

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-A-0036
JEFFREY K. BARNARD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 336.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jeffrey K. Barnard, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, denying his Motion to Dismiss for Violation of Right to Speedy Trial. The issue before this court is whether Barnard was entitled to apply the triple-count provision of R.C. 2945.71(E) for the purposes of calculating time under the speedy trial statute, where a bench warrant had been previously issued for his arrest in an unrelated matter. For the following reasons, we affirm the decision of the court below.

{¶2} On September 29, 2010, Barnard was arrested by the Conneaut Police Department for Having Weapons while under Disability.

{¶3} On December 2, 2010, the Ashtabula County Grand Jury indicted Barnard for the following: Aggravated Trafficking in Drugs, a felony of the second degree in violation of R.C. 2925.03(A)(2) and (C)(1)(c); Possession of Drugs, a felony of the third degree in violation of R.C. 2925.11(A) and (C)(1)(b); Having Weapons while under Disability, a felony of the third degree in violation of R.C. 2923.13(A)(3); Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24(A); and Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, a felony of the second degree when committed in the vicinity of a school and/or juvenile, in violation of R.C. 2925.04 and R.C. 2925.041(A) and (C)(2). In addition, the Indictment contained forfeiture and firearm specifications.

{¶4} On December 6, 2010, Barnard was arraigned. The Judgment Entry memorializing the arraignment proceedings contained the following: “Upon inquiry by the Court, it was determined that the Defendant spent sixty-eight (68) days in jail pursuant to the charges contained in the Indictment.¹ The Defendant is currently incarcerated on other matters.”

{¶5} On January 5, 2011, Barnard filed a Motion to Dismiss for Violation of Right to Speedy Trial. As the basis for dismissal, Barnard asserted that the State was required to bring him to trial by December 28, 2010. A person charged with a felony “[s]hall be brought to trial within two hundred seventy days after the person’s arrest.” R.C. 2945.71(C)(2). For the purposes of calculating time under the speedy trial

1. This 68-day period represents the time between Barnard’s arrest on September 29, 2010, and the arraignment on December 6, 2010.

statutes, however, “each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E). Since Barnard had been in jail since his arrest on September 29, 2010, the State was required to bring him to trial within 90 days of his arrest, applying the triple-count provision, i.e., by December 28, 2010.

{¶6} On January 18, 2011, the trial court held a hearing on Barnard’s Motion to Dismiss.

{¶7} At the hearing, the State argued that Barnard was not entitled to rely on the triple-count provision since he was not being held solely on the charges pending in the December 2, 2010 Indictment. *State v. MacDonald*, 48 Ohio St.2d 66, 357 N.E.2d 40 (1976), paragraph one of the syllabus.

{¶8} The State introduced evidence that, on November 19, 2007, a Complaint was filed against Barnard in the Conneaut Municipal Court, charging him with misdemeanor Obstructing Official Business (Case No. 07CRB00872). On December 12, 2007, Barnard was found guilty and sentenced to 90 days in the Conneaut City Jail, with credit given for 23 days served, and 67 days suspended provided he abide by the conditions of unsupervised Community Control for a period of five years. On August 20, 2008, the State moved the municipal court to revoke Barnard’s probation. On September 3, 2008, a Bench Warrant was issued for Barnard’s arrest, on account of his failure to appear for the revocation hearing. According to the Return on the Warrant, it was executed on September 29, 2010, “by arresting said JEFFREY K. BARNARD.” Finally, the State introduced a January 10, 2011 Order, in which the Conneaut

Municipal Court imposed the 67-day suspended jail sentence on Barnard and credited him for 103 days served.²

{¶9} On January 20, 2011, the trial court issued a Judgment Entry, denying Barnard's Motion to Dismiss. The trial court determined that, as of the filing of the Motion to Dismiss on January 5, 2011, a total of 160 days had elapsed against the 270 allowed by the statute for bringing Barnard to trial. The court determined that from the date of Barnard's arrest on September 29, 2010, until December 4, 2010, "the Defendant clearly was held on the charges filed in this case, as well as the charges filed in the Conneaut Municipal case 2007-CR-872."³ Accordingly, Barnard was credited with 67 days for this period. From December 5, 2010, until January 5, 2011, 31 days elapsed. However, the court applied the triple-count provision for this period, and so credited Barnard with 93 days. The court further ruled that following the issuance of the January 20, 2011 Judgment Entry, the triple-count provision would not apply, since Barnard would remain in jail due to the sentence imposed in another Conneaut Municipal case pending against him.

