[Cite as *State v. Delacerda*, 2013-Ohio-3556.]

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

State of Ohio — Court of Appeals No. WD-12-021

Appellee — Trial Court No. 2011CR0686

v.

Joseph Delacerda — **DECISION AND JUDGMENT**

Appellant — Decided: August 16, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

JENSEN, J.

A. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas which entered a judgment finding appellant, Joseph Delacerda, guilty of two counts

of drug possession, R.C. 2925.11(A)(C)(4)(a), a felony in the fifth degree, and R.C. 2925.11(A)(C)(6)(a), a felony in the fifth degree. For the following reasons, we affirm the trial court's judgment.

B. Statement of Facts and Procedural History

{¶ 2} This case stems from an incident that occurred on March 14, 2011, when appellant was stopped in his truck for speeding by the Ohio State Highway Patrol on State Route 25. The state trooper smelled marijuana coming from inside the vehicle, and based upon that smell, conducted a probable cause search of appellant's truck. During the search, burnt spoons and syringes were found. Appellant was arrested and charged with one count of possessing drug abuse instruments, in violation R.C. 2925.12, a misdemeanor in the second degree. On October 5, 2011, appellant entered a plea of "no contest" to the charge in the Bowling Green Municipal Court and received a 90 day suspended sentence (case No. 11-CR-B-00517).

{¶ 3} On November 12, 2011, the highway patrol received laboratory test results conducted on the drug instruments that were confiscated. The results showed cocaine residue on one spoon and heroin residue on another. Based upon that evidence, the Wood County Grand Jury indicted appellant on December 22, 2011, on two counts of drug possession, R.C. 2925.11(A)(C)(4)(a), a felony in the fifth degree, and R.C. 2925.11(A)(C)(6)(a), a felony in the fifth degree. The parties agree that the misdemeanor charge in the municipal court and the felony charges in the common pleas court arose out of the same traffic stop.

{¶ 4} On March 2, 2012, appellant filed a motion to dismiss. Appellant argued that the state violated his right to a speedy trial and exposed him to double jeopardy under the federal and state constitutions.

{¶ 5} On March 26, 2012, the trial court denied appellant's motion to dismiss. On April 23, 2012, appellant pled no contest to both felony charges. The trial court imposed a sentence of five years community control sanctions and ordered appellant to complete an in-house rehabilitation program.

{¶ 6} On May 11, 2012, appellant filed a notice of appeal, raising one assignment of error for this court's review.

> THE TRIAL COURT ERRED IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION IN DENYING HIS MOTION TO DISMISS.

C. Analysis

{¶ 7} We apply a de novo standard of review when reviewing the denial of a motion to dismiss on double jeopardy grounds or speedy trial grounds. *State v. Williams*, 6th Dist. Wood No. WD-07-079, 2008-Ohio-2730, ¶ 7 (double jeopardy) and *State v. Browand*, 9th Dist. Lorain No. 06CA009053, 2007-Ohio-4342, ¶ 10 (speedy trial).

1. Speedy Trial

{¶ 8} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Pursuant to the constitutional mandates, R.C. 2945.71 to 2945.73 prescribe specific time requirements within which the state must bring an accused to trial. R.C. 2945.71(C)(2) provides that "A person against whom a charge of felony is pending * * * [s]hall be brought to trial within two hundred seventy days after his arrest."

{¶ 9} In this case, appellant argues that "the clock began running at the time of Appellant's arrest on March 14, 2011." That is, appellant claims that the 270 day window to try him on the felony charges began to run when he was originally arrested on the misdemeanor charge.

{¶ 10} The Supreme Court of Ohio recognized an exception to the speedy-trial timetable for subsequent indictments in *State v. Baker*, 78 Ohio St.3d 108, 112, 676 N.E.2d 883 (1997). The court held,

> When additional criminal charges arise from facts distinct from those supporting an original charge, or the state was unaware of such facts at that time, the state is not required to bring the accused to trial within the same statutory period as the original charge under R.C. 2945.71 et seq.

