

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-04-028

Appellant

Trial Court No. 91-CR-389

v.

Steven Roberts a/k/a Darryl Brown

DECISION AND JUDGMENT ENTRY

Appellee

Decided: October 15, 2004

* * * * *

Raymond C. Fischer, Wood County Prosecuting Attorney,
Gary D. Bishop and Jacqueline M. Kirian, for appellant.

Andy P. Hart, for appellee.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal by the state of Ohio from a judgment of the Wood County Court of Common Pleas that granted appellee's motion to dismiss for the state's failure to comply with his speedy trial rights as guaranteed by R.C. 2941.401. For the reasons that follow, this court reverses the judgment of the trial court.

{¶ 2} Appellant state of Ohio sets forth the following assignment of error:

{¶ 3} “Upon receipt of a motion for final disposition pursuant to R.C. 2941.401, the State has one hundred eighty days within which to bring the accused to trial. The filing of several defense motions tolled speedy trial time in this case. Because one hundred eighty ‘speedy trial days’ had not expired at the time the trial court dismissed the case, the dismissal was in error, and the case should be reinstated.”

{¶ 4} The undisputed facts that are relevant to the issues raised on appeal are as follows. This matter came before the trial court on appellee’s motion to dismiss filed August 13, 2003, on the basis of a violation of his statutory right to a speedy trial. Although the record provides scant background information, it appears that appellee was charged with breaking and entering and receiving stolen property in November 1991. It further appears that, although a summons was issued, appellee failed to appear for hearings. An arrest warrant was issued in January 1992, but authorities were unable to locate appellee. Appellee’s memorandum in support of his motion to dismiss indicates that he was incarcerated several times between November 1991 and August 2003, when he filed his motion to dismiss this action. In its judgment entry on appellee’s motion to dismiss, the trial court found that the 180 days which the state had to bring appellee to trial pursuant to R.C. 2941.401 began to run on August 13, 2003, when his motion to dismiss was received and filed with the court. The trial court further found that the only two motions filed by appellee were his motion to dismiss and a request for appointment of counsel, and concluded that neither of those motions tolled the running of the 180-day statutory period. Accordingly, the trial court granted the motion to dismiss.

{¶ 5} In its sole assignment of error, the state asserts that the trial court should have held that the speedy trial period commenced running when appellee's request for final disposition was received by the trial court on August 18, 2003. Appellant further asserts that appellee's motion to dismiss did not comply with the requirements of R.C. 2945.401 necessary to trigger the 180-day time period because it did not contain a request for final disposition to be made of the matter. Appellant also asserts that the 180-day period was tolled several times by motions and requests appellee filed subsequent to August 18, 2003.

{¶ 6} In order to determine whether the trial court properly dismissed the indictment we must first ascertain the date on which the 180-day period began to run: August 13, 2003, when appellee filed his motion to dismiss, or August 18, 2003, when his request for final disposition of the charges pending against him was filed with the trial court. Once we have made that determination, we can proceed to a calculation of whether the 180 days had run by the time the trial court granted the motion to dismiss. Appellant contends that the 180-day period commenced on August 18, 2003, the date on which the trial court received the completed "Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Information or Complaints" from appellee.

{¶ 7} R.C. 2941.401 places a duty on an incarcerated defendant to "cause[] to be delivered to the prosecuting attorney and the appropriate court * * * *written notice of the place of his imprisonment and a request for a final disposition to be made of the matter* * * * ." [Emphasis added.] The duty to bring the defendant to trial within 180 days of the

written notice and request arises only after receipt of that statutory notice. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969 at ¶ 26.

{¶ 8} Appellee’s motion to dismiss, file-stamped August 13, 2003, simply asked the trial court to dismiss the charges pending against him. On August 18, 2003, however, the trial court received appellee’s notice of place of imprisonment and request for disposition of the indictment along with a “Certificate of Inmate Status” completed by the warden as required by R.C. 2941.401. Upon consideration of the foregoing, we find that the 180-day period did not begin to run until August 18, 2003, and that the trial court erred by finding otherwise.