{¶10} On May 2, 2011, Barnard entered a plea of No Contest to third-degree Aggravated Trafficking in Drugs, Having Weapons while under Disability, third-degree Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, and the specifications contained in the Indictment. The remaining counts were dismissed.

2. This 103 day period represents the time between Barnard's arrest on September 29, 2010, and the final revocation hearing on January 10, 2011.

3. Barnard completed serving the 67-day jail sentence imposed for Case No. 07CRB00872 on December 4, 2010. However, the Conneaut Municipal Court's January 11, 2011 Order also imposed a 180-day jail term on Barnard for violating probation in another matter, Conneaut Municipal Case No. 06CRB00129A. The State did not move for the revocation of Barnard's probation in Case No. 06CRB00129A until January 3, 2011. Accordingly, the existence of this case did not prevent the application of the triple-count provision after December 4, 2010.

{¶11} On the same date, the trial court sentenced Barnard to three-year terms of imprisonment for each of the felony counts, to be served concurrently with each other. The court also imposed a one-year term of imprisonment for the firearm specification, to be served consecutively for an aggregate prison sentence of four years.

{¶12} On May 24, 2011, Barnard filed his notice of appeal. On appeal, Barnard raises the following assignment of error:

{¶13} “[1.] The trial court erred when it denied Barnard’s Motion to Dismiss based on a violation of his speedy trial rights.”

{¶14} Speedy trial issues present mixed questions of law and fact for the reviewing court. *State v. Hiatt*, 120 Ohio App.3d 247, 261, 697 N.E.2d 1025 (4th Dist.1997); *State v. Lewis*, 11th Dist. No. 2010-P-0070, 2011-Ohio-3748, ¶ 18. The reviewing court accepts the facts as determined by the trial court, if supported by competent and credible evidence, while “freely,” i.e., de novo, reviewing the application of the law to the facts. *Hiatt* at 261. Accordingly, “[t]he determination whether or not an accused is held ‘solely on the pending charge’ is a legal conclusion dependent upon the underlying facts.” *State v. Howard*, 4th Dist. No. 93CA2136, 1994 Ohio App. LEXIS 983, *15 (Mar. 4, 1994).

{¶15} Barnard contends that he was “arrested solely due to the charges herein,” so that the triple-count provision of R.C. 2945.71(E) applied every day following his arrest: “The warrant that was issued by the Conneaut Municipal Court was dated September 3, 2008, but was not filed with the court until more than two years later, on September 29, 2010, well after Barnard was arrested. * * * Moreover, there was no Motion to Revoke Barnard’s Probation filed with the municipal court until January 3,

2011, ninety-six (96) days after Barnard was originally arrested on the pending charge.”
Brief of Appellant, 8.

{¶16} Barnard’s argument badly misconstrues the factual record. The September 3, 2008 Bench Warrant was not filed “well after” Barnard’s arrest, but on the same day as his arrest, i.e., September 29, 2010. As of that day, Barnard was held in jail on the underlying charges in this case as well as the Warrant issued in Conneaut Municipal Case No. 07CRB00872, thus precluding the application of the triple-count provision.

{¶17} Moreover, Barnard is incorrect that there was no Motion for Revocation filed until January 3, 2011. In Case No. 07CRB00872, the State filed its Motion for Revocation on August 20, 2008. The January 3, 2011 Motion for Revocation referred to by Barnard was filed in another Conneaut municipal proceeding against him, Case No. 06CRB00129A. Although the State submitted evidence regarding Case No. 06CRB00129A during the hearing on the Motion to Dismiss, the trial court did not consider this case in its speedy trial calculations prior to the filing of the Motion to Dismiss.

{¶18} The unrefuted evidence before this court demonstrates that, on September 29, 2010, Barnard was arrested on the underlying charges of the present case and on the Bench Warrant in Case No. 07CRB00872. The trial court properly refrained from applying the triple-count provision until December 5, 2010, when Barnard had served his suspended sentence in Case No. 07CRB00872. *State v. Martin*, 56 Ohio St.2d 207, 211, 383 N.E.2d 585 (1978) (the defendant “was not held solely on the pending criminal charges” where “[h]e was also being held on the probation violation,” so that the triple-count provision did not apply); *State v. Hubbard*, 104 Ohio App.3d 443,

446, 662 N.E.2d 394 (11th Dist.1995) (“[t]he existence of a valid probation violation holder serves to prevent the triggering of the triple-count provision”).

{¶19} The sole assignment of error is without merit.

{¶20} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, denying Barnard’s Motion to Dismiss, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.