

[Cite as *State v. Stamper*, 2006-Ohio-722.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 05CA21
v.	:	
	:	<u>DECISION AND</u>
Don Stamper,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 2-07-06

APPEARANCES:

Robert C. Delawder, Ironton, Ohio, for appellant.

J.B. Collier, Jr., Prosecuting Attorney, and Charles Cooper, Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Kline, J.:

{¶ 1} Don Stamper appeals the judgment of the Lawrence County Municipal Court denying his motion to dismiss the assault charge against him. Stamper contends that the delay of almost forty-two months between the filing of charges and the execution of the arrest warrant against him violated his constitutional right to a speedy trial. After carefully balancing the factors enumerated in *Barker v. Wingo* (1972), 407 U.S. 514, 530, we conclude that the postaccusation delay, although lengthy, did not violate Stamper's speedy trial

rights because he suffered no prejudice in his ability to defend himself.

Additionally, Stamper contends that the delay violated his statutory right to a speedy trial afforded by R.C. 2901.13. Because we find that some competent, credible evidence supports the trial court's conclusion that Stamper left the state to avoid prosecution, we find that the trial court properly concluded that the statute of limitations was tolled during Stamper's absence from the state. Accordingly, we overrule Stamper's sole assignment of error and affirm the trial court's judgment.

I.

{¶ 2} On June 22, 2001, the Lawrence County Prosecuting Attorney filed a complaint upon affidavit against Don Stamper, alleging that on May 4, 2001, in Union Township, Lawrence County, Ohio, Stamper knowingly caused or attempted to cause physical harm to Carol Spencer. The complaint alleged that Stamper's actions constituted assault in violation of R.C. 2903.13, a first degree misdemeanor. Upon the prosecuting attorney's request, the clerk of court issued a warrant for Stamper's arrest that day.

{¶ 3} The record reflects that, at some unspecified time, the June 22, 2001 warrant was recalled. The clerk then reissued the warrant on February 12, 2003. The parties do not dispute that, on November 30, 2004, Stamper was arrested on

the outstanding warrant after he was stopped for a malfunctioning license plate light.

{¶ 4} On January 7, 2005, Stamper filed a motion to dismiss the assault charge against him on the ground that it violated his constitutional right to a speedy trial. In his motion, Stamper argued that lengthy delays in serving complaints upon defendants presumptively implicate speedy trial rights, and that the state could not demonstrate good cause for the delay. He noted that the address listed on the complaint and the arrest warrants was, and continued to be, his correct address. However, in its memorandum contra, the state argued that Stamper failed to mention that his home address was outside the State of Ohio, and, therefore, outside the jurisdiction of Lawrence County, Ohio authorities.

{¶ 5} The trial court conducted a hearing on Stamper's motion where it heard the testimony of Timothy Newman, a former Chesapeake Police Investigator, Carol Spencer, the alleged victim of the assault, and Stamper's Wife, Virginia.

{¶ 6} At the close of testimony, the trial court invited counsel to submit additional authority or argument. In response, Stamper's counsel reiterated his constitutional argument. Additionally, he cited R.C. 2901.13 for the proposition that the prosecution of a misdemeanor must commence within two years of the

offense. Counsel argued that under that statute, simply filing a complaint is not enough to commence an action. Instead, he argued that the state must exercise due diligence to notify the defendant of the pending charges. Because the state had Stamper's correct address, and failed to notify him of the pending charges during the two year statute of limitations provided in R.C. 2901.13, counsel argued that the statutory provision was an additional ground for dismissal of the state's complaint.

{¶ 7} In contrast, the state argued that it exercised due diligence by filing the complaint and causing two warrants for Stamper's arrest to be issued. Additionally, the state asserted that Officer Newman did notify Stamper's girlfriend, who then alerted Stamper, that charges were pending against one of them.

