[Cite as *State v. Najjar-Banks,* 2019-Ohio-3337.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Williams B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
NINA M. NAJJAR-BANKS,	:	Case No. 18 CAC 11 0085
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware Municipal Court, Case No. 18 TRD 13628
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 14, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
AMELIA BEAN-DEFLUMER Assistant Prosecuting Attorney Delaware City Prosecutor 70 N. Union Street Delaware, Ohio 43015	JAMES H. BANKS P.O. Box 40 Dublin, Ohio 43017

Baldwin, J.

{¶1} Defendant-appellant Nina Najjar-Banks appeals her conviction and sentence from the Delaware City Municipal Court. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 5, 2018, a complaint was filed charging appellant with the offense of "Traffic Control Devices" in violation of R.C. 4511.12, a minor misdemeanor. On September 10, 2018, appellant filed a written plea of not guilty and asked that the matter be tried within the time provided by law.

{¶3} As memorialized in a notice filed on September 17, 2018, a bench trial was scheduled for September 25, 2018. Appellee, on September 20, 2018, filed a motion seeking a continuance of the trial on the basis that "Our Trooper is in training on this day. This Trooper is necessary for the State of Ohio." Attached to the motion was a document from Trooper Davis indicating that he had a training day on September 25, 2018 and would be available on September 26, 2018. While the motion contained boxes wherein time "Waived" or "Not Waived" should be marked, neither box was marked by the Prosecutor. The motion was granted and pursuant to a notice filed on September 24, 2018, the trial was rescheduled to October 16, 2018.

{¶4} Appellant, on October 16, 2018, filed a Motion to Dismiss on speedy trial grounds. Prior to the commencement of trial on October 16, 2018, the trial court denied the motion, stating in relevant part, as follows:

{¶5} "Well, it's statute (sic) at this point in time, and there's two different speedy trial statutes- the Constitution and the statutory. And certainly I don't find a violation of constitutional rights of speedy trial. There's been no due-process concerns that have

been raised, and under the statute, the case law is clear – is very clear that if it's a necessary witness, that the tolling event occurs once the State alleges it's necessary. Clearly this is the only officer on the case."

{¶6} Trial Transcript at 6-7.

{¶7} At trial, Trooper William Scott Davis of the Ohio State Highway Patrol testified that he was working in uniform in a marked cruiser on September 3, 2018 when he came into contact with appellant. When asked how the contact happened, he testified as follows:

{¶8} "I was sitting north of the intersection, watching the intersection, I was facing southbound and I seen a silver van approach from the west come to a slow roll and then continued to make a northbound turn onto Green Meadows, where there's a sign posted "no left turn." There's yellow solid lines painted on the pavement that separates the north and eastbound lanes, and there's a concrete divider."

{¶9} Trial Transcript at 9-10.

{¶10} Trooper Davis then initiated a stop of the vehicle which was driven by appellant. When the Trooper told appellant of the reason for the traffic stop, she was confused. Trooper Davis testified that appellant was on State Route 750 and had made a left turn onto Green Meadow North which was illegal.

{¶11} On cross-examination, Trooper Davis testified that the traffic control devices that appellant had violated were the paint, (i.e. solid yellow lines, double yellow lines), concrete and a "no left turn" sign on the right hand side of the intersection. He testified that the sign was on the right of a four-lane highway and when asked whether a person traveling in the left lane with a truck in the right lane would have been able to see the sign, indicted that he did not know. On redirect, Trooper Davis testified that the concrete barrier

would block a left hand turn and that someone would have to drive around it in order to make a left hand turn. On recross, the Trooper testified that appellant "went out, around, and came like—more like—more over into the westbound lanes to make a U-turn." Trial Transcript at 17.

{¶12} Appellant testified at trial that she was shocked to have received a ticket. The following is an excerpt from her testimony at trial:

{¶13} "So when I turned right onto Powell Road, or 750, the very first – the very—as I turned right, Exhibit 1 is on your left. It's on the right-hand side. It says – I believe that there's a sign that says "no left turn" with an arrow and a cross, but when you turn in, there's a big sign that says "do not enter" and another arrow—a left turn with a slash through it so you know that you can't turn left there." She testified that this place was about 100 steps from the place where she turned.

{¶14} Trial Transcript at 23.

{¶15} She testified that where she turned (Exhibit 2), there was concrete in the middle that separated the two lanes but did not block the left-turn area. She further testified that the no-left turn sign that Trooper Davis was referring to was on the right, but that there were trucks and cars in the right lane and because she was in the left lane, she could not have and did not see that sign.

{¶16} On cross-examination, appellant testified that the no left turn sign was not at the intersection, but was on the right of a four lane road. She testified that the sign was not directly across the road from the intersection she turned on, but was slightly further east.

{¶17} Trooper Davis was called on rebuttal. He testified that there was a no-left turn sign on the right side of the street across from where appellant turned. He further

testified that there were double yellow lines at the intersection where appellant turned at and the double yellow lines indicated that appellant should not have turned there. He further testified that there was not a sign on the concrete island.

{¶18} At the conclusion of the evidence, the trial court found appellant guilty. The trial court found that there were three different traffic control devices indicating that appellant could not have turned left where she did. He noted that there was a sign directly across from the intersection, "gore lines delineating the eastbound and westbound traffic that you would have had to cross over", and the concrete barrier. Trial Transcript at 30. The trial court found that "it's clear that what—you're not to turn left because of the way the concrete barrier is carved out for the right-turn only coming the other direction." Trial Transcript at 39-40. The trial court fined appellant $25.00 and ordered her to pay court costs.

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

{¶20} "I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS AS DEFENDANT-APPELLANT WAS NOT BROUGHT TO TRIAL WITHIN THE STATUTORILY REQUIRED TIME ENUMERATED IN R.C. SECTION 2945.71(A)."

{¶21} "II. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY BASED UPON THE INSUFFICIENCY OF THE EVIDENCE PRESENTED AND BASED UPON THE WEIGHT ON THE EVIDENCE AND APPLICABLE LAW."

I

{¶22} Appellant, in her first assignment of error, argues that the trial court erred in denying her Motion to Dismiss on speedy trial grounds. We disagree.

{¶23} 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. Richland No. 2004–CA–103, 2005-Ohio-3122, ¶ 11. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. *State v. Taylor*, 5th Dist. Richland No. 16 CA 17, 2016-Ohio-5912, ¶ 43, citing *Larkin*, supra. With regard to the legal issues, however, we apply a *de novo* standard of review and thus freely review the trial court's application of the law to the facts. *Id.*

{¶24} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against appellee. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996-Ohio-171 661 N.E.2d 706, 709.

{¶25} Appellant, in the case sub judice was charged with a minor misdemeanor. R.C. 2945.71(A) states as follows: “(A) Subject to division (D) of this section, a person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after the person's arrest or the service of summons.”

{¶26} 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.).

{¶27} R.C. 2945.72 states, in relevant part, as follows:

{¶28} 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:…

{¶29} (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.

{¶30} Under R.C. 2945.72(H), continuances granted on the state's motion will toll the running of speedy trial time if the continuance is reasonable and necessary under the circumstances of the case. *State v. Saffell*, 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988). The record must affirmatively demonstrate that the continuance was reasonable and necessary. *Id.* A continuance must be journalized before the expiration of the time limit specified in R.C. 2945.71. *State v. King*, 70 Ohio St.3d 158, 1994-Ohio-412, 162, 637 N.E.2d 903, citing *State v. Mincy*, 2 Ohio St.3d 6, 441 N.E.2d 571 (1982), syllabus. The reasonableness of a continuance is determined by examining the purpose and length of the continuance as specified in the record. *State v. Lee*, 48 Ohio St.2d 208, 210, 357 N.E.2d 1095 (1976). The reasonableness of a continuance must be reviewed on a case by case basis. See *Saffell*, supra., at 91.

{¶31} As is stated above, appellant was originally scheduled for trial on September 25, 2018, which was within the statutory period. On September 20, 2018, appellee filed a motion for a continuance stating that the Trooper was in training on such date and that he was a necessary witness. Trooper Davis in a document in the trial court file, indicated that he was in training on September 25, 2018 and that the next date that he would be available was September 26, 2018. The trial court granted the motion for a continuance and rescheduled the trial to October 16, 2018.

