

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

STATE OF OHIO,

Plaintiff-Appellee,

v.

CLIFFORD PHILLIPS,

Defendant-Appellant.

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Case No: 09CA13

**DECISION AND
JUDGMENT ENTRY**

File-stamped date: 12-30-09

APPEARANCES:

Kenneth G. Hawley, Cincinnati, Ohio for Appellant.

James B. Grandey, Highland County Prosecutor, and Anneka P. Collins, Highland County Assistant Prosecutor, Hillsboro, Ohio for Appellee.

Kline, P.J.:

{¶1} Clifford Phillips appeals his convictions and sentences for trafficking in cocaine and oxycodone. On appeal, Phillips contends that the trial court failed to comply with the requirements of Ohio's Speedy Trial Act and erred when it denied his motion to dismiss. Because of certain tolling events that occurred after the State served Phillips with his summons and indictment, we disagree. Phillips next contends that the trial judge erred when the judge refused to recuse himself. Because we lack jurisdiction to consider this issue, we do not address it. Phillips next contends that his convictions are against the manifest weight of the evidence. Because we find substantial evidence in the record supporting his convictions, we disagree. Phillips next contends that his convictions are not supported by sufficient evidence. Because, after viewing the

evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crimes of trafficking in cocaine and oxycodone proven beyond a reasonable doubt, we disagree. Finally, Phillips contends that the trial court imposed prison sentences that unconstitutionally punished him for asserting his right to a jury trial. We disagree and find that the record merely supports the conclusion that the prosecutor offered sentences before trial that were more lenient than the prosecutor expected Phillips would receive if convicted after a trial. This, absent more, does not support an argument that the trial court unconstitutionally punished Phillips for asserting his right to trial.

{¶2} Accordingly, we affirm the judgment of the trial court.

I.

{¶3} Antoinette Metcalf violated her community control . On March 6, 2007, while working as a confidential informant for the State Route 23 Drug Task Force, Metcalf indicated to officers that she could purchase drugs from Phillips.

{¶4} The Task Force officers arranged two controlled purchases. In both of the transactions, Task Force officers utilized Metcalf to purchase drugs from Phillips.

{¶5} A Highland County Grand Jury returned a two count indictment against Phillips accusing him of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and trafficking in oxycodone also in violation of R.C. 2925.03(A)(1). The indictment also contained a forfeiture specification, which alleged Phillips's truck was subject to forfeiture due to its involvement in the second transaction for oxycodone.

{¶6} According to the record, Phillips was served with the summons and a copy of the indictment on August 19, 2007. The trial court arraigned Phillips and, after he pled

not guilty, released him on his own recognizance on August 22, 2007. The case proceeded to a jury trial on February 23, 2009.

{¶7} At trial, Task Force officers testified. Detective Amy Lahrmer from the Highland County Sheriff's Office testified that she searches female confidential informants before and after every transaction. She testified that she had searched Metcalf before both transactions. Lahrmer also testified that all of the money given to confidential informants is marked. Detective Robert Stewart from the Ross County Sheriff's Office testified that he drove Metcalf to both transactions, undercover and in an unmarked car.

{¶8} The officers testified that both transactions took place in the parking lot of the Old Depot Bar in Hillsboro. They stated that they videotaped and audiotaped the transactions. In the first transaction, Metcalf obtained a plastic bag containing three clear packets that, in turn, contained white powder, and she turned the bag and its contents over to Stewart. Beverly Wiltshire, an expert with the Ohio Bureau of Criminal Identification and Investigation, testified that the white powder in the bag was 2.9 grams of cocaine.

{¶9} In the second transaction, Stewart obtained two pink tablets directly from Phillips. According to Gina Wallicks, another testifying expert from the Ohio Bureau of Criminal Identification and Investigation, the two tablets weighed 0.2 grams and contained oxycodone.

{¶10} The jury convicted Phillips of both trafficking in oxycodone and cocaine, but found that Phillips's truck was not subject to forfeiture. On March 25, 2009, the trial

court sentenced Phillips to a seven-month sentence for each conviction, to be served consecutively.

