[Cite as *State v. Myers*, 2007-Ohio-279.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87973

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HUGH MYERS (MYRIE)

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-278025

BEFORE: Dyke, J., Celebrezze, A.J., Rocco, J.

RELEASED: January 25, 2007

JOURNALIZED:

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ANN DYKE, J.:

{¶1} Defendant Hugh Myrie appeals from his conviction for drug possession and contends that it is barred by the statute of limitations. For the reasons set forth below, we reverse.

{¶2} The record reveals that defendant was arrested on January 12, 1992 under the name "Hugh Myron." At that time, defendant listed his address as 3638 Community College Road, Cleveland, Ohio. Police records demonstrate that defendant has also used the names James Roy Scott and Jeffrey Toland. He

signed the booking card as "Hugh Myrie," but he used the name "Hugh Myers" in a later arrest.

{¶3} On June 16, 1992, defendant was indicted under the name "Hugh Myers" pursuant to a three-count indictment. Count One charged him with possession of an amount equal to or exceeding three times the bulk amount of cocaine. Count Two charged him with preparing cocaine for shipment or distribution, and Count Three charged him with possession of criminal tools.

{¶4} The State attempted to serve defendant with the indictment via certified mail at the Community College address, but it was returned "att[empted]," "unk[nown.]" The record further reflects that on July 13, 1992, the trial court journalized an entry indicating that a capias was to issue for defendant. Defendant was indicted and arraigned in later cases, however the 1992 case was never pursued.

{¶5} On September 20, 2004, the trial court journalized an entry indicating "capias recalled on." Thereafter, on November 5, 2004, defendant moved to dismiss the indictment in which he asserted that his right to a speedy trial had been violated in connection with the service of the indictment. In opposition, the state argued that defendant had caused the delay by refusing to accept the summons sent to the address which he provided to police at the time of his arrest. In an undated entry, Judge Peggy Foley Jones granted the motion, however, this entry was never journalized. Judge Jones was then defeated by Peter Corrigan, and on February 2,

2005, Judge Corrigan denied the motion to dismiss concluding:

{¶6} "The State has overcome any presumptive prejudice in that the length of the delay does not outweigh the reason for the delay, defendant's lack of assertion of his right, and actual prejudice to mount a defense. The Court finds that defendant has precipitated the delay by failing to accept the certified mail with the original notice of indictment, summons and date of arraignment, and that the due diligence of the State of Ohio to apprehend defendant and institute these charges were thwarted by defendant's own subterfuge evidenced by the myriad of aliases used in subsequent encounters with the state."

{¶7} Defendant subsequently moved to suppress the evidence obtained against him. He also moved to bar introduction of evidence regarding drugs which were allegedly seized from him because they had been destroyed and were not available for independent analysis. The trial court denied both motions and on January 31, 2005, defendant pled no contest to Count Two of the indictment. The trial court found defendant guilty and sentenced him to one year of community control sanctions. Defendant now appeals and assigns six errors[1] for our review.

{¶8} Defendant's second assignment of error is dispositive and it states:

{¶9} "Defendant was denied due process of law when the prosecution was not commenced until after the statute of limitations had expired."

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[1] See Appendix.

{¶10} Pursuant to R.C. 2901.13(A)(1) a prosecution for a felony other than aggravated murder or murder shall be barred unless it is commenced within six years after the offense is committed.

{¶11} R.C. 2901.13(E) states that a:

{¶12} “prosecution is commenced on the date an indictment is returned * * *, or on the date a warrant * * * is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment * * * unless reasonable diligence is exercised to issue and execute process on the same."

{¶13} In *State v. Jackson,* Cuyahoga App. No. 86755 , 2006-Ohio-2468, this court determined that the state had failed to use reasonable diligence where it served the defendant but the summons was returned marked “address unknown," and no additional efforts were made to serve or to locate the defendant until 2005. The *Jackson* Court stated:

{¶14} “The state also admitted that it made no further attempts to serve Jackson after the summons was returned and marked "address unknown" in 1999. The mere lack of additional efforts to locate Jackson to serve him with the summons for eight years is indicative of the state's failure to exercise any diligence, much less the requisite ‘reasonable diligence.’ Thus, the trial court properly granted Jackson's motion to quash and properly dismissed the case with prejudice for failure to commence the prosecution within the six-year statute of limitations provided in R.C. 2901.13(A)(1)(a).”

{¶15} Accord *State v. King* (1995), 103 Ohio App.3d 210, 658 N.E.2d 1138, (reasonable diligence was not found where the state made only one attempt to serve a summons); *State v. McNichols* (September 5, 2000). Stark App. No. 2000CA00058 (single attempt to serve defendant in twelve years was not reasonable diligence).

{¶16} We note that R.C. 2901.13(G) provides for a tolling of the period of limitation when the accused has concealed his identity or whereabouts. We further note that defendant has used several different names. However, the state is still required to exercise reasonable diligence in order to defeat the speedy trial claim. *State v. Triplett,* 78 Ohio St.3d 566, 1997-Ohio-182, 679 N.E.2d 290, citing *Doggett v. United States* (1992), 505 U.S. 647, 112 S. Ct. 2686, 120 L.Ed.2d 520, ("Where the defendant himself causes the delay, by going into hiding, for instance, and the government pursues him with reasonable diligence, a speedy trial claim would fail.").

{¶17} In accordance with the foregoing, and athough we cannot condone defendant's use of alias names, we are compelled to conclude that the state failed to exercise reasonable diligence. This matter was therefore not commenced within the six-year limitations period, and we therefore reverse defendant's conviction.

{¶18} The assignment of error is well-taken.

Reversed.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KENNETH A. ROCCO, J., CONCUR

Appendix

The remaining assignments of error state:

"Defendant was denied due process of law when the court refused to dismiss the case based on a denial of a speedy trial."

"Defendant was denied due process of law when the court overruled defendant's motion to suppress."

"Defendant was denied his right of confrontation and cross-examination when the court allowed one officer to relate what he was told by another officer."

"Defendant was denied due process of law when the court ruled that probable cause is based upon information from a known informant."

"Defendant was denied due process of law when the court overruled defendant's motion in limine."