[Cite as *State v. Miller*, 2009-Ohio-4831.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-008
	:	O P I N I O N
- vs -		9/14/2009
	:	
MICHELLE MILLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 08 TRC 02543

Robert W. Peeler, Mason City Prosecutor, Juliette Gaffney Dame, 5950 Mason-Montgomery Road Mason, Ohio 45040, for plaintiff-appellee

Christopher W. Thompson, 130 West Second Street, Suite 2050, Dayton, Ohio 45402, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Michelle Miller, appeals her convictions in the Mason Municipal Court for operating a vehicle while under the influence of alcohol ("OVI"), driving under suspension ("DUS"), and failure to maintain assured clear distance ("ACD").

{¶2} On January 22, 2008, appellant was arrested for OVI, DUS, and ACD in the city of Mason. Appellant was detained in the Warren County Jail until the next day, and was then

charged by a complaint with a felony OVI as she had allegedly been convicted of or pleaded guilty to five prior OVI offenses within a 20-year period. See R.C. 4511.19(G)(1)(d). On January 25, 2008, appellant was also charged with misdemeanor OVI, DUS, and ACD.

{¶3} On January 31, 2008, all of the misdemeanor charges against appellant were dismissed, and the felony charge was bound over to the grand jury for consideration. On February 25, 2008, the grand jury returned an indictment for OVI, a felony of the fourth degree. On February 27, 2008, appellant was arraigned on the felony OVI charge and appellant filed a request for discovery on that date.

{¶4} On March 28, 2008 at a pretrial hearing, appellant's counsel notified the state that appellant did not have five prior OVI convictions within 20 years and that the pending OVI charge should not have been charged as a felony. On April 3, 2008, appellant withdrew all pending motions and requests for discovery. On April 16, 2008, instead of amending the indictment from a felony OVI to a misdemeanor OVI, the state dismissed the indictment and appellant was released.

{¶5} On April 19, 2008, appellant was re-charged with the January 25, 2008 misdemeanor charges when she was served with a summons. Appellant moved to dismiss these charges on April 21, 2008, and the court denied the motion on June 12, 2008. On January 13, 2009, appellant entered pleas of no contest to each charge, and the trial court sentenced appellant to serve 180 days in jail with 84 days credit for time served, two years of probation, and a five-year driver's license suspension. Appellant appeals her conviction and sentence, raising the following assignment of error:

{¶6} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION TO DISMISS."

{¶7} In her assignment of error, appellant argues the trial court should have granted her motion to dismiss the charges, as she was denied her right to a speedy trial. Appellant

maintains the 270-day speedy-trial time requirement of R.C. 2945.71(C)(2) cannot be applied to a misdemeanor offense unless there is a felony charge pending simultaneously, and that she was not brought to trial within 90 days of her arrest as required by R.C. 2945.71(B)(2).

{¶8} "The right to a speedy trial is guaranteed to all state criminal defendants by the Sixth and Fourteenth Amendments to the United States Constitution * * * and by Section 10, Article I of the Ohio Constitution." *State v. Gellenbeck*, Fayette App. No. CA2008-08-030, 2009-Ohio-1731, ¶8, citing *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, ¶16. Additionally, the General Assembly has enacted Ohio's speedy-trial statutes to preserve this right. See R.C. 2945.71, et seq. The speedy-trial statutory provisions are mandatory and must be strictly construed against the state. *State v. Cox*, Clermont App. No. CA2008-03-028, 2009-Ohio-928, ¶12, citing *State v. Sandura*, Brown App. No. CA2007-09-016, 2008-Ohio-6378, ¶4. "An appellate court's review of a speedy-trial issue involves a mixed question of law and fact: the appellate court defers to the trial court's findings of fact as long as the findings are supported by competent, credible evidence, but the appellate court independently reviews whether the trial court properly applied the law to those facts." *Gellenbeck* at ¶8, citing *Riley* at ¶19

{¶9} Once a defendant demonstrates she was not brought to trial within the permissible period, the accused presents a prima facie case for release. *State v. Masters*, 172 Ohio App.3d 666, 2007-Ohio-4229, ¶10, citing *State v. Steinke*, 158 Ohio App.3d 241, 2004-Ohio-1201, ¶5. The burden then shifts to the state to demonstrate that sufficient time was tolled or extended under the statute. *Masters* at ¶10, citing *State v. Butcher* (1986), 27 Ohio St.3d 28, 31. A defendant's right to a speedy trial may be waived, provided such waiver is either expressed in writing or made in open court on the record. *State v. King*, 70 Ohio St.3d 158, 1994-Ohio-412, syllabus.

{¶10} R.C. 2945.71(B), provides, in relevant part:

{¶11} "Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

{¶12} "* * *

{¶13} "(2) Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days."

{¶14} R.C. 2945.71(C)(2) provides, in relevant part, "[a] person against whom a charge of felony is pending * * * [s]hall be brought to trial within two hundred seventy days after the person's arrest.

{¶15} Further, R.C. 2945.71(D) provides:

{¶16} "A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, *are pending* shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section." (Emphasis added.)

{¶17} And R.C. 2945.71(E) provides, "[f]or purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

{¶18} According to the record, appellant was arrested for OVI, DUS, and ACD on January 22, 2008 and was held in jail pending charges until April 16, 2008. When the triple-count provision of R.C. 2945.71(E) is applied, 108 days elapsed between the time of appellant's arrest and the time appellant filed her motion for discovery on February 27, 2008, as this is a tolling event under R.C. 2945.71(E). See *State v. Brown*, 98 Ohio St.3d 121,

2002-Ohio-7040, syllabus. Appellant withdrew all motions and discovery requests on April 3, 2008 and remained incarcerated until April 16, 2008, so an additional 36 speedy-trial days are added. Appellant was arraigned on the new misdemeanor charges on April 21, 2008. As of this date, appellant's speedy-trial time totaled 144 days.[1] See *State v. Parker*, 113 Ohio St.3d. 207, 2007-Ohio-1534, ¶21.

{¶19} The issue left for this court to determine is whether the state was required to bring appellant to trial within 90 days pursuant to R.C. 2945.71(B)(2) or 270 days pursuant to R.C. 2945.71(C)(2).

{¶20} In *State v. Adams* (1989), 43 Ohio St.3d 67, 68, the Ohio Supreme Court held that "subsequent charges made against an accused would be subject to the same speedy-trial constraints as the original charges, if additional charges arose from the same facts as the first indictment." Following *Adams*, the Ohio Supreme Court stated in *State v. Baker*, 78 Ohio St.3d 108, 1997-Ohio-229, syllabus, that "[i]n 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."

{¶21} In this case, the April 19, 2008 misdemeanor charges were not additional charges against appellant. Instead, the state simply re-charged appellant with the same misdemeanor charges it had previously charged on January 25, 2008, which were based on the same facts. Therefore, the exception in *Baker* does not apply to this case, and the subsequent misdemeanor charges are subject to the same speedy-trial constraints as the original charges.

{¶22} In denying appellant's motion to dismiss the April 19, 2008 misdemeanor

1. The state does not dispute that this calculation is correct for determining appellant's speed-trial time.

charges, the trial court applied R.C. 2945.71(D). Despite acknowledging the three-day period between the state's dismissal of the felony charges and the service of summons on the new misdemeanor charges, the trial court found that the felony and misdemeanor charges were pending simultaneously. We find that the trial court erred in applying R.C. 2945.71(D).

{¶23} In *City of Rocky River v. Glodick*, Cuyahoga App. No. 89302, 2007-Ohio-5705, ¶12-14, the Eighth Appellate District held that two sets of charges must be pending simultaneously for R.C. 2945.71(D) to apply, and that a two-day lapse between the dismissal of first-degree misdemeanor charges and the filing of minor misdemeanor charges prevents the application of this statute. The court found *Glodick* to be unpersuasive "in light of the countervailing public interest in obtaining convictions against people who have committed crimes against the state." We disagree, and find that the reasoning in *Glodick* applies to this case.

{¶24} As the court stated in *Glodick* at ¶14, "[r]egardless of the fact that the later charges stemmed from the same act or transactions as those of the earlier charges, the two sets of charges were not pending simultaneously. The language of R.C. 2945.71(D) states that when determining the time period to trial for one or more offenses which arose from the same transaction, these charges must be pending simultaneously to trigger the application of division (D)." In this case, as in *Glodick*, there was a gap between the dismissal of the more serious offense and the charging of less serious offenses. At no time were the April 19, 2008 charges pending with any felony charges. Accordingly, the provision in R.C. 2945.71(D) does not apply in this case, and the state was required to bring appellant to trial on the misdemeanor offenses within 90 days of her arrest as prescribed by R.C. 2945.71(B)(2).

{¶25} Further, we find that the state's reliance on *State v. Casto* (Feb. 8, 2000), Pike App. No. 99 CA 634, is misplaced, as the facts in *Casto* are distinguishable from those in this case. In *Casto*, the state charged the defendant with felony OVI by complaint and the

defendant was also indicted on a felony OVI charge. Id. The state dismissed the felony OVI that was charged by complaint, and later charged the defendant with misdemeanor OVI. Id. To determine which speedy-trial deadline to apply, the Fourth Appellate District "compare[d] the deadlines for the original charge versus the reduced charge and then use the earlier of the two (2) deadlines." Id. However, *Casto* did not involve the application of R.C. 2945.71(D). Moreover, in this case the subsequent charges were merely a re-filing of the original misdemeanor charges, and this was not the case in *Casto*. The resolution of *Casto* was also complicated by the fact the felony OVI charged by grand jury indictment was never actually dismissed and a tolling event occurred under that case. Id. Thus, we find that *Casto* is distinguishable from this case.

{¶26} As we previously discussed, 144 speedy-trial days elapsed between the date of appellant's arrest and the date she was arraigned on the re-filed misdemeanor charges. Because appellant was not brought to trial within 90 days of her arrest, we find that appellant's statutory right to a speedy trial was violated.[2] The trial court's judgment is reversed, and appellant is ordered discharged pursuant to R.C. 2945.73(B).

YOUNG and RINGLAND, JJ., concur.

2. We note that while the record includes a waiver of appellant's "State and Constitutional right to a speedy trial," this waiver was made on December 10, 2008, which was after the trial court denied appellant's motion to dismiss on speedy trial grounds and after the trial court found appellant guilty of the misdemeanor offenses. Because appellant did not expressly indicate that this waiver applies retroactively, we find this waiver does not apply to the prior speedy-trial violation. See *State v. McDonald* (Sept. 19, 1997), Highland App. No. 96CA913.