{¶11} Phillips appeals and asserts the following six assignments of error: I. “The Trial Court erred to the prejudice of the defendant-appellant Clifford Phillips by overruling his first Motion to Dismiss for Violation of Speedy Trial Act.” II. “The Trial Court erred to the prejudice of the defendant-appellant Clifford Phillips by overruling his Renewed Motion to Dismiss for Violation of Speedy Trial Act.” III. “The Trial Judge erred to the prejudice of the defendant-appellant Clifford Phillips by failing to recuse himself due to the appearance of bias and prejudice created by the Prosecutor’s statements to defense counsel.” IV. “The defendant-appellant’s conviction [sic] is against the manifest weight of the evidence.” V. “The defendant-appellant’s conviction [sic] is not supported by sufficient evidence.” And, VI. “The defendant-appellant’s sentence of incarceration constitutes an unlawful punishment for his exercise of his right to jury trial.”

II.

{¶12} For ease of consideration, we will consider Phillips’s first and second assignments of error together. Phillips contends that the trial court erred when it denied both of his motions to dismiss for failure to comply with Ohio’s Speedy Trial Act.

{¶13} Ohio’s Speedy Trial Act “place[s] a burden upon the prosecution and the courts to try criminal defendants within a specified time after arrest.” *State v. Mincy* (1982), 2 Ohio St.3d 6, 8. “A person against whom a charge of felony is pending: * * * (2) Shall be brought to trial within two hundred seventy days after the person’s arrest.” R.C. 2945.71(C)(2). For purposes of this computation, “each day during which the accused

is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E). “The rationale supporting these statutory provisions was to prevent inexcusable delays caused by indolence within the judicial system.” *State v. Ladd* (1978), 56 Ohio St.2d 197, 200.

{¶14} Among other events, the following events extend the time within which an accused must be brought to trial: “(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused; * * * (G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order; (H) 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[.]” R.C. 2945.72.

{¶15} “Upon review of a speedy-trial issue, a court is required to count the days of delay chargeable to either side and determine whether the case was tried within applicable time limits.” *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, at ¶8. “Our review of a trial court’s decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact.” *State v. Eldridge*, Scioto App. No. 02CA2842, 2003-Ohio-1198, at ¶5, citing *State v. Brown* (1998), 131 Ohio App.3d 387, 391; *State v. Kuhn* (Jun. 10, 1998), Ross App. No. 97CA2307. “We accord due deference to the trial court’s findings of fact if supported by competent, credible evidence. However, we independently review whether the trial court properly applied the law to the facts of the case.” *Eldridge* at ¶5, citing *Brown* at 391. Finally, we must “strictly construe the speedy trial statutes against the state[.]” *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57.

{¶16} The trial court correctly found that the time under Ohio's Speedy Trial Act starts to run on the day after August 19, 2007, the date the State served Phillips with the summons and indictment. *State v. Szorady*, Lorain App. No. 02CA008159, 2003-Ohio-2716, at ¶12. Phillips's trial was held on February 23, 2009. That is, it took the State 554 calendar days to bring Phillips to trial. The trial court further found that Phillips spent the three days from service of summons to arraignment incarcerated, which would add six days to the total. However, at oral argument, both parties agreed that Phillips was never taken into custody. We need not resolve this discrepancy because it makes no difference in the outcome of the present case. Therefore, under the Speedy Trial Act, 554 days elapsed from Phillips's arrest to his trial.

{¶17} In this case, there were two affidavits of disqualification filed with the Ohio Supreme Court. When an affidavit is filed that contends the trial judge of a court of common pleas is biased or otherwise should be disqualified from proceeding, the statute deprives the trial judge of jurisdiction over that action. R.C. 2701.03(D)(1). The Ohio Speedy Trial Act does not count "[a]ny period during which trial is stayed pursuant to an express statutory requirement[.]" R.C. 2945.72(G).

