

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

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : Case No. 07CA849
 :
 vs. :
 :
 DANIEL T. FRISTOE, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellee. :

APPEARANCES:

COUNSEL FOR APPELLANT: David Kelley, Adams County Prosecuting Attorney,
and Mark R. Weaver, Assistant Prosecuting Attorney,
112 Courthouse, 100 West Main Street, West Union,
Ohio 45693

COUNSEL FOR APPELLEE: David H. Bodiker,¹ Ohio Public Defender, and
Katherine A. Szudy, Assistant State Public Defender,
8 East Long Street, 11th Floor, Columbus, Ohio 43215

DATE JOURNALIZED:3-13-08

ABELE, P.J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment that dismissed charges against Daniel T. Fristoe, defendant below and appellee herein, due to a statutory speedy trial right violation. The State of Ohio, plaintiff below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

¹ On January 1, 2008, subsequent to the filing of this appeal, Timothy Young was named the Director of the Ohio Public Defender's office.

"THE TRIAL COURT ERRED WHEN IT FAILED TO TOLL THE SPEEDY TRIAL CALCULATION DURING THE TIME BETWEEN WHEN APPELLEE ASKED FOR DISCOVERY AND THE STATE OF OHIO PROVIDED SUCH DISCOVERY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT FAILED TO TOLL THE SPEEDY TRIAL CALCULATION DURING THE TIME BETWEEN WHEN APPELLEE WAS COURT-ORDERED TO RESPOND TO THE STATES'S REQUEST FOR RECIPROCAL DISCOVERY AND THE APPELLEE'S MOTION TO DISMISS, SINCE NO SUCH DISCOVERY WAS EVER PROVIDED."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT FAILED TO TOLL THE SPEEDY TRIAL CALCULATION UPON APPELLEE'S MOTION TO DISMISS."²

{¶ 2} The facts in this case are relatively undisputed. Appellee was arrested and incarcerated on May 1, 2007. On May 25, 2007, the Adams County Grand Jury returned an indictment charging him with possession of chemicals used in the manufacture of drugs and the improper handling of a firearm in a motor vehicle. He pled not guilty to both charges.

{¶ 3} On May 30, 2007, appellant filed a request for discovery and a bill of particulars. Appellant responded to both on June 26, 2007, and also requested reciprocal discovery pursuant to Crim.R. 16. We find no indication in the record that appellee complied with that request.

{¶ 4} On August 1, 2007, appellee filed a motion to dismiss the case on

²Appellant neglected to include in its brief a separate statement of assignments of error, as required by App.R. 16(A)(3). Therefore, we have taken these from scattered portions of its argument.

grounds of a statutory speedy trial violation. Appellant apparently did not respond and, on August 21, 2007, the trial court granted the motion. In so doing, the court expressly noted that appellant "failed to file a response." This appeal followed.

{¶ 5} For ease of discussion, we jointly consider all three assignments of error wherein appellant contends that the trial court erred in its speedy trial calculations.

{¶ 6} R.C. 2945.71(C)(2) mandates that a person against whom a felony charge is pending must be brought to trial within two hundred and seventy days. Each day spent in jail solely on the pending charge is counted as three days. *Id.* at (E). If a person is not brought to trial within the statutory time frame, that person must be discharged upon motion made at or before the start of trial. See R.C. 2945.73(B).

{¶ 7} It is undisputed that appellee was arrested and incarcerated on May 1, 2007. Accordingly, in the absence of any event that would toll running of the speedy trial time, appellee should have been brought to trial by July 30, 2007.

{¶ 8} Appellant argues that the speedy trial time was tolled because a delay instituted on behalf of the accused tolls the running of the statute. See R.C. 2945.72(E). In State v. Brown, 98 Ohio St.3d 121, 781 N.E.2d 159, 2002-Ohio-7040, at the syllabus, the Ohio Supreme Court held that an accused's request for a bill of particulars is such a proceeding for purposes of that statute. Thus, when appellee filed his May 30, 2007 request for a bill of particulars, speedy trial time tolled until appellant responded on June 26, 2007. This exchange added several weeks to the aforementioned July 30th speedy trial deadline.

{¶ 9} Appellant further argues that the time again tolled, pursuant to the Ohio Supreme Court's holding in State v. Palmer, 112 Ohio St.3d 457, 860 N.E.2d 1011, 2007-Ohio-374, because appellee failed to respond to a request for reciprocal

discovery. In Palmer the Ohio Supreme Court held that such failure tolls the statute's operation for a "reasonable time." *Id.* Here, the trial court did not determine, under the particular circumstances of this case, what constituted a "reasonable time" to respond to appellant's discovery request. However, we need not consider that issue because appellee filed his motion to dismiss on August 1, 2007, two days after his time would have expired without any tolling. Thus, not only was the speedy trial deadline extended by virtue of the time it took to respond to his request for a bill of particulars, it was again tolled by virtue of the filing of his motion to dismiss. See State v. McCall, 152 Ohio App.3d 377, 787 N.E.2d 1241, 2003-Ohio-1603, at ¶25; State v. Radabaugh, Jackson App. No. 06CA2, 2007-Ohio-153, at ¶13. Thus, we do not believe that the two hundred seventy day deadline expired.

{¶ 10} Appellee does not dispute the tolling events, but argues that appellant did not bother to respond to his motion. Thus, appellee contends, appellant waived these issues. We disagree. Although we do not condone appellant's failure to respond, its assignments of error assert that the trial court erred in calculating the speedy trial time. Obviously, those errors did not occur until the court issued its ruling and, thus, could not have been waived by the failure to file an opposing memorandum.

{¶ 11} In addition, we note that in this type of situation we review a trial court's application of the law to the facts de novo. State v. Webb, Washington App. No. 01CA32, 2002-Ohio-3552, at ¶18; State v. Jennings (Aug. 31, 2001), Pike App. No. 00CA654. Here, because the factual circumstances tolling the speedy trial time are undisputed, we simply apply applicable case law to those facts.

{¶ 12} Accordingly, based upon the foregoing reasons, we hereby sustain appellant's first and third assignments of error, reverse the trial court's judgment and

remand the case for further proceedings. Appellant's second assignment of error is moot and will be disregarded. App.R. 12(A)(1)(c).

JUDGMENT REVERSED
AND CASE REMANDED
FOR FURTHER
PROCEEDINGS.

Harsha, J., dissenting:

{¶ 13} I respectfully dissent on the grounds that the State failed to carry its burden in the trial court of going forward with some evidence to show the time limits were extended. An accused presents a prima facie case for discharge by demonstrating that the time limit imposed by R.C. 2945.71 has expired. The burden then shifts to the State to show the statutory time limit has been extended under R.C. 2945.72. See, *State v. Hiatt*, 1997, 120 Ohio App.3d 247 at 261

{¶ 14} Here the State failed to respond to Fristoe's motion to dismiss, which presented a prima facie case for discharge. Its failure to go forward in the trial court was fatal and cannot be rectified by raising issues here that it should have presented to the trial court. Thus, I would affirm.

JUDGMENT ENTRY

It is ordered that the judgment be reversed, that the case be remanded for further proceedings and that appellant recover of appellee the 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 Adams County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of

the Rules of Appellate Procedure.

Harsha, J.: Dissents with Dissenting Opinion
McFarland, J.: Concurs in Judgment & Opinion

For the Court

BY:

Peter B. Abele
Presiding 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.