{¶ 11} In a similar case to the one at bar, the defendant was arrested for driving under the influence. *State v. Riley*, 12th Dist. Clermont No. CA99-09-087, 2000 WL 745300 (June 12, 2000). A search of the vehicle revealed the presence of a white

powdery substance which was later tested and proved to be cocaine. *Id*. Defendant alleged that the state's failure to try him on the drug possession charge within 270 days of his original arrest violated his right to a speedy trial. *Id.* The court rejected the argument. It found,

> The two charges arose out of different, albeit related, investigations or searches. The possession charge ultimately resulted out of an operative fact not present as to the DUI charge: the testing of the white powder and its confirmation as cocaine. The speedy trial time for the possession charge therefore began to run * * * when [the defendant was] charged * * * with possession of cocaine. *Id*. at *2.

{¶ 12} Here, the felony drug possession charges were dependent upon a lab analysis that was not available to the police on the date appellant was first arrested. Therefore, the felony charges did not arise from the same set of facts as the original misdemeanor charge. Accordingly, the speedy trial time for the felony drug possession charges began to run on December 23, 2011, the day after appellant was indicted by the grand jury. S*tate v. Masters*, 172 Ohio App.3d 666, 2007-Ohio-4229, 876 N.E.2d 1007, ¶ 12 (3d Dist.). (The date of arrest is not counted when computing the statutory time period.) In sum, we find that appellant's right to a speedy trial was not violated.

2. Double Jeopardy

{¶ 13} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect against multiple

punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds in Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *see also State v. Casalicchio*, 58 Ohio St.3d 178, 183, 569 N.E.2d 178 (1991). "The double jeopardy protections afforded by the federal and state constitutions guard citizens against both successive prosecutions and cumulative punishments for the 'same offense.'" *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699 (1999).

{¶ 14} Appellant premises his double jeopardy argument on the claim "that he was already prosecuted in the municipal court on a charge based on the same incident." When a case involves the issue of successive prosecutions in separate trials, *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and its progeny apply.[1]

> In *Blockburger*, the Supreme Court stated that the applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *State v. Schrier*, 6th Dist. Wood No. WD-04-087, 2006-Ohio-974, ¶ 13.

{¶ 15} Stated another way, double jeopardy will be found where one of the cited offenses may be considered a lesser included offense of the other.

[1] A different analysis is involved for cases dealing with the "cumulative punishments branch" of the double jeopardy clause. R.C. 2945.25 prescribes procedural safeguards to protect against cumulative punishments imposed in a single trial.

> An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph three of syllabus.

{¶ 16} For example, in *State v. Schrier*, 6th Dist. Wood No. WD-04-087, 2006-Ohio-974, the defendant argued that her conviction for misuse of a credit card in a mayor's court barred her subsequent prosecution for theft in a common pleas court. *Id.* Examining the elements of each offense, we found that the misuse of a credit card was not a lesser included offense of theft because "theft of a credit card *can* be committed without misuse also being committed." *Id.* at ¶ 36. Therefore, double jeopardy did not bar the state's subsequent prosecution on the theft charge. *Id.* at ¶ 37.

{¶ 17} In this case, the statute carrying the lesser penalty is R.C. 2925.12(A) which provides, in part, that "No person shall knowingly * * * possess, or use any instrument, article, or thing the customary and primary purpose of which is for the administration or use of a dangerous drug * * * ." By contrast, the other statute, R.C. 2925.11(A), provides that, "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶ 18} We find that the instruments offense is not a "lesser included offense" inasmuch as it *can* be committed without also violating the drug abuse statute. Indeed, it is possible to possess a drug abuse instrument without also possessing a controlled substance. Because the two offenses are distinct from one another, double jeopardy does not apply. Appellant's assignment of error is not well-taken.

{¶ 19} On consideration whereof, we find 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. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE