

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 :
 Plaintiff-Appellee : C.A. CASE NO. 23378
 :
 vs. : T.C. CASE NO. 08CR3876
 :
 DAVID JUDD : (Criminal Appeal from
 : Common Appeals Court)
 Defendant-Appellant :

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O P I N I O N

Rendered on the 25th day of November, 2009.

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GRADY, J.:

{¶ 1} Defendant, David Judd, was indicted on one count of
escape in violation of R.C. 2921.34(A)(1). Defendant waived his
right to a jury trial. Defendant filed a motion to dismiss upon
a claimed violation of his speedy trial rights. Following a
hearing, the trial court overruled Defendant's motion to dismiss,

finding that only one hundred and eighty four days out of a permissible two hundred and seventy days had elapsed for speedy trial purposes. Defendant was found guilty of escape following a trial to the court. The trial court sentenced Defendant to a mandatory two year prison term.

{¶ 2} Defendant appealed to this court from his conviction and sentence. Defendant's appellate counsel filed an *Anders* brief, *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. We notified Defendant of his appellate counsel's representations and afforded him ample time to file a brief pro se. None has been received. This case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 3} Defendant's appellate counsel has raised two possible issues for appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "WHETHER THE CONCLUSION OF THE COURT IN FINDING THE DEFENDANT-APPELLANT GUILTY OF ESCAPE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE?"

{¶ 5} 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 set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 6} "[t]he 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*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 7} Defendant was found guilty of escape in violation of R.C. 2921.34(A)(1), which provides:

{¶ 8} "No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement."

{¶ 9} At trial, the parties stipulated to three exhibits. State's Exhibit 3, the termination entry in Case No. 2006-CR-4127, shows that Defendant was previously convicted of burglary and sentenced to two years in prison. That conviction resulted in the transitional control Defendant violated, which in turn led

to his conviction for escape in the present case. State's Exhibit 2 is an Adult Parole Authority (APA) notification of release violation hearing, which alleges a violation of the Volunteers of America (VOA) program rules from which the escape charge arose.

State's Exhibit 1 is the transitional control program rules for VOA that Defendant signed on August 4, 2008, when he entered that program, acknowledging its requirements.

{¶ 10} Tracey Haynes, Defendant's case manager while he was in the VOA program, testified that VOA is a halfway house for transitional control where persons recently released from prison typically spend the last three to six months of their sentence transitioning back into life in the community. In order to leave the facility for any reason, such as seeking employment, clients must have the approval of their case manager and an itinerary that includes a specific time they are to leave and a specific time they must return. Clients who are late returning must call in or they are in violation of the program's rules.

{¶ 11} On September 2, 2008, Defendant had permission to be gone between 8:00 a.m. and 3:30 p.m. to look for work. By 4:30 p.m., Defendant had not returned or called in. In fact, Defendant never returned to the facility on September 2, 2008. As a result, on September 3, 2008, Defendant was terminated from the VOA program for a rule violation. That was the second time Defendant had been

late in returning to the facility. Defendant had previously been disciplined for failing to return on August 22, 2008. When Defendant was terminated from the VOA program, his parole officer was notified, an arrest warrant was issued, and Defendant was arrested on the evening of September 3, 2008.

{¶ 12} Defendant testified in his own behalf and admitted that he signed the VOA program rules when he first came into the program and that he knew returning to the facility late could lead to disciplinary action. Defendant acknowledged that he violated the rules by returning late, but explained that he was late because he yearned for the comfort of female companionship on the night of September 2, 2008. When Defendant discovered on September 3, 2008, that he had been terminated from the program and a warrant had issued for his arrest, he unsuccessfully tried to contact his parole officer and then surrendered to Dayton police.

{¶ 13} Based upon the stipulated exhibits and the testimony of Tracey Haynes and Defendant, the trier of facts, the trial court here, could reasonably conclude beyond a reasonable doubt that the State proved each and every essential element of escape.

The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 14} Reviewing this record as a whole, we cannot say that

the evidence weighs heavily against a conviction, that the trial court lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice occurred. Defendant's conviction for escape is not against the manifest weight of the evidence. This assignment of error lacks arguable merit.

SECOND ASSIGNMENT OF ERROR

{¶ 15} "WHETHER THE SPEEDY TRIAL RIGHT WAS VIOLATED BY AN INCORRECT APPLICATION OF R.C. 2945.71(E) IN CALCULATING THE TIME ELAPSED AWAITING TRIAL?"

{¶ 16} Defendant argues that each day he spent in jail awaiting trial on the escape charge, a total of one hundred and three days, counts as three days for speedy trial purposes pursuant to R.C. 2945.71(E), and therefore the two hundred and seventy day limit was exceeded and Defendant's speedy trial rights were violated.

{¶ 17} The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio constitution guarantee a criminal defendant the right to a speedy trial. In Ohio, that right is implemented by the statutory scheme imposing specific time limits in R.C. 2945.71, et seq. *State v. Pachay* (1980), 64 Ohio St.2d 218, 221. The particular rights that that statutory scheme confers attach when a defendant is arrested on criminal charges. They continue so long as those charges remain pending, until his criminal liability is determined by trial or a plea of

guilty or no contest.

{¶ 18} 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 seventy days after the person's arrest. 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. However, the triple count provision in R.C. 2945.71(E) applies where a defendant is held in jail in lieu of bail solely on the pending charge. *State v. MacDonald* (1976), 48 Ohio St.2d 66; *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534.

{¶ 19} Defendant was released from prison on transitional control in his burglary case, 2006-CR-4127, and following a transitional control violation hearing Defendant was returned to prison on September 29, 2008, to complete his sentence in 2006-CR-4127. On November 10, 2008, Defendant was indicted on the escape charge in Case No. 2008-CR-3876. Defendant remained incarcerated on that charge until February 20, 2009, when his trial commenced. Defendant was convicted of escape, and was sentenced to serve a mandatory two year term of incarceration. Defendant remained in prison serving his sentence in the underlying burglary case, 2006-CR-4127, until January 2, 2009, at which time Defendant

was transferred to the Montgomery County jail. At the Montgomery County jail, Defendant completed the eight days he had remaining on his sentence in the burglary case, 2006-CR-4127. On January 9, 2009, Defendant began being held solely on the escape charge in Case No. 2008-CR-3876.

{¶ 20} Based upon these stipulated facts, speedy trial time ran at one-for-one from the commencement of the speedy trial time on the escape charge on November 10, 2008, through January 9, 2009, when Defendant completed serving his sentence in the burglary case, 2006-CR-4127. During that period, Defendant was not being held in jail in lieu of bail solely on the pending escape charge, but rather was also serving his sentence in the unrelated burglary case. That is a total of sixty one days. Between January 10, 2009, and February 20, 2009, when trial on the escape charge commenced, a total of forty two days, Defendant was being held in jail in lieu of bail solely on the pending escape charge. That speedy trial time ran at three-for-one pursuant to the triple count provision in R.C. 2945.71(E), for a total of one hundred and twenty-six speedy trial days. Added to the previously elapsed sixty-one days, that is a total of one hundred and eighty-seven days for speedy trial purposes, well within the allowable two hundred and seventy days limit. Defendant's speedy trial rights were not violated in this case. This assignment of error lacks

arguable merit.

{¶ 21} In addition to reviewing the possible issues for appeal raised by Defendant's appellate counsel, we have conducted an independent review of the trial court's proceedings in this case and have found no errors having arguable merit.

{¶ 22} Accordingly, Defendant's appeal is without merit and the judgment of the trial court will be affirmed.

BROGAN, J., And FROELICH, J. concur.

Copies mailed to:

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David Judd
Hon. Timothy N. O'Connell