

[Cite as *State v. Byrd*, 2009-Ohio-3283.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91433

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DAVID BYRD

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506224

BEFORE: Kilbane, P.J., McMonagle, J., and Stewart, J.

RELEASED: July 2, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Defendant-appellant, David Byrd (Byrd), appeals his conviction from the Cuyahoga County Court of Common Pleas, arguing his speedy trial rights were violated.¹ Byrd argues that the State’s 49-day response time to his discovery motion was unreasonable and, therefore, should not constitute a tolling event for speedy trial purposes. For the reasons adduced below, we agree and reverse.

{¶ 2} Appellant’s sole assignment of error reads:

“A Defendant’s request for discovery pursuant to Criminal Rule 16, tolls the time to trial pursuant to R.C. 2945.71, not until the State Responds, but only for an amount of time reasonably necessary for the State to respond to the discovery request.”

{¶ 3} Though couched in terms of a discovery issue, the thrust of Byrd’s argument is that the State’s 49-day delay in responding to his discovery requests was unreasonable and, therefore, should not constitute a tolling event for purposes of the speedy trial statute. If such delays are assessed against the State, Byrd argues that his right to a speedy trial has been violated.

{¶ 4} At the outset, we note that Byrd’s counsel never objected to the alleged discovery violations at the trial court level. Thus, he waives his right to claim all but plain error. Crim.R. 52(B). An alleged error is plain error only if the error is

¹We note that Byrd was convicted of two fifth degree felonies: breaking and entering and aggravated theft, and one count of misdemeanor theft.

“obvious,”² and “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

Speedy Trial and Discovery Allegations

{¶ 5} Crim.R. 16(A) states that “[u]pon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.”

The Ohio Supreme Court has stated that while the “forthwith” command of the rule need not be followed “immediately,” it must be followed within a reasonable amount of time. See, e.g., *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374; *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478. This court has interpreted the reasonableness requirement of the rule to mean 30 days. See *State v. Barb*, Cuyahoga App. No. 90768, 2008-Ohio-5877, at ¶1.

{¶ 6} Pursuant to R.C. 2945.71(C)(2), a person against whom a felony charge is pending must be brought to trial within 270 days after his arrest. See R.C. 2945.71(C). For purposes of computing this time, each day spent in jail pending trial must be counted as three days. R.C. 2945.71(E). Further, the date of arrest itself is not counted. See, e.g., *State v. Stewart*, Montgomery App. No. 20462, 2006-Ohio-4164, at ¶16. Therefore, excluding tolling events under the statute, the

²*State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68.

State had 90 days from November 6, 2007, or until February 3, 2008, within which to try Byrd.

Analysis

{¶ 7} The parties agree that Byrd remained incarcerated from his date of arrest³ until his eventual trial date on March 19, 2008. The first tolling event occurred on November 28, 2007, when Byrd's counsel filed various routine discovery motions.⁴ See *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, at ¶23, 781 N.E.2d 159. Thus, the speedy trial clock is tolled from the date upon which Byrd's counsel filed his discovery requests and remains so for a "reasonable time," after which, barring the State's response, the speedy trial clock begins again. See, e.g., *Palmer*, supra⁵ and *Sanchez*, supra.⁶

³November 5, 2007.

⁴Pursuant to R.C. 2945.72(E), the speedy trial time is extended for any period of delay necessitated by a motion filed by the defendant.

⁵In *Palmer*, the Ohio Supreme Court held, inter alia, that a defendant's failure to respond within a reasonable time to a prosecution's request for reciprocal discovery constitutes neglect that tolls the running of speedy trial time pursuant to R.C. 2945.72(D).

⁶The record also indicates that the first two pretrials in the case, December 6, 2007 and December 13, 2007, were held and continued at defense counsel's request. Because extensions may be granted against speedy trial time upon "the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion" under R.C. 2945.72(H), the 22 days from the date upon which Byrd's counsel filed his discovery requests (November 28) through the third pretrial (December 19), act as tolling events under the statute and would normally be attributable to Byrd. Since his discovery requests were already pending, however, these days are accounted for. See, also, *State v. Wirtanen* (1996), 110 Ohio App.3d 604, 674 N.E.2d 1245 (Defendant's request for a pretrial conference tolled the time for trial.)

