[Cite as *State v. Gee*, 2009-Ohio-5139.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellant	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2008 CA 00132
	:	
	:	
ANDREW W. GEE	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 2006 CR 326
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 28, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
EARL L. FROST Assistant Prosecuting Attorney Licking County Prosecutor's Office 20 S. second Street, 4th Floor Newark, Ohio 43055	DAVID STANSBURY 41 East Church Street Newark, Ohio 43055

Edwards, P. J.

{¶1} Appellant, the State of Ohio, appeals a judgment of the Licking County Common Pleas Court dismissing an indictment charging appellee Andrew W. Gee with trafficking in drugs (R.C. 2925.03(A)(2)(C)(3)(a)), possession of marijuana (R.C. 2925.11(A)(C)(3)(a)) and possession of drug paraphernalia (R.C. 2925.14(C)(1)) for violation of appellee's right to a speedy trial.

STATEMENT OF FACTS AND CASE

{¶2} On June 15, 2006, Ptl. Jonathan Bell of the Licking Police Department stopped a vehicle driven by appellee because the car did not have an operable license plate light. After stopping the car, the patrolman noticed a faint odor of marijuana. Appellee gave the officer consent to search the vehicle. The officer found a multi-colored marijuana pipe wedged between the front seats. In a backpack behind the driver's seat the officer found a small package of rolling papers, a set of digital scales, and a clear plastic container containing individually wrapped bundles of marijuana. Appellee later admitted that he was selling marijuana to try to earn enough money for gas to look for a real job.

{¶3} On June 16, 2006, appellee was charged in the Licking Municipal Court with trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(a), a fifth degree felony. He was arrested and posted a recognizance bond the same day.

{¶4} On June 23, 2006, appellee was indicted by the Licking County Grand Jury with trafficking in marijuana as a felony of the fifth degree, a charge identical to that previously filed in the municipal court. He was also indicted with possession of marijuana, a minor misdemeanor, and possession of drug paraphernalia, a fourth

degree misdemeanor. The summons on the indictment listed appellee's address as 10681 Pleasant Valley Road. Appellee's correct address was 10881 Pleasant Valley Road. The summons ordered appellant to appear on July 3, 2006. The summons was returned for failure of service. The process server noted on the return, "bad address – has never lived there – warrant issued."

{¶5} The Licking County Municipal Court case was dismissed on July 13, 2006, due to the felony indictment.

{¶6} A warrant was issued on the indictment on July 18, 2006, specifying appellee's address as 10881 Pleasant Valley Road. Appellee was arrested on the warrant on June 16, 2008.

{¶7} On September 18, 2008, appellee filed a motion to dismiss the indictment for violation of appellee's right to a speedy trial. Following a hearing, the court granted the motion. The court found that appellee was arrested June 16, 2006, and indicted June 23, 2006, but never served a copy of the indictment due to a typographical error placed on the summons and the praecipe. The court noted that appellee's address was noted correctly on every other piece of paper in the file. The warrant issued on July 18, 2006, but no attempt was made to serve the warrant until 2008. Because the state failed to bring appellee to trial within 270 days from his arrest, and appellee had taken no steps to cause the speedy trial time to be tolled, the court granted the motion to dismiss.

{¶8} The State assigns a single error on appeal:

{¶9} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS FOR AN ALLEGED SPEEDY TRIAL VIOLATION."

{¶10} The right to a speedy trial is guaranteed by the Sixth Amendment to the U.S. Constitution and Section 10, Article I of the Ohio Constitution. The states are obligated under the Fourteenth Amendment to afford a person accused of a crime the right to a speedy trial. *Klopfer v. North Carolina* (1967), 386 U.S. 213, 222-223, 87 S. Ct. 988, 993. The states are free to prescribe a reasonable period of time to conform to the constitutional requirement of a speedy trial. *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S. Ct. 2182, 2188, 33 L.Ed.2d 101, 113. In response, Ohio has enacted R.C. 2945.71 to 2945.73, which designate specific time requirements for the state to bring the accused to trial.