{¶32} The Ohio Supreme Court held, in *Saffell,* that a continuance based on the fact that the arresting officer would be on vacation at the time of trial was not unreasonable. *Id.* at 92, 518 N.E.2d 934. See also *State v. Williamson*, 5th Dist. Licking No. 2005 CA 00046, 2005-Ohio-6198, ¶ 35 ("A continuance based upon the fact the arresting officer is unavailable at the time of trial is not unreasonable"). We find that the trial court's decision to grant the state a continuance due to the unavailability of Trooper Davis was reasonable and necessary and therefore, tolled the running of speedy trial time under R.C. 2945.72(H). Further, the trial court granted the state's request for a continuance prior to the expiration of the 30 day deadline.

{¶33} Based on the forgoing, we find that the trial court did not err in denying appellant's Motion to Dismiss.

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

II

{¶35} Appellant, in her second assignment of error, argues that her conviction for violating R.C. 4511.12 was against the sufficiency and manifest weight of the evidence.

{¶36} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 1997–Ohio–52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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."

{¶37} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins,* supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶38} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass,* 10 Ohio St.2d 230, 237 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997–Ohio–260, 674 N.E.2d 1159.

{¶39} R.C. 4511.12 states, in relevant part, as follows: "A) No pedestrian, driver of a vehicle, or operator of a streetcar or trackless trolley shall disobey the instructions of any traffic control device placed in accordance with this chapter, unless at the time otherwise directed by a police officer." R.C. 4511.01(QQ) defines a "traffic control device" as meaning "a flagger, sign, signal, marking, or other device used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, private road open to public travel, pedestrian facility, or shared-use path by authority of a public agency or official

having jurisdiction, or, in the case of a private road open to public travel, by authority of the private owner or private official having jurisdiction".

{¶40} Appellant, in her brief, contends that the no left turn sign was not in proper position according to the Ohio Manual of Uniform Traffic Control Devices and that R.C. 4511.12 prohibits the State from enforcing the alleged violation in this case.

{¶41} R.C. 4511.12 further states, in relevant part, as follows: "No provision of this chapter for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. …"

{¶42} We note that "[t]here have been divergent appellate rulings as to whether traffic signs must strictly versus substantially comply with the Ohio Manual on Uniform Traffic Control Devices (OMUTCD). *State v. Millhouse* (Feb. 3, 1995), 4th Dist. Lawrence No. 94 CA 4, 1995 WL 57369 .However, the Supreme Court of Ohio has recognized that the rule that issues presented for the first time on appeal are waived is "deeply embedded in a just regard for the fair administration of justice." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706, 709 (1997). Our review of the record indicates that this issue was not raised before the trial court, so it is waived. We note that appellant did not present any evidence that the traffic control devices did not comply with the OMUTCD.

{¶43} As is stated above, appellant argues that her conviction for violating R.C. 4511.12 was against the sufficiency and manifest weight of the evidence.

{¶44} In the case sub judice, Trooper Davis testified that appellant made a northbound turn onto Green Meadows where there was a "no left turn" sign posted. He further testified that there were solid yellow lines painted on the pavement separating the

northbound and eastbound lanes and that there was a concrete divide that would block a left turn. According to the Trooper he observed appellant drive around the concrete barrier in order to make the left turn. The trial court, in finding appellant guilty stated, in relevant part, on the record:

{¶45} I think there were- - and I'm going to say, you know, when I look at this intersection, it's clear to me, based on the Defendant's exhibits, not to turn left there. There's a sign, there's the gore markings on the road, there's a concrete barrier, There's all kinds of things that we call traffic control devices that would tell a driver that they weren't allowed to drive or turn left onto—into what I would call an access road.

{¶46} Now, there's a sign directly across from the intersection. There are gore lines delineating the eastbound and westbound traffic that you would have to cross over, and when you look at the concrete barrier, it's clear that what - - you're not to turn left because of the way the concrete barrier its carved out for the right-turn only coming from the other direction.

{¶47} So, you know, I don't think it's confusing at all because there were three different traffic control devices- if you look at the definition of a traffic control device- that would have told you you couldn't turn there.

{¶48} Trial Transcript at 39-40.

{¶49} The trial court further stated that it found the Trooper to be credible and that appellant's own exhibits undercut her argument

{¶50} We find that, viewing the evidence in a light most favorable to the prosecution, including the photographs, that any rational trier of fact could have found that appellant violated R.C. 4511.12. We further find that the trial court, as trier of fact, did not lose its way in convicting appellant

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

{¶52} Accordingly, the judgment of the Delaware City Municipal Court is affirmed.

By: Baldwin, J.

Hoffman, P.J. concurs

Wise, Earle, J. dissents.

Wise, Earle, J., dissents.

{¶ 53} I would sustain assignment of error No. 1 and vacate appellant's conviction for the failure to bring her case to trial within the limits set by R.C. 2945.71(A).

{¶ 54} Appellee's sole witness, the arresting officer, was certainly necessary and was justifiably unavailable on the date set for trial. I agree a continuance was proper. However, as the majority stated, the speedy-trial statutes must be strictly construed against the state, and based on the particular facts and the record in this case, I would find the delay beyond the time limit was not necessary and was not reasonable.

{¶ 55} It is not disputed that the statutory time limit required the trial to take place on or before October 3, 2018. The trial took place on October 16, 2018, outside the 30-day requirement. Appellant properly raised the issue, and the 13-day delay from October 4, to October 16, 2018, must be affirmatively justified. *State v. Saffell,* 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988).

{¶ 56} On September 10, 2018, appellant's counsel filed a notice of appearance along with a demand for a speedy trial. The case was set for trial for September 25, 2018.

{¶ 57} On September 20, 2018, appellee filed a motion to continue the trial because the arresting officer was in training and unavailable to appear on the scheduled trial date. An attachment to the motion indicated the officer was available beginning the next day, September 26, 2018. This left eight days (six working days) before the speedy-trial time ran.

{¶ 58} The motion did not make the trial court aware of any speedy-trial concerns. The motion was filed on a preprinted "Motion for Continuance" form, which included the language: "If this is a criminal/traffic case, time is [ ] wavied [ ] not waived," and neither

box was checked. Additionally, the motion did not inform the trial court that appellant had filed a demand for a speedy trial.

{¶ 59} It appears the state was unaware of this filing by appellant's counsel. The motion to continue does not reference an attorney for appellant. The service of the motion was indicated by typing onto the form, the words: "NOTIFIED: PRO SE (LEFT MESSAGE ON VOICEMAIL)," but no phone number was listed for the voicemail. Additionally, the certificate of service indicated such service by checking a box labeled, "[ ] regular mail." However, it failed to list a name or an address of the person to whom it was mailed. Appellant maintains that neither she nor her attorney were aware of the motion for or the granting of the continuance until they appeared in court for trial on the original trial date of September 25, 2018.

{¶ 60} On Friday, September 21, 2018, the trial court granted the continuance. It appears the trial court was also unaware of any speedy-trial concerns. The trial court's judgment entry, a preprinted form on the back of appellee's motion, granted the continuance by checking a box followed by the words "Motion GRANTED. The Court finds the Motion well taken. The case will be forwarded to the Assignment Commissioner for scheduling." This verbiage is followed by two blank lines to be utilized for additional handwritten or typed comments. The two lines were left empty. The judgment entry did not direct the assignment commissioner to either expedite scheduling or to set the trial at the next available date because of the approaching October 3, 2018 try-by date.

{¶ 61} On Monday, September 24, 2018, the assignment commissioner set the new trial date of October 16, 2018. This filing did not give any justification for the 21-day continuance, which set the trial 13 days beyond the 30-day try-by date of October 3, 2018.

{¶ 62} A review of the record does not demonstrate a justification for the new trial date. It does not indicate a new trial date could not have been set before the October 3, 2018 try-by date. There is no indication that the trial court had a busy or crowded docket which would have required the 13-day delay beyond October 3, 2018. The record is silent as to whether the new trial date was the earliest possible date available for the trial.

