[Cite as *State v. Bailey*, 2010-Ohio-2239.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA3287
	:	
v.	:	
	:	**DECISION AND**
KEVIN J. BAILEY,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 5-14-10

APPEARANCES:

Robert A. Cassity, Law Offices of Robert A. Cassity, Portsmouth, OH, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, OH, for Appellee.

Kline, J.:

{¶1} Kevin J. Bailey (hereinafter "Bailey") appeals the judgment of the Scioto County Court of Common Pleas, which found him guilty of Burglary in violation of R.C. 2911.12(A)(1). On appeal, Bailey contends that the trial court erred in denying his motion to dismiss on speedy-trial grounds. We disagree. Bailey's speedy-trial time accumulated in two separate trial-court cases. Because Bailey has not provided us with the record from his first case, we must presume that Bailey's two motions to continue properly tolled his speedy trial-time. Furthermore, no speedy-trial time accrued between the dismissal of Bailey's first indictment and the service of his second indictment. Therefore, after adding Bailey's total speedy-trial time, we cannot find that Bailey's speedy-trial rights were violated. Next, Bailey contends that the state violated his due

process rights by withholding exculpatory evidence. Because the state's failure to disclose the evidence before trial is immaterial, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} On February 27, 2008, Bailey, Amanda McCain (hereinafter "McCain"), and Josh Moore (hereinafter "Moore") participated in a burglary. They had spent the day of the burglary in McCain's car, getting high on cocaine and seeking money to purchase drugs. In their quest for drug money, Bailey apparently suggested that he could steal some power tools from the victim's property. After McCain drove Bailey and Moore to the victim's residence, Bailey exited the car and walked to the rear of the house. Sometime thereafter, Moore also exited the car and walked to the front door. As Moore knocked on the front door, he heard a crash. Bailey had thrown a brick through the back door window.

{¶3} The victim was home stripping wallpaper during the burglary. After hearing the crash, she retrieved a handgun and proceeded to the rear of the house. Once there, the victim saw a hand reaching through the broken window of the back door. Bailey unlocked the deadbolt from the inside and then pushed the door open about eighteen inches to two feet. Once the door was open, the victim yelled that she would shoot if Bailey continued. Bailey then stopped in the threshold of the doorway and looked at the victim. During Bailey's trial, the victim identified Bailey as the burglar who tried to break in through the back door.

{¶4} After seeing the victim, Bailey shut the door and ran away from the house. Then, the victim went to the back door, aimed her gun in the air, and fired a shot. Bailey

continued running, and, despite a later search, the police never found Bailey in the area of the burglary.

{¶5} After Moore heard the shot, he ran back to McCain's car. McCain then attempted to drive away from the scene of the burglary, but her car ended up stuck in the victim's front yard. Moore flagged down a U.P.S. driver for help, but the victim told the U.P.S. driver that the people in the car were trying to rob her. The U.P.S. driver then agreed to stay with the victim until the police responded.

{¶6} The police arrived and arrested Moore and McCain, who both later identified Bailey as the third accomplice. Bailey was arrested on February 29, 2008, and charged with burglary in Case Number 08CR228. We do not have the docket or filings from that case, but both parties agree that Case Number 08CR228 was dismissed on September 25, 2008.

{¶7} Based on these same facts, Bailey was indicted for burglary a second time in Case Number 08CR1218. Bailey was served with the second indictment on December 31, 2008, and he went to trial on Monday, March 23, 2009. On the day of his trial, Bailey filed a Motion to Dismiss Pursuant to Revised Code Section 2945.71 (a speedy-trial motion). To establish a record for speedy-trial purposes, the parties agreed to the following facts:

{¶8} "[BAILEY'S ATTORNEY]: I think I've got a copy of the docket sheet if you'll permit me to pull it out.

{¶9} "THE COURT: Sure.

{¶10} "[BAILEY'S ATTORNEY]: I think I've got it right here Judge. Can we go through it one more time? There's no dispute in the prior case [08CR228] with regard to the jail credit, right?

{¶11} "MS. HUTCHINSON: That's right, 42 days jail credit, 3 for 1.

{¶12} "[BAILEY'S ATTORNEY]: 3 for 1, 42 days total on the prior case.

{¶13} "MS. HUTCHINSON: From February 29th to March 14th.

{¶14} "[BAILEY'S ATTORNEY]: And I'm looking at the docket sheet for 08-CR-228, the arraignment was originally scheduled for [5/13/08], the Defendant filed a Motion to Continue the arraignment * * * on 5/2/08. Also filed a Request for Discovery on the same day. That arraignment was continued until 5/21/08 and that was, I believe, the same day the State responded, is that correct?

{¶15} "MS. HUTCHINSON: And asked for reciprocal discovery.

{¶16} "[BAILEY'S ATTORNEY]: Correct.

{¶17} "MS. HUTCHINSON: There was a Motion to Continue by defendant on 7/14/08 which was granted on August 5, 2008.

{¶18} "[BAILEY'S ATTORNEY]: Defendant responded to discovery on 8/15/08 per the docket sheet.

{¶19} "MS. HUTCHINSON: [Bailey's Attorney], do you agree that there was a Motion to Continue filed on 7/14/08?

{¶20} "[BAILEY'S ATTORNEY]: Yes.

{¶21} "MS. HUTCHINSON: And that it was granted on 8/5/08?

{¶22} "[BAILEY'S ATTORNEY]: Yes.

{¶23} "THE COURT: And it was later rescheduled on September 19th.

{¶24} "MS. HUTCHINSON: That's correct Your Honor.

{¶25} "[BAILEY'S ATTORNEY]: Correct.

{¶26} "MS. HUTCHINSON: On September 19th we had the pre-trial and it was dismissed on September 25, 2008.

{¶27} "[BAILEY'S ATTORNEY]: That's correct.

{¶28} "THE COURT: So all those figures are in the record.

{¶29} "[BAILEY'S ATTORNEY]: I think we've hit them all.

{¶30} "MR APEL: And that's stipulated by both parties that those are the actual dates.

{¶31} "[BAILEY'S ATTORNEY]: Yes, as long as the print-out I have is correct." Transcript at 5-7.

{¶32} Based on these dates, the trial court dismissed Bailey's speedy-trial motion before the start of his trial.

{¶33} On the Friday before Bailey's trial, the prosecutor's office showed the victim a photo array of various mug shots. The victim could not pick Bailey's picture out of the photo array. Apparently, the prosecutor's office did not reveal this information to Bailey's attorney before the start of the trial the following Monday.

{¶34} On direct examination, the victim identified Bailey as the burglar and then testified to the following:

{¶35} "Q. Okay, you had never been shown a line up early on in this case?

{¶36} "A. A line up, no.

{¶37} "Q. A photo array early on in this case? You never had the opportunity to see him?

{¶38} "A. No, no.

{¶39} "Q. Now so you haven't seen him since February 27, 2008?

{¶40} "A. Correct." Id. at 179.

{¶41} After Bailey's attorney cross-examined the victim, the prosecutor made the following statement: "If Your Honor please, I want to kind of clarify one thing. I got ahead of myself a moment there and let me make sure we all understand this. [The victim], and this is my fault and I apologize for this, I asked you if you had seen him since February 27th, have you seen him –

{¶42} "[BAILEY'S ATTORNEY]: Objection, not addressed on cross your Honor.

{¶43} "THE COURT: And by the way he started out I'm going to allow it. It may be something that's objectionable but let's see where it goes. I agree, it was not brought on cross. He stated that it's something he forgot to do and we'll see what it is and we'll go from there." Id. at 183.

{¶44} At this point, the state questioned the victim about her failure to pick Bailey's picture out of the photo array. The victim explained that the photos were "black and whites, just grainy, [and that] it was hard to distinguish anyone." Id. at 186. Further, the victim testified that, after seeing the photo array, she believed "if [she] could see him in person then [she] could probably pick him out because [she] didn't think [she] would ever forget that look." Id. at 190.

{¶45} Bailey's attorney then cross-examined the victim about her failure to identify Bailey's picture.

{¶46} "Q. So the defendant's photo is in this photo array, correct?

{¶47} "A. Correct.

{¶48} "Q. And you were unable to identify his photo?

{¶49} "A. Right, it's a black and white.

{¶50} "Q. But you now claim that you can identify him, the defendant, as the person who broke in your home?

{¶51} "A. Correct." Id. at 193.

{¶52} Subsequently, the jury found Bailey guilty of burglary, a second-degree felony, and the trial court sentenced Bailey to six years in prison.