{¶ 8} In denying Stamper's motion to dismiss, the trial court found that, at all relevant times, Stamper was a resident of the State of West Virginia. The court concluded that because Stamper was the resident of another state and the charges against him were misdemeanors, the state had no means of arresting him or otherwise compelling him to appear in court. The court also noted that there was evidence that Stamper was put on notice of the pending charges, and could have voluntarily placed himself before the court to avoid any prejudice from delay.

Because the trial court believed Stamper's absence from its jurisdiction tolled his speedy trial rights, and because Stamper offered no evidence to demonstrate how he was prejudiced by the delay, the court denied his motion to dismiss.

{¶ 9} Thereafter, Stamper entered a plea agreement, wherein he pled no contest to an amended charge of disorderly conduct in violation of R.C. 2917.11, a fourth degree misdemeanor. The court gave him a suspended thirty-day jail sentence, placed him on probation for one year, and ordered him to pay a fine of \$250.

{¶ 10} Stamper timely appeals, raising the following assignment of error: "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS BASED ON A VIOLATION OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A SPEEDY TRIAL AND IN VIOLATION OF SECTION R.C. 2901.13 OF THE OHIO REVISED CODE."

II.

{¶ 11} In his sole assignment of error, Stamper contends that the trial court erred in denying his motion to dismiss the charge against him because the state violated his constitutional and statutory rights to a speedy trial. Specifically, Stamper contends that the forty-two month delay between the filing of the

complaint and his arrest is presumptively prejudicial, and that the state failed to demonstrate a good reason for the delay.¹ Additionally, Stamper contends that the state violated his statutory right to a speedy trial by failing to sufficiently commence the prosecution against him within the two-year time-period prescribed in R.C. 2901.13.

{¶ 12} Our review of a trial court’s decision on a motion to dismiss for a speedy trial violation involves a mixed question of law and fact. *State v. Easley*, Scioto App. No. 03CA2910, 2005-Ohio-767, at ¶6, citing *State v. Brown* (1998), 131 Ohio App.3d 387, 391; *State v. Kuhn* (June 10, 1998), Ross App. No. 97CA2307. Therefore, we accord due deference to a trial court’s findings of fact if supported by competent, credible evidence, but determine independently if the trial court correctly applied the law to the facts of the case. *Id.*

{¶ 13} The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.” The Due Process Clause of the Fourteenth Amendment to the United States Constitution makes this provision applicable to state prosecutions. *Klopper v. North Carolina* (1967), 386 U.S. 213. Additionally, Section 10, Article I, of the Ohio Constitution provides an accused with the right to “a speedy and

¹ We note that the delay was actually forty-one months and eight days.

public trial.” The Ohio Supreme Court held that the constitutional guarantees of a speedy trial apply to both unjustifiable delays in commencing prosecution and unjustifiable delays after indictment. *State v. Meeker* (1971), 26 Ohio St.2d 9, at paragraph three of the syllabus.

{¶ 14} Subsequently, the United States Supreme Court ruled that the right to a speedy trial under the Sixth Amendment to the United States Constitution does not apply to pre-indictment delays, effectively limiting speedy trial guarantees to those persons who have been formally accused of a crime. *United States v. Marion* (1971), 404 U.S. 307, 316-317. However, the Ohio Supreme Court later determined that, even in light of the United States Supreme Court holding in *Marion*, its holding in *Meeker* remained viable in factually similar cases, i.e., where the defendant was the subject of an “official prosecution” or “official accusation.” See *State v. Luck* (1984), 15 Ohio St.3d 150, 153, and *State v. Selvage*, 80 Ohio St.3d 465, 466, 1997-Ohio-287. Here, Stamper was subject to an official accusation based upon the initial complaint and the issuance of an arrest warrant. Therefore, we conclude that this case is factually similar to *Meeker*. The delay of more than forty-one months between the accusation in June 2001 and Stamper’s arrest in November 2004 necessitates an analysis of whether Stamper was denied his constitutional right to a speedy trial.

