

[Cite as *State v. Hamblin*, 2010-Ohio-1620.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	:
	:	Appellate Case No. 23189
Plaintiff-Appellee	:	:
	:	Trial Court Case No. 08-CRB-9065
v.	:	:
	:	(Criminal Appeal from Dayton
MICHAEL J. HAMBLIN	:	Municipal Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 9th day of April, 2010.

JOHN J. DANISH, Director of Law, and STEPHANIE L. COOK, Chief Prosecutor, by
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FAIN, J.

{¶ 1} Defendant-appellant Michael Hamblin appeals from his conviction and sentence, following a bench trial, for violating a civil protection order, in violation of R.C.

2919.27(B). Hamblin contends that the trial court erred by overruling his motion to dismiss, based on statutory speedy trial grounds, and that the trial court erred in overruling his motion for a judgment of acquittal, made at the close of all the evidence, under Crim. R. 29.

{¶ 2} We conclude that there is evidence in the record that, if believed, would persuade a reasonable mind, beyond reasonable doubt, that Hamblin committed the charged offense. Therefore, there was sufficient evidence to support his conviction, and the trial court did not err in overruling his motion for a judgment of acquittal.

{¶ 3} The identical charge, based upon the same facts, had previously been pending against Hamblin. That charge was dismissed. Later, the present charge was instituted. During the pendency of the prior, identical charge, Hamblin executed a speedy trial waiver. That waiver remained in effect up to the time that Hamblin filed his motion to dismiss on speedy trial grounds. The time allowed to bring Hamblin to trial under R.C. 2945.71 had not expired when Hamblin waived his speedy trial rights. Therefore, the trial court did not err when it overruled his motion to dismiss. Accordingly, the judgment is Affirmed.

II

{¶ 4} Hamblin had been married to Angela Beiter. They were divorced in 1998. They had two children together, born in 2004 and in 2005. This is not a typo. From Beiter's testimony, it is clear that "we were long divorced," when the children were born. Hamblin had no visitation with the children.

{¶ 5} In October, 2007, Beiter obtained a protective order against Hamblin, effective until September 14, 2012. Among other provisions in the protective order

was the following:

{¶ 6} “**RESPONDENT SHALL NOT INITIATE OR HAVE ANY CONTACT** with the protected persons named in this Order or their residences, businesses, places of employment, schools, day care centers, or child care providers. Contact includes, but is not limited to, telephone, fax, e-mail, voice mail, delivery service, writings, or communications by any other means in person or through another person. Respondent may not violate this order even with the permission of a protected person.”

{¶ 7} The order named Beiter as one of the persons protected by the order.

{¶ 8} At the hearing, the parties stipulated that Hamblin was served with the order some time before March 11, 2008. The State presented evidence that on that date, Hamblin placed two telephone calls to Beiter at her residence.

{¶ 9} Hamblin was charged that same day, March 11, 2008, with violating R.C. 2919.27(B). Both parties agree that on April 29, 2008, with the charge still pending against him, Hamblin filed a waiver of his rights under Ohio’s speedy trial statute, R.C. 2945.71. Neither the waiver itself, nor the exact terms of the waiver, is in our record on appeal.

{¶ 10} On June 2, 2008, the charge against Hamblin was dismissed. On June 19, 2008, the identical charge – violating R.C. 2919.27(B) by violating a civil protection order – was re-filed against Hamblin, based upon the same allegation – that he had called Beiter twice at her residence.

{¶ 11} On October 1, 2008, Hamblin moved to dismiss the charge against him, contending that he had not been brought to trial within the time prescribed by Ohio’s speedy trial statute, R.C. 2945.71. At no time between April 29, 2008, when Hamblin

filed his speedy trial waiver, and October 1, 2008, when Hamblin moved to dismiss the charge on speedy trial grounds, did Hamblin withdraw, or otherwise seek to revoke, his speedy trial waiver.

