickers*, we focused on the fact that we could find no cases that were "factually similar" to the "situation" in *Vickers*. *See Vickers* at ¶ 34. The present case is not factually similar to the situation in *Vickers*. Rather, the present case is similar to the circumstances in *Broughton* and *Myers*. Thus, we find *Broughton* and *Myers* are controlling in the current case. Based upon *Broughton* and *Myers*, as well as our own decision in *Bayless*, we find the running of appellant's speedy trial period commenced upon his initial arrest on December 21, 2010, and was tolled when those charges were dismissed for future indictment. Therefore, there was no speedy trial violation in the present case. Appellant's sole assignment of error is overruled.

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

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.

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