{¶ 15} The United States Supreme Court has recognized that the right to a speedy trial is “a more vague concept than other procedural rights[,]” that it is “necessarily relative[,]” and that it “depends upon circumstances.” *Barker v. Wingo* (1972), 407 U.S. 514, 521-522. Accordingly, the court adopted a balancing test, in which a court weighs the conduct of both the prosecution and the defendant to determine whether a particular defendant has been deprived of his constitutional right to a speedy trial. *Id.* at 530. In so doing, the *Barker* court identified four factors that a court should assess in determining whether a defendant has been deprived of his constitutional right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Id.*

{¶ 16} While the *Barker* court noted that no one factor is controlling, it noted that the length of the delay is an important factor. *Id.* Specifically, the court stated: “The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street

crime is considerably less than for a serious, complex conspiracy charge.” *Id.* at 530-531.

{¶ 17} While the United States Supreme Court declined to specify the length of delay that was necessary to trigger a speedy trial inquiry in *Barker*, the court later noted that “courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.” *Doggett v. United States* (1992), 505 U.S. 647, 652. The Ohio Supreme Court has recognized that a ten-month delay from the filing of a complaint to the issuance of an indictment is presumptively prejudicial. *State v. Selvage*, 80 Ohio St.3d 465, 468, 1997-Ohio-287. We find that the more than forty-one month delay from the filing of the complaint and issuance of the arrest warrant until Stamper’s arrest is presumptively prejudicial, thus triggering the trial court’s inquiry into the remaining *Barker* factors.

{¶ 18} The second *Barker* factor is the reason for the delay. Here, Stamper argues that the state did not exercise due diligence in notifying him of the charges pending against him. Specifically, he notes that the state had his correct address and telephone number, yet failed to execute the arrest warrant, serve a summons, send him a letter, or telephone him to inform him that charges were pending. While this is true, the state contends, and the trial court found, that the delay was

the result of Stamper's residence in the State of West Virginia, which placed him outside the jurisdiction of Lawrence County, Ohio authorities.

{¶ 19} While the record contains no evidence of any efforts the state made to execute the arrest warrant against Stamper, Crim.R. 4(B)(2) provides: "Territorial limits. Warrants may be executed or summons may be served at any place *within this state.*" (Emphasis added.) Stamper concedes that, at all relevant times, he resided in the State of West Virginia, and that the state was aware of that fact. The evidence adduced at hearing further demonstrates that Stamper worked in the State of West Virginia. Nothing in the record suggests that the state intentionally delayed Stamper's arrest. Nor does Stamper argue that he was present in this jurisdiction, that the authorities had knowledge of his presence, or that the authorities had the opportunity to apprehend him before they did.

{¶ 20} Additionally, the trial court noted that the record contained some evidence that Stamper had been put on notice of the charges pending against him, and could have voluntarily appeared before the court in order to avoid any prejudice from delay. Specifically, the record reveals that Officer Newman testified he had the occasion to speak with Stamper's girlfriend on two separate occasions while he was directing traffic at a local school probably six months after the underlying incident occurred. He stated that during their conversations he

informed her that charges were pending against either her or Stamper, and that they needed to take care of the matter. Officer Newman thought that Stamper might have been present in his girlfriend's car during one of the conversations.

{¶ 21} Stamper's wife, Virginia, testified that she was the girlfriend that Officer Newman referred to in his testimony. Virginia acknowledged that she spoke with Officer Newman at the school, and that he informed her that he thought charges had been filed against either her or Stamper. Moreover, Virginia indicated that she relayed the information to Stamper. But, she testified that the only time they went to the Sheriff's office was the day of the underlying incident, when they went to file a complaint against Spencer.