{¶ 9} We must now consider whether the running of the 180-day period was tolled by any events contemplated by R.C. 2945.72. Based on a beginning date of August 18, 2003, the speedy trial time limit would run by February 9, 2004. Appellee filed his motion to dismiss on February 5, 2004 and the trial court dismissed the case on March 22, 2004.

{¶ 10} We note preliminarily that appellee asserts that the provisions set forth in R.C. 2945.72 for extending the 180-day time period cannot be applied to a situation such as his where he filed a request for disposition pursuant to R.C. 2941.401. Appellee argues that applying R.C. 2945.72 to an action filed pursuant to R.C. 2941.401 would amount to an attempt to modify the latter statute. Appellee cites R.C. 2945.71, which states that “(F) This section shall not be construed to modify in any way section 2941.401 * * * of the Revised Code.” Appellee goes on to state that R.C. 2945.72 exists in

conjunction with R.C. 2945.71 and therefore cannot be used to extend the time limit set forth in R.C. 2941.401, because that would be an attempt at modification of R.C. 2941.401.

{¶ 11} We find, however, that R.C. 2945.71 has no bearing on the issues raised in this case. R.C. 2945.71 sets forth the time within which hearings or trials must be held for persons accused of misdemeanors and felonies, which in appellee's case would normally be 270 days. In appellee's case, however, the 180-day limit set forth in R.C. 2941.401 controls because he was incarcerated with a pending untried indictment for which he requested final disposition. R.C. 2941.201 contains no language prohibiting the application of the tolling events set forth in R.C. 2945.72 and, accordingly, we will consider whether any of those events applied in this case to extend the time within which the state was able to bring appellee to trial.

{¶ 12} Appellant argues that the 180-day time limit was tolled several times between August 18, 2003, when the 180 days began to run, and March 22, 2004, when the trial court ruled on appellee's motion to dismiss, which was 217 days later. We find, however, that several events occurred in the interim which tolled the time charged to the state for a total of 83 days. At the time that the indictment was dismissed only 134 days were chargeable to the state. First, on September 17, 2003, appellee filed a motion for an evidentiary hearing, which tolled the running of the statutory period for 22 days pursuant to R.C. 2945.72(E), which states that the time within which an accused must be brought

to trial may be extended by “* * * [a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused

- * *. ” The time began to run again on October 9, when the motion was ruled on and ran until December 23, when appellee filed a request for counsel. This tolling event is allowed pursuant to R.C. 2945.72(C), which permits an extension due to “[a]ny period of delay necessitated by the accused’s lack of counsel * * *.” See *State v. Hiatt* (1997), 120 Ohio App.3d 247. The running of time was tolled for 16 days until the trial court appointed counsel at a hearing held on January 8, 2004. The time began to run again until February 5, 2004, when appellee filed his motion to dismiss. Time was tolled for 45 days until the trial court ruled on the motion and dismissed the indictment on March 22, 2004. See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, wherein the Supreme Court of Ohio held that a defendant’s motion to dismiss the indictment acts to toll the statutory time period since it represents a period of delay initiated by the accused. Based on the foregoing, 83 days must be deducted from the 217 days that elapsed from delivery of appellee’s notice under R.C. 2941.401 to the date the motion to dismiss was granted. Thus, as of March 22, 2004, only 134 days were chargeable to the state. Accordingly, we find that the trial court erred by granting appellee’s motion to dismiss and appellant’s sole assignment of error is found well-taken.

{¶ 13} On consideration whereof, this court finds that substantial justice was not done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. This case is hereby remanded and the trial court is ordered to bring

appellee to trial on the indictment filed in case no. 91-CR-389 within 46 days of the date this decision and judgment entry is entered on the journal. Costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J.

JUDGE

Judith Ann Lanzinger, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE