

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

City of Toledo

Court of Appeals No. L-13-1017

Appellee

Trial Court No. TRC-07-03651

v.

Michael D. Burns

DECISION AND JUDGMENT

Appellant

Decided: April 18, 2014

* * * * *

David L. Toska, City of Toledo Chief Prosecutor, and
Henry Schaefer, Assistant Prosecutor, for appellee.

George R. Royer, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Michael D. Burns, appeals his January 9, 2013 conviction for reckless operation, a violation of Toledo Municipal Code 333.02A. He claims (1) that police officers illegally seized his blood, violating his Fourth Amendment

rights, and (2) that his right to a speedy trial was violated. For the reasons that follow, we reverse his conviction.

I. Background

{¶ 2} On December 2, 2006, Toledo police and emergency response personnel were called to the scene of a rollover accident at the intersection of N. Detroit and Pasadena in Toledo, Ohio. First responders found Burns inside the vehicle, unrestrained, lying on the roof of the car. He smelled of alcohol. Witnesses to the accident reported that Burns had lost control of his vehicle and hit a telephone pole, causing the vehicle to roll over. He was initially unconscious. When emergency personnel removed him from his vehicle, he was conscious but disoriented, but he eventually lost consciousness again. He was transported by ambulance to St. Vincent Mercy Medical Center and he was admitted to the burn unit where a bed was available.

{¶ 3} Once at the hospital, Burns regained consciousness. Toledo police officers, suspecting that Burns had been driving while intoxicated, arrived at the hospital to obtain blood so that they could determine Burns' blood alcohol content ("BAC"). When the nurse who treated Burns attempted to draw a blood sample, Burns was initially compliant, evidently until the nurse told him that the police were there to speak with him and wanted the blood sample. He then said "no," verbalizing that he did not want to speak with police. He retracted his arm and moved his head and extremities, making it impossible for the nurse to draw blood.

{¶ 4} Burns continued to alternate between being conscious and responsive and being unconscious and unresponsive. The officers were becoming concerned because they were approaching the window within which they needed Burns' blood to obtain an accurate BAC. They commanded the nurse to find someone to perform the blood draw. After contacting her supervisor, the nurse called a phlebotomist in to draw Burns' blood. By this point, Ativan had been administered to Burns for the purpose of relaxing him, alleviating his agitation so that blood could be drawn, and preventing the onset of Delirium Tremens, a nervous condition that alcoholics experience as the alcohol begins to dissipate. According to the nurse, it was routine to order and administer Ativan to a patient like Burns who was both agitated and exhibiting signs of alcohol use.

{¶ 5} After being given the Ativan, Burns became lethargic. Although officers were there holding his arms, he did not resist the blood draw by the phlebotomist. His blood was tested and it was determined that his BAC was .290%. He was charged with operating a motor vehicle while under the influence of alcohol, a first-degree misdemeanor under Toledo Municipal Code 333.01A, and failure to control, under Toledo Municipal Code 331.32A.

{¶ 6} Burns moved the court to suppress the results of the blood testing, arguing that his blood sample was illegally seized because it was obtained without a warrant and without his consent. A hearing was held on December 19, 2007, and continued on April 1, 2008. The parties also briefed the issues. After four years of inexplicable inactivity on the case, the trial court denied the motion on May 8, 2012, holding that the

seizure was reasonable because “the blood sample was drawn by a medical professional in accordance with acceptable medical practice.”

{¶ 7} After his motion to suppress was denied, Burns moved several times to dismiss the case under R.C. 2945.71, Ohio’s speedy trial statute, arguing that the four-year delay in ruling on his motion to suppress rendered the process unfair to him. His motions to dismiss were denied. On January 9, 2013, Burns entered a plea of no contest to the reduced charge of reckless operation. He was found guilty and sentenced to 30 days’ incarceration with 30 days suspended, three days in a driver intervention program, a \$100 fine, and court costs.

{¶ 8} Burns now appeals and assigns the following errors for our review:

Assignment of Error No. 1: THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT’S MOTION TO SUPPRESS.

Assignment of Error No. 2: THE COURT SHOULD HAVE GRANTED DEFENDANT’S MOTION TO DISMISS[.]

II. Law and Analysis

{¶ 9} We begin by addressing Burns’ second assignment of error. “Appellate review of speedy-trial issues involves a mixed question of law and fact.” *State v. Masters*, 172 Ohio App.3d 666, 2007-Ohio-4229, 876 N.E.2d 1007, ¶ 11 (3d Dist.), citing *State v. High*, 143 Ohio App.3d 232, 242, 757 N.E.2d 1176 (7th Dist. 2001). The trial court’s findings of fact are entitled to due deference if they are supported by

competent, credible evidence, however, the appellate court will independently review whether the trial court correctly applied the law to the facts of the case. *Id.*

{¶ 10} Under R.C. 2945.71(B)(2), where a defendant is charged with a first-degree misdemeanor, as was Burns, the case must be brought to trial within 90 days of arrest or service of summons. Burns, through his attorney, waived his speedy-trial rights on February 15, 2007. However, on September 6, 2012, Burns moved to dismiss the charges against him under R.C. 2945.71 on the grounds that the trial court’s four-year delay in ruling on his motion to suppress rendered the process unfair to him.

{¶ 11} Before discussing the mechanics of whether Burns’ speedy-trial rights were violated, we must agree with him that the trial court’s four-year delay in ruling on his motion to dismiss certainly did render the process unfair to him.

{¶ 12} The Code of Judicial Conduct—both as it exists today and as it existed before March 1, 2009 (when Burns’ motion to suppress was submitted)—requires courts to dispose of matters promptly and efficiently. *See* Jud.Cond.R. 2.5, Comment [3] (“Prompt disposition of the court’s business requires a judge to devote adequate time to judicial duties, be punctual in attending court and expeditious in determining matters under submission, and take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.”) and Comment [4] (“In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory

practices, avoidable delays, and unnecessary costs.”) *See also* Canon 3(8) of the Code of Judicial Conduct (superseded March 1, 2009) (“A judge shall dispose of all judicial matters promptly, efficiently, and fairly and comply with guidelines set forth in the Rules of Superintendence for the Courts of Ohio.”) and Comment B(8) (“A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.”) The four-year delay in ruling on Burns’ motion to suppress runs afoul of the duties expressed in these codes.

{¶ 13} Turning back to the substance of Burns’ second assignment of error, we have held that the filing of a motion to dismiss on speedy-trial grounds acts to revoke a prior waiver. *Toledo v. Sauger*, 179 Ohio App.3d 285, 2008-Ohio-5810, 901 N.E.2d 826, ¶ 19 (6th Dist.). We, therefore, find that Burns revoked his waiver on September 6, 2012. Assuming that time began to run for purposes of R.C. 2945.71 on the day that Burns filed his motion to dismiss, the 90-day period by which he was required to be tried expired on December 5, 2012. The case was not scheduled for trial by that date and a series of continuances that appear in the journal entries are unexplained and do not appear to have been initiated by defendant. We, therefore, agree with Burns that his right to a speedy trial was violated and that his motion to dismiss should have been granted. We find his second assignment of error well-taken.

{¶ 14} Because our holding with respect to Burns’ second assignment of error is dispositive, we need not address his first assignment of error.

III. Conclusion

{¶ 15} We find that Burns' speedy-trial rights were violated and we find his second assignment of error well-taken. We reverse and vacate his January 9, 2013 conviction and his resulting sentence. The costs of this appeal are assessed to the city pursuant to App.R. 24.

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.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>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.</p>
