

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

ROBERT M. BARCUS

Defendant-Appellant

: JUDGES:

: Hon. John W. Wise, P.J.
: Hon. Patricia A. Delaney, J.
: Hon. Craig R. Baldwin, J.

: Case No. 15-CA-12

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 14 CR 283

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

June 5, 2015

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT
LICKING CO. PROSECUTOR
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For Defendant-Appellant:

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Delaney, J.

{¶1} Appellant Robert M. Barcus appeals from the February 17, 2015 Judgment Entry of the Licking County Court of Common Pleas. Appellee is the state of Ohio.

{¶2} This case comes to us on the accelerated calendar. App.R. 11.1 governs accelerated-calendar cases and states in pertinent part:

(E) Determination and judgment on appeal.

The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{¶3} One of the most important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶4} We review the instant appeal according to these guidelines.

FACTS AND PROCEDURAL HISTORY

{¶5} A statement of the facts underlying appellant's criminal conviction is not necessary. The following facts are adduced from the record before us including the felony case file and the transcript of appellant's change-of-plea and sentencing hearing.

{¶6} On April 10, 2014, appellant was charged by indictment with one count of aggravated drug possession pursuant to R.C. 2925.11(A) and (C)(1)(a), a felony of the fifth degree [Count I]; one count of failure to comply with the order or signal of a police officer pursuant to R.C. 2921.331(B) and (C)(3), a misdemeanor of the first degree [Count II]; and one count of illegal conveyance pursuant to R.C. 2921.36(A)(2) and (G)(2), a felony of the third degree [Count III]. Appellant was summoned to appear upon the indictment but due to failure to complete service a warrant was issued on May 21, 2014.

{¶7} Appellant was arrested on August 31, 2014 and his initial appearance occurred on September 4, 2014. Bond was set at \$30,000 cash or surety. At the September 9, 2014 arraignment, bond was reduced to \$10,000 cash or surety and appellant was ordered to report to the Adult Court Services Department upon his release from incarceration.

{¶8} Appellant posted bond on September 22, 2014.

{¶9} A pretrial judgment entry dated October 7, 2014 indicates appellant remained free on bond. A jury trial was scheduled for November 18, 2014. The pretrial entry states appellant's "try-by date" was March 12, 2015.

{¶10} Appellant filed a request for discovery on September 12, 2014 and appellee responded on September 25, 2014.

{¶11} On October 16, 2014, a probation officer sought and obtained a capias for appellant's arrest because he failed to comply with bond conditions including reporting to probation. Specifically, "[Appellant] was to report every other week. He last reported on 9-23-14. Attempts to contact [appellant] have failed."

{¶12} The arrest warrant was executed on November 27, 2014; appellant appeared before a magistrate on December 2, 2014 and bond was set at \$25,000 cash or surety. Jury trial was scheduled for January 8, 2015.

{¶13} A Judgment Entry dated January 6, 2015 states the following: "Upon motion of the Court, the Court being unavailable on January 8, 2015 at 9:00 a.m., this matter shall be continued until February 17, 2015 at 9:00 a.m. Speedy trial time shall be tolled. The Clerk of Courts shall serve a copy of this Judgment Entry upon all parties or counsel of record."

{¶14} On January 8, 2015, appellant filed a motion to reconsider bond asking that bond be reduced to a personal recognizance bond. The motion was denied by judgment entry dated January 14, 2015.

{¶15} On February 4, 2015, appellant filed a motion to dismiss¹ arguing as of that date he was incarcerated 91 days in violation of R.C. 2945.71. The record does not contain resolution of this motion.

{¶16} On February 17, 2015, appellant withdrew his pleas of not guilty and entered pleas of no contest to Counts I, II, and III. The trial court found Counts I and III merged and appellee elected to sentence on Count I. Appellant was sentenced to a prison term of 10 months on Count I and to time served on Count II.

{¶17} Appellant raises one assignment of error:

¹ Appellant also filed a motion to dismiss on the basis of a noncompliant lab report pursuant to R.C. 2925.51. The record does not include any ruling upon this motion.

ASSIGNMENT OF ERROR

{¶18} "I. THE TRIAL COURT VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS BY FAILING TO BRING APPELLANT TO TRIAL WITHIN THE TIME LIMITS SET FORTH IN R.C. 2945.71."

ANALYSIS

{¶19} Appellant argues the trial court failed to set his trial within the time limits set forth in R.C. 2945.71. We disagree.

{¶20} Speedy trial provisions are mandatory and are encompassed within the Sixth Amendment to the United States Constitution. The availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. *State v. Ladd*, 56 Ohio St.2d 197, 383 N.E.2d 579 (1978); *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980). 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. Larkin*, 5th Dist. No.2004–CA–103, 2005–Ohio–3122, ¶ 11. Due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *Id.* However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, an appellate court must strictly construe the relevant statutes against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996–Ohio–171, 661 N.E.2d 706.

{¶21} A person charged with a felony must be brought to trial within 270 days unless the right to a speedy trial is waived. R.C. 2945.71(D)(2). If a person is held in jail in lieu of bond, then each day that the suspect is in custody counts as three days. R.C.

2945.71(E). Pursuant to R.C. 2945.73, a person who is not brought to trial within the proscribed time periods found in R.C. 2945.71 and R.C. 2945.72 “shall be discharged” and further criminal proceedings based on the same conduct are barred. “When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71.” *State v. Riley*, 162 Ohio App.3d 730, 2005–Ohio–4337, 834 N.E.2d 887, ¶ 19 (12th Dist.).

{¶22} Certain events toll the accumulation of speedy-trial time. R.C. 2945.72 states in pertinent part:

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 only by the following:

* * * *.

(D) Any period of delay occasioned by the neglect or improper act of the accused;

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

* * * *.

(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;

* * * *.

{¶23} The trial court in the instant case did not rule on the speedy-trial motion to dismiss. In the absence of a ruling, we presume the court overruled such motion. *State v. Picard*, 5th Dist. Richland No. 14 CA 65, 2015-Ohio-431 at ¶ 35, citing *Newman v. Al Castrucci Ford Sales*, 54 Ohio App.3d 166, 169 (1988); *Mancino v. Lakewood*, 36 Ohio App.3d 219, 222 (1989); *Solon v. Solon Baptist Temple, Inc.*, 8 Ohio App.3d 347, 8 OBR 458, 457 N.E.2d 858 (1982).

Effect of Prior Case

{¶24} Both parties reference a prior case in which appellant was, apparently, charged only with misdemeanor failure to comply and incarcerated for 11 days before the charge was dismissed in anticipation of the felony indictment. The record of the prior case is not before us. Appellant bears the burden of demonstrating error by reference to matters in the record and the record must contain evidence of speedy trial violations. See *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). The relevant documentation of the prior case is not part of this record on appeal and therefore cannot factor into our speedy-trial calculation. *State v. Bailey*, 4th Dist. Scioto No. 09CA3287, 2010-Ohio-2239, ¶ 57; *State v. Barbour*, 10th Dist. Franklin No. 05AP-612, 2006-Ohio-4980, ¶ 6.

August 31, 2014 through November 27, 2014

{¶25} We turn then to appellant's argument that his speedy-trial time began to run on August 31, 2014, the date of his initial arrest in the instant case. Appellant remained incarcerated until September 22, 2014 when he posted bond [22 days times three: 66 days]. Credit then accrued at the rate of one day at a time until October 16, 2014 [24 days], when a probation officer obtained a capias for appellant's arrest.

{¶26} Two factors affect our calculation of time during this period..

{¶27} First, appellant filed a request for discovery (September 12, 2014) which tolled time until appellee responded (September 25, 2014) [13 days]. *State v. Counts*, 170 Ohio App.3d 339, 2007-Ohio-117, 867 N.E.2d 432, ¶ 56 (5th Dist.), citing *State v. Brown*, 98 Ohio St.3d 121, 781 N.E.2d 159, syllabus ("A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)").

{¶28} Second, the capias was issued on October 16, 2014 and the arrest warrant was executed on November 27, 2014 [42 days]. Appellant argues this time should merely be "tolled" but we find the capias necessitated by appellant's failure to comply with bond conditions re-starts the speedy-trial clock for the following reasons.

{¶29} The Ohio Supreme Court has ruled that a defendant who fails to appear at a scheduled trial, and whose trial must therefore be rescheduled for a later date, waives his right to assert the provisions of R.C. 2945.71 through 2945.73 for that period of time which elapses from his initial arrest to the date he is subsequently rearrested. *State v. Bauer*, 61 Ohio St.2d 83, 85, 399 N.E.2d 555 (1980) (per curiam). "Although *Bauer* involved a defendant missing his final trial date, various courts have extended *Bauer* to include a variety of other missed appointments, hearings and court-ordered events." *State v. Whaley*, 7th Dist. Columbiana No. 09 CO 30, 2010-Ohio-4853, ¶ 34, citing *State v. Gibson*, 75 Ohio App.3d 388, 599 N.E.2d 438 (1992) (*Bauer* applied when defendant missed a scheduling conference); *State v. Eldridge*, 4th Dist. No. 02CA2842, 2003-Ohio-1198 (*Bauer* applied because defendant missed his arraignment); *State v. Campbell*, 11th Dist. No.2003-A-0056, 2005-Ohio-3091 (*Bauer* applied when defendant missed a preliminary hearing); *State v. Evans*, 12th Dist. No. CA98-11-237, (Dec. 30,

1999) (*Bauer* applied when defendant failed to appear at a hearing to resolve counsel's motion to withdraw).