{¶ 63} On October 16, 2018, appellant filed a motion to dismiss on speedy-trial grounds. The trial court heard arguments on the motion just prior to the start of the trial. The trial court overruled the motion to dismiss from the bench, stating: "[U]nder the statute, the case law is clear - is very clear that if it's a necessary witness, that the tolling event occurs once the State alleges it's necessary. Clearly this is the only officer on the case."

{¶ 64} The trial court filed no judgment entry relating to the motion to dismiss. It gave no additional reasons for the delay of the trial or the denial of the motion to dismiss.

{¶ 65} The unavailability of appellee's sole witness was a legitimate reason to continue the trial. However, was the tolling of time for 21 days reasonable?

{¶ 66} The Supreme Court of Ohio in *Saffell, supra,* addressed the issue of reasonable delay when a necessary witness is unavailable. In *Saffell,* a bench trial was scheduled for a misdemeanor OVI offense. The case was set for trial for June 28, 1985, and then continued on the state's motion because the arresting officer was on vacation from June 6, through July 9, 1985. The 90-day try-by date was up on July 21, 1985. However, the trial was rescheduled for July 24, 1985, because the trial judge was away at a conference during the week of July 15, 1985.

{¶ 67} Defendant filed a motion to dismiss on July 23, 1985. The motion was denied and the defendant entered a no contest plea the same day. The *Saffell* court

found the delay beyond the time limit was necessary and reasonable because the trial judge was unavailable during the week of July 15, 1985. The court determined the record showed that July 24, 1985, "was the earliest possible date that could have been set for defendant's trial," and then concluded the following at 92:

> [W]e find that **the record affirmatively indicates that the continuance granted a mere three days beyond the ninety-day limitation of R.C. 2945.71 was reasonable under the circumstances.** Lastly, we hold that the continuance was necessary given the peculiar facts of the case. **While under a different fact situation a continuance granted three days beyond the limitation of R.C. 2945.71 may be unreasonable or unnecessary,** we do not find such to be the case herein. (Emphasis added, citation omitted.)

{¶ 68} The Ninth District Court of Appeals addressed a similar situation in *Medina v. Kemper,* 9th Dist. Medina No. C.A. No. 777, 1978 WL 215191 (May 17, 1978). The defendant was cited with a minor misdemeanor traffic offense. His trial was set on the 17th day of the 30-day speedy-trial time frame. The state filed for a continuance two days before trial because a material witness was unavailable on the scheduled trial date. The trial court granted the continuance and set the trial out an additional 28 days. On the new trial date, the defendant moved for dismissal pursuant to a speedy-trial violation. The motion was denied. The Ninth District found nothing in the record to support the extended

delay, and held the continuance of 28 days, on an original speedy-trial period of 30 days, to be unreasonable as a matter of law.[1]

{¶ 69} In the instant case, the record does not indicate an attempt to set this matter for trial expeditiously. The trial was a bench trial so a jury did not have to be summonsed. There is no indication that the new trial date was the earliest available date for trial. The record is devoid of any scheduling conflict preventing the trial court or any other participant from beginning the trial on or before October 3, 2018.

{¶ 70} The unavailability of the witness was legitimate and would reasonably toll the time from the filing of the motion to continue on September 20, 2018, until the witness was available on September 26, 2018. That period of six days (21, 22, 23, 24, 25, and 26) properly extended the try-by date of October 3, to October 9, 2018. Based upon the state of the record and the requirement to strictly construe the statutes against the state, nothing in the record gives a reasonable basis for further tolling. The trial on October 16, 2018, was seven days beyond the 30-day time limit; this delay was both unnecessary and unreasonable.

{¶ 71} I would affirm appellant's first assignment of error. I would find assignment of error two to be moot. I would reverse the trial court and direct that appellant's conviction be vacated and the case dismissed with prejudice.

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[1]The trial had been continued 28 days from the original trial date. The trial occurred 15 days beyond the try-by date. In the case sub judice, the trial was continued 21 days out and took place 13 days beyond the try-by date.