

[Cite as *State v. Rodriguez*, 2005-Ohio-6485.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85856

|                       |   |               |
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| STATE OF OHIO         | : |               |
|                       | : |               |
| Plaintiff-appellee    | : |               |
|                       | : | JOURNAL ENTRY |
| vs.                   | : | and           |
|                       | : | OPINION       |
| JOSE GORDON RODRIGUEZ | : |               |
|                       | : |               |
| Defendant-appellant   | : |               |

|                                     |   |                  |
|-------------------------------------|---|------------------|
| DATE OF ANNOUNCEMENT<br>OF DECISION | : | DECEMBER 8, 2005 |
|-------------------------------------|---|------------------|

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| CHARACTER OF PROCEEDING | : | Criminal appeal from Cuyahoga |
|                         | : | County Common Pleas Court     |
|                         | : | Case No. CR-453593            |

|          |   |           |
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| JUDGMENT | : | AFFIRMED. |
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| DATE OF JOURNALIZATION | : |  |
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APPEARANCES:

|                         |   |
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| For plaintiff-appellee: | WILLIAM D. MASON<br>Cuyahoga County Prosecutor<br>SCOTT ZARZYCKI, Assistant<br>Justice Center, Courts Tower<br>1200 Ontario Street<br>Cleveland, Ohio 44113 |
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| For defendant-appellant: | ROBERT A. DIXON<br>Attorney at Law<br>4403 St. Clair Avenue<br>Cleveland, Ohio 44103 |
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KENNETH A. ROCCO, J.:

{¶ 1} Defendant appeals from his convictions for menacing by stalking, arguing that the court erred by failing to dismiss the charges against him because the court violated his right to a speedy trial. We find no error in the common pleas court proceedings and affirm.

#### Procedural History

{¶ 2} Appellant was arrested on charges of menacing by stalking on May 11, 2004. Although bond was set at \$100,000 on May 25, appellant remained in jail; the parties agree there were no "holders" on appellant.

{¶ 3} Appellant was charged in a thirty-one count indictment filed June 28, 2004 with breaking and entering (one count), attempted grand theft (one count), menacing by stalking (twenty-two counts), telecommunications harassment (five counts), burglary (one count) and theft (one count). At his arraignment on July 1, 2004, he entered a not guilty plea to all counts. An initial pretrial was held on July 14, 2004. Appellant's originally assigned counsel was permitted to withdraw at that time due to a conflict of interest. New counsel was appointed on the same day. The pretrial was rescheduled to July 22, 2004, and trial was set for August 5, at defendant's request.

{¶ 4} The July 22, 2004 pretrial was continued to August 5, 2004 at the defendant's request. At the August 5 pretrial, trial was set for August 31, 2004, at the defendant's request. On the

August 31, 2004 trial date, however, the court granted defense counsel's oral motion to withdraw.

{¶ 5} On October 4, 2004, the court appointed a third attorney to represent the defendant and scheduled a pretrial for October 7.

Although the docket does not reflect that a pretrial was held on that date, defense counsel did move for discovery and for a bill of particulars on October 7, 2004. Defendant filed a pro se motion to dismiss on October 13, 2004, claiming, among other things, that he was denied a speedy trial.

{¶ 6} A pretrial was conducted on October 20, 2004, and trial was set for November 4, 2004 at that time. The trial was rescheduled for November 10, 2004 at the court's request because the court was in trial on another matter. While no written ruling on appellant's motion to dismiss was ever entered, the court did hear argument on the motion before trial began and orally denied it.

{¶ 7} Before the trial began, the parties agreed to amend the indictment by deleting all but two of the charges of menacing by stalking, and renumbering the remaining counts. Following trial, the jury found appellant guilty of the two charges of menacing by stalking, and not guilty of the remaining charges. The court sentenced appellant to 18 months of community control sanctions as to one of the counts and 18 months' probation as to the other count, to run concurrent with one another.

Law and Analysis

{¶ 8} Appellant's sole argument in this appeal is that he was not provided with a speedy trial. In general, a person against whom a felony charge is pending must be brought to trial within two hundred seventy days after the person's arrest. R.C. 2945.71(C)(2). The parties agree that appellant was jailed from the date of his arrest and that each day he was held in jail must be counted as three days for purposes of computing whether he was provided with a speedy trial pursuant to R.C. 2945.71(E). In other words, appellant had to be brought to trial within ninety days of his arrest.

{¶ 9} The parties agree that sixty-four days elapsed between the date of appellant's arrest on May 11, 2004 and the first pretrial conducted on July 14, 2004. There is no indication in the record that appellant requested the continuance of the July 14, 2004 pretrial to July 22, 2004; therefore, we will count this eight day period against the time within which appellant had to be brought to trial. A total of seventy-two days elapsed from the time of appellant's arrest until the July 22, 2004 pretrial.

{¶ 10} The record discloses that the appellant requested all continuances from the July 22, 2004 pretrial until the August 31, 2004 trial date, tolling the speedy trial clock during this period. See R.C. 2945.72(H).

{¶ 11} Appellant's counsel resigned on August 31, 2004. New counsel was not appointed until October 4, 2004. The parties dispute whether the period from August 31, 2004 to October 4, 2004 should be counted against the time within which appellant had to be brought to trial. Appellant contends that this thirty-four day delay in appointing new counsel, taken together with the previous seventy-two day delay, deprived him of his speedy trial rights.

{¶ 12} R.C. 2945.72(C) allows the court to extend the time for trial by "[a]ny period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law." In its oral ruling on appellant's motion to dismiss, the court described its unsuccessful efforts to locate a Spanish-speaking attorney to represent appellant after his second appointed attorney withdrew. Unable to locate an attorney fluent in Spanish, the court then sought an attorney who could represent appellant through an interpreter, with the understanding that this case would probably have to be tried. The court concluded that the delay was necessitated by its diligent efforts to find effective counsel for appellant, and therefore denied appellant's motion to dismiss.

{¶ 13} Appellant urges that the court should have journalized the reasons for the delay before the speedy trial time expired.

However, the reasons were apparent on the record. Appellant was without counsel. No additional explanation was needed.

{¶ 14} We find the court adequately explained why the appointment of counsel in this case was more complicated than in most cases, requiring a longer period of delay. We hold that the delay was necessitated by the accused's lack of counsel, was not occasioned by any lack of diligence in appointing counsel for him, and should toll the time for bringing appellant to trial.

{¶ 15} Three additional days elapsed between the date counsel was appointed and the date the first of several pretrial motions was filed. These motions tolled the speedy trial clock until the trial date. R.C. 2945.72(E). Appellant was brought to trial within seventy-five days after his arrest, well within the ninety day period required by R.C. 2945.71. Appellant's sole assignment of error is therefore overruled.

Affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any

bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE  
KENNETH A. ROCCO

JAMES J. SWEENEY, P.J. and

SEAN C. GALLAGHER, J. CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).