{¶18} The State filed an affidavit of disqualification with the Supreme Court of Ohio on September 7, 2007, and the same court denied this affidavit on October 5, 2007, an elapsed time of 28 days. Phillips filed a separate affidavit of disqualification with the Supreme Court of Ohio on September 17, 2008, and the same court denied this affidavit on September 29, 2008, an elapsed time of 12 days. We therefore find that 40 days are not counted for the purpose of Ohio's Speedy Trial Act because of the affidavits of disqualification filed in this case.

{¶19} Phillips also filed three motions, which resulted in delays that are not chargeable to the State under Ohio's Speedy Trial Act.

{¶20} Phillips filed a motion to suppress evidence on January 2, 2008. This motion was not decided until May 30, 2008. Initially, the trial court scheduled a hearing for February 6, 2008. Phillips filed two motions to continue the hearing. And, we will consider the motion decided as of April 16, 2008, which was the date scheduled for the motion hearing following those two continuances. For some reason, the actual hearing did not occur until May 12, 2008.

{¶21} The statute does not count "[a]ny period of delay necessitated by reason of a * * * motion * * * or action made or instituted by the accused[.]" R.C. 2945.72(E). This includes motions for discovery from the State as well as motions to suppress evidence. See, e.g., *State v. Baker*, Fayette App. No. CA2005-05-017, 2006-Ohio-2516, at ¶24 (motion to suppress); *State v. Littlefield*, Marion App. No. 9-02-03, 2002-Ohio-3399, at ¶9 (motion to suppress); *State v. Beam* (1991), 77 Ohio App.3d 200, 207-08 (motion to suppress); *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, at the syllabus ("A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E).").

{¶22} Phillips agrees that the time between January 2, 2008 and April 16, 2008 does not count against the State for speedy trial purposes. Phillips's Brief at 21. We do, however, count the number of days from January 2, 2008 to April 16, 2008 as 105 rather than Phillips's claim of 104. As such, we hold that 105 days count against Phillips as a result of his motion to suppress.

{¶23} Additionally, as noted above, the Supreme Court of Ohio has held that the demand for discovery is a tolling event for Ohio's Speedy Trial Act. See *Brown* at the syllabus. Here, Phillips demanded discovery on August 24, 2007, and the State responded on August 27, 2007. We therefore find this elapsed time of 3 days does not count against the State for the purposes of Ohio's Speedy Trial Act.

{¶24} The final defense motion that tolls time for speedy trial purposes is Phillips's first motion to dismiss for failure to comply with Ohio's Speedy Trial Act, which he filed on September 17, 2008. After the Ohio Supreme Court denied Phillips's affidavit of disqualification on September 29, 2008, the trial court once again had jurisdiction to proceed in this case. The trial court held a hearing on the motion to dismiss on October 10, 2008.¹ And the trial court issued its entry denying Phillips's motion on the same day.

{¶25} Ordinarily, we would begin counting time against the State from the disposition of this motion. Here, however, that would be inappropriate. The trial court had previously scheduled the trial for September 18, 2008. Phillips advised the trial court that he would file his affidavit of disqualification on September 17, 2008 and also filed his motion to dismiss on that same date. The trial court regained jurisdiction to try the case on September 29, 2008. The motion to dismiss remained pending, and the trial court then scheduled a hearing to consider the motion. Notwithstanding the fact the motion to dismiss was resolved on October 10, 2008, the trial would have been held on September 18 but for Phillips's motions. In function, these motions were no different than a motion for a continuance. We find that where a trial court must reschedule a trial

¹ We recognize that the trial court's scheduling order indicated the hearing would be held on October 8, 2008, but the trial court's entry denying the motion to dismiss indicates that the trial court held the hearing on October 10, 2008.

because of a motion of the accused, whether styled as a motion for a continuance or not, the entire time between the motion and the rescheduled trial date is a delay attributable to a motion filed by the accused under R.C. 2945.72(E).

{¶26} We recognize that other cases may raise questions as to whether a trial court must delay the trial to consider a motion. But in this case, the filing of the affidavit of disqualification deprived the trial court of jurisdiction to proceed. Furthermore, Phillips does not argue that the trial court acted unreasonably when it rescheduled the trial for November 20. And we can discern no such argument based on our review of the record.

{¶27} We therefore do not count the time between September 29, 2008 and November 20, 2008 against the State. This removes a further 52 days from the time chargeable to the State.

{¶28} The State then filed a motion to continue the trial scheduled on November 20, 2008. One of the State's expert witnesses would be unavailable for trial because she was scheduled to be on maternity leave. A trial court may grant a continuance of a trial date beyond the statutory speedy trial time limit, so long as the continuance is reasonable under the circumstances. R.C. 2945.72(H). The Supreme Court of Ohio has held that a trial court may grant a continuance for the unavailability of a State witness without violating the defendant's rights under Ohio's Speedy Trial Act. *State v. Saffell* (1988), 35 Ohio St.3d 90, 91-92 (vacation may qualify as reasonable and necessary). The trial court did not err in finding this continuance reasonable under the circumstances. We therefore do not charge this time against the State. The trial court

continued the trial from November 20, 2008 to February 23, 2008, an elapsed time of 95 days.

{¶29} In conclusion, we do not count the following days against the State: first, the affidavits of disqualification, 40 days; second, Phillips's motion to dismiss, 105 days; Phillips's demand for discovery, 3 days; Phillips's first motion to dismiss for failure to comply with Ohio's Speedy Trial Act, 52 days; and the State's motion to continue because one of its witnesses would be on maternity leave, 95 days. This constitutes a total of 295 days. Phillips was tried 554 days after service of summons and a copy of his indictment. After we subtract the time tolled under the act, Phillips was tried 259 days after his arrest. Therefore, the trial court complied with Ohio's Speedy Trial Act and properly denied Phillips's motions to dismiss. Even if the trial court was correct that Phillips was incarcerated for three days before his arraignment, this would only add six days to the total, which would still be less than 270 days. We note that the State has credible arguments on other continuances, but we need not address them at this time because they are now moot.

{¶30} Accordingly, we overrule Phillips's first and second assignments of error.

III.

{¶31} Phillips in his third assignment of error contends that the trial judge was biased and failed to recuse himself. "The authority to review and enter orders related to the disqualification of a Court of Common Pleas judge is solely vested in the Chief Justice of the Ohio Supreme Court, and this Court is without authority 'to pass upon disqualification or to void the judgment of the trial court upon that basis.'" *State v.*

Hicks, Highland App. No. 08CA12, 2009-Ohio-1260, at ¶19, quoting *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441.

{¶32} Accordingly, we overrule Phillips’s third assignment of error.

IV.

{¶33} Phillips contends in his fourth assignment of error that his convictions are against the manifest weight of the evidence.

{¶34} When determining whether a criminal conviction is against the manifest weight of the evidence, we “will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We “must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted.” *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175 (citations omitted).

{¶35} Phillips asserts that Stewart, the undercover officer present at the transactions, offered materially false testimony. Phillips also claims that the State failed to call the informant, Metcalf, and this failure counts against the State. We are not persuaded.

{¶36} Here, we find substantial evidence in the record to support Phillips's convictions.

{¶37} In his brief, Phillips neglects to explain how Stewart's testimony was materially false. Nonetheless, having perused the record, we are satisfied that Phillips is referring to an inconsistency between Stewart's testimony and the video taped recording of the second transaction.

{¶38} The video recording demonstrated that Stewart pulled his car into the parking lot next to Phillips's truck. Phillips's truck was then in between Stewart's car and the video camera, obstructing its view of the transaction. According to Stewart's testimony, for the second transaction, Phillips walked to the driver's side window of Stewart's car and directly handed Stewart the two oxycodone pills. Phillips's counsel argued that if Phillips had in fact handed Stewart the pills through the driver's side window, then he would have had to walk around the rear end of Stewart's car. And the video recording did not show Phillips walking around the rear end of Stewart's car. Transcript 140-41.

{¶39} Lahrmer testified that she searched Metcalf prior to both transactions and confirmed that Metcalf had no drugs on her person prior to the transactions. Transcript at 142. Both Lahrmer and Stewart testified that Stewart and Metcalf met Phillips in the parking lot. The video recordings of the meetings confirmed that this took place, although the actual transactions were not recorded. After both meetings, Stewart had possession of drugs that he testified that either he or Metcalf received from Phillips.

{¶40} Phillips merely points to a discrepancy between Stewart's testimony and the videotape. From the record this does appear to be a significant inconsistency. However, the inconsistency is easily explainable by the unusually lengthy passage of

time between Phillips's conduct and the trial. Presumably, the jury simply considered this discrepancy an inadvertent error caused by an understandable lapse in memory. It is important to note that this discrepancy only concerns one of two transactions. Phillips provides no similar inconsistency for the first transaction either at trial or on appeal.

{¶41} Therefore, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot find, in resolving conflicts in the evidence, that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted. As we stated above, we find substantial evidence in the record to support Phillips's convictions for trafficking.

{¶42} Accordingly, we overrule Phillips's fourth assignment of error.

V.

{¶43} Phillips, in his fifth assignment of error, contends that his convictions are not supported by sufficient evidence.

{¶44} When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶45} This test raises a question of law and does not allow the court to weigh the evidence. *Martin* at 175. Rather, this test “gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson* at 319. Accordingly, the weight given to the evidence and the credibility of witnesses are issues for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶46} Phillips contends that the only evidence that directly implicates him is the testimony of Stewart. Phillips also contends that Stewart’s testimony, which alleged Phillips had sold cocaine to Metcalf and sold oxycodone to Stewart, should not have been credited. We disagree. When we review a conviction for the sufficiency of the evidence, we do not consider the credibility of the witnesses, but grant all reasonable inferences in favor of the State, including credibility determinations. Under the circumstances of this case, any conflict between Stewart’s account of the transactions and the videotape is one for the finder of facts to resolve. “Thus, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it.” *State v. Rhoads*, Highland App. No. 08CA25, 2009-Ohio-4180, at ¶23, citing *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470; *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 42. Here, Stewart testified that he personally observed Phillips sell cocaine and oxycodone. Transcript at 85, 87.

{¶47} Therefore, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the two crimes proven beyond a reasonable doubt.

{¶48} Accordingly, we overrule Phillips's fifth assignment of error.

VI.

{¶49} Finally, Phillips contends in his sixth assignment of error that the trial court unlawfully punished Phillips for his exercise of his right to a jury trial. He claims that the State offered to recommend a sentence before he went to trial that was not as harsh as his actual sentence. The State agrees that it offered a more lenient sentence than Phillips received but denies this offer punished Phillips for exercising his right to a jury trial.

{¶50} This issue presents a legal question, which we review de novo. See, e.g., *State v. Messer*, Ross App. No. 08CA3050, 2009-Ohio-312, ¶5.

{¶51} Here, the prosecutor offered Phillips a plea bargain that would have included a recommendation of community control in exchange for Phillips's plea of guilty to all counts in the indictment. The prosecutor also warned Phillips that the trial court was likely to sentence Phillips to jail if he decided to go to trial. Phillips contends that the jury acquitted him on one of the counts in the indictment, and therefore this sentence constitutes an unlawful punishment for his exercise of his right to jury trial.

{¶52} Phillips has stated little more than the fact that the prosecution offered him a more lenient sentence in a plea bargain than he received after trial. This, absent more, does not make out a claim that the trial court violated his constitutional right to jury trial. See *State v. Donald*, Mahoning App. No. 08 MA 154, 2009-Ohio-4638, at ¶24, citing *Corbitt v. New Jersey* (1978), 439 U.S. 212, 221-24; *State v. Steers* (Feb. 20, 1997), Washington App. No. 96CA12. As the United States Supreme Court stated, so long as

plea bargaining is constitutional, “withholding the possibility of leniency from [defendants who go to trial] cannot be equated with impermissible punishment[.]” *Corbitt* at 223.

{¶53} Accordingly, we overrule Phillips’s sixth assignment of error.

VII.

{¶54} Having overruled all of Phillips’s assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay 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 Highland County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the 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, 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.