[Cite as *State v. Ellington*, 2015-Ohio-2058.]

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

STATE OF OHIO	:	
	:	C.A. CASE NO. 26335
Plaintiff-Appellant	:	
	:	T.C. NO. 14-CRB-4652
v.	:	
	:	(Criminal appeal from
ROBERT ELLINGTON	:	Dayton Municipal Court)
	:	
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ____29th___ day of ___May___, 2015.

. . . . . .

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of the State of Ohio, filed August 1, 2014. The State appeals from the Dayton Municipal Court's decision, issued on September 10, 2014, that granted Robert Ellington's motion to dismiss on

speedy trial grounds. We note that on September 16, 2014, this Court issued an Entry that provides that this Court ordered the State to show cause why its appeal should not be dismissed for lack of jurisdiction, since at the time of the appeal, the municipal court had not journalized its decision but rather the decision was handwritten and not filed with the clerk. This Court noted that on September 10, 2014, the State filed a notice that the municipal court issued a judgment entry granting the motion to dismiss on September 10, 2014. This Court determined that the order to show cause was satisfied and construed the notice of appeal as being amended to reflect the September 10, 2014 judgment entry.

{¶ 2} Ellington was charged by way of Complaint on June 24, 2014 with criminal trespass, in violation of R.C. 2911.21(A)(3), a misdemeanor of the fourth degree, and he entered a plea of not guilty. The Complaint alleged that the trespass occurred on June 23, 2014 at Sinclair Community College.

{¶ 3} The matter was set for trial on July 7, 2014. On that date, the following exchange occurred:

> THE STATE (ATTORNEY EGAN): The next case is going to be State of Ohio versus Robert Ellington. That case number is fourteen CRB Four Six Five Two and Fourteen CRB Four Zero Three Seven. Your Honor, the State in these matters has made an offer with a plea to the trespass we would dismiss the possession, the minor misdemeanor possession of drugs. I do not believe the Defendant is accepting that offer. We are requesting a continuance in the trespass matter. Officer West, who is an essential witness, was unable to attend due to a pre-approved vacation. We are ready to proceed on the minor misdemeanor possession of drugs.

THE DEFENSE: Your Honor, their witness who was essential to this case is not here. My client has been in jail since this offense was June twenty third. We would ask the court to dismiss the case. We are set for trial today. My client has been locked up on a misdemeanor of the fourth degree. We'd ask that the case be dismissed because they are not ready to go forward today on their criminal trespass case.

* * *

THE COURT: Case number two thousand fourteen CRB forty-six fifty-two, criminal trespass, he's been in custody since, it's a fourth degree misdemeanor and he's been in custody since June twenty third, counsel.

THE DEFENSE: Your Honor, I think this case should be dismissed. My client, they're not ready to go forward today and my client is only being held on a misdemeanor of the fourth degree and therefore I think the court should dismiss the case since they are not ready to go forward.

THE COURT: What's the basis for dismissal counsel?

THE DEFENSE: Because they will be out of time, where we have not executed a time waiver in this case, so, therefore, I think the court should make a finding that the prosecutors are out of time in which they are to bring these charges against my client.

* * *

THE STATE (ATTORNEY EGAN): Your Honor, continuing because we have a witness who is unavailable is good cause shown in order to toll time. We would ask that a continuance be granted.

THE COURT: The problem is today is day fifteen. So even if you tolled time you are still out of time, is that correct?

THE STATE (ATTORNEY KORTJOHN): No Your Honor, it would extend under subsection "H" of the speedy trial statute. When you don't have a person that's available that's an essential witness. If the court were to grant the continuance, even for the State, subsection "H" extends time for good cause shown so it would be extended until the next trial date.

THE COURT: I'm asking you, as we stand here today, are you out of time? He's been in jail fifteen days on a fourth degree misdemeanor.

THE STATE (ATTORNEY EGAN): This is the last day your Honor but if –

THE COURT: Right.

THE STATE (ATTORNEY EGAN): Is it fifteen days?

THE COURT: So I'm going to grant the motion to dismiss.

THE STATE (ATTORNEY KORTJOHN): Is the motion being granted on the basis of speedy trial your Honor?

THE COURT: Yes.

{¶ 4} The transcript reflects that Ellington then entered a plea of guilty to the minor misdemeanor possession offense, and the following exchange then occurred:

THE COURT: And I will accept the guilty plea and make a finding of guilty. I'm going to give you credit for fifteen days. You've been in, actually, fourteen days. You've been in jail on this one since the * * * twenty-fourth. That will be fourteen days credit.

THE STATE (ATTORNEY EGAN): Your Honor, as to the trespass, he's actually only been locked up only fourteen days on that from my calculations.

THE COURT: He's been in jail since the twenty-third.

THE STATE (ATTORNEY EGAN): And that would be seven days in June and seven days in July, that's fourteen.

THE COURT: One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. Today is the fifteenth day.

* * *

THE STATE (ATTORNEY KORTJOHN): He was, if he was arrested on the twenty third, you don't count the day of arrest. That doesn't get counted. So you'd start on the twenty-fourth.

THE COURT: The dismissal will be granted.

{¶ 5} The municipal court's entry granting the motion to dismiss provides that "the court Found that Defendant had been in custody for fifteen days on a fourth degree misdemeanor and Grants the Defendant's Motion to Dismiss for Speedy trial."

{¶ 6} The State asserts one assignment of error herein as follows:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING ELLINGTON'S MOTION TO DISMISS ON THE BASIS OF SPEEDY TRIAL GROUNDS.

{¶ 7} The State asserts that "Ellington had been in jail 14 days, not counting the day of arrest, for the purposes of computing speedy trial time." Ellington concedes "that his speedy trial time had not elapsed as of the date the trial court dismissed the matter on

speedy trial grounds, and that he therefore did not establish a prima facie case for dismissal. Dismissal is nonetheless proper, as it was apparent at the time of the motion that the State could not have tried Appellee within the speedy trial time." Ellington asserts that the matter herein is analogous to *State v. D.M. Pallet Service, Inc*. 10th Dist. Franklin No. 94APC02-195, 1994 WL 649982 (Nov. 15, 1994) ("*D.M. Pallet Service*").

{¶ 8} As this Court has previously noted:

> The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989). Ohio's speedy trial statute, R.C. 2945.71, "was implemented to incorporate the constitutional protection of the right to a speedy trial" provided in the United States and Ohio Constitutions. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 661 N.E.2d 706 (1996). As such, that statute must be strictly construed against the State*. Id*.
>
> A defendant can establish a prima facie case for a speedy trial violation by demonstrating that the trial was held past the time limit set by statute for the crime with which the defendant is charged. *State v. Gray*, 2d Dist. Montgomery No. 20980, 2007-Ohio-4549, ¶ 15. "If the defendant can make this showing, the burden shifts to the State to establish that some exception[s] applied to toll the time and to make the trial timely. If the State does not meet its burden, the defendant must be discharged. R.C. 2945.73" (Citation omitted.) *Id*.

State v. Large, 2d Dist. Montgomery No. 23947, 2015-Ohio-33, ¶ 10-11.

{¶ 9} R.C. 2945.73(B) provides: "Upon motion at or prior to the commencement

of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

{¶ 10} R.C. 2945.71 provides:

> * * *
>
> (B) 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:
>
> (1) Within forty-five days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, * * *
>
> * * *
>
> (E) For 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. * * *

{¶ 11} Crim.R. 45(A) provides:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday. * * *

{¶ 12} " 'The standard of review in speedy trial cases is simply to count the days as directed in R.C. 2945.71 *et* seq. * * * ' " *State v. Jackson*, 2d Dist. Montgomery No.17226, 1999 WL 115010, *3 (March 5, 1999), quoting *State v. Carter*, 10th Dist.

Franklin No. 97AP08-976, 1998 WL 151108, *4 (March 31, 1998).

