

[Cite as *State v. Eicher*, 2007-Ohio-6813.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89161

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

JUNE EICHER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-476323

BEFORE: McMonagle, J., Celebrezze, A.J., and Stewart, J.

RELEASED: December 20, 2007

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} June Eicher, defendant-appellant, appeals her driving under the influence convictions. We affirm.

{¶ 2} On August 21, 2005, appellant was arrested by the Mayfield Heights police on suspicion of operating a motor vehicle while under the influence of alcohol. She did not post bond and, therefore, remained incarcerated. She was subsequently transferred to the Cuyahoga County jail and indicted on October 18, 2005, in Case No. CR-471659 on two counts of driving under the influence, in violation of R.C. 4511.19. Both counts contained a specification that appellant had been convicted of or pleaded guilty to five or more equivalent offenses.

{¶ 3} Appellant was arraigned on October 21, 2005; she did not post bond and, therefore, remained in custody. On October 24, 2005, she filed a request for discovery, and the State likewise responded with its own discovery request. Discovery with respect to both parties was completed on November 14, 2005. On November 29, 2005, appellant filed a motion to declare the statute under which she was charged unconstitutional. On December 15, 2005, she waived speedy trial in writing and upon the record until January 31, 2006. On January 3, 2006, the trial court dismissed the charges against her for want of prosecution, and she was released from custody.

{¶ 4} The State reindicted the case on January 27, 2006 in Case No. CR-476322. Appellant was released on a personal bond that day and remained at liberty through the pendency of the case. On February 16, 2006, appellant filed a motion to dismiss based on a violation of her statutory speedy trial rights. From the date of that motion, through untold pretrial dates, appellant continuously requested that the court continue matters, until at last on November 16, 2006, she waived her right to a trial by jury, and proceeded to have her case tried to the bench. After one day of proceedings, the trial was continued to November 27.

{¶ 5} On November 20, appellant filed a supplemental motion to dismiss in support of her previous allegation that her statutory speedy trial rights had been violated. Appellant's motion was denied on November 27, and on the same date, the bench trial was completed.

{¶ 6} The court dismissed the specifications attendant to both counts, finding that two of the prior convictions were uncounseled. The counts, therefore, were amended from felonies to misdemeanors of the first degree, and the court found appellant guilty of both counts. Appellant was sentenced to a suspended six months on each count.

{¶ 7} In her first assignment of error, appellant contends that her convictions should be vacated because she was not brought to trial within the statutory speedy trial time.

{¶ 8} In her motion to dismiss (and supplemental motion), appellant contended that based upon the calculation of time from the first indictment, her statutory speedy trial rights were violated.

{¶ 9} R.C. 2945.71 governs the time within which a defendant must be brought to trial and provides in relevant part:

{¶ 10} “(C) A person against whom a charge of felony is pending:

{¶ 11} “***

{¶ 12} “(2) Shall be brought to trial within two hundred seventy days after the person’s arrest.

{¶ 13} “***

{¶ 14} “(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.”

{¶ 15} R.C. 2945.72 governs extensions of time for a defendant to be brought to trial and provides:

{¶ 16} “The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶ 17} “***

{¶ 18} “(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

{¶ 19} “***

{¶ 20} “(H) The period of any continuance granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion[.]”

{¶ 21} In denying appellant’s motion to dismiss, the court found that time was tolled from October 28, 2005 (i.e., when appellant filed a motion to suppress while under the original indictment), until January 3, 2006 (i.e., when the case was dismissed).¹ Appellant, however, contended that speedy trial time was tolled beginning on October 24, 2005, when she filed her motion for discovery, until November 7, 2005, when the State responded to her request. Appellant calculates that by the time she executed the first waiver on December 15, 2005, 261 days (i.e., 87 days times 3) had already elapsed.

{¶ 22} Upon review, we find that the time began to be tolled on October 24, 2005, when appellant filed her motion for discovery, and stayed tolled until discovery was completed on November 14, 2005. It began to run again on November 15, 2005, until appellant filed a motion to declare the statute unconstitutional on November 29, 2005. Speedy trial never began to run again, as that motion was pending resolution and the defendant waived speedy trial until January 31, 2006. Therefore, between

¹The court incorrectly stated on the record that the case was dismissed on December 15, 2005, when, in fact, it was dismissed on January 3, 2006, but made it clear that time was tolled from when the suppression motion was filed until the case was dismissed.

the time appellant was arrested on August 21, 2005, and the date the case was dismissed totalled 79 days of incarceration. That sum, times three, results in a calculation of 237 days.