{¶11} In the instant case, the court applied R. C. 2945.71(C)(2), which provides that a person against whom a charge of a felony is pending shall be brought to trial within 270 days after the person's arrest.

{¶12} Appellant argues that the court erred in dismissing the case under R.C. 2945.71 because appellee was not arrested on the indictment until June 16, 2008, and 270 days had therefore not elapsed after his arrest. The state argues that the appropriate test is whether appellee was prejudiced by the delay between his indictment and service of the indictment. The state argues that we should consider the factors set forth in *Barker v. Wingo*, supra, to determine whether appellant was prejudiced by the delay: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. Id. at 530.

{¶13} The state relies on *State v. Broughton* (1991), 62 Ohio St.3d 253, 258, for the proposition that for purposes of computing how much time has run against the state under R.C. 2945.71, the time period between the dismissal without prejudice of an

original indictment and the filing of a subsequent indictment, premised on 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). In *Broughton*, the defendant was indicted on November 17, 1988, and brought to trial on July 18, 1989. After the state presented its case-in-chief, the defendant moved to dismiss for a defect in the indictment. The court granted the motion to dismiss, and the case returned to the grand jury. The defendant was re-indicted on October 19, 1989, and arrested on the indictment on October 26, 1989. The Ohio Supreme Court found that the speedy trial time was tolled during the time period between the dismissal on July 18, 1989, and the defendant's re-arrest on the new indictment on October 26, 1989. Id. at 259. However, in determining that the defendant's speedy trial rights were not violated, the court tacked on the days which were chargeable to the state between the original indictment on November 17, 1988, and the time of the original trial on July 18, 1989. Id. at 261.

{¶14} In *State v. Azbell*, 112 Ohio St.3d 300, 859 N.E.2d 532, 2006-Ohio-6552, the Ohio Supreme Court considered the issue of when a charge is "pending" for purposes of calculating speedy trial time pursuant to R.C. 2945.71(C). The court concluded that a charge is not pending until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance. Id. at syllabus. The court held that although the defendant in that case was arrested in May 2003, she was not "held to answer" because she was immediately released after being photographed and fingerprinted and at the time of her arrest was not charged with any offense. Id. at ¶ 20. Because no charge was outstanding and she was not held pending the filing of charges or released on bail or

recognizance, the defendant did not become a "person against whom a charge of felony is pending" within the meaning of R.C. 2945.71 until she was arrested on the indictment in April of 2004. Id.

{¶15} In the instant case, there was no period of time during which the felony charge was not pending against appellee from the filing of the complaint in municipal court on June 16, 2006. He was arrested on the complaint the same day and released on a recognizance bond. The charge in municipal court was not dismissed until July 13, 2006, after the filing of the indictment in Common Pleas court on June 23, 2006. Therefore, this was not a case like *Broughton* where there was a period of time during which no charge was pending against appellee. Appellee was a "person against whom a charge of a felony is pending" within the meaning of R.C. 2945.71 from the time of his arrest on June 16, 2006. See *Azbell*, supra. As noted by the trial court, the address provided by appellee was correct on every piece of paper except the summons and praceipe on the indictment. The warrant for appellee's arrest which was issued on July 18, 2006, recited the correct address but the record does not reflect that an attempt was made to serve the warrant before 2008. The record does not reflect that appellee took any actions to toll the speedy trial time. The court therefore did not err in finding that the state was required to bring appellee to trial within 270 days of his arrest on June 16, 2006, and failed to do so.

{¶16} The assignment of error is overruled.

{¶17} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, J.

Farmer, J. and

Delaney, J. concur

_____

_____

_____

JUDGES

JAE/r0826

[Cite as *State v. Gee*, 2009-Ohio-5139.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ANDREW W. GEE	:	
Defendant-Appellee	:	CASE NO. 2008 CA 00132

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

_____

_____

_____

JUDGES