

[Cite as *State v. Cooper*, 2015-Ohio-744.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

)

)

PLAINTIFF-APPELLANT,

)

)

CASE NO. 14 CO 22

V.

)

)

OPINION

VONLIE COOPER,

)

)

DEFENDANT-APPELLEE.

)

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common
Pleas of Columbiana County, Ohio
Case No. 2012-CR-65

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellant

Robert Herron
Prosecutor
Tammie M. Jones
Assistant Prosecuting Attorney
105 South Market St.
Lisbon, Ohio 44432

For Defendant-Appellee

Attorney Richard J. Hura
9 East Park Ave.
Columbiana, Ohio 44408

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 24, 2015

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DONOFRIO, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a Columbiana County Common Pleas Court judgment discharging defendant-appellee, Vonlie Cooper, on speedy trial grounds.

{¶2} Cooper was arrested on March 5, 2012, for failing to comply with an order or signal of a police officer. Cooper was jailed and on March 16, 2012, he waived extradition to West Virginia to face other charges.

{¶3} Cooper was jailed in West Virginia from March 16, 2012, until March 27, 2012. On that date, he was placed on house arrest in West Virginia.

{¶4} On March 27, 2012, a Columbiana County Grand Jury indicted Cooper on one count of failure to comply with an order or signal of a police officer, a third-degree felony in violation of R.C. 2921.331(B). A failure of service was noted on April 19, 2012, and a warrant was issued.

{¶5} On May 23, 2012, the grand jury handed down a superseding indictment adding two counts of drug possession, fifth-degree felonies in violation of R.C. 2925.11(A). A failure of service was noted on June 15, 2012, and another warrant was issued.

{¶6} Cooper remained on house arrest in West Virginia until April 2013, when he absconded. He was apprehended by U.S. Marshalls on August 21, 2013. He was again placed in a West Virginia jail.

{¶7} Cooper was not served with the superseding indictment until September 19, 2013. At the time, he was nearing completion of his sentence in West Virginia. When Cooper was discharged from the West Virginia jail, he was transported to the Columbiana County Jail.

{¶8} On October 4, 2013, Cooper signed a recognizance bond and was released from the Columbiana County Jail.

{¶9} On November 5, 2013, Cooper filed a motion for discharge alleging a speedy trial violation. He claimed 594 days had elapsed since his arrest. In response, the state asserted that most of those days were tolled because Cooper was unavailable due to being outside of Ohio and/or incarcerated in West Virginia.

{¶10} The trial court held an evidentiary hearing on the motion. The state presented evidence of the sheriff's efforts to locate Cooper. The trial court granted Cooper's motion for discharge. It found that Cooper's whereabouts were unknown to the state from the date of his extradition to West Virginia on March 16, 2012, until a West Virginia Sheriff's Sergeant told the Columbiana County Sheriff's Department on February 22, 2013, that Cooper was on house arrest in his county. Moreover, the court found the state's efforts to serve the superseding indictment fell short, noting that no extradition proceedings could have been pending until Cooper was actually served with the indictment on September 19, 2013, which was after the expiration of the speedy-trial time. And the trial court pointed out that this was not a pre-indictment delay case because Cooper had been arrested, charged, and was afforded an opportunity to have a preliminary hearing. The court concluded by finding the evidence was insufficient to show that the state acted with reasonable diligence to secure Cooper's availability. It disagreed with the tolling asserted by the state. Therefore, the trial court granted the motion, dismissed the indictment with prejudice, and discharged Cooper.

{¶11} The state filed a timely notice of appeal on April 7, 2014.

{¶12} The state raises a single assignment of error that states:

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT DID NOT ACT WITH REASONABLE DILIGENCE IN SERVING THE APPELLEE AND GRANTING THE MOTION FOR DISCHARGE.

{¶13} The state notes that Cooper was incarcerated in West Virginia from March 16, 2012, to March 27, 2012, and again from August 22, 2013, to September 19, 2013, when he was transported to Ohio. It argues that this time should be tolled pursuant to R.C. 2945.72(A), which provides that the time within which an accused must be brought to trial may be extended by,

[a]ny period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability.

{¶14} The state asserts that following Cooper's release from the West Virginia jail on March 27, 2012, it was unaware of his whereabouts. It states that it made contact with West Virginia authorities on multiple occasions following the issuance of the indictment. The state urges that for reasons beyond its control, it did not locate Cooper until he was again incarcerated in West Virginia in August 2013. At this time, the state contends, it learned that Cooper had been on house arrest in West Virginia from March 27, 2012, until April 12, 2013, when he absconded from house arrest. The state argues the time that Cooper was on house arrest is a form of confinement, which constitutes another tolling event.

{¶15} The state further argues that a fugitive complaint was filed in West Virginia on February 22, 2013, which began the extradition process and also tolled the speedy trial clock. Citing, R.C. 2945.72(A). It asserts this tolled the time until September 19, 2013, when Cooper signed a waiver of extradition to Ohio.

{¶16} Moreover, the state notes that the speedy trial time is tolled for any delay caused by neglect or improper acts of the accused. R.C. 2945.72(D). Thus, it argues, the time from when Cooper absconded from his house arrest in West Virginia (April 12, 2013) until he was arrested in West Virginia (August 21, 2013) should be tolled.

{¶17} Finally, the state argues that it acted with reasonable diligence to secure Cooper's availability as required by R.C. 2945.72(A). It asserts that it made several attempts to notify Cooper and the West Virginia authorities of the Columbiana County indictment. The state points to the following actions by the sheriff's department in support: (1) it attempted to serve Cooper at the address he provided; (2) it placed the warrant into LEADS and NCIC databases; (3) it followed up on

information that Cooper was incarcerated in West Virginia; (4) it unsuccessfully pursued a lead that Cooper was in Weirton, West Virginia; (5) it worked with West Virginia authorities after learning Cooper was on house arrest; and (6) it picked Cooper up from West Virginia authorities immediately upon his completion of his sentence in West Virginia on September 19, 2013, and returned him to Ohio.

{¶18} This Court previously set out the standard of review for speedy trial issues in *State v. High*, 143 Ohio App.3d 232, 241-242, 2001-Ohio-3530, 757 N.E.2d 1176, as follows:

Our standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71. *Oregon v. Kohne* (1997), 117 Ohio App.3d 179, 180, 690 N.E.2d 66, 67; *State v. DePue* (1994), 96 Ohio App.3d 513, 516, 645 N.E.2d 745, 746-747. Our review of the trial court's decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. McDonald* (June 30, 1999), Mahoning App. Nos. 97 C.A. 146 and 97 C.A. 148. Due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *Id.* However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, an appellate court must strictly construe the relevant statutes against the state. *Id.*, citing *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 708-709.

{¶19} Pursuant to R.C. 2945.71(C)(2), the state must bring a person charged with a felony to trial within 270 days after his arrest. If the accused is held in jail in lieu of bail on the pending charge, then each day he is held in jail counts as three days. R.C. 2945.71(E). This is known as the "triple-count" provision. The triple-

count provision only applies to those defendants held in jail in lieu of bail solely on those pending charges. *State v. Christian*, 7th Dist. No. 12 MA 164, 2014-Ohio-2590, ¶11.

{¶20} The time for speedy trial begins to run when an accused is arrested. *State v. Canty*, 7th Dist. No. 08-MA-156, 2009-Ohio-6161, ¶80. But the actual day of the arrest is not counted. *Id.* Cooper was arrested on March 5, 2012. Thus, his speedy trial time began to run on March 6, 2012.

{¶21} Cooper was jailed on March 6, 2012. A preliminary hearing was set for March 15, 2012. Cooper waived his right to a preliminary hearing that day and consented to the matter being bound over to the grand jury. The court released Cooper on his own recognizance. At this time, although Cooper was only jailed for ten days, 30 days had elapsed on his speedy trial clock because of the triple-count provision.

{¶22} Cooper was picked up in Ohio by West Virginia authorities on March 16, 2012. He was jailed in West Virginia from March 16, until March 27, 2012.

{¶23} As stated above, the speedy trial time may be tolled by any period during which the accused is unavailable due to other criminal proceedings against him or due to his confinement in another state, as long as the state exercises reasonable diligence to secure his availability. R.C. 2945.72(A). Thus, the time from March 16, to March 27, 2012, when Cooper was in jail in West Virginia, was tolled. Cooper's speedy trial time on March 27, 2012, remained at 30 days.

{¶24} Next, Cooper was placed on house arrest in West Virginia. He remained on house arrest from March 27, 2012, until he absconded on April 12, 2013. (Tr. 91). The state urges that the period of house arrest constituted "confinement in another state" that made Cooper unavailable for trial in Ohio pursuant to R.C. 2945.72(A), thus tolling his speedy trial time.