{¶ 13} We initially note, contrary to Ellington's assertion, that *D.M. Pallet Service* is distinguishable from the matter herein. Therein, the City of Columbus appealed from a decision of the Franklin County Municipal Court, Environmental Division, that dismissed charges against D.M. Pallet Service for failure to comply with speedy trial limitations. *Id*., *1. The initial issue was "whether an offense under R.C. 4923.20 and 4923.99 must be considered a minor misdemeanor or an unclassified misdemeanor, and consequently whether the speedy trial period is thirty days or forty-five days." *Id*., * 2. The court concluded that violations of R.C. 4923.20 "should be properly treated as unclassified misdemeanors subject to a forty-five day speedy trial limitation under R.C. 2945.71." *Id*., *3. The Tenth District further concluded that the trial court properly granted D.M. Pallet Service's motion to dismiss, determining as follows:

> * * * [Appellee] was served with its summons on November 12, 1993. On the forty-fifth day following, or December 27, 1993, appellee filed its motion to dismiss. Appellant argues that the speedy trial period was extended under R.C. 2945.72(E) on the basis of the motion "made or instituted by the accused." The filing of a motion to dismiss by defendant clearly tolls the speedy trial period under some circumstances. *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 67; *State v. Bunyan* (1988), 51 Ohio App.3d 190, 193-194. As the motion to dismiss was filed by appellee on precisely the forty-fifth day following service of summons, appellant argues that one day remains in which to bring the case to trial upon a remand to the trial court. Neither party on appeal, nor *amicus curiae*, provides us with

authority to settle the issue of whether a notice to dismiss filed on the final day of the speedy trial period is in fact premature and tolls the speedy trial period. Arguably, of course, the state still benefitted from a few hours in which to bring the case to trial. The state of the record before us, however, clearly indicates that this was a remote possibility at best; due to transfer of the case to the environmental division and other delays, it is apparent that on the date the motion to dismiss was filed, the case had not even progressed to the point of a pretrial hearing. Thus, the state has not shown there was compliance with the speedy trial statute but for the actions of the appellee.

On the one hand, it is tempting to analogize the situation to that in which a court is constrained to continue a case for valid administrative or other reasons when trial has been set on the final day of the speedy trial period. Under R.C. 2945.72(H), such a delay would clearly toll the time period for bringing the case to trial. More persuasive, and more reasonable, however, is a strict interpretation of R.C. 2945.72:

"The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

"* * *

"(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused."

> On the facts before us, we cannot conclude that the state's failure to bring appellee to trial was "necessitated by reason" of appellee's motion filed on the final day of the applicable period, where there is no indication that a trial or other proceeding scheduled for that date was in fact delayed by the motion. We therefore conclude that appellee's motion to dismiss under R.C. 2945.71 was properly granted by the trial court and the arguments presented by appellant in this respect are not well-taken.

Id., *3-4.

{¶ 14} Unlike in *D.M. Pallet* Service, where the appellee's motion was filed on the final day of the applicable period, and there was no indication that the State was prepared to proceed to trial due to the transfer of the case to another division of the court and other delays, we conclude that the State herein has demonstrated compliance with the speedy trial statute. It is undisputed that Ellington was arrested on June 23, 2014 on the criminal trespass charge, and that the matter was set for trial on July 7, 2014. We note that on July 7, 2014, the State requested a continuance pursuant to R.C. 2945.72(H), which provides that the "time within which an accused must be brought to trial * * * may be extended" by the "period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." As Ellington concedes, he failed to make a prima facie case for a speedy trial violation, since July 7, 2014 did not exceed the time limit set by R.C. 2945.71(B)(1) for a fourth degree misdemeanor. As the State asserted before the trial court, the date of Ellington's arrest is not to be included in the computation. Accordingly, the trial court erred in counting 15 days, commencing on June 23, 2014, up to July 7, 2014 (multiplied

by three and equaling 45 days) for speedy trial purposes. June 24, 2014 is the date upon which the computation should have begun, meaning that on July 7, 2014, Ellington had been in jail 14 days (multiplied by three and equaling 42 days), and his speedy trial time of 45 days had not elapsed. Accordingly, the trial court erred in granting Ellington's motion to dismiss on the basis of a speedy trial violation.

{¶ 15} The judgment of the trial court is reversed and the matter is remanded for further proceedings.

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FAIN, J., and WELBAUM, J., concur.

Copies mailed to:

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