{¶ 23} When appellant was reindicted in Case No. CR-476323 on January 27, 2006, until she filed a motion to dismiss for violation of her statutory right to speedy trial, twenty days elapsed. From that point onward, all continuances were at her request, and in several instances she affirmatively waived speedy trial. By the time she proceeded to bench trial on November 16, 2006, only twenty days in the second case had elapsed. Hence, the total of untolled days spent on both cases totaled 257 days.

{¶ 24} The State argued (and the trial court found) that a suppression motion filed October 28, 2005, tolled all of the time in the first case, as it was never resolved. We do not need to resolve that argument here, because even if we ignore the suppression motion, the statutory 270-day limit was not exceeded.

{¶ 25} However, while not deciding the issue of the tolling nature of the suppression motion, we do raise a cautionary note. For the convenience of the court, the parties and police officers, suppression motions are almost always heard directly before trial, usually the first day of the scheduled trial. So the attorney who adheres to Crim. R.12(D), which requires the filing of a motion to suppress “within 35 days after arraignment or seven days before trial, *whichever is earlier*,” (emphasis added), would impliedly waive speedy trial for his client by simply exercising his constitutional

right to contest either a search, an identification or the voluntariness of a statement. Such a reading of the speedy trial statute is, of course, counterintuitive. Such analysis would require a defendant to choose between constitutional rights; he would be unable to assert one without waiving the other.

{¶ 26} The first assignment of error is overruled.

{¶ 27} In her second assignment of error, appellant argues that her constitutional speedy trial rights were violated.

{¶ 28} The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. The Ohio Constitution provides the same right. See Section 10, Article I of the Ohio Constitution. In *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court set forth a balancing test to determine whether a defendant’s constitutional right to a speedy trial had been violated, even if the statutory time had not elapsed. The test requires a court to weigh the following factors: 1) length of delay; 2) reason for the delay; 3) assertion by defendant of his right; and 4) amount of prejudice to the defendant.

{¶ 29} Here, while appellant was not brought to trial until 15 months after her arrest, much of the delay was attributed to her. In fact, the only time the State requested a continuance, on January 3, 2006, the case was dismissed. The other continuances, 13 all totaled, were at appellant’s behest. Appellant further executed, in writing and open court, five speedy trial waivers. The delays, therefore, were

numerous and occasioned by appellant and even prompted the State, on August 30, 2006, to file a “motion to set case for trial.”

{¶ 30} Moreover, appellant only “mentioned” in September 2006 that her motion to dismiss was pending. At that hearing, defense counsel stated “[a]t this point in time I think we have everything taken care. *** There was – I should note there was a speedy trial motion filed *** indicating that the time from her original indictment until the reindictment had already [elapsed].” When questioned by the court about resolving the motion on another date, defense counsel stated, “[n]o, we can handle that on that [i.e., trial] date. I think that’s fine.”

{¶ 31} In regard to prejudice, three types may result from a lengthy delay: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the accused’s defense will be impaired by dimming memories and the loss of exculpatory evidence. *State v. Wells*, Cuyahoga App. No. 85586, 2006-87, citing *Barker*, supra at 532-533.

{¶ 32} Upon the State being unable to proceed to trial on January 3, 2006, the case was dismissed and appellant was discharged. She was not incarcerated again on this case. During her period of incarceration, appellant filed motions for discovery, contested the constitutionality of the statute, and sought two continuances of pretrials. Appellant also executed a written waiver of her speedy trial rights. Under these circumstances, appellant’s pretrial incarceration was not oppressive.

{¶ 33} Further, appellant's blanket statement, without more, that she "suffered much anxiety and concern during her four and one-half months of pre-trial detention," is insufficient to show the type of prejudice required for a violation of constitutional speedy trial rights.

{¶ 34} Finally, appellant's claim that the delay may have caused the police "to forget the case or confuse it with another," and that another witness "had a hard time recalling some *minor* details of the incident," without more, is also insufficient to show the type of prejudice required for a violation of constitutional speedy trial rights. (Emphasis added.)

{¶ 35} Appellant's second assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant 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.

CHRISTINE T. McMONAGLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR