[Cite as *State v. Pacheco*, 2011-Ohio-3117.]

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

State of Ohio — Court of Appeals No. WD-10-003

Appellee — Trial Court No. 2008CR0508

v.

Jamie Pacheco — **DECISION AND JUDGMENT**

Appellant — Decided: June 24, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker, and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

William F. Hayes, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Wood County Court of Common Pleas after defendant-appellant, Jamie Pacheco, entered no contest pleas to one count of menacing by stalking and four counts of violating a civil

protection order. Appellant now challenges that judgment through the following assignment of error:

{¶ 2} "The trial court erred in denying the appellant's motion to dismiss on the grounds that the state violated the appellant's right to a speedy trial."

{¶ 3} On October 1, 2008, appellant was indicted and charged with one count of menacing by stalking in violation of R.C. 2903.211(A)(1) and (B)(2)(d), a fourth degree felony, and four counts of violating a protection order in violation of R.C. 2919.27(A)(1), all first degree misdemeanors. Appellant initially entered pleas of not guilty to all charges. Thereafter, on August 20, 2009, he filed a motion to dismiss the indictment on the ground that his right to a speedy trial had been violated. In a judgment entry of November 24, 2009, the court denied the motion to dismiss finding that pursuant to the applicable provisions of R.C. 2945.71, the statutory time limit had not yet run. Specifically, the court determined that the three-for-one provision of R.C. 2945.71(E) did not apply to appellant because during the time periods at question there were multiple cases pending against him and there was a holder placed on him. The court cited *State v. Brown*, 2d Dist. No. 21540, 2007-Ohio-2098, for the proposition that in order for the three-for-one provision to apply, the defendant must be held on the pending case only. On December 8, 2009, appellant entered a plea of no contest to all charges and was found guilty. The trial court subsequently entered its sentence and this appeal follows.

{¶ 4} In his sole assignment of error, appellant challenges the trial court's ruling on his motion to dismiss. Appellant contends that his right to a speedy trial was violated and that the lower court therefore erred in refusing to dismiss the charges against him.

{¶ 5} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). "This 'triple count' provision applies only when the defendant is being held in jail solely on the pending charge." *State v. Sanchez*, 110 Ohio St.3d 274, 276-277, 2006-Ohio-4478, ¶ 7. Therefore, if an accused is held in jail solely on the pending charge for the entire time from arrest to trial, he must be brought to trial within 90 days. The time by which an accused must be brought to trial, however, may be tolled under certain conditions, including:

{¶ 6} "(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused;

{¶ 7} "* * *

{¶ 8} "(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[.]" R.C. 2945.72

{¶ 9} Accordingly, where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15. Similarly, the Supreme Court of Ohio has definitively established that an accused's demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. In addition, the state and federal rights to a speedy trial can be waived in writing or in open court on the record. *State v. King* (1994), 70 Ohio St.3d 158, syllabus. In this regard, when an accused signs an unlimited waiver of his right to a speedy trial, the accused may not seek dismissal of the criminal charges against him on speedy trial grounds "unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time." *State v. O'Brien* (1987), 34 Ohio St.3d 7, paragraph two of the syllabus.

{¶ 10} "It is well established that once an accused has demonstrated that the applicable speedy-trial time has expired, he or she has established a prima facie case for dismissal, and the burden shifts to the state to demonstrate any tolling or extensions of time permissible under the law." *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-4342, ¶ 27. Appellant was arrested on October 1, 2008. He then entered his pleas of no contest and was found guilty of all charges on December 8, 2009. Accordingly, not counting the day of arrest, appellant waited 433 days to be tried on the pending charges.

He therefore established a prima facie case for dismissal and the burden shifted to the state.

{¶ 11} Appellate review of a trial court's decision on a motion to dismiss on speedy trial grounds involves a mixed question of law and fact. *State v. High*, 143 Ohio App.3d 232, 242. Accordingly, we must give due deference to the trial court's findings of fact if they are supported by competent, credible evidence, but then must independently review whether the trial court properly applied the law to the facts. Id.

{¶ 12} The record reveals the following series of events. Appellant was arrested and charged in the five count indictment on October 1, 2008. He remained incarcerated on those charges awaiting arraignment until October 7, 2008. The day an accused is arrested is not counted in computing the time by which an accused must be brought to trial. *State v. Lautenslager* (1996), 112 Ohio App.3d 108, 110. Accordingly, only six days from October 1 to October 7 should be counted in the speedy trial calculation but the three for one provision applies to those days. Accordingly, by October 7, 2008, 18 days should be counted in the calculation. On that day, however, appellant was brought to court and, upon his request, the arraignment was continued until October 28, 2008. Pursuant to R.C. 2945.72(H), the time was therefore tolled.

{¶ 13} On October 28, 2008, the parties returned to court, at which time appellant again requested a continuance of the arraignment. The court granted the continuance, rescheduling the arraignment for December 2, 2008, and further noted in its order that the speedy trial time from October 28 to December 2, was to be charged to appellant. On

December 2, 2008, appellant was transported from the Lucas County Corrections Center, where he was being held on other charges, to the Wood County Common Pleas Court for arraignment. He entered a plea of not guilty to all charges and the court set a pretrial for December 23, 2008. Accordingly, on December 2, 2008, the speedy trial clock again began to run. However, because appellant was being held in another jail on other charges, the triple count provision did not apply.

{¶ 14} On December 9, 2008, appellant filed a request for discovery, thereby tolling the calculation. Appellant did not receive the requested discovery until February 13, 2009. Accordingly, the time from December 9, 2008, until February 13, 2009, should not have been counted in the calculation. See *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. It is noteworthy that neither party or the trial court included this time period as being tolled, but the Supreme Court of Ohio in *Brown* made it clear that the defendant's filing of a discovery request is a tolling event because it "divert[s] the attention of prosecutors from preparing their case for trial, thus necessitating delay." Id. at ¶ 23.

{¶ 15} At the February 3, 2009, pretrial conference, appellant executed a waiver of his constitutional and statutory right to a speedy trial to the conclusion of the case. Subsequently, on June 16, 2009, appellant, on the record, withdrew his waiver and the court set the case for a jury trial, scheduled for August 20, 2009. Appellant was further advised that the calculation of speedy trial time was to restart on June 16, 2009. At this time, appellant was being held in the Wood County jail solely on the charges in this case.

On July 20, 2009, however, Lucas County placed a holder on appellant based on new charges pending in that jurisdiction. As stated above, it is well-settled that for purposes of a speedy trial calculation, the triple count provision of R.C. 2945.71(E) only applies "when the defendant is being held in jail solely on the pending charge." *Sanchez*, supra, at 276-277. Accordingly, while the triple count provision did apply to the period from June 16, 2009, to July 20, 2009, it did not apply thereafter. On August 20, 2009, appellant filed his motion to dismiss, which tolled the running of the speedy trial time. Accordingly, from June 16, 2009, until July 20, 2009, 35 days were counted three-for-one, for a total of 105 days toward the speedy trial calculation. Thereafter, from July 20 until August 20, 31 days were counted toward the calculation.

{¶ 16} By our count, on August 20, 2009, when appellant filed his motion to dismiss, only 161 days had passed that could be counted toward the speedy trial calculation. Appellant, however, asserts that the triple count provision should apply to the time period from July 20, 2009, to August 20, 2009. He contends that because the holder placed on him by Lucas County was for possible additional charges, not for a conviction, he was in jail solely on the pending charge. In support, he asserts that the court in *Sanchez*, supra, held that the triple count provision did not apply when the defendant was simultaneously in custody on a parole or probation violation holder. That is, when the defendant had already be convicted of other charges. The court in *Sanchez*, supra, at ¶ 7, however was clear when it stated: "Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to *other charges*. Id. Nor does

it apply when the accused is being held on a parole- or probation-violation holder." (Emphasis added.) Accordingly, appellant was not entitled to triple count the time he was in jail from July 20, 2009, to August 20, 2009.

{¶ 17} Appellant next contends that the time period from January 8, 2009, to February 3, 2009, when appellant was determined to be unavailable, should not be counted against him because the state did not adequately show his unavailability. Because this time period fell within the tolling period prompted by appellant's filing of a request for discovery, we need not address this issue.

{¶ 18} Finally, appellant asserts that the time period following the court's ruling on his motion to dismiss, November 24, 2009, until the date when he entered his plea of no contest to the charges, December 8, 2009, must be included in the calculation and must be triple counted. Assuming arguendo that the time should be included in the calculation and triple counted, appellant was still tried within the statutory speedy trial time period.

{¶ 19} Accordingly, because appellant's right to a speedy trial was not violated, the lower court did not err in denying his motion to dismiss and the sole assignment of error is not well-taken.

{¶ 20} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

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