{¶25} But the house arrest in West Virginia did not constitute "confinement in another state" so as to make Cooper unavailable for trial in Ohio and toll his speedy trial time.

{¶26} “House arrest” is a period of confinement of an offender in the offender's home during which the offender is required to remain in his home for the specified period of confinement, except for periods of time during which the offender is at his place of employment or at other premises as authorized by the sentencing court or by the parole board and the offender is required to report periodically to a person designated by the court or parole board. R.C. 2929.01(P).

{¶27} Courts have often analyzed whether house arrest counts toward the computation of jail time served. In so doing, courts have concluded that the fact that house arrest is defined using the term “confinement” does not necessarily mean that it qualifies for time-served credit. *State v. Blankenship*, 192 Ohio App. 3d 639, 643, 2011-Ohio-1601, 949 N.E.2d 1087, ¶19. One court defined “confinement” as requiring a restraint on the defendant's freedom of movement so great that he cannot leave official custody of his own volition. *State v. Slager*, 10th Dist. No. 08AP-581, 2009-Ohio-1804, ¶20. Moreover the Ohio Supreme Court has found that pretrial house arrest as a condition of bond does not constitute detention or confinement. *State v. Gopen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶72.

{¶28} Courts have also found that house arrest orders that allow the offender to leave his home for work and counseling, thus allowing the offender to leave his home of his own volition, do not constitute confinement for purposes of computing jail time served. *Blankenship*, 192 Ohio App.3d at ¶16; *State v. Ober*, 2d Dist. No. 2003-CA-27, 2004-Ohio-3568.

{¶29} In this case, Cooper testified that under the terms of his house arrest, he was permitted to leave his house for court proceedings. (Tr. 53-54, 68). Cooper's testimony was corroborated by Adam Hudek, Cooper's house arrest officer, who testified that Cooper's house arrest allowed him to go to work, AA meetings, counseling, a place of worship, and court appearances. (Tr. 106). Officer Hudek specifically stated that if Cooper had been contacted by Columbiana County for a court proceeding, he could have attended the hearing and he would not have been in violation of his house arrest. (Tr. 106).

{¶30} Given the above, Cooper's period of house arrest in West Virginia did not constitute "confinement in another state" so as to toll his speedy trial time.

{¶31} Thus, we must move on to consider the state's next argument. The state asserts that a fugitive complaint was filed in West Virginia on February 22, 2013, which began the extradition process, tolling the speedy trial clock.

{¶32} R.C. 2945.72(A) provides that the speedy trial clock is tolled "during any period during which the accused is unavailable" due to one of three reasons: (1) by reason of other criminal proceedings (in or out of the state); (2) by reason of his confinement in another state; or (3) by reason of pendency of extradition proceedings. If one of these three reasons applies, the prosecution still must exercise reasonable diligence to secure the accused's availability in order to toll the speedy trial clock. R.C. 2945.72(A).

{¶33} On March 27, 2012, Cooper's speedy trial clock was at 30 days. As of this date, he was not "confined" in another state and extradition proceedings were not pending. Thus, the only way the speedy trial time would be tolled was if Cooper was unavailable due to other criminal proceedings and the state exercised reasonable diligence to secure his availability.

{¶34} The trial court found that the state did not exercise reasonable diligence to secure Cooper's availability. But we need not even reach the issue of the reasonableness of the state's efforts.

{¶35} Cooper was not unavailable due to other criminal proceedings. As discussed above, both Cooper and his house arrest officer testified that he was available for any court proceedings, even in Ohio, without violating the terms of his house arrest. And there was no mention of any other criminal proceedings in West Virginia.

{¶36} Moreover, even if we were to conclude that Cooper was unavailable due to other criminal proceedings, the trial court was correct in its conclusion that the evidence did not support a finding of reasonable diligence on the state's part.

{¶37} The first indictment was filed on March 27, 2012. The state attempted

to serve it March 30, 2012. (Tr. 8; State Ex. 1). The attempt was unsuccessful and the sheriff noted that Cooper was “in jail in West Virginia.” (Tr. 8-9; State Ex. 1). The state again attempted to serve the indictment on April 19, 2012. Also on that date, the sheriff’s log indicated that Cooper was in jail in West Virginia. (State Ex. 2). The sheriff’s log on April 20, 2012, however, indicated that Copper was not in any West Virginia jail. (State Ex. 2).

{¶38} The superseding indictment was filed on May 23, 2012. The state did not attempt to serve it until June 14, 2012.

