[Cite as *State v. Houng*, 2009-Ohio-2955.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-T-0106**
- vs -	:	
TONY HOUNG,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 00529.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, *Charles L. Morrow,* and *LuWayne Annos*, Assistant Prosecutors, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellant).

Lynn Maro, Maro and Schoenike Co., 7081 West Boulevard, #4, Youngstown, OH 44512 and *Thomas E. Zena*, 1032 Boardman-Canfield Road, #101 & 103, Youngstown, OH 44512 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} The state of Ohio appeals from the judgment of the Trumbull County Court of Common Pleas, dismissing the indictment against Tony Houng in a major drug case. We affirm.

{¶2} July 18, 2007 and July 19, 2007, members of the Trumbull, Ashtabula, Geauga Law Enforcement Task Force ("TAG") executed search warrants at four properties in Trumbull County, Ohio, seizing vast amounts of evidence of a large scale

marijuana growing and distribution ring. As part of the operation, Mr. Houng, owner of three of the properties, was arrested on July 18, 2007. Mr. Houng was initially charged in the Girard Municipal Court on July 20, 2007, with one count of illegal cultivation of marijuana, a third degree felony in violation of R.C. 2925.04(A) and (C)(5)(e). Bond was set at one hundred fifty thousand dollars, ten percent cash; and, Mr. Houng was remanded to custody at the Trumbull County Jail.

{¶3} Mr. Houng is a native of Vietnam. Since November 4, 1996, a deportation order has been pending against him. Mark Bodo, an agent with Immigration and Customs Enforcement ("ICE"), was aware that Mr. Houng was being detained in Trumbull County. Consequently, July 20, 2007, he sent a Form I-247 "Immigration Detainer – Notice of Action" to the Trumbull County Jail. By this detainer, he requested prior notification of any release of Mr. Houng, and that Trumbull County hold Mr. Houng for a period not to exceed forty-eight hours upon his release, to allow immigration authorities to assume his custody.

{¶4} July 23, 2007, Mr. Thanh Thi Vu of Louisville, Kentucky, posted fifteen thousand dollars cash bond for Mr. Houng. Evidently under the belief that the ICE detainer authorized keeping Mr. Houng imprisoned, the Trumbull County Jail did not release him; neither did those authorities inform ICE that he had made bail.

{¶5} February 14, 2008, the Trumbull County Grand Jury returned an indictment in four counts against Mr. Houng: Count 1, illegal cultivation of marijuana, a second degree felony, in violation of R.C. 2925.04(A) and (C)(5)(f), with a forfeiture specification; Count 2, trafficking in marijuana, a second degree felony, in violation of R.C. 2925.03(A)(2) and (C)(3)(f), with a forfeiture specification; Count 3, conspiracy to

illegal cultivation of marijuana, a fourth degree felony, in violation of R.C. 2923.01(A)(1) and (2), and R.C. 2925.04(A) and (C)(5)(e); and, Count 4, conspiracy to trafficking in marijuana, a fourth degree felony, in violation of R.C. 2923.01(A)(1) and (2) and R.C. 2925.03(A)(2) and (C)(3)(e).

{¶6} February 19, 2008, Mr. Houng appeared in the trial court and entered pleas of "not guilty."

{¶7} Motion practice ensued. July 28, 2008, Mr. Houng moved the trial court to dismiss the indictment, on the basis that his speedy trial rights had been violated by failing to bring him to trial during the nearly seven month period he was held in jail, between making bail on July 23, 2007, and being indicted February 14, 2008. August 12, 2008, the state filed a brief in opposition. Hearing was held August 21, 2008. The state filed an additional brief on or about August 26, as did Mr. Houng on September 3, 2008.