{¶ 22} Stamper contends that Officer Newman's communication occurred in late May or early June 2001, before school let out. Therefore, he contends that the communication occurred before the charges were filed and, therefore, before the warrant actually issued. However, our review of the record reveals that it was Spencer who testified that she told Virginia that charges were pending during that period. In contrast, Officer Newman estimated that his conversation with Virginia occurred six months after the incident underlying the charges. Therefore, based upon the testimony of Officer Newman and Virginia, the trial court could reasonably conclude that Stamper was put on notice of the charges against him and

could have voluntarily placed himself before the court in order to avoid any prejudice from delay.

{¶ 23} Because the record contains some competent, credible evidence that Stamper resided and worked outside of the territorial limits of the Lawrence County authorities, and that Stamper had some notice that charges were pending against either himself or Virginia and failed to make further inquiry, we cannot conclude that the trial court erred in weighing the reason for the delay in the state's favor.

{¶ 24} The third *Barker* factor is the defendant's assertion of his right to a speedy trial. The trial court reasonably found that Stamper was put on notice of the charges pending against him before his arrest, yet failed to voluntarily place himself before the court. While Officer Newman could not recall exactly when he provided that notice to Stamper's girlfriend, he indicated that it was probably six months after the incident underlying the charges—long before Stamper's arrest in November 2004, and his assertion of his right to a speedy trial in January 2005.

{¶ 25} Both the United States Supreme Court and the Ohio Supreme Court have indicated that evidence that a defendant had knowledge of the charges against him before his arrest should be weighed heavily against him in the context of a speedy trial inquiry. *State v. Triplett* (1997), 78 Ohio St.3d 566, 569-570, citing

Doggett, 505 U.S. at 653. Therefore, Stamper's knowledge that the state had filed charges against either him or his girlfriend, and his corresponding failure to make further inquiry, weigh in the State's favor.

{¶ 26} Despite the testimony of Officer Newman and Virginia, demonstrating that Stamper had knowledge that charges were pending against either himself or his girlfriend, Stamper argues that he was not aware of the pending charges until his arrest in November 2004. Thus, he contends that he timely asserted his right to a speedy trial after his arrest. However, we note that Stamper introduced no evidence to counter the testimony of Officer Newman and his own wife, Virginia, demonstrating that he had knowledge that charges were pending against either him or Virginia long before his arrest. Accordingly, this argument is without merit.

{¶ 27} The final *Barker* factor is the prejudice to the defendant. In *Barker* the United States Supreme Court identified interests that the speedy trial right is designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. Here, the facts clearly do not implicate the first interest, as Stamper was not incarcerated during the delay. Nor does it appear to this court that facts implicate the second interest, minimizing

anxiety and concern of the accused. Here, with the knowledge imparted by Officer Newman's statements to Stamper's girlfriend, it was within Stamper's own power to ease any anxiety and concern he may have had by voluntarily appearing before the court. Moreover, Stamper now claims to have had no knowledge of the charges against him. Therefore, by his own admission, he could not have suffered anxiety and concern.

{¶ 28} Thus, we are left with the third interest that the speedy trial right is designed to protect—limiting the possibility of a delay impairing the defense. As the *Triplett* and *Doggett* courts noted, the possibility that a defense could be impaired by dimming memories and the loss of exculpatory evidence is the most serious form of prejudice a pretrial delay can bring. *Triplett* at 570, citing *Doggett*, 505 U.S. at 654. Both the United States and Ohio Supreme Courts have recognized the difficulty in demonstrating the erosion of exculpatory evidence and testimony, and that “we generally have to recognize that the excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” *Barker*, 407 U.S. at 532; *Doggett*, 505 U.S. at 655; *Triplett* at 570. The *Doggett* court recognized that “[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria * * *, it is part of the mix of relevant facts, and its importance

increases with the length of delay.” *Doggett*, 505 U.S. at 655-656. (Citation omitted.) See also *Triplett* at 570. *Id.* However, because the prosecution carries the burden of proof, delay can often benefit the accused. *Barker*, 407 U.S. at 521. A deprivation of the right to speedy trial “does not per se prejudice the accused’s ability to defend himself.” *Id.*

{¶ 29} Here, Stamper does not allege any particularized trial prejudice and the other *Barker* factors weigh heavily in favor of the state. Accordingly, we cannot find that the trial court erred in concluding that Stamper did not suffer a deprivation of his constitutional right to a speedy trial.

{¶ 30} Stamper also argues that the delay between the issuance of the arrest warrant and his arrest deprived him of his statutory right to a speedy trial pursuant to R.C. 2901.13. Although Stamper argues that the statute provides a statutory speedy trial right, we find that it is actually a statute of limitations. Like our review of speedy trial issues, our review of statute of limitations issues involves a mixed question of law and fact. Therefore, we accord due deference to a trial court’s findings of fact if supported by competent, credible evidence, but determine independently if the trial court correctly applied the law to the facts of the case. *Easley*, *supra*, at ¶6.

{¶ 31} R.C. 2901.13(A)(1)(b) provides that a prosecution for a misdemeanor, other than a minor misdemeanor must be commenced within two years after the offense is committed. R.C. 2901.13(E) further provides: “(E) A prosecution is commenced on the date an indictment is returned or an information filed, or on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. * * * A prosecution is not commenced upon issuance of a warrant, summons, citation, or other process, unless reasonable diligence is exercised to execute the same.” The Ohio Supreme Court has recognized that the purpose of the statute of limitations embodied in R.C. 2901.13 is “to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct.” *Climaco*, supra, at 586, citing *State v. Hensley* (1991), 59 Ohio St.3d 136,138.

{¶ 32} Here, the parties do not dispute that the arrest warrant issued within the statutorily prescribed period. However, Stamper argues that the state did not exercise reasonable diligence to execute the warrant after it issued, and therefore the statute of limitations expired before his arrest. Once Stamper raised the issue that the statute limitations expired, the burden shifted to the state to show that it exercised reasonable diligence to execute the warrant and, thereby, commenced prosecution, or to show that the applicable time was tolled. *State v. Climaco*,

Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A. (1999), 85 Ohio St.3d 582, 587 citing *State v. Young* (1981), 2 Ohio App.3d 155; *State v. Mahoney* (Oct. 4, 1993), Stark App. No. CA9316.

{¶ 33} R.C. 2901.13(G) provides: “The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused departed this state or concealed the accused’s identity or whereabouts is prima-facie evidence of the accused’s purpose to avoid prosecution.” Here, the state failed to introduce any evidence regarding its efforts to execute the arrest warrant, other than the fact that it twice requested that a warrant issue. However, the state did introduce some evidence that the statute of limitations had tolled based upon Stamper’s departure from the State of Ohio. Specifically, the evidence demonstrated that Stamper resided in West Virginia, beyond the territorial limits of the Lawrence County authorities. See Crim.R. 4(B)(2).

{¶ 34} While the record demonstrates that Stamper resided outside of the state of Ohio before the incident giving rise to the charges against him, it also reveals that Stamper was put on notice of the charges, and elected to ignore them. Under R.C. 2901.13(G) this constitutes prima facie evidence of his purpose to avoid prosecution. The record also reveals that Stamper failed to introduce any evidence to rebut the state’s prima facie case, other than the fact that the State had

his correct address in the State of West Virginia. However, the trial court, the prosecutor, and even Stamper's own counsel acknowledged that it would be difficult, if not impossible, to have the misdemeanor warrant executed out of state. Therefore, the trial court could reasonably have concluded that Stamper left the jurisdiction to purposely avoid prosecution. Stamper's purpose in leaving the state of Ohio was a question of fact for the trial court to determine. See, e.g., *State v. Stansberry* (July 5, 2001), Cuyahoga App. No. 78195. Because there is some competent, credible evidence supporting the trial court's implicit determination that Stamper left the state to avoid prosecution, we decline to substitute our judgment for that of the trial court. Accordingly, we overrule Stamper's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellee shall recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.