{¶39} The next entry on the sheriff’s log, almost four months later, was dated August 10, 2012, and indicated that the state sent inquiries to the Hancock County, West Virginia Sheriff’s Department and the Weirton, West Virginia Police Department. (State Ex. 2). The next entry came over six months later on February 22, 2013, when a Sergeant Swan from the Hancock Sheriff’s Office advised the Columbiana County Sheriff’s Office that Cooper was on house arrest in his county and they intended to “pick him up.” (State Ex. 2). There are no further entries on the sheriff’s log.

{¶40} Sergeant Robert Dowling of the Columbiana County Sheriff’s Office testified as to the measures taken to locate Cooper. He testified that in August 2012, the sheriff’s department received information that Cooper was residing at an address in Weirton, West Virginia. (Tr. 12). He also testified that on February 22, 2013, the department received information that Cooper was on house arrest in Hancock County, West Virginia. (Tr. 14, 16). But Sgt. Dowling offered no explanation as to why the state was unable to locate Cooper and bring him back to Ohio sooner.

{¶41} Lieutenant Brian Swan of the Hancock County Sheriff’s Department also testified. He stated that in February 2013, he happened to be perusing the Columbiana County Sheriff’s website and noticed that Cooper was on its most-wanted list. (Tr. 109). Consequently, he contacted the Columbiana County Sheriff’s Office and conveyed this information to Lieutenant Allen Young, who in turn faxed over Cooper’s warrant. (Tr. 110-111). Lt. Swan then obtained a fugitive from justice

warrant to arrest Cooper. (Tr. 114; State Ex. 9). When Lt. Swan contacted Cooper's house arrest officer, the officer indicated that Cooper had recently been released from the hospital and was still having medical issues. (Tr. 114). Lt. Swan conveyed this information to Lt. Young, who agreed to wait on the arrest until Cooper's medical issues were resolved. (Tr. 114-115). The next information Lt. Swan received was that in April 2013, Cooper cut off his house arrest bracelet and absconded. (Tr. 115).

{¶42} The trial court emphasized several points in finding that the record did not demonstrate reasonable diligence on the part of the state in locating Cooper. First, it noted that the state was unaware of Cooper's whereabouts from the date of his extradition to West Virginia on March 16, 2012, until the Hancock County Sheriff's Department informed the Columbiana County Sheriff's Department on February 22, 2013, that Cooper was on house arrest in Hancock County. Second, the court noted that no extradition proceedings could have been started until the actual service of the indictment on September 19, 2013. Finally, the court pointed out that this was not a pre-indictment delay case because Cooper had been charged, arrested, and afforded a preliminary hearing opportunity. Thus, the case was legally commenced and was an ongoing matter. Based on these points and the above cited evidence, the trial court concluded the record was insufficient to show reasonable diligence on the part of the state so as to toll the speedy trial statute.

{¶43} The record supports the trial court's finding. Cooper was extradited to West Virginia on March 16, 2012. He was jailed for ten days and then was placed on house arrest for over a year before he absconded. The state knew Cooper was in West Virginia and was facing criminal charges there. Once it found out Cooper was no longer in jail, it could have checked the West Virginia court's docket and discovered he was on house arrest. The state should have been able to locate him during his period of house arrest. Moreover, on February 22, 2013, the state was directly informed that Cooper was on house arrest in West Virginia. Cooper did not abscond until mid-April 2013. And yet, the state still failed to secure his availability. Given these circumstances and the reasons cited by the trial court, the state did not

exercise reasonable diligence in this case. Thus, the tolling the state urges cannot have occurred.

{¶44} The state also argues that the speedy trial clock was tolled from February 22, 2013, when a fugitive from justice complaint was filed in West Virginia. The problem with this argument, however, is the speedy trial time had already expired. By February 22, 2013, 333 days had elapsed on Cooper's speedy trial clock.

{¶45} The state also argues that the speedy trial time was tolled during a period of delay caused by the neglect or improper act of the accused. R.C. 2945.72(D). It asserts the speedy trial time was tolled beginning in April 2013, when Cooper absconded from his West Virginia house arrest. But like the problem with the extradition argument above, Cooper's speedy trial clock had already expired by April 2013.

{¶46} In sum, Cooper's speedy trial time expired before the state was able to bring him to trial. The trial court properly granted Cooper's motion to dismiss the indictment on speedy trial grounds.

{¶47} Accordingly, the state's sole assignment of error is without merit.

{¶48} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.