{¶30} The issue in the instant case is what effect appellant's violation of a bond condition has on the speedy-trial calculation. Appellant did not fail to appear for a scheduled court date as occurred in *Bauer* and its progeny. In *State v. Franz*, 3rd Dist. Logan No. 8-96-1, 1996 WL 310038, *4 (June 4, 1996), the appellate court distinguished a bond violation from the failure to appear in *Bauer* and *Gibson*, supra:

The failure of the defendant to show up at trial created a situation where, according to the speedy trial statutes, the defendant would have to be brought to trial within days of his rearrest, whenever that might occur (in that case, a month later). The supreme court found the effect of this delay thwarted the efficient administration of justice and created an unworkable situation in light of congested court dockets. * * * *. This court, in *Gibson*, applied [*Bauer's*] holding to a defendant who violated his bond by leaving the jurisdiction and failing to appear at scheduling conferences where more than a month of statutory time was available to bring him to trial upon rearrest. *Gibson*, 75 Ohio App.3d at 391-392. Both *Bauer* and *Gibson* involved clear R.C. 2945.72 violations where a defendant's failure to appear and unpredictable time of rearrest, in turn, placed the state in unrealistic scheduling situations. As we have concluded, the record in this case reveals Appellant caused no delay in his criminal proceedings. Since the

present case does not involve a failure to appear as in *Gibson* and *Bauer*, Appellant has not forfeited his speedy trial right for that period of time from his initial arrest until his bond violations.

{¶31} The instant case does involve a delay in the criminal proceedings. Appellant's first trial date was November 18, during the period of absconding from pretrial supervision. In *State v. Counts*, we applied the *Bauer* rationale to instances of delay occasioned by a defendant including failure to appear for pretrial and a stipulated polygraph test and to maintain contact with his attorney, finding "it is clear that the later trial date was the result of appellant's own conduct." *State v. Counts*, 170 Ohio App.3d 339, 2007-Ohio-117, 867 N.E.2d 432, ¶¶ 47-54 (5th Dist.) *Counts* and *Franz* can be reconciled because both look to the facts of the case to determine whether the defendant's conduct caused delay in the proceedings.

{¶32} In the instant case, appellant's failure to keep appointments and to maintain contact with the probation department resulted in an active warrant for his arrest which was not executed until November 27, 2014, thereby eliminating the first jury trial date of November 18, 2014. The first rescheduling of the trial date to January 8, 2015 is therefore attributable to appellant.

{¶33} The *Bauer* court found that a mere "tolling" of the limitation period during the defendant's absence prior to the final trial date is a "solution unworkable and inconsistent with the efficient administration of justice." *Id.* at 85. Similarly, we find merely tolling the speedy-trial clock under the instant circumstances is inconsistent with the rationale of R.C. 2945.71 and R.C. 2945.72. Appellant's violation of the bond

condition "thwarted the efficient administration of justice." *Franz*, supra. We therefore re-start the speedy-trial clock upon his arrest on November 27, 2014.

{¶34} We note speedy-trial questions turn upon their facts as observed by the *Bauer* court: "[T]he proper focus of a court in circumstances such as these is upon the underlying source of the delay. In a situation where it is alleged that the defendant is the cause for the delay, the court * * * [should] carefully examine the facts in the case to prevent a 'mockery of justice' by discharging defendants if in fact the delay was occasioned by their acts." *Bauer*, supra, 61 Ohio St.2d at 84, citing *People v. Fosdick*, 36 Ill.2d 524, 528-529, 224 N.E.2d 242 (1967).

{¶35} Appellant was incarcerated from his arrest upon the capias on November 27, 2014 through his motion to reconsider bond on January 8, 2015 [42 days times 3, or 126 days] tolling time until the motion was denied on January 14, 2015. Appellant then receives triple credit until his speedy-trial motion to dismiss was filed on February 4, 2015 [21 days times 3, or 63 days]. "[T]he time that elapsed while a motion to dismiss was pending [is not] included for purposes of R.C. 2945.71." *State v. Nichols*, 2013-Ohio-308, ¶ 23 (4th Dist. Adams) *appeal not allowed*, 135 Ohio St.3d 1448, 2013-Ohio-2062, 987 N.E.2d 703, ¶ 23 (2013), citing *State v. Bickerstaff*, 10 Ohio St.3d 62, 67, 461 N.E.2d 892 (1984). The rescheduled jury date of February 17, 2014 is the date upon which appellant entered no-contest pleas and was found guilty.

{¶36} Appellant's speedy-trial credits through the date of conviction on February 17, 2015 thus total 189 days.

{¶37} We need not reach the issue whether the trial court's sua sponte continuance of the trial date on January 6, 2015 tolls the time limit pursuant to R.C.

2945.72(H) because appellant's trial date of February 17, 2015 was within speedy-trial limits.

CONCLUSION

{¶38} Appellant's sole assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.