{¶ 12} The trial court overruled Hamblin's motion to dismiss on October 7, 2008. Hamblin was tried to the bench on November 17, 2008. After all of the testimony was taken, Hamblin moved for a judgment of acquittal, under the authority of Crim. R. 29. His motion was overruled, and the trial court found him guilty of the charge. A little over a month later, Hamblin was sentenced to sixty days in the Montgomery County Jail, to be served concurrently with another sentence, and subject to a jail-time credit of twenty-five days.

{¶ 13} From his conviction and sentence, Hamblin appeals.

II

{¶ 14} Hamblin's First Assignment of Error is as follows:

{¶ 15} "THE THE [sic] TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL IN VIOLATION [OF] SECTION 2945.71(B)(2) OF THE OHIO REVISED CODE."

{¶ 16} Both parties agree that R.C. 2945.71 required that Hamblin be brought to trial within 90 days. Hamblin contends that 48 days elapsed from March 11, when he was arrested, until April 28, when he waived his right to a speedy trial. He contends that his speedy trial time began to run again on July 15, when he was arrested on the second charge, and that 49 days chargeable to the State ran before he moved to dismiss on speedy trial grounds on October 1, 2008. Hamblin adds the 48 days chargeable to the State during the pendency of the first charge to the 49 days

chargeable to the State during the pendency of the second charge, and asserts that the total – 97 days – is beyond the amount of time within which he was required to be brought to trial.

{¶ 17} The trial court found that Hamblin’s waiver of his speedy trial right during the pendency of the first charge not only waived the time accruing after the waiver, but all of the time that had elapsed before the waiver, as well. The State agrees.

{¶ 18} We do not have the actual speedy trial waiver in our record. It would not be customary for a defendant to waive not only speedy-trial time that may accrue after a waiver, but all of the time that has already elapsed as well. See *State v. Kerby* (2005), 162 Ohio App.3d 353, 2005-Ohio-3734, ¶66, in which we expressed our understanding that a speedy trial waiver waives the accrual of speedy trial time *after* the waiver, at least until such time as the waiver is withdrawn. Based upon our customary understanding of the effect of a speedy trial waiver – that it operates prospectively, not retroactively – and in accordance with the familiar principle that waivers of constitutional rights (including statutory implementations of constitutional rights, like Ohio’s speedy trial statute) must be construed strictly, we conclude that Hamblin’s speedy trial waiver did not, as the State argues, and the trial court supposed, waive speedy trial time that had already accrued, but only time accruing thereafter.

{¶ 19} But both the State and Hamblin assume that Hamblin’s speedy trial waiver during the pendency of the first charge did not apply to the pendency of the second charge. With this assumption, we disagree. We had occasion to consider this issue in *State v. Davis*, Clark App. No. 2002-CA-43, 2003-Ohio-4839, ¶¶ 30-32:

{¶ 20} “In [*State v.*] *Adams* [(1989), 43 Ohio St.3d 67], the Ohio Supreme Court

considered whether a defendant's waiver of speedy trial rights for an initial charge of driving while having a prohibited concentration of alcohol applied to a subsequently-filed charge of operating a vehicle while under the influence of alcohol. Both charges stemmed from the same set of facts, but involved different subsections of R.C. 4511.19(A). Ultimately, the Ohio Supreme Court decided that the initial waiver did not apply to the additional charge. In particular, the court stressed that: '[u]naware that his original waivers could affect the course of a subsequent charge, * * * [defendant] did not have sufficient knowledge of the consequences of his actions at the time he executed the waivers.' *Id.*, at 69, 538 N.E.2d 1025.

{¶ 21} "Although both charges in *Adams* involved the same set of facts, the Ohio Supreme Court focused on the fact that the charges could involve different defenses at trial. The court concluded that because of these differences, a defendant might waive speedy trial rights for one charge, but might not be willing to waive a speedy trial for the other. *Id.* At 69-70, 538 N.E.2d 1025. Accordingly, the court held that 'a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the exact nature of the crime he is charged with.' *Id.* At 70, 538 N.E.2d 1025.