{¶53} Bailey appeals and asserts the following two assignments of error: I. "The Trial Court Erred in Overruling Appellant's Motion to Dismiss for Lack of a Speedy Trial." And, II. "The Trial Court Erred When the State Failed to Timely Provide Appellant with Exculpatory Evidence."

II.

{¶54} In his first assignment of error, Bailey contends that the trial court erred in overruling his speedy-trial motion.

{¶55} 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. Under the act, "[a] person against whom a charge of felony is pending * * * [s]hall 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.

{¶56} "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*, 75 Ohio St.3d 53, 57, 1996-Ohio-171.

{¶57} Here, we cannot find a speedy-trial violation. As an initial matter, we do not have the record from Case Number 08CR228. "Pursuant to App.R. 9(A), the record on appeal must contain '[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court[.]'" *State v. Dalton*, Lorain App. No. 09CA009589, 2009-Ohio-6910, at ¶25, quoting App.R. 9(A). Furthermore, "[i]t is the appellant's duty to transmit the [record] to the court of appeals. * * * This duty falls to the appellant because the appellant has the burden of establishing error in the trial court." *Dalton* at ¶25, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199 (internal citations omitted).

{¶58} Both Bailey and the state discuss several potential tolling events that took place in Case Number 08CR228, including Bailey's two motions to continue. However, Bailey has not provided this court with anything from Case Number 08CR228. As a result, we have nothing to review (other than the stipulated facts) in regards to the potential tolling events that took place while Case Number 08CR228 was pending. Thus, when considering the stipulated facts, we must presume the regularity of the trial court proceedings; i.e., we must presume that Bailey's speedy trial time was properly tolled in Case Number 08CR228. See *Dalton* at ¶25; *Dublin v. Streb*, Franklin App. No. 07AP-995, 2008-Ohio-3766, at ¶36-37; *State v. Pimental*, Cuyahoga App. No. 84034, 2005-Ohio-384, at ¶37-38; *State v. Robinson*, Franklin App. No. 01AP-1005, 2002-Ohio-2090, at ¶16; *City of Akron v. Kulasa* (Apr. 5, 2000), Summit App. No. 19815. Cf. *Knapp* at 199 ("When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.").

{¶59} Both parties agree that Bailey accumulated forty-two (42) speedy trial days as jail-time credit. Bailey was released from jail on March 14, 2008, and Case Number 08CR228 was dismissed on September 25, 2008. Thus, after combining his three-for-one jail time and his non-jail time, Bailey could have accumulated a maximum of 237 speedy-trial days in Case Number 08CR228.

{¶60} The parties stipulated to several events, including (1) Bailey's May 2, 2008 Motion to Continue Arraignment and (2) Bailey's July 14, 2008 Motion to Continue the Jury Trial. According to the parties' stipulations, the trial court granted both of these

motions. "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 * * * by * * * [t]he period of any continuance granted on the accused's own motion[.]" R.C. 2945.72(H). See, also, *State v. Mitchell*, Mahoning App. No. 06-MA-169, 2008-Ohio-645, at ¶27. Because we do not have the record from Case Number 08CR228, we must presume regularity. Therefore, we must conclude that Bailey's motions to continue properly tolled his speedy-trial time. Based on the stipulated facts, Bailey's first motion tolled his speedy-trial time from May 2, 2008, until May 21, 2008 (the arraignment), and Bailey's second motion tolled his speedy-trial time from August 5, 2008, until September 19, 2008 (Bailey's pre-trial).[1] This accounts for a total of sixty-four (64) days that are not chargeable to the state. Therefore, Bailey accumulated, at most, 173 speedy-trial days in Case Number 08CR228.

{¶61} The state dismissed Case Number 08CR228 on September 25, 2008. "For purposes of computing how much time has run against the state * * *, the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I)." *State v. Broughton* (1991), 62 Ohio St.3d 253, at paragraph

[1] Because we do not have the record for Case Number 08CR228, we do not know the circumstances behind Bailey's July 14, 2008 motion to continue. "Under R.C. 2945.72(H), the period of any continuance granted on the accused's own motion extends the speedy-trial time during the period of delay caused by the motion." *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, at ¶32, citing *State v. Martin* (1978), 56 Ohio St.2d 289, 297-298. Here, we do not know what caused the delay between the July 14, 2008 motion and the trial court's granting of the continuance on August 5, 2008. Thus, without deciding the issue, we have selected August 5, 2008, as the tolling date. Regardless, choosing either date would take Bailey below 270 total speedy-trial days.

one of the syllabus. Thus, we do not count the days between September 25, 2008 and the date of service for Bailey's indictment in Case Number 08CR1218.

{¶62} For speedy trial purposes, "we [resume] our count with the date on which the [second] indictment was served upon [Bailey]." *State v. Rupp*, Mahoning App. No. 05 MA 166, 2007-Ohio-1561, at ¶103 (citations omitted). See, also, *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, at ¶20; *State v. Spencer* (Nov. 4, 1998), Scioto App. No. 97CA2536. Bailey was served with the indictment in Case Number 08CR1218 on December 31, 2008, and his trial date was March 23, 2009. Therefore, Bailey accumulated eighty-two (82) days of speedy-trial time in Case Number 08CR1218. Both Bailey and the state agree on this number.

{¶63} Here, Bailey accumulated, at most, 255 speedy-trial days.[2] He accumulated (1) 173 speedy-trial days (at most) in Case Number 08CR228; (2) no speedy-trial days between September 25, 2008, and December 31, 2008; and (3) eighty-two (82) speedy-trial days in Case Number 08CR1218. Thus, we cannot find that more than 270 days are chargeable to the state. In other words, we find that Bailey's speedy-trial rights were not violated.

{¶64} Accordingly, we overrule Bailey's first assignment of error.

III.

{¶65} In his second assignment of error, Bailey contends that the state concealed exculpatory evidence. Bailey argues that the state should have disclosed the

[2] Based on all the potential tolling events in Case Number 08CR228, the state contends that Bailey accumulated 177 speedy-trial days. However, because it is unnecessary to do so, we offer no opinion as to whether these other events actually tolled Bailey's speedy-trial time. The two motions to continue take Bailey well below 270 speedy-trial days

information about the photo array as soon as the victim failed to identify Bailey's picture. Because the state did not disclose this information before the victim's testimony, Bailey contends that he could not prepare an effective trial strategy.

{¶66} "Implicit within the Fifth Amendment guarantee that the government shall not deprive a person of life, liberty, or property without due process of law, is the guarantee to criminal defendants of a fair trial. This guarantee imposes upon the prosecution a duty to reveal to the defense evidence tending to exculpate the defendant." *State v. Mosley*, Scioto App. No. 00CA2739, 2001-Ohio-2524, citing *Brady v. Maryland* (1963), 373 U.S. 83; *United States v. Agurs* (1976), 427 U.S. 97. "The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Johnston* (1988), 39 Ohio St.3d 48, at paragraph four of the syllabus, following *Brady*. Additionally, "[t]he defendant has the burden of proving a *Brady* violation involving a denial of due process." *State v. Lupardus*, Washington App. No. 08CA31, 2008-Ohio-5960, at ¶10, citing *State v. Jackson* (1991), 57 Ohio St.3d 29, 33.

{¶67} "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense." *Johnston*, at paragraph five of the syllabus, following *United States v.*

Bagley (1985), 473 U.S. 667. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Jackson* at 33.

{¶68} Here, Bailey learned of the photo array during the victim's testimony. As a result, Bailey's trial counsel had the opportunity to cross-examine the victim about her inability to identify Bailey's picture. And despite hearing this evidence, the jury still found Bailey guilty. Therefore, because the jury heard all of the relevant information about the photo array, the state's failure to disclose this information before trial is immaterial. Nothing in the record indicates that the outcome of the trial would have been different if Bailey had received this information any earlier. Furthermore, Bailey has not proven a denial of due process. Had the state disclosed the information about the photo array earlier, Bailey claims that his "trial counsel could have more effectively prepared and would have likely employed a different trial strategy[.]" Brief of Appellant Kevin J. Bailey at 18. This is mere speculation because Bailey has not (1) explained any different trial strategies or (2) explained what the different trial strategies may have accomplished. "Speculative claims of prejudice are insufficient to demonstrate a due process violation." *State v. Shilling*, Wayne App. No. 08CA0002, 2008-Ohio-4951, at ¶13, citing *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, at ¶56.

{¶69} Accordingly, we overrule Bailey's second assignment of error. Having overruled both of his 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 shall 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 Scioto County Common Pleas Court to carry this judgment into execution.

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

McFarland, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error I;
Concurs in Judgment Only as to Assignment of Error II.

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.