[Cite as *State v. Robinson*, 2009-Ohio-2981.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00283
THOMAS L. ROBINSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Canton Municipal Court Case No. 2007 CRB 4737
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 22, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH MARTUCCIO Canton Law Director FRANCIS G. FORCHIONE Canton City Prosecutor GRETCHEN L. STOCKER Assistant City Prosecutor 218 Cleveland Ave., S.W Canton, Ohio 44702	GREGORY L. GOLUB 1340 Market Ave., North, Suite 1 Canton, Ohio 44714

Edwards, J.

{¶1} Defendant-appellant, Thomas L. Robinson, appeals his conviction and sentence from the Canton Municipal Court on one count of telecommunications harassment. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 11, 2007, appellant was arrested and charged with one count of aggravated menacing in violation of R.C. 2903.21, a misdemeanor of the first degree, and one count of telecommunications harassment in violation of R.C. 2917.21, also a misdemeanor of the first degree. After all of the judges of the Canton Municipal Court disqualified themselves "being of the opinion that their impartiality might reasonably be questioned", Judge Stephen Belden, as memorialized in a Judgment Entry filed on October 12, 2007, ordered that a visiting judge be appointed to the hear the case.

{¶3} On October 18, 2007, the Stark County Public Defender's Office filed a motion indicating that appellant previously had filed a civil action against the Office and stated that "[p]ursuant to a conversation with [appellant] on October 17, 2007, he clearly does not wish to have any member of the Public Defender Office represent him." Pursuant to a Judgment Entry filed on October 25, 2007, the visiting judge, Judge Michael McNulty, ordered that the Public Defender's Office be withdrawn from representing appellant because of a conflict of interest. As memorialized in a separate Judgment Entry filed the same day, Attorney Richard Drake was appointed to represent appellant, and a prosecutor's conference was set for November 8, 2007. Appellant was released from jail on his own recognizance on November 8, 2007.

{¶4} On November 15, 2007, appellant filed a pro se motion seeking recusal of Richard Drake. As memorialized in a Judgment Entry filed on November 21, 2007, a special prosecutor was appointed to handle appellant's case due to a conflict of interest with the Canton City Prosecutor's Office. A jury trial was scheduled for November 21, 2007.

{¶5} Thereafter, Judge Michael McNulty, as memorialized in a Judgment Entry filed on November 26, 2007, disqualified himself "in the interests of justice and in order to avoid impropriety..." Effective November 28, 2007, Judge George Herbert Ferguson was appointed by the Ohio Supreme Court to handle appellant's pending cases.

{¶6} On November 28, 2007, appellant filed a motion to dismiss, arguing that his statutory right to a speedy trial had been violated. Appellant, in such motion, argued, in relevant part, as follows:

{¶7} "It is undisputed that the defendant was held in jail in lieu of bond from October 11, 2007 to November 9, 2007 – a period of twenty-eight days. Under the 'triple-count provision,' this accounts for eighty-four days. The prosecution thus had to bring the defendant to trial no later than November 15, 2007 but has failed to do so."

{¶8} After appellant's motion to dismiss the case sub judice was denied, a jury trial commenced on November 29, 2007. The following testimony was adduced at trial.

{¶9} Attorney Walter Madison was appointed to represent appellant in Canton Municipal Court on a charge of obstructing official business. On September 6, 2007, Attorney Madison met with appellant for the first time face-to-face in the courthouse and provided appellant with legal advice. Appellant rejected the advice and fired Attorney Madison even though he had been appointed.

{¶10} Later on September 6, 2007, at around 2:20 p.m., Attorney Madison's secretary, Diane Scott-Pou, answered a telephone call at Madison's law office in Akron. The call was from appellant. Scott-Pou testified that appellant, during the telephone call, stated that he was going to kill Attorney Madison and also "was going to deal with the Court." Trial Transcript at 116. She further testified that appellant, who was at times calm and at times irate during the conversation, "stated his dislike for Attorney Madison." Trial Transcript at 117. According to Scott-Pou, appellant also left a voice mail message on her phone later that day after 6:40 p.m. With respect to the message, Scott-Pou testified as follows:

{¶11} "A. I believe the second call he began telling me that Attorney Madison had went into a room with the prosecutor – the pregnant prosecutor – and he was going to deal with the Court. He was going to deal with those who were in court that day.

{¶12} "Q. At some point in time did you actually learn that there was a pregnant prosecutor on that case?

{¶13} "A. Yes." Trial Transcript at 119.

{¶14} After her conversation with appellant, Scott-Pou, believing appellant's threat to be serious, e-mailed Attorney Madison the content of the message. Attorney Madison then contacted the Canton City Prosecutor.