{¶ 22} "Consistent with the above authority, Davis [the defendant] claims his waiver of speedy trial rights cannot apply to a subsequent charge that is based on the same set of circumstances as the original indictment. We disagree, however, because the concerns expressed in *Adams* are absent when the subsequent charge is a lesser-included offense of an initial charge. Specifically, in such cases, waiving defendants are aware of the exact nature of the crimes with which they are charged,

since ‘the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed.’ *State v. Deem* (1988), 40 Ohio St.3d 205, 206, 533 N.E.2d 294, paragraph three of the syllabus. Because the greater offense requires proof of one or more additional elements, it may involve considerations of defense that would not be contemplated in defending against the lesser-included offense, but not vice versa.”

{¶ 23} In *State v. Davis*, supra, the defendant was originally charged with two counts of Murder and certain other offenses. Later, a second indictment was filed, charging him with Involuntary Manslaughter, as a lesser-included offense of one of the Murder charges. We held that because the subsequent Involuntary Manslaughter charge was wholly subsumed within one of the Murder charges that was pending when the defendant executed his speedy trial waiver, that waiver applied to the subsequent charge. Here, it is an even simpler situation – the subsequent charge filed against Hamblin is identical, in every respect, to the charge that was pending against Hamblin when he executed his speedy trial waiver.

{¶ 24} We see no reason to distinguish *State v. Davis*, supra, and we see no reason to depart from its holding. The speedy trial waiver Hamblin executed when the first charge was pending against him, which had not been withdrawn or revoked, applied to the identical, second charge. By Hamblin’s own admission, only 48 days chargeable to the State had elapsed when he executed his speedy trial waiver. Thus, when Hamblin filed his motion to dismiss, the State had not exceeded the 90 days within which it was allowed to bring him to trial, and the trial court did not err in overruling the motion (notwithstanding that the trial court overruled the motion for an

incorrect reason).

{¶ 25} Hamblin's First Assignment of Error is overruled.

III

{¶ 26} Hamblin's Second Assignment of Error is as follows:

{¶ 27} "THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION FOR ACQUITTAL BASED ON CRIMINAL RULE [29] AS THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED BY THE STATE TO ESTABLISH A PRIMA FACIE CASE OF VIOLATING A PROTECTIVE ORDER."

{¶ 28} As Hamblin points out in his brief, a motion for a judgment of acquittal, under the authority of Crim. R. 29, tests whether there is sufficient evidence to support a conviction. This issue, in turn, rests upon whether there is evidence in the record from which the finder of fact could find guilt beyond reasonable doubt. *State v. Thompson* (1997), 78 Ohio St.3d 380.

{¶ 29} Beiter testified that Hamblin placed at least two phone calls to her, at her residence, while she was at home during the evening hours of March 11, 2008. She recognized his voice. Placing these calls to Beiter violated the protective order.

{¶ 30} Beiter's friend, Lisa Hamblin, and her fiancé, Dennis Crow, were with her at the time. When Hamblin called the second time, Beiter put the call on her speakerphone, so that her friends could hear. They both testified that they heard Hamblin's voice, which they recognized, on the speakerphone. The testimony of these three witnesses – Beiter and her two friends – if believed, would persuade the

average mind of Hamblin's guilt beyond reasonable doubt. Therefore, there is sufficient evidence in the record to support the conviction. *State v. Walker* (1978), 55 Ohio St.2d 208, 213.

{¶ 31} The trial court did not err in overruling Hamblin's motion for a judgment of acquittal. Hamblin's Second Assignment of Error is overruled.

IV

{¶ 32} Both of Hamblin's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, J., concurs.

FROELICH, J., concurring separately.

{¶ 33} Although, based on stare decisis and the specific record and facts before us, I concur in the decision and judgment, the issue of the effect of a previous time waiver on a refiled case is not without question. To paraphrase Brutus, "there is a tide in the affairs of defendants;" attorneys, memories, laws, witnesses, technologies, defense theories, and circumstances change with time and events – as may a defendant's decision to waive time.

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