[Cite as *State v. Vansickle*, 2011-Ohio-4692.]

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

State of Ohio — Court of Appeals No. OT-11-001

Appellant — Trial Court No. 10CR063

v.

Wayne Vansickle — **DECISION AND JUDGMENT**

Appellee — Decided: September 16, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
and Andrew M. Bigler, Assistant Prosecuting Attorney, for appellant.

Howard C. Whitcomb, III, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is a state's appeal from an order of the Ottawa County Court of Common Pleas that dismissed burglary and theft charges for failure to provide a speedy trial. For the reasons that follow, we affirm.

{¶ 2} On June 24, 2010, the Ottawa County Grand Jury handed down a two count indictment, charging appellee, Wayne Vansickle, with burglary and theft, both felonies.

{¶ 3} A warrant for appellee's arrest was issued the same day. According to the sheriff's return of service and appellee's subsequent testimony, appellee was arrested on July 24.

{¶ 4} Appellee was arraigned on July 27, 2010, at which time counsel was appointed and bond set at $20,000. The same day, the court set an October 26, 2010 trial date. In the intervening period, appellee remained incarcerated, unable to post bond.

{¶ 5} According to the state's argument, at some point just before the scheduled trial date, discussions between the parties resulted in a plea agreement. The trial date was vacated and a subsequent hearing, ostensibly to enter a plea change, was set for December 2. Prior to that hearing, however, appellee moved to dismiss the charges against him on the ground that he had been denied his statutory right to a speedy trial. At the December 2 hearing, the court ordered the parties to brief the issue and scheduled a December 27 hearing on the motion to dismiss. That hearing resulted in the order dismissing both counts against appellee. That is the order at issue here. The state sets forth a single assignment of error:

{¶ 6} "The trial court improperly dismissed the indictment against Wayne Vansickle."

{¶ 7} The right of an accused to a speedy trial is guaranteed by both the federal and Ohio Constitutions. Section 10, Article I, Ohio Constitution; the Sixth Amendment to

the United States Constitution. The right has also been codified in Ohio law. R.C. 2945.71 sets time limits within which a defendant must be tried.

{¶ 8} It is the affirmative duty of the state to insure that a defendant's right to a speedy trial is respected. *State v. Major*, 180 Ohio App.3d 29, 2008-Ohio-6534, ¶ 21. The remedy for the violation of an accused's right to a speedy trial is dismissal of the charge. Id. at ¶ 25, citing *Barker v. Wingo* (1972), 407 U.S. 514, 522; R.C. 2945.73(B).

{¶ 9} There are four factors to be weighed to determine whether a defendant's right to a constitutional speedy trial has been violated. "The four factors are (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. [*Barker* at 530]. While the court stated that none of the factors are a 'necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial,' it also said that those factors 'must be considered together with such other circumstances as may be relevant.' Id. at 533." *Major* at ¶ 12.

{¶ 10} In Ohio, statutory speedy trial for accused felons is governed by R.C. 2945.71(C):

{¶ 11} "(C) A person against whom a charge of felony is pending:

{¶ 12} "* * *

{¶ 13} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

{¶ 14} "* * *

{¶ 15} "(E) For purposes of computing time under [division (C)(2)] each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. * * *."

{¶ 16} The time for computing a statutory speedy trial violation may be tolled, but only for those reasons expressly provided in R.C. 2945.72. Those reasons include:

{¶ 17} "(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him * * *;

{¶ 18} "(B) Any period during which the accused is mentally incompetent to stand trial * * *;

{¶ 19} "(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;

{¶ 20} "(D) Any period of delay occasioned by the neglect or improper act of the accused;

{¶ 21} "(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;

{¶ 22} "(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

{¶ 23} "(G) Any period during which trial is stayed pursuant to an express statutory requirement * * *;

{¶ 24} "(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 * * *."

{¶ 25} It is undisputed that appellee was arrested July 24, 2010. It is similarly undisputed that appellee did not post bond and remained incarcerated until he was released on his own recognizance following the December 2, 2010 initial hearing on his speedy trial motion. Since appellant was incarcerated he must be brought to trial within 90 days to satisfy R.C. 2945.71. The record contains no entry that would satisfy any of the statutory factors that would toll time. The court docket does contain a notation dated October 26, 2010, stating, "Trial cancelled after juror notices."

{¶ 26} The state insists that appellee's agreement to a plea bargain on October 22, 2010, should have tolled time and that it was appellee's responsibility to provide an entry to the court. At the December 2 hearing, counsel for appellee conceded that the plea arrangement was set, but denies any responsibility to document the delay. Absent such an entry prior to the expiration of the speedy trial period, appellee insists, he was entitled to have the charges against him dismissed.

{¶ 27} "For purposes of R.C. 2945.72, the unequivocal and repeated holding of the Ohio Supreme Court (and of this court) has been: (1) that the granting of a continuance *must* be recorded by the trial court in its journal entry; (2) that the journal entry *must* identify the party to whom the continuance is chargeable; and (3) that if the trial court is acting sua sponte, the journal entry *must* so indicate and *must* set forth the reasons

justifying the continuance." (Emphasis in original.) *State v. Geraldo* (1983), 13 Ohio App.3d 27, 30-31. Moreover, it is the responsibility of the state, not the accused, to make sure that a time tolling event is documented in the record. *Major*, supra, at ¶ 21.

{¶ 28} In this matter, the record reveals no such documentation. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE