

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

State of Ohio

Court of Appeals No. OT-12-018

Appellant

Trial Court No. 09CR186

v.

Mark Kilis

DECISION AND JUDGMENT

Appellee

Decided: July 12, 2013

* * * * *

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

Michael W. Sandwisch, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal by the state from a judgment of the Ottawa County Court of Common Pleas, which dismissed all counts in a criminal indictment based upon a

determination of speedy trial violations. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} On December 18, 2009, appellee, Mark M. Kilis, was indicted by the Ottawa County Grand Jury on twelve felony offenses. Appellee was indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b), six counts of rape, in violation of R.C. 2901.02(A)(2), one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), three counts of gross sexual imposition, in violation of 2907.05(A)(1), and one count of improper discharge of a firearm, in violation of R.C. 2923.161(A)(1).

{¶ 3} The record clearly reflects that an extraordinary volume of motions have been filed in connection to this long contested case. Of most relevance to the primary issue before us, on January 4, 2011, appellee filed a written time waiver which specified a termination of the time waiver to occur on April 26, 2011.

{¶ 4} In February 2011, the trial court dismissed three counts of the indictment. That decision was appealed to this court. In September 2011, we reversed that decision. In addition, in December 2011, the trial court granted a motion filed by appellee for relief from prejudicial joinder.

{¶ 5} Based upon the motion contesting joinder being granted, the twelve counts pending against appellee were severed into three separate trials, with the first set of cases set for trial scheduled to commence on June 19, 2012. On June 18, 2012, the day before trial, appellee filed a motion to dismiss based on a violation of the right to a speedy trial. The motion was granted. This appeal ensued.

{¶ 6} Appellant, the state of Ohio, sets forth the following two assignments of error:

I. THE STATE DID NOT VIOLATE APPELLEE’S RIGHT TO A SPEEDY TRIAL.

II. THE TRIAL COURT ERRED WHEN IT FOUND APPELLEE HAD MET HIS BURDEN ESTABLISHING PREJUDICIAL JOINDER.

{¶ 7} In the first assignment of error, appellant asserts that it did not violate appellee’s right to a speedy trial. The United States Constitution, through the Sixth and Fourteenth Amendments, protects a criminal defendant’s right to a speedy prosecution by the state. Ohio has codified this right in R.C. 2945.71.

{¶ 8} R.C. 2945.71(C) establishes that when a person has a felony charge pending against them, they “[s]hall be brought to trial within two hundred seventy days after the person’s arrest.” The burden is placed upon the defendant to establish a prima facie case that the 270-day time limit has passed. *State v. Daley*, 4th Dist. No. 11CA3240, 2012-Ohio-796, citing *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986).

{¶ 9} The following undisputed facts are relevant to this appeal. Appellee was indicted on December 18, 2009, and taken into custody. The time within which to try his case commenced the next day. On December 23, 2009, appellee filed motions for discovery and a bill of particulars. Since he remained in custody during this time period, these days were credited under the “triple count” provisions of R.C. 2945.71(E) which mandates that each day during which the accused is held in jail in lieu of bail on a

pending charge shall be counted as three days. Therefore, these 15 days counted toward the time within which appellee was to be brought to trial.

{¶ 10} Appellant responded to appellee's discovery request on January 14, 2010. Appellee was released from custody on January 20, 2010. Therefore, under R.C. 2945.71(E), these additional days were credited to appellee since he remained in custody.

{¶ 11} On February 1, 2010, appellee filed a motion to continue the trial date scheduled for February 23, 2012, for "approximately four months." Attached to this motion is a waiver executed by appellee that simply states:

WAIVER OF DATE OF TRIAL OR PRELIMINARY HEARING

The defendant herewith waives the requirement that his case be tried within the time limits prescribed by Section 2945.71 O.R.C.

{¶ 12} The court thereafter rescheduled the trial on September 28, 2010. Thus, since he had requested the continuance and he was not in custody, these days are not counted toward the time limits of R.C. 2945.71.

{¶ 13} On June 11, 2010, appellant filed a motion to continue. That motion was granted and a new trial date of November 16, 2010, was established by the court.

{¶ 14} On November 5, 2010, appellant filed a motion to continue the November 16, 2010 trial date. Therefore, the 39 days from the last scheduled trial date of September 28, 2010 until November 5, 2010, are counted toward the time limits within which appellee should have been brought to trial.

{¶ 15} The court granted appellant's motion to continue and a new trial date of April 26, 2011, was established.

{¶ 16} On January 4, 2011, appellee filed a time waiver. That waiver stated clearly and unequivocally that any time limits pursuant to R.C. 2945.71 were waived through the trial date of April 26, 2011. Thus, it is undisputed that this time cannot count against the time limits that appellee should have been brought to trial.

{¶ 17} On March 3, 2011, the trial court dismissed three of the gross sexual imposition counts, sustained appellee's motion for a more specific bill of particulars and sustained a motion to compel. On March 8, 2011, appellant filed its notice of appeal.

{¶ 18} Therefore, at the time the notice of appeal was filed on March 8, 2011, 68 days had lapsed that were chargeable towards appellee's time within which he should have been brought to trial.

{¶ 19} On September 2, 2011, this court reversed and remanded for further proceedings. On December 16, 2011, appellee filed motions for discovery and relief from prejudicial joinder. The 105 days that elapsed during this period must be counted toward the time within which the case must be tried.

{¶ 20} On December 27, 2011, the court granted appellee's motion for relief from prejudicial joinder.

{¶ 21} A trial date of June 19, 2012, was established by the court.

{¶ 22} On June 18, 2012, appellee filed a motion to dismiss on speedy trial grounds. On the date that appellee had filed his motion, 348 days had lapsed that would

be chargeable against the time within which his case should have been tried under R.C. 2945.71.

{¶ 23} The focus of the inquiry in this case is the nature and extent of the January 4, 2011 time waiver that unequivocally waived time only until the then scheduled trial date of April 26, 2011. The language of the earlier waiver filed February 1, 2010, was general in nature.

{¶ 24} The prosecution asserts that *State v. O'Brien*, 34 Ohio St.3d 7, 516 N.E.2d 218 (1987), is controlling in this case. In *O'Brien*, the Supreme Court held:

Following an express, written waiver of unlimited duration by any accused of his right to speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial. * * * *Id.* at paragraph two of the syllabus.

{¶ 25} It is undisputed that appellee herein did not file a formal written objection to the trial date of June 19, 2012, nor did he file a formal demand for trial. However, his waiver filed on January 4, 2011, stated clearly and unequivocally that any time limits pursuant to R.C. 2945.71 were waived through the trial date of April 26, 2011 only. This waiver acted to notify the trial court that the prior waiver filed February 1, 2010, nearly 11 months prior, was being revoked.

{¶ 26} The facts of this case are very similar to those presented in *State v. Masters*, 172 Ohio App.3d 666, 2007-Ohio-4229, 876 N.E.2d 1007 (3d Dist.). In that case, the court held that the filing of a motion to dismiss should have put the court on

notice that time would no longer be tolled by the defendant, despite not having filed a formal written objection or demand for trial. *Id.* at ¶ 26.

{¶ 27} The record clearly establishes that on June 18, 2012, appellant was in violation of its R.C. 2945.71(C) duty to furnish appellee a speedy trial. The facts plainly demonstrate that appellant breached appellee's right to a speedy trial. The motion to dismiss was correctly granted. Accordingly, the first assignment of error is found not well-taken.

{¶ 28} Given our adverse determination in response to appellant's first assignment of error, thereby rendering any issue of the propriety of joinder involving properly dismissed cases a nullity, the second assignment of error is rendered moot.

{¶ 29} On consideration whereof, we find the trial court properly determined that appellee's right to a speedy trial was violated. The untimely cases were correctly dismissed. The judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.