[Cite as *State v. Tillman*, 2008-Ohio-2060.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 06CA0118
vs.	:	T.C. CASE NO. 06CR636
DWIGHT TILLMAN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 29th day of February, 2008.

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GRADY, J.:

{¶ 1} Defendant, Dwight Tillman, appeals from his conviction and sentence for failure to comply with an order or signal of a police officer.

{¶ 2} On June 3, 2006, at around 5:00 to 6:00 p.m., Springfield Police Officer Don Bartolet observed a vehicle on Yellow Springs Street that matched the description of a

vehicle reported stolen earlier that day. Officer Bartolet began following the vehicle and observed it run a red light at Yellow Springs and Fair Streets. Officer Bartolet activated his cruiser's lights and siren, but the vehicle did not stop, and Officer Bartolet began pursuing the vehicle.

{¶ 3} The pursuit continued on several streets in a residential neighborhood in Springfield. During that time, the driver of the vehicle, Defendant Tillman, ran one stop light and six stop signs and exceeded the speed limit. There were other vehicles and pedestrians about the area during this police pursuit. The pursuit ended when Defendant pulled into an alley off of Euclid Avenue and stopped, and then fled on foot.

{¶ 4} Officer Bartolet called to Defendant to halt and that he was under arrest, but Defendant continued to run. Officer Bartolet chased Defendant on foot for no more than two hundred yards. During the foot chase, Officer Bartolet was only fifteen to twenty feet behind Defendant. After Defendant ran around the corner of a building at Innisfallen and Yellow Springs Streets, Officer Bartolet found him lying on the ground next to a tree. Defendant was breathing heavily and perspiring.

{¶ 5} Defendant was indicted for two felony offenses: one

count of failure to comply with an order or signal of a police officer, R.C. 2921.331(B), and one count of receiving stolen property, R.C. 2913.51(A). His trial was scheduled to begin August 28, 2006, but was continued by the court sua sponte on August 31, 2006. The case was reassigned on September 6 2006, to the probate court judge, who held a pretrial conference on September 19, 2006. At that time Defendant filed a motion to dismiss the charges, claiming that his speedy trial rights were violated. The court overruled the motion.

{¶ 6} In order to give Defendant time to consider the State's plea offer, the matter was again continued until September 22, 2006, and then again until September 25, 2006, at which time Defendant requested the appointment of different counsel. The trial court denied the request, and Defendant declined the State's plea offer.

{¶ 7} A jury trial commenced on October 20, 2006. Defendant was found guilty of failing to comply with the order or signal of a police officer. The jury also found that Defendant's operation of his vehicle during the police pursuit caused a substantial risk of serious physical harm to persons or property. R.C. 2921.331(C)(5)(a)(ii). The trial court sentenced Defendant to two years incarceration and suspended his driver's license for life. Defendant timely appealed to

this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "TRIAL COURT ERRED BY OVERRULING MR. TILLMAN'S MOTION TO DISMISS ON GROUNDS HIS RIGHTS TO SPEEDY TRIAL WERE VIOLATED."

SECOND ASSIGNMENT OF ERROR

{¶ 9} "TRIAL COURT'S CONTINUANCE OF MR. TILLMAN'S TRIAL WAS UNREASONABLE GIVEN THE FACT THAT MR. TILLMAN WAS STILL IN CUSTODY."

{¶ 10} In these related assignments of error, Defendant contends that the trial court's sua sponte continuance of his trial on August 31, 2006, was not reasonable, and that the court therefore erred when it denied his motion to dismiss based upon a claimed violation of his speedy trial rights.

{¶ 11} The right to a speedy, public trial is a constitutional right of every defendant who is charged with a criminal offense for which he may be deprived of his liberty or property. Sixth Amendment, Constitution of the United States; Article I, Section 10, Constitution of Ohio. The constitutional right is implemented by R.C. 2945.71, *et seq.*, which imposes an affirmative duty on the State to bring a defendant to trial within the statutory times prescribed. *State v. Cross* (1971), 26 Ohio St.2d 270, 271 N.E.2d 264;

State v. Pachey (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. The speedy trial statute, R.C. 2945.71 et. seq., is mandatory and must be strictly construed against the State. *State v. Steinke*, 158 Ohio App.3d 241, 2004-Ohio-1201.

{¶ 12} Defendant was charged with and convicted of two felony offenses. R.C. 2945.71(C)(2) requires the State to bring a person against whom a felony charge is pending to trial within two hundred and seventy days after the person's arrest, unless the time for trial is extended for one of the reasons set forth in R.C. 2945.72. Each day the person is held in jail in lieu of bail on the pending charge is counted as three days. R.C. 2945.71(E). For a violation of the rights these sections confer, a defendant may seek a discharge from criminal liability pursuant to R.C. 2945.73(B). "The merits of a motion for discharge for a violation of speedy trial rights made pursuant to R.C. 2945.73 are determined as of the date of the motion is filed, not when it is decided or when, after a denial, a defendant is brought to trial." *State v. Williams*, Montgomery App. No. 20104, 2004-Ohio-5273, ¶11.

{¶ 13} Defendant was arrested on June 3, 2006, and thereafter remained incarcerated on the pending charges of failure to comply with an order or signal of a police officer and receiving stolen property. Pursuant to R.C. 2945.71(C)(2)

and (E), the State was required to bring Defendant to trial within ninety days after his arrest, on or before September 1, 2006, unless prior to that date the trial date was extended pursuant to R.C. 2945.72.

{¶ 14} Defendant's trial was originally scheduled to begin on August 28, 2006, within the allowable ninety-day limit. On August 31, 2006, eighty-nine days after Defendant's arrest, the trial court sua sponte continued Defendant's trial, because on the date set for Defendant's trial the court was in trial in another case that had begun two weeks earlier. The trial court's order states:

{¶ 15} "This matter was scheduled for trial on August 28, 2006. However, the case of State of Ohio v. Joshua Wade, Case No. 05-CR-373 and 06-CR-11 is presently before the Court on that date. Therefore, the time constraints currently placed upon this court's schedule are reasonable and necessitate continuing the trial in the case at bar. This matter is hereby re-scheduled for trial at the earliest possible date.

{¶ 16} SO ORDERED."

{¶ 17} The State argues that the continuance the court ordered extended Defendant's R.C. 2945.71 speedy trial time pursuant to R.C. 2945.72(H). That section provides that "the time in which an accused must be brought to trial . . . may be

extended . . . by . . . the period of any reasonable continuance granted other than on the accused's own motion." That section contemplates continuances resulting from the court's docket pressures. *State v. Lee* (1976), 48 Ohio St.3d 208.

{¶ 18} Whether a sua sponte continuance is "reasonable" for purposes of R.C. 2945.72(H) requires two inquires. First, the grounds for the continuance must be reasonable and must be stated by the court in an entry journalized prior to the expiration of the defendant's speedy trial time. *State v. Mincy* (1982), 2 Ohio St.3d 6. Second, the resulting extension of the defendant's trial time, which is determined in relation to the new trial date the court sets, must not be unreasonable in duration, and in making that determination courts are limited to the delay that actually and directly results from the continuance ordered. 2 Baldwin's Ohio Practice, Criminal Law § 60:16.

{¶ 19} A continuance is "[t]he adjournment or postponement of a future date." Black's Law Dictionary (Seventh Ed.). That definition contemplates both abandonment of a date that's been set and establishment of a new date certain. We believe that, for purposes of the extension of a defendant's statutory speedy trial time pursuant to R.C. 2945.72(H), the better

practice is to establish a new trial date when a continuance of a defendant's trial is ordered. Otherwise, the resulting extension may be unduly protracted in relation to the reason for the continuance as well as its duration. Not setting a new trial date runs the risk that a defendant will be in "limbo" until a date is set, and that undermines the spirit and purposes of the statutory speedy trial provisions. In the present case, Defendant was not prejudiced because the trial date that subsequently was set, October 20, 2006, did not create an extension of Defendant's speedy trial time that was unduly protracted.

{¶ 20} The sua sponte continuance the court ordered on August 31, 2006, satisfies the requirements of *Mincy* because it was journalized before his statutory speedy trial time expired and affirmatively demonstrates the necessity and reasonableness of the continuance. *City of Aurora v. Patrick* (1980), 61 Ohio St.2d 107. Further, the court ordered the case promptly rescheduled for trial. However, instead of doing that, on September 6, 2006, the court reassigned the case to the probate court judge, without explanation. The reassignment produced some delay that did not directly and actually result from the continuance. However, Defendant did not argue in the trial court, and does not argue on appeal,

that the reassignment itself or any delay it actually produced deprived him of his speedy trial rights.

{¶ 21} The probate court judge was out of the state on September 6-8, 2006. On September 12, 2006, the probate court judge set the matter for a pretrial conference on September 19, 2006. At that pretrial conference, Defendant filed a motion to dismiss the case based upon a claimed speedy trial violation.

{¶ 22} By entry filed September 20, 2006, the court overruled Defendant's motion to dismiss, concluding that it was impossible for the original trial court judge to proceed with Defendant's case as scheduled because a murder trial in another case was proceeding in that judge's court at that time. Also at that September 19, 2006 pretrial conference, Defendant requested time to consider a plea offer from the State. Pursuant to Defendant's request, the court continued the matter for a plea hearing on September 22, 2006. R.C. 2945.72(H).

{¶ 23} On September 22, 2006, the court explained his options to Defendant, which were to either accept the State's plea offer, a guilty plea to one charge with a two-year sentence and the dismissal of the other charge, or proceed to trial on October 20, 2006, which was the earliest date

available that the court could convene a jury trial, given its docket. Defendant requested appointment of a new counsel, claiming that his current counsel had not properly represented him with respect to his speedy trial claim. The court discussed that issue with Defendant, and also discussed available options, such as a no contest plea that would allow Defendant to accept the State's plea offer while still preserving his right to appeal the speedy trial issue. At Defendant's request, the court again continued the plea hearing until September 25, 2006, to allow Defendant more time over the weekend to consider the State's plea offer. R.C. 2945.72(H).

{¶ 24} At the September 25, 2006 plea hearing, Defendant renewed his request that other counsel be appointed to represent him, claiming that there was a conflict between him and current counsel. The court denied Defendant's request, finding no conflict that would justify the removal of current counsel for Defendant. At that point, Defendant refused to accept the State's plea offer, and the court scheduled the matter for a jury trial on October 20, 2006, the earliest date available on the court's calendar.

{¶ 25} Defendant's speedy trial time was extended by the continuance the court ordered on August 31, 2006. In the

Motion to Dismiss that he filed on September 19, 2006, (Dkt 9), Defendant merely argued that his statutory speedy trial rights were violated in relation to the date of his arrest, because more than ninety days had then expired. Defendant did not argue that the continuance was unreasonable, or that the resulting extension was unreasonable due to the passage of time. Because no new trial date had been ordered, the extension resulting from the continuance had not expired when the motion was filed. And, because only eighty-nine speedy trial days had expired since his arrest, Defendant's motion was premature. *State v. Williams*. The court did not err when it denied the relief Defendant's motion requested.

{¶ 26} The first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 27} "TRIAL COURT ERRED BY OVERRULING MR. TILLMAN'S REQUEST TO HAVE NEW COUNSEL ASSIGNED."

{¶ 28} Defendant argues that the trial court abused its discretion when it denied his motion to dismiss court appointed counsel and substitute new counsel. We disagree.

{¶ 29} In *State v. Furlow*, Clark App. No. 03CA0058, 2004-Ohio-5279, at ¶11-13, this court stated:

{¶ 30} "'An indigent defendant has no right to have a

particular attorney of his own choosing represent him. He is entitled to competent representation by the attorney the court appoints for him. Therefore, in order to demonstrate the good cause necessary to warrant removing court appointed counsel and substituting new counsel, defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize defendant's Sixth Amendment right to effective assistance of counsel.' *State v. Coleman* (1988), 37 Ohio St.3d 286, 292, 525 N.E.2d 792; *State v. Murphy,* 91 Ohio St.3d 516, 523, 747 N.E.2d 765, 2001-Ohio-112.

{¶ 31} "Disagreement between the attorney and client over trial tactics and strategy does not warrant a substitution of counsel. *State v. Glasure* (1999), 132 Ohio App.3d 227, 724 N.E.2d 1165. Moreover, mere hostility, tension and personal conflicts between attorney and client do not constitute a total breakdown in communication if those problems do not interfere with the preparation and presentation of a defense. *State v. Gorden,* 149 Ohio App.3d 237, 241, 776 N.E.2d 1135, 2002-Ohio-2761.

{¶ 32} "The decision whether or not to remove court appointed counsel and allow substitution of new counsel is addressed to the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of

discretion. *Murphy, supra.* An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151."

{¶ 33} At the September 22, 2006 plea hearing, and again at the September 25, 2006 continuation of that hearing, Defendant argued that an irreconcilable conflict of interest between himself and court appointed counsel had developed, because counsel failed to properly represent him with respect to his claimed speedy trial violation, and because counsel had attempted to coerce him into accepting a plea. Neither allegation is supported by this record.

{¶ 34} On September 19, 2006, Defendant's counsel filed a motion to dismiss based upon a claimed speedy trial violation. As we discussed in overruling Defendant first and second assignments of error, that motion to dismiss for want of a speedy trial lacked merit, and the trial court properly overruled it. Furthermore, a review of the September 22 and 25, 2006 hearings fails to demonstrate that court-appointed counsel attempted to coerce Defendant into accepting the State's plea offer. Rather, both defense counsel and the trial court simply made accurate representations to Defendant regarding his option to either accept the State's plea offer

or go to trial, and his option to either be represented at trial by his appointed counsel or represent himself.

{¶ 35} The matter was discussed fully on the record and the court repeatedly questioned Defendant as to the reasons behind his request for the appointment of new counsel. Clearly, Defendant was not coerced by his counsel into accepting a plea because he rejected the State's plea offer and elected to go to trial. Furthermore, neither deficient performance by defense counsel nor a total breakdown in the attorney-client relationship has been demonstrated on this record. At worst, there may have been personal conflicts and disagreement between the attorney and the client over trial tactics and strategy, but that does not warrant a substitution of new counsel. *Furlow.* The trial court correctly concluded that the record simply did not demonstrate the existence of a conflict which would justify removal of court appointed counsel in this case. Defendant's right to the effective assistance of counsel was not compromised.

{¶ 36} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 37} "THE STATE FAILED TO SATISFY ITS BURDEN OF PROVING THAT MR. TILLMAN'S ACTIONS CONSTITUTED A SUBSTANTIAL RISK OF SERIOUS PHYSICAL HARM TO PERSONS OR PROPERTY."

{¶ 38} Defendant argues that his conviction is against the manifest weight of the evidence because the evidence presented at trial does not demonstrate that his operation of the vehicle during the police pursuit created a substantial risk of serious physical harm to persons or property.

{¶ 39} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 40} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, *supra*.

{¶ 41} In order to find that a manifest miscarriage of justice occurred, an appellate court must conclude that a guilty verdict is "against," that is, contrary to, the manifest weight of the evidence presented. See, *State v.*

McDaniel (May 1, 1998), Montgomery App. No. 16221. The fact that the evidence is subject to different interpretations on the matter of guilt or innocence does not rise to that level.

{¶ 42} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 43} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*, at p. 4.

{¶ 44} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 45} In arguing that his conviction is against the weight of the evidence, Defendant claims that the posted speed limit in the area where this police pursuit occurred is thirty-five miles per hour, that for much of the pursuit the speeds were between twenty to thirty miles per hour, and the speeds never exceeded forty-five miles per hour. Defendant also claims that he never lost control of his vehicle and therefore there was no substantial risk of serious physical harm to persons or property.

{¶ 46} The evidence demonstrates that this car chase lasted seven minutes and occurred in a residential area of Springfield. At times during the police pursuit, speeds exceeded the posted thirty-five mile-per-hour speed limit. During the pursuit, Defendant disregarded traffic laws, failing to signal turns and running one red light and six stop signs. Furthermore, this pursuit occurred at rush hour, 5:00-6:00 p.m., when other vehicles and pedestrians were about on the streets where the pursuit occurred. On these facts, the jury did not lose its way in finding Defendant guilty. The guilty verdict is not contrary to the testimony of the two police officers who were chasing Defendant.

{¶ 47} Reviewing this record as a whole we cannot say that the evidence weighs heavily against a conviction, that the

jury lost its way, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 48} Defendant's fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J., concurs.

WOLFF, P.J., concurs separately.

WOLFF, P.J., concurring:

{¶ 49} I agree with the disposition of the third and fourth assignments of error, and I agree with the result reached on the first and second assignments.

{¶ 50} I have difficulty with the characterization of Tillman's September 19 motion to dismiss as "premature" and with the citation to *Williams* in support of that characterization.

{¶ 51} Because I agree that the fifty-day continuance was reasonable under the circumstances here, the motion to dismiss was properly overruled, particularly when the motion was filed only twenty days after the August 31 continuance.

{¶ 52} As I read the majority opinion, however, the motion to dismiss was premature because the trial date had been

timely continued on the eighty-ninth day and no new trial date had been set when the motion to dismiss was filed, so that "the extension resulting from the continuance had not expired."

{¶ 53} I think one could reasonably interpret the majority opinion to say that a motion to dismiss on speedy trial grounds is premature (and subject to dismissal) until the new trial date is actually established, regardless of the length of time between the old and new trial dates. I don't believe the majority intends this interpretation, but I believe it's a reasonable interpretation.

{¶ 54} This interpretation would run counter to R.C. 2945.72(H), which limits the trial court to periods of reasonable continuance granted other than upon the defendant's own motion, and R.C. 2945.73(B), which permits a motion to dismiss to be made at or prior to the commencement of trial if the defendant is not brought to trial within the time required by R.C. 2945.71 and R.C. 2945.72.

{¶ 55} Simply put, I would hold that Tillman's motion was properly overruled because it was made within a period of reasonable continuance, not because a new trial date had yet to be set.

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