{¶15} On September 7, 2007, Attorney Madison and Diane Scott-Pou met with Detective Victor George of the Canton City Police Department who took an incident report from them. Detective George also took a statement from Scott-Pou. Detective George testified that he verified that appellant had made a phone call to Attorney Madison's office on the date and at the time in question by reviewing phone records

from Attorney Madison's office and comparing them to appellant's phone records, which had been subpoenaed. The records indicated that appellant had made a call to the office on September 6, 2007, at approximately 2:20 p.m.

{¶16} At the conclusion of the evidence and the end of deliberations, the jury found appellant guilty of telecommunications harassment. The jury, however, was unable to reach a decision on the charge of aggravated menacing. As memorialized on the Judgment Entry filed on December 11, 2007, appellant was sentenced to serve a forty (40) day jail sentence and to pay a two hundred and fifty dollar ($250.00) fine. Appellant was credited thirty days for jail time served. Appellant's remaining sentence and fine were suspended on the condition that appellant obtain an evaluation at Trillium Family Services and follow any recommendations.

{¶17} The trial court, in its December 11, 2007, Judgment Entry, stated, in relevant part, as follows: "On the charge of Aggravated Menacing, the jury was unable to reach a unanimous verdict. The State has indicated no intention to retry this matter on this charge."

{¶18} Appellant then appealed. Pursuant to an Opinion filed on November 10, 2008, in *State v. Robinson,* Stark App. No. No. 2007 CA 00349, 2008-Ohio-5585, this Court dismissed appellant's appeal for lack of a final, appealable order. This Court specifically found that the charge of aggravated menacing remained pending because the dismissal of such charge was never journalized.

{¶19} Thereafter, as memorialized in a Judgment Entry filed on November 14, 2008, the trial court dismissed the charge of aggravated menacing.

{¶20} Appellant now raises the following assignments of error on appeal:

{¶21} "I. THOMAS L. ROBINSON WAS DENIED HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION.

{¶22} "II. THOMAS L. ROBINSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION 10 OF THE OHIO CONSTITUTION."

I

{¶23} Appellant, in his first assignment of error, argues that he was denied his right to a speedy trial as guaranteed by the Ohio and United States Constitutions. We disagree.

{¶24} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Pursuant to these constitutional mandates, R.C. 2945.71 through R.C. 2945.73 prescribe specific time requirements within which the State must bring an accused to trial. *State v. Baker,* 78 Ohio St.3d 108, 110, 1997-Ohio-229, 676 N.E.2d 883.

{¶25} As relevant to the instant action, R.C. 2945.71(B)(2) requires that a person against whom a first degree misdemeanor is pending must be brought to trial within 90 days after the person's arrest or service of summons. An accused, such as appellant, charged with a first degree misdemeanor must be tried within ninety (90) days of his arrest or service of summons. R.C. 2945.71(B)(2). Each day the defendant

is held in jail in lieu of bond, except for the first day, counts for three days for speedy trial purposes. See R.C. 2945.71(E). Once a defendant establishes a prima facie case of a violation of his right to a speedy trial, the burden then shifts to the State to demonstrate the statutory limit was not exceeded by establishing the time was properly extended pursuant to R.C. 2945.72. *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368.

{¶26} Since a defendant's right to a speedy trial is guaranteed by statute and by the Sixth and Fourteenth Amendments to the United States Constitution, extensions of speedy trial time are to be strictly construed against the State. *State v. Singer* (1977), 50 Ohio St.2d 103, 362 N.E.2d 1216. Revised Code 2945.73 mandates that if an accused is not brought to trial within the time requirements of R.C. 2945.71 and 2945.72, the accused shall be discharged. The law in Ohio is that speedy trial time starts to run the day after arrest. R.C. 2945.71. However, speedy trial time is tolled during "(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;" and "(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

{¶27} In the case sub judice, appellant was arrested on October 11, 2007, and was not released from jail until November 8, 2007. As noted by appellee, the day of arrest does not count for determining whether a defendant's right to a speedy trial has been violated. Thus, the statutory time began to run on October 12, 2007, the day after appellant's arrest.

{¶28} Appellant, in his brief, contends that he was held in jail for 28 days and that, applying the triple count provision of R.C. 2945.71(E), 84 days (28 x 3) had therefore elapsed up to and including November 8, 2007, the date that he was released from jail. Appellant further notes that his trial did not commence until November 29, 2007, which is 21 days after his release from jail. According to appellant, "[t]herefore, a total of 105 days elapsed from the time of [appellant's] arrest until is (sic) trial, which exceeds the statutory limit by fifteen days."

{¶29} However, as is set forth in detail in the statement of facts, after all of the judges from Canton Municipal Court recused themselves on October 12, 2007, Judge McNulty was assigned on October 15, 2007. We find, that the time between October 12, 2007, and October 15, 2007, was tolled pursuant to R.C. 2945.72(H) as a reasonable continuance granted other than upon the accused's own motion.