{¶ 8} However, the State did not serve its discovery responses or file a reciprocal discovery request until January 16, 2008, some 49 days after Byrd's counsel first requested discovery. The discovery requested by Byrd constituted routine requests that were readily discernable by the State and amounted to a simple summary of his oral statement to the police, the names of three witnesses, and his criminal record. In light of the reasonableness of this request, such a delay is arguably unreasonable.

{¶ 9} In *Barb*, supra, we found that while a two-month delay by the State in responding to routine discovery requests was probably not reasonable, a 30-day response period was deemed reasonable. In this case, the State's additional 19-day delay in responding to these routine requests is unreasonable; it therefore does not constitute a tolling event for purposes of speedy trial. The time is tolled for 30 days under *Barb*. Thus, when the State filed its reciprocal discovery requests on January 16, 2008, it still had 48 days, or until March 5, 2008, to bring Byrd to trial under the triple-count provisions of R.C. 2945.71(E).

Sua Sponte Continuance

{¶ 10} On January 23, 2008, the court sua sponte cancelled the trial and reset it for January 29, 2008. Scheduling and docketing conflicts have been held to be reasonable grounds for extending an accused's trial date beyond the speedy trial limit date. *State v. Lee* (1976), 48 Ohio St.2d 208, 357 N.E.2d 1095; *State v. Saffell* (1988), 35 Ohio St.3d 90, 92, 518 N.E.2d 934.

{¶ 11} Here, the journal entry states as follows:

“Trial set. Trial continued to 1/29/08 at the request of court.

Reason for continuance: Court engaged in trial 1/23/08.”

{¶ 12} Since *Lee*, the Ohio Supreme Court has held that a trial court’s sua sponte continuance beyond the statutory time limits is not a basis for dismissal if the “trial record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof.” *Aurora v. Patrick* (1980), 61 Ohio St.2d 107, 109, 399 N.E.2d 1220, 1221.

{¶ 13} Ordinarily, the record of the trial court must in some manner affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose. *Id.*; see, also, *State v. Hudson* (1983), 10 Ohio App.3d 52, 54; *State v. Martin* (1978), 56 Ohio St.2d 289. Mere entries by the court are insufficient unless the reasonableness of the continuance cannot be seriously questioned. *Id.* Under *State v. Mincy* (1982), 2 Ohio St.3d 6, 441 N.E.2d 571, in order for a sua sponte continuance to fall within the ambit of R.C. 2945.72(H), the trial court must: (1) record the continuance through its journal entry prior to the expiration of the speedy trial requirements, (2) identify the party to be charged with the continuance, and (3) briefly indicate the reasons requiring the continuance. *Id.*

{¶ 14} In the case sub judice, the court’s entry meets the requirements of *Mincy*. The six-day continuance between January 23 and January 29, 2008, is reasonable and cannot seriously be questioned.⁷ *Martin*, *supra*. Based upon this

⁷A review of the docket indicates that Byrd was not tried on January 29, 2008. There is no explanation given in the record for this delay.

reasonable continuance, the State had until March 11, 2008, within which to try Byrd.

Dismissal and Reindictment

{¶ 15} For reasons that are unclear in the record, the State reindicted the case on January 28, 2008, as CR-506224.⁸ The State argues that the speedy trial clock is tolled after Byrd was reindicted and that his counsel's failure to respond to the reciprocal discovery request filed in the original case on January 16, 2008, constitutes neglect and should be "carried over" to the new case under *Palmer*. While *Palmer* indicates that a defendant's failure to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy trial time pursuant to R.C. 2945.72(D),⁹ nothing in that case holds that the speedy trial clock is tolled from one case to another because of a defendant's failure to respond to the State's discovery requests. Therefore, the State's position on this issue is not well taken.

⁸The State dismissed the original case on February 5, 2008.

⁹The *Palmer* court stated: "In the case at bar the trial court held, in effect, that it was reasonable to allow the defendant 30 days to provide its response to the State's request for reciprocal discovery and that, thereafter, the defendant was in neglect of its duty to respond. *Palmer* ultimately provided the State with a response to its discovery request revealing that he simply had nothing to disclose and acknowledging his duty under Crim.R. 16(D) to supplement his response should that circumstance change. That response clearly could have been prepared and served much earlier than 60 days after it was requested, and it was neglect on the part of *Palmer* not to have done so. Therefore, the trial court did not abuse its discretion in tolling the running of speedy trial time after 30 days had passed from service of the State's request." *Palmer* at 461-462.

