[Cite as *State v. Blanton*, 2013-Ohio-2127.]

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

State of Ohio — Court of Appeals No. OT-11-030

Appellee — Trial Court No. CRB-1100307A

v.

Kyle Blanton — **DECISION AND JUDGMENT**

Appellant — Decided: May 24, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
David R. Boldt, Assistant Prosecuting Attorney, for appellee.

Jack J. Brady, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} On May 8, 2011, appellant, Kyle Blanton, was arrested and charged with assault in violation of R.C. 2903.13(A), a first degree misdemeanor. Appellant entered a not guilty plea, and was released on his own recognizance. A bench trial was set for August 5, 2011, at which appellant appeared, acting pro se. Before the trial commenced,

the court-appointed magistrate noted that a plea offer was pending. The state asked the court for a continuance to allow for time to subpoena a witness. Thereafter, the following exchange took place:

> The Court: All right. So this was a witness unbeknownst to the State, that [sic] it may not be absolutely mandatory or necessary, but someone that the State feels is important enough that the State would want to proceed and what, have this person subpoenaed for trial?
>
> [The prosecutor]: Yes, Your Honor.
>
> The Court: All right. So you are asking for a continuance. This is a May case. Of course, Mr. Blanton is not in custody. We do have time issues in terms of the trial.
>
> Mr. Blanton, what is your position with regard to the State's motion to have this matter continued? As I said, I understand there has [sic] been some discussions and whether or not that leads to a resolution - -
>
> [Appellant]: Right, correct.
>
> The Court: Nobody knows at this point. What is your position with regard to the continuance?
>
> [Appellant]: If that is - - I would rather take care of it today, if possible.
>
> The Court: But apparently, you weren't able to work out the agreement? My understanding was you wanted –

[Appellant]: We didn't speak enough.

The Court: And you wanted some additional time maybe to think some things over?

[Appellant]: Yes, sir.

The Court: All right. Do you still want some time to think things over in terms of the offer that has been made by the State or is this something that you are going to either accept or refuse or – I don't want to be involved in negotiations.

[Appellant]: Just a little bit more time, that is all.

The Court: All right. So you would like some additional time to at least ponder, think about the offer that has been made?

[Appellant]: Yes, sir.

The Court: So in that context then continuance of today's trial is okay with you?

[Appellant]: Yes, sir.

The Court: Okay. All right. I will go ahead and continue this case then. We do have, like I say, time limits.

I am going to have this matter reset for trial on the 22nd of August at two o'clock in the afternoon. Of course, assignment notices will go out.

[Appellant]: Okay.

The Court: But since that is just a little over two weeks away, it would be two weeks from Monday, August 22nd at two o'clock, I wanted everybody to know in court here today when that is set for.

So that is when our trial date is scheduled. Obviously, I encourage, Mr. Blanton, you and the State * * * to continue discussions, and, hopefully, resolve the matter.

If they do not resolve, we can handle the resolution on the 22nd if that is what the parties want to do. Obviously, if it doesn't resolve, we will proceed to trial on the 22nd. Okay?

[Appellant]: Sure.

{¶ 2} On Monday, August 8, 2011, the 92nd day after appellant's arrest, the trial court issued a judgment entry in which it stated that:

Pursuant to 2945.72(H), the Court sua sponte, and for reasons of a crowded docket, set the above matter for Bench Trial on Monday, August 22, 2011 at 2:00 p.m., the next available date.

The Court finds that the defendant is not unfairly prejudiced by this extension of his/her speedy trial rights insofar as the length of continuance is an additional seventeen (17) days past the statutory period. **BARKER v. WINGO** (1972) 407 US 514, 33 LEd. 2D 101, 92 SCt 2182.

{¶ 3} On August 9, 2011, appellant filed a request for discovery, to which the state responded on August 10, 2011. On August 16, 2011, appellant, again acting pro se, filed

a motion to dismiss the case due a violation of his speedy trial rights. The trial court scheduled a hearing on appellant's motion to dismiss, and also maintained the scheduled bench trial, for August 22, 2011. On August 22, 2011, the state filed a motion to dismiss the case, which the trial court granted that same day. Subsequently, the case was presented to a grand jury, which indicted appellant on one count of felonious assault, in violation of R.C. 2903.11(A)(1), a second degree felony.

{¶ 4} On September 13, 2011, appellant filed a "motion for journalization [sic] record and memorandum in support" in which he asked the trial court "to state findings of fact and conclusions of law in support" of the decision to overrule appellant's motion to dismiss. On September 14, 2011, Ottawa County Municipal Court Judge Frederick Hany wrote appellant a letter explaining that, because the misdemeanor case was dismissed and a felony indictment was issued, the case was transferred to the Ottawa County Court of Common Pleas and the municipal court no longer had jurisdiction over the matter. Judge Hany also told appellant that as to his motion to dismiss filed on August 16, 2011, "there no longer is a controversy or issue to be decided."

{¶ 5} On September 19, 2011, appellant, acting pro se, filed a notice of appeal from the trial court's order dismissing the case at the prosecutor's request. On November 29, 2011, this court issued a decision in which we found that the order from which the appeal was taken was not final and appealable, and dismissed the appeal. Appellant later filed a motion for reconsideration of our dismissal of the appeal, which

was granted. The appeal was reinstated, and counsel was appointed to assist appellant with this appeal.

{¶ 6} On appeal, appellant sets forth the following two assignments of error:

> 1. The trial court violated appellant's constitutional rights as guaranteed by the Sixth Amendment to the United States Constitution, and Section 10 of Article 1 of the Ohio Constitution, and Ohio's Speedy Trial statutes, Revised Code 2945.71 through 2945.73, which it failed to conduct the hearing and grant appellant's motion to dismiss.
>
> 2. The trial court violated appellant's constitutional rights by failing to follow that mandate of Rule 48(A) of the Ohio Rules of Criminal Procedure.

{¶ 7} In support of his first assignment of error, appellant argues that the trial court should have held a hearing on his motion to dismiss, and should have granted the motion because: (1) he did not waive his right to a speedy trial in writing, and (2) the trial court did not journalize its order for a continuance prior to the expiration of the time period in which appellant was to be brought to trial.

{¶ 8} In reviewing speedy trial cases on appeal, this court must count the number of days that have passed pursuant to R.C. 2945.71, et seq. *State v. Maisch*, 173 Ohio App.3d 724, 2007-Ohio-6230, 880 N.E.2d 153, ¶ 22 (3d Dist.). "If any ambiguity exists, this court will construe the record in the defendant's favor." *Id.*, citing *State v. King*, 3d Dist. No. 9-06-18, 2007-Ohio-335, ¶ 30. (Other citation omitted.)

{¶ 9} In addition to the speedy trial guarantees set forth in the United States and Ohio Constitution, R.C. 2945.71(B)(2) states that a person charged with a misdemeanor of the first or second degree must be brought to trial "[w]ithin ninety days after the person's arrest * * *." Pursuant to R.C. 2945.73(B), "[u]pon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

{¶ 10} The requirements of both R.C. 2945.71 and 2945.73 are mandatory, and therefore strict compliance on the part of the state is required. *Maisch* at ¶ 24. Accordingly, "[w]hen *sua sponte* granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." *State v. Mincy*, 2 Ohio St.3d 6, 441 N.E.2d 571 (1982), syllabus. Justifications for a continuance, such as the court's crowded docket, are reasonable in a speedy trial case only where the trial court's entry is journalized prior to the running of the statutory time limit. *Id.* at 7, citing *State v. Lee*, 48 Ohio St.2d 208, 357 N.E.2d 1095 (1976).

{¶ 11} It is undisputed in this case that the 90-day period within which appellant was to be brought to trial expired before the trial court, acting sua sponte, filed a journal entry continuing the case until August 22, 2011. Although the record contains discussions regarding other reasons to support a continuance, the only reason stated in the trial court's August 8 judgment entry was its "crowded docket." *See State v. Simmons*,

6th Dist. No. L-12-1084, 2013-Ohio-1712, ¶ 27 ("[I]t is axiomatic that court speaks through its journal, not by oral pronouncement.").

{¶ 12} This court has reviewed the entire record that was before the trial court and, upon consideration thereof, we find that appellant's constitutional rights under the United States Constitution and the Ohio Constitution, as well as R.C. 2945. 71 and 2945.73, were violated when the trial court failed to either: (1) bring appellant to trial within 90 days of his arrest, or (2) timely journalize a judgment entry that sets forth adequate reasons for extending the statutory time period. Accordingly, appellant's first assignment of error is well-taken.

{¶ 13} In support of his second assignment of error, appellant argues that the trial court's dismissal of his misdemeanor case violated his constitutional rights because it was not done after a hearing in "open court" as required by Crim.R. 48(A) and R.C. 2945.73.

Crim.R. 48(A) provides that "[t]he state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall hereupon terminate." R.C. 2945.73 provides for the discharge of a person charged with a misdemeanor "[u]pon motion made at or prior to the commencement of trial * * * if [the accused] is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

{¶ 14} On consideration of our disposition as to appellant's first assignment of error, appellant's second assignment of error is moot.

{¶ 15} For the foregoing reasons, the judgment of the Ottawa County Municipal Court is reversed and vacated, and the charge against appellant is dismissed on the ground that he was not brought to trial within the time limit prescribed by R.C. 2945.71(B)(2). The case is remanded to the trial court for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the court costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE