

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0070
ROBERT S. LEWIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2008 CR 0743.

Judgment: Affirmed in part, reversed in part and remanded.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Neil P. Agarwal, 3766 Fishcreek Road, Suite 289, Stow, OH 44224-4379 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Robert S. Lewis, appeals his conviction and sentence in the Court of Common Pleas of Portage County. After a bench trial, Mr. Lewis, was acquitted of one count of felonious assault involving a knife in violation of R.C. 2903.11(A)(2), but was found guilty of a second felonious assault count in violation of R.C. 2903.11(A)(1) and sentenced to two-years incarceration for inflicting a substantial bite wound on Amanda Linna, his girlfriend at the time, during an altercation in his fraternity house bedroom. Mr. Lewis raises two assignments of error in this appeal, one

related to a violation of his statutory speedy trial right and one for the trial court's failure to inform him at the sentencing hearing that costs would be imposed. For the reasons set forth below, we affirm Mr. Lewis' underlying conviction, but reverse and remand to the trial court for the limited purpose of correcting the trial court's error in the imposition of costs.

{¶2} Statement of Facts and Procedural History

{¶3} The verbal and physical altercation between Mr. Lewis and Ms. Linna occurred very early on the morning of September 21, 2007. The fight, apparently triggered by a break-up, culminated in Mr. Lewis inflicting a serious and lasting bite wound on his former girlfriend.

{¶4} A Portage County Grand Jury indicted Mr. Lewis on September 27, 2007 for one count of felonious assault, R.C. 2903.11(A)(2), a felony of the second degree. Mr. Lewis was arrested and released on bond that same day. On November 19, 2010, Mr. Lewis waived his statutory right to a speedy trial. The prosecution entered a *nolle prosequi* without prejudice as to the indictment on April 25, 2008, and the trial court ordered the matter dismissed.

{¶5} On December 19, 2008, a Portage County Grand Jury again indicted Mr. Lewis on two counts of felonious assault, R.C. 2903.11(A)(1) and (2), felonies of the second degree, arising out of the same incident as the previous indictment. Mr. Lewis was again arrested, on December 25, 2008, and released on bond the following day. That matter was set for trial on April 7, 2009. Mr. Lewis and the prosecution engaged in discovery during the early part of 2009.

{¶6} On April 3, 2009, the state requested a continuance due to the unavailability of an expert witness. The trial was reset for May 11, 2009. On May 6,

2009, Mr. Lewis requested a continuance in order to allow him to hire a new attorney because his former counsel had closed his office and could not be located in order to retrieve his file. The court granted a continuance until July 14, 2009 and Mr. Lewis executed a statutory speedy trial waiver, which was granted on May 7, 2009. On June 12, 2009, the state and Mr. Lewis filed a joint motion to continue the trial in order to conduct an expert's deposition. The joint motion was granted, and the trial was moved to the September 2009 trial schedule. Through a series of notices from the court, and without request from either side, the trial date was continued a number of times.

{¶7} Mr. Lewis filed a motion to dismiss the indictment based on a violation of his constitutional right to a speedy trial on May 3, 2010. In the motion, Mr. Lewis acknowledged that he had waived his statutory right to a speedy trial in this case, as well as in the earlier case, and further supported the motion with a supplemental submission on May 12, 2010. The trial court denied his motion to dismiss on May 18, 2010. While the court's entry did not contain a detailed analysis of the tolling dates and the cause or causes of the period of delay, the court did find that Mr. Lewis had "waived time and requested many of the continuances" and that Mr. Lewis had "presented no evidence of prejudice due to the delay."

{¶8} After waiving a jury, Mr. Lewis went to trial and was found guilty of one count of felonious assault. He was sentenced on August 16, 2010 to a two year prison term, with three years of post-release control. In the journal entry dated August 18, 2010, Mr. Lewis was also ordered to pay costs of the proceedings. Mr. Lewis filed a timely notice of appeal on September 7, 2010.

{¶9} After serving 180 days of his sentence, Mr. Lewis moved for judicial release on February 10, 2011. On March 15, 2011, the trial court granted Mr. Lewis judicial release pursuant to R.C. 2929.20.

{¶10} On appeal, Mr. Lewis raises two assignments of error:

{¶11} “[1.] The Trial Court committed reversible error when it denied Defendant’s motion to dismiss the case pursuant to Defendant’s right to a speedy trial under R.C. 2945.71, R.C. 2945.72, and R.C. 2945.73.

{¶12} “[2.] The Trial Court committed reversible error when it assessed costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing.”

{¶13} **Statutory Speedy Trial Violation**

{¶14} In his first assignment of error, Mr. Lewis argues that the trial court erred in not dismissing the charges against him pursuant to a violation of his statutory right to a speedy trial. We note, however, that Mr. Lewis never moved the trial court to dismiss the charges on statutory grounds. Instead, Mr. Lewis moved the court to discharge the indictment solely based on violations of his *constitutional* right to a speedy trial. On appeal, Mr. Lewis now limits his assignment of error solely to a violation of his statutory right. As for his statutory right to a speedy trial, we find no violation by the state and no error was committed by the trial court in failing to dismiss the charges against Mr. Lewis.

{¶15} **Standard of Review**

{¶16} “The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. The statutory speedy trial provisions set forth at R.C. 2945.71 et seq. are coextensive with the constitutional speedy trial provisions.” *State v. Kist*, 173 Ohio App.3d 158, 2007-

Ohio-4773, ¶16, citing *State v. King* (1994), 70 Ohio St.3d 158, 160. “The statutory speedy trial provisions “constitute a rational effort to enforce the constitutional right to a *** speedy trial and [must] be strictly enforced by the courts of this state.” Id., quoting *State v. Pachay* (1980), 64 Ohio St.2d 218, at syllabus. “The speedy trial statute is constitutional, mandatory, and must be strictly construed against the state.” Id., citing *State v. Singer* (1977), 50 Ohio St.2d 103, 109.

{¶17} “The standard of review of a speedy trial issue is to count the days of delay chargeable to either side, and determine whether the case was tried within the time limits set by R.C. 2945.71.” Id. at ¶17, citing *State v. Blumensaadt* (Sept. 21, 2001), 11th Dist. No. 2000-L-107, 2001 Ohio App. LEXIS 4283, *17; see, also, *State v. Pierson*, 149 Ohio App.3d 318, 2002-Ohio-4515, ¶12.

{¶18} “Speedy trial issues present mixed questions of law and fact.” Id. at ¶18, citing *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261. “We accept the facts as found by the trial court on some competent, credible evidence, but freely review the application of the law to the facts.” Id.

{¶19} Mr. Lewis was charged with a felony of the second degree; the state, therefore, was obligated to bring him to trial within 270 days of his arrest. R.C. 2945.71(C)(2). Because Mr. Lewis was indicted and arrested twice for the same offense and based on the same exact circumstances, we will begin counting for purposes of the speedy trial statute from the September 27, 2007 arrest. See *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823; *State v. Adams* (1989), 43 Ohio St.3d 67; *State v. Bonarrigo* (1980), 62 Ohio St.2d 7. We do not count the day of arrest, but begin counting the day after arrest, crediting Mr. Lewis with three days for any one day he spent incarcerated. *Pierson*, at ¶14; R.C. 2945.71(E). See, also, *State v. Wolos*

(1983), 8 Ohio App.3d 361 (crediting defendant triple-count days from the day after arraignment through the day of release). Pursuant to Crim.R. 45, “[i]n computing time, the date of the act or event from which the designated period of time begins shall not be included,” therefore, upon any act either tolling or running the speedy trial time period, we begin counting the day after.

{¶20} Calculating the Days and Tolling Events

{¶21} Mr. Lewis was arrested on September 27, 2007 and was released on bond that same day. We, therefore, charge the seven (7) days between September 28, 2007 and October 5, 2007 against the state. On October 4, 2007, Mr. Lewis made requests for discovery and the speedy trial timetable was tolled from October 5 until November 9, 2007, when the state filed a motion for reciprocal discovery. We then charge against the state the 10 days between November 10, 2007 and November 19, 2007, when the trial court granted a waiver of speedy trial to Mr. Lewis. On April 25, 2007, the state dismissed the indictment against Mr. Lewis and the speedy trial clock stopped. At the time of dismissal, the state had a total of 17 days charged against it, and thus 253 days remained to bring Mr. Lewis to trial on a subsequent indictment of the same nature and resulting from the same circumstances.

{¶22} On December 19, 2008, the state again indicted Mr. Lewis for two counts of felonious assault stemming from the same September 2007 incident. Mr. Lewis was arrested on December 25, 2008, and was released on bond the following day. We therefore credit Mr. Lewis with triple-time for the one night he spent incarcerated. Fourteen (14) days -- three (3) for December 26, due to incarceration and release later that day -- are therefore charged against the state between December 26, 2008 and January 6, 2009. Upon Mr. Lewis’ request for discovery on January 6, 2009, the time

again was tolled, beginning on January 7, 2009. The state did not respond to the discovery requests until April 3, 2009 – 87 days after the requests were made.

{¶23} Tolling During Outstanding Discovery Request to the State

{¶24} Mr. Lewis suggests that 87 days is an unreasonable amount of time for the state to respond to his discovery requests. The question then becomes: what is a reasonable amount of time to allow the state to respond to discovery and stop the speedy trial clock?

{¶25} The Supreme Court of Ohio has held, as against a defendant who delayed in responding to the state's discovery request, that 30 days is a reasonable period of time for discovery responses if the trial court has not issued a discovery order. See *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374 (upholding a trial court's determination to begin tolling the speedy trial time at the 30 day mark until defendant responded to discovery requests). The concept of 30 days as a reasonable period of time for discovery responses has been applied to cases corollary to *Palmer*, in which it was the state who delayed in responding to a defendant's discovery request. See *State v. Ford*, 180 Ohio App.3d 636, 2009-Ohio-146 (holding that only 30 days of tolling would be charged against the defendant upon his discovery requests, not the 67 days the state took to respond).

{¶26} Without determining whether 87 days for the state's discovery response in Mr. Lewis' case was unreasonable, for our analysis and in the vein of *Palmer* and *Ford*, we will accept the proposition that the speedy trial clock was stopped for only 30 days upon Mr. Lewis' request for discovery, not the 87 days the state took to respond. The time thus began to run again on February 6, 2009 and continued to run for 91 days, through May 7, 2009, when Mr. Lewis executed a waiver of his statutory speedy trial

right. This brings the total days charged against the state to 122 at the time of waiver on May 7, 2009. Therefore, we find no violation of the statutory speedy trial requirements. The state was well within the 270 days it had to bring Mr. Lewis to trial when he executed a written waiver of his statutory right to a speedy trial. Therefore, Mr. Lewis' first assignment of error is without merit.

{¶27} Sentencing and the Imposition of Costs

{¶28} In his second assignment of error, Mr. Lewis argues that the trial court committed reversible error when it did not inform him during the sentencing hearing of the imposition of costs, but imposed costs in the sentencing journal entry. The state concedes this assignment of error and suggests the case should be remanded for the limited purpose of informing Mr. Lewis on the record of the imposition of costs and providing the opportunity for him to seek a waiver of payment.

{¶29} R.C. 2947.23 requires that, in all criminal cases, the judge or magistrate include in the sentence the general costs and jury fees, rendering a judgment against the defendant for such costs. The trial court is required to notify the defendant, at the time of sentencing, that if he fails to pay the judgment the court may order him to perform community service until the judgment is paid. A trial court commits error in imposing costs in a sentencing entry when it did not do so during the sentencing hearing. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954. The error does not void the defendant's entire sentence, however, but merely requires a remand for the limited purpose of informing the defendant, on the record, of the imposition of costs and allowing the defendant to move for a waiver of payment at that time.

{¶30} A review of the record in the case *sub judice* reveals that the trial court did not in fact inform Mr. Lewis at the sentencing hearing that costs would be imposed upon

him. Rather, the only mention of costs is found in the sentencing entry of August 18, 2010. Therefore, Mr. Lewis' second assignment of error has merit. We remand the case for the limited purpose of informing Mr. Lewis, on the record, of the imposition of costs and the consequences of not paying those costs, as well as allowing Mr. Lewis to seek a waiver of payment if he so chooses.

{¶31} Mr. Lewis argues that the trial court failed to comply with R.C. 2929.19(B)(6), by not considering his present and future ability to pay "fees" pursuant to R.C. 2929.18(A)(4). The trial court, however, was not obligated to make such a consideration, because the trial court does not appear to have imposed monetary sanctions beyond R.C. 2947.23's general costs and jury fees. No such consideration is required under 2947.23. The same holds true for Mr. Lewis' contention that the trial court failed to conduct the appropriate analysis under R.C. 2941.51(D), related to an indigent defendant's future payment of appointed counsel fees. Nowhere in the judgment entry does the trial court impose attorney fees associated with Mr. Lewis' appointed counsel, thus the trial court was not obligated to engage in the analysis required under R.C. 2941.51(D).

{¶32} Based upon the foregoing, the judgment of the trial court is affirmed in part and reversed and remanded in part.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.