{¶8} September 17, 2008, the trial court filed its judgment entry. Citing to *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, the trial court noted that an ICE detainer does not toll the running of an accused's speedy trial rights. The trial court further noted that none of the tolling events set forth in R.C. 2945.72 occurred during the period between Mr. Houng's posting of bail, and indictment. The trial court held that Mr. Houng was held in jail in lieu of bail, despite posting it. It further held the triple count provision of R.C. 2945.71(E) applied, and that Mr. Houng should have been brought to trial by October 16, 2007. Consequently, the trial court dismissed the indictment, and discharged Mr. Houng pursuant to R.C. 2945.73(B).

{¶9} October 6, 2008, the state timely noticed this appeal, assigning a single error:

{¶10} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS THE INDICTMENT."

{¶11} In *Sanchez*, supra, the Supreme Court of Ohio analyzed whether an ICE detainer tolled the speedy trial period under a statutory, not constitutional analysis. Id. at ¶6-19. We shall do the same. The analysis is a mixed one of law and fact. *State v. Nieves*, 11th Dist. No. 2007-A-0039, 2008-Ohio-534, at ¶16, fn. 1.[1]

{¶12} We apply a de novo standard of review to questions of law, and a clearly erroneous standard to questions of fact. *State v. Berner*, 9th Dist. No. 3275-M, 2002-Ohio-3024, at ¶5.

{¶13} In support of its assignment of error, the state reasons as follows. First, it notes that the triple count provision of R.C. 2945.71(E) "is applicable only to those defendants held in jail in lieu of bail solely on the pending charge." *State v. MacDonald* (1976), 48 Ohio St.2d 66, at paragraph one of the syllabus [interpreting former R.C. 2945.71(D)]. It then reminds us that Mr. Houng was, in fact, held in jail *despite* making bail, evidently under the mistaken belief that the ICE detainer authorized this detention. Consequently, the state argues that the triple count provision should not apply at all. It

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1. We note that the Eighth District Court of Appeals has criticized this court's application in *Nieves*, at ¶16, of an abuse of discretion standard to constitutional challenges to speedy trial violations. See, e.g., *State v. Barnes*, 8th Dist. No. 90847, 2008-Ohio-5472, at ¶14-19. In *Barnes*, the court of appeals reviewed the appellant's constitutional speedy trial challenge under the mixed question of law and fact standard we apply to this statutory challenge. We are not convinced that the standards of review are significantly different. Appellate courts always review legal questions de novo. Regarding a trial court's finding of facts, both the abuse of discretion, and the clearly erroneous, standards of review are highly deferential.

also cites to a series of cases, wherein courts have refused to apply the triple count provision when the state failed to bring an accused to trial based on alleged clerical error.

{¶14} We respectfully disagree with the state's analysis. Section 9, Article I, of the Ohio Constitution provides, in pertinent part:

{¶15} "All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community."

{¶16} Except as provided in Section 9, Article I, the right to bail in Ohio is absolute. *Locke v. Jenkins* (1969), 20 Ohio St.2d 45, 46. In this case, it was determined that Mr. Houng was entitled to bail, and he made it – yet, the state continued to hold him prisoner, evidently under the authority of the ICE detainer. However, the Supreme Court of Ohio has held that ICE detainers are not custodial in nature, but civil, since deportation is a civil proceeding. *Sanchez*, supra, at ¶19. Consequently, we conclude that Mr. Houng was held in jail from July 23, 2007, onward, "in lieu of bail." To conclude otherwise would make the right to bail illusory. Further, since he was held in jail in lieu of bail, the triple count provision of R.C. 2945.71(E) applied, absent a tolling event.

{¶17} "The running of the speedy-trial clock may be temporarily stopped, that is, tolled, *only* for reasons listed in R.C. 2945.72." *Sanchez*, supra, at ¶8. (Emphasis

added.) Clerical or administrative error by the state, or misreading of the law by its agents, are not among the tolling events set forth by the statute.

{¶18} The state cites to various cases allegedly analogous to this one. We find each distinguishable.

{¶19} In *State v. Casto* (Feb. 8, 2000), 4th Dist. No. 99 CA 634, 2000 Ohio App. LEXIS 610, the appellant was arrested and charged with felony DUI. Id. at 2-3. By accident, two cases were opened against him. Id. Later, the felony charge under one case was dismissed voluntarily by the state, but not the other, which all parties appear to have forgotten. Id. at 3. Eventually, the appellant was recharged with misdemeanor DUI. Id. He pleaded no contest to this charge, then appealed. Id. at 4. One of his arguments on appeal was that, since one of the felony cases against him was never dismissed, it still pended – and the speedy trial period had long expired under that case. The Fourth Appellate District rejected this argument, holding:

{¶20} "There is nothing in the record to suggest that this oversight ever resulted in the restriction of appellant's freedom and there is no indication anywhere in the record that this mistake was the result of any bad faith or malfeasance on the part of the prosecution. The prosecution did not circumvent the various constitutional policies behind the speedy trial time limits and we will not permit appellant to profit as a result of a clerical error." *Casto* at 10-11.

{¶21} Similarly, in this case, there is no suggestion that the illegal detention of Mr. Houng was the result of bad faith on the part of the prosecution or the sheriff's department. However, his freedom was restricted. Further, the *Casto* decision predates *Sanchez*, wherein the Supreme Court of Ohio reiterated that only those events

listed in R.C. 2945.72 toll the speedy trial requirements. Based on *Sanchez*, we seriously doubt that *Casto* remains valid law.

{¶22} The state also cites the decision of this court in *State v. Jones* (1992), 81 Ohio App.3d 348, 349-351, wherein it was determined that a defendant being held on a parole violation holder was not entitled to the benefit of the triple count provision, even though robbery charges which had been filed against him were dismissed, then later re-filed. The case is inapplicable to the situation herein, where appellee was imprisoned for no valid reason.

{¶23} Nor does *State v. Garlinsky* (June 29, 1990), 11th Dist. No. 88-T-4153, 1990 Ohio App. LEXIS 2706, provide any comfort to the state. In *Garlinsky*, the appellant asserted that he was entitled to the triple count provision when he was indicted on further charges, while already incarcerated. Id. at 1. This court found no merit in this argument, noting that the triple count provision only applies when an accused is being held solely on the pending charge. Id. at 3. In this case, Mr. Houng was being held on no charge.

{¶24} The state further directs our attention to the decision of the court in *State v. Kingen* (1984), 39 Wash.App. 124. Therein, the appellee was arrested for second degree burglary, but the district court dismissed the charge and ordered his release. Id. at 125. However, jail officials continued to detain him. Id. Thereafter, he was charged again in the superior court with second degree burglary and possession of a controlled substance, the charges arising from the same conduct. Id. The appellee moved to dismiss, based on his speedy trial rights under Washington's statute. Id.

{¶25} The superior court dismissed the charges. *Kingen* at 125-126. The state appealed, and the court of appeals reversed and remanded. As the state notes herein, that court concluded that the appellee's improper incarceration was "irrelevant" for determining whether his speedy trial rights had been violated. Id. at 130. However, the Washington statute or rule involved merely required that a defendant held in jail be brought to trial within sixty days of arraignment, "'less time elapsed in district court (***)'[.]" Id. at 127. "Time elapsed in district court" commenced with the filing of a criminal complaint, and ended with dismissal of the complaint by that tribunal, or the filing of an information or indictment with the superior court. Id. The appellee had spent twenty-two days in jail prior to the dismissal of the complaint. However, once he was arraigned in superior court, he went to trial within thirty-one days, for a total under the Washington statute of only fifty-three days from arraignment, "less time elapsed in district court."

{¶26} In a nutshell, the very language of the Washington statute at issue discounted the appellee's time under illegal detainment as part of the speedy trial period, since the only relevant issues were the arraignment date, the trial date, and the period spent in the district court. Since that court had dismissed the charge against the appellee, his time in illegal detention between the dismissal and his arraignment did not count against the state.

{¶27} The situation in this case is different, since the Ohio speedy trial statutes contain no provisions similar to those at issue in *Kingen*. In Ohio, the significant issues are the date of arrest or service of summons, time spent in jail in lieu of bail, tolling events, and the trial date.

{¶28} The assignment of error is without merit.

{¶29} The judgment of the Trumbull County Court of Common Pleas is affirmed.

{¶30} It is the further order of this court that appellant is assessed costs herein taxed.

{¶31} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs in judgment only,

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion.

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion.

{¶32} I concur in judgment only because I respectfully disagree with the majority's statement that "the *Casto* decision predates *Sanchez*, wherein the Supreme Court of Ohio reiterated that only those events listed in R.C. 2945.72 toll the speedy trial requirements. Based on *Sanchez*, we seriously doubt that *Casto* remains valid law."

{¶33} While it is true that *Casto* was decided by the Fourth Appellate District before *Sanchez* was decided by the Supreme Court of Ohio, nothing in *Sanchez* overrules the *Casto* decision, as they deal with entirely different speedy trial issues. Thus, I am puzzled by the majority's statement in that respect, as both cases remain good law and are distinguishable from this case on their facts alone.

{¶34} In *Casto*, the appellant was charged with a felony DUI that was subsequently dismissed and later refiled as a misdemeanor charge. Because a motion

to suppress the evidence generally tolls the speedy trial time under R.C. 2945.72(E), the court determined that the appellant's motion to suppress the evidence in the felony case "would have tolled the speedy trial time, notwithstanding any clerical or technical failure in omitting to file the dismissal entry under that particular case number." Id. at 11. Because the parties and the trial court all operated under the assumption that the felony charge had been terminated, the failure to properly dismiss the felony case was simply a clerical error. As the state did not "circumvent the various constitutional policies behind the speedy trial time limits," the court determined that it could not "permit appellant to profit as a result of a clerical mistake." Id. at 11. Rather, the appellant's motion to suppress in the felony case tolled the statute.

{¶35} *Sanchez* also concerned an alleged speedy trial violation, albeit where a United States Bureau of Immigration and Customs Enforcement ("ICE") detainer was filed against the appellant and the appellant filed a motion in limine. The appellant was a noncitizen arrested for money laundering and possession of criminal tools and was issued an ICE detainer subsequent to her arrest. The Supreme Court of Ohio decided two matters of "first impression" in that case, stating that "[t]he effect of an ICE detainer on Ohio's speedy-trial statute is a matter of first impression, as is the propriety of imposing a burden upon the state to show that a defense motion, such as a motion in limine, actually caused a delay before speedy-trial computation may be tolled." Id. at ¶5.

{¶36} The Supreme Court of Ohio determined that the triple-count provision applies only when a defendant is being held in jail solely on a pending charge, id. at ¶7, and that, "[u]nlike parole-or probation-violation holders, the ICE detainer does not hold a

defendant in concurrent custody on previously adjudicated charges while the defendant awaits trial on the new charges." Id. at ¶19. Rather, the ICE detainer serves only as notice to the state that ICE may seek custody of a detainee in the future and to notify ICE before his or her release. Thus, the court determined that an ICE detainer is not a custodial instrument and the triple-count provision applies. Id. at ¶17.

{¶37} As for the tolling of time due to the appellant's motion to suppress, the court determined the state has no affirmative duty to prove delay as it is the filing of the motion itself that tolls the statute. Just as when a defendant files a motion to quash, a motion to dismiss, a motion to compel grand jury testimony, or a motion for discovery, the state has a reasonable period of time to respond and the court, a reasonable opportunity to rule. Id. at ¶25 and ¶27.

{¶38} Applying these provisions to the appellant Sanchez, the court determined that the appellant was brought to trial within the appropriate statutory time because, although the ICE detainer did not affect the triple-count provisions of R.C. 2945.71(E), her motion in limine, as well as her motion to dismiss, tolled the statute. Thus, the appellant's right to a speedy trial was not violated because her plea was entered while the count was still at 89 days. Id. at ¶28.