{¶30} As is stated above, on October 18, 2007, the Public Defender's Office filed a motion to withdraw because appellant previously had filed a civil action against the Office. Pursuant to a Judgment Entry filed on October 25, 2007, the visiting judge, Judge Michael McNulty, ordered that the Public Defender's Office be withdrawn from representing appellant. As memorialized in a separate Judgment Entry filed the same day, Attorney Richard Drake was appointed to represent appellant. We find that the time between October 18, 2007, and October 25, 2007, was tolled pursuant to R.C. 2945.72(C) since such delay was necessitated due to appellant's lack of counsel.[1]

{¶31} Excluding the periods tolled by the statue, appellant had spent sixteen days in jail until his release on November 8, 2007. These sixteen days count as forty-

[1] See *State v. Ward*, Richland App. No. 03 CA 60, 2004-Ohio-2323 in which this Court, held that defense counsel's filing of a motion to withdraw tolled the speedy trial time limit until the trial court granted the motion.

eight days for the purpose of computing the speedy trial time under R.C. 2945.71. Thus, as of the time of his trial on November 29, 2007, a total of sixty-nine (69) days had elapsed for speedy trial purposes.[2]

{¶32} Based on the foregoing, we find that appellant was brought to trial within ninety days as required by R.C. 2945.71(B)(2) and that his speedy trial rights were not violated.

{¶33} Appellant's first assignment of error is, therefore, overruled.

II

{¶34} Appellant, in his second assignment of error, argues that he received ineffective assistance of trial counsel.

{¶35} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142. Trial counsel is entitled to a strong presumption that all decisions fall within the

[2] This figure is arrived at by adding the forty-eight (48) days spent in jail to the twenty-one (21) days between appellant's release from jail on November 8, 2007, and his trial on November 29, 2007.

wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶36} Appellant initially argues that his trial counsel was ineffective in failing to object to Detective George's testimony that George obtained Attorney Madison's phone records and that the records indicated that a call came into Attorney Madison's office on September 6, 2007, at 2:21 p.m. from appellant. Appellant argues that such testimony was inadmissible hearsay prohibited by Evid.R. 802. Appellant also argues that counsel was ineffective in failing to raise a hearsay exception to the admission of both Attorney Madison's and appellant's telephone records as trial exhibits.

{¶37} However, at trial, defense counsel indicated that "no one" disputed that appellant made the call on September 6, 2007. See Trial Transcript at 112-113. As is stated above, Diane Scott-Pou, Attorney Madison's secretary, testified that she received a call from appellant on September 6, 2007 at approximately 2:20 p.m. Rather, what was in dispute was the substance of the call. Id. Thus, we find that counsel was not ineffective in failing to object to the above.

{¶38} Appellant also argues that trial counsel was ineffective in failing to object to Attorney Madison's testimony that appellant was ungroomed, unkempt and erratic when Attorney Madison met with him on September 6, 2007, and that appellant "seemed to engage in flights of fancy of…a grand conspiracy." Trial Transcript at 138. Appellant further argues that counsel was ineffective in failing to object to Attorney Madison's testimony that he believed that appellant was mentally ill based on his behavior and how he dressed and groomed himself. According to appellant, Attorney Madison "made repeated statements of unqualified opinion which were intended to lead

the jury to believe either that [appellant] would no (sic) be credible or that he would be the type of person that would make and follow through with threatening remarks."

{¶39} However, Evid.R. 701 provides as follows: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

{¶40} In *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49, 519 N.E.2d 662, the First District Court of Appeals explained that lay testimony must be, "(1) 'rationally based on the perception of the witness,' *i.e.,* the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts; and (2) 'helpful,' *i.e.,* it must aid the trier of fact in understanding the testimony of the witness or in determining a fact in issue."

{¶41} In the case sub judice, appellant also was tried, although he was not convicted of the same, for aggravated menacing in violation of R.C. 2903.21. Such section states, in relevant part, as follows: "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." We find that Attorney Madison's testimony was permitted opinion testimony under Evid.R. 701 since it was rationally based on his perception and helpful to a clear understanding of his testimony or the determination of a fact in issue. Attorney Madison's opinion testimony was relevant to show why Attorney Madison believed that

appellant would cause serious physical harm to him and took appellant's threat seriously.

{¶42} Based on the foregoing, we find that appellant did not receive ineffective assistance of trial counsel.

{¶43} Appellant's second assignment of error is, therefore, overruled.

{¶44} Accordingly, the judgment of the Canton Municipal Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

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JUDGES

JAE/dr/0114

[Cite as *State v. Robinson*, 2009-Ohio-2981.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
THOMAS L. ROBINSON	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00283

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court is affirmed. Costs assessed to appellant.

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JUDGES