{¶ 16} Further, we agree with the State’s position that ordinarily the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment is not counted. *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552. However, time is not tolled where the defendant remains held in jail or released on bail pursuant to Crim.R. 12(I). *Id.* Therefore, the dismissal and reindictment of the first case is not a tolling event for speedy trial purposes, not only because Byrd remained in jail the entire time, but also because, in this case, the dismissal did not come until after the case was reindicted.

{¶ 17} Thus, the speedy trial clock does not start anew with the January 28, 2008, reindictment, but continues to run from November 6, 2007. Under the triple-count provisions of the statute, 48 days are attributable to the State as of the January 28, 2008 reindictment. Therefore, excluding any additional tolling events, the State still had 42 days from January 28, 2008, or until March 11, 2008, within which to try Byrd.

{¶ 18} At the initial pretrial on February 5, 2008, defense counsel moved that the case be set for trial on February 20, 2008.¹⁰ Although the entry indicates that the trial was set “at defendant’s request,” we find that this request is not a tolling event for purposes of speedy trial. Although “[s]peedy trial time is tolled by any period of delay necessitated by reason of a motion, proceeding, or

¹⁰Also on February 5, 2008, the State dismissed the charges in the original case, Case No. CR-503382, without prejudice.

action made or instituted by a defendant,” this was an oral request at a pretrial that the State did not object to and which took no time for the State or court to respond. See R.C. 2945.72(E). There was no delay necessitated by this request. It is therefore not a tolling event for speedy trial purposes.

{¶ 19} On February 20, 2008, the trial court, without explanation, cancelled the trial and reset it for March 3, 2008. As indicated above, where the trial court’s journal entry neither indicates to which party the continuance should be charged nor indicates the reason for the continuance, such continuance does not extend the time in which defendant has to be brought to trial. See *Patrick*, supra; *Mincey*, supra; *State v. Geraldo* (1983), Lucas App. No. L-83-168, 13 Ohio App.3d 27; *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio 30, at ¶22, stating that where the journal entry does not contain the basis for a continuance, it should not count against a defendant. This continuance is therefore not a tolling event under the statute.

{¶ 20} On March 4, 2008, the bailiff, outside the presence of the judge, called the parties into the courtroom on the record to discuss the potential for a plea, which the defendant declined. The docket indicates that on that date, the bailiff surreptitiously cancelled the trial, this time continuing the matter for a third time on March 18, 2008. In its entry, the court attributed the continuance to the defendant; however, the record indicates that Byrd was present in court on that date and prepared to go to trial. The ultimate reason for this

continuance was revealed in the record by the trial judge himself on March 18, 2008, when he indicated that the court was on vacation on March 4, 2008. The March 4, 2008 entry does not indicate the actual reason for the continuance or the party to be charged, therefore, it cannot constitute a tolling event under *Mincy* and its progeny.

Hybrid Representation

{¶ 21} We note the State's argument that Byrd's pro se motions create an impermissible hybrid representation issue. This court has already held that pro se motions by criminal defendants represented by counsel do not fall within the notion of hybrid representation. *State v. Martin*, Cuyahoga App. No. 87339, 2006-Ohio-5012.

Pro Se Motions

{¶ 22} On March 10, 2008, Byrd filed a "motion to deny consent to any continuances 'at defendant's request' and to move this court to set a trial date." On March 13, 2008, Byrd filed a motion to dismiss based upon speedy trial grounds.

{¶ 23} R.C. 2945.72(E) indicates that any period of delay necessitated by reason of a "motion, proceeding, or action made or instituted by the accused" permits the tolling of time for speedy trial. This statutory section "permits the tolling of time when a defendant files a motion to dismiss for speedy trial violations." See *State v. Hopkins*, Cuyahoga App. No. 90005, 2008-Ohio-3558, citing *City of Cleveland v. Pangrace*, Cuyahoga App. No. 89271, 2007-Ohio-6321. However, the March 10, 2008, second filing stated that Byrd would not consent to any more

continuances and asked that the court set the case for trial. It did not require any period of delay for the State to respond or for the court to rule. What is more, the court had already set a trial date of March 18, 2008, in this matter, so the March 10, 2008 request for the court to set the case for trial was moot upon filing.

{¶ 24} The speedy trial clock was not tolled at 89 days by virtue of the March 10, 2008 filing because no period of delay was necessitated by its filing. March 11, 2008, was the 90th day on the speedy trial clock. The speedy trial clock ran on this date.

{¶ 25} The March 13, 2008 motion to dismiss for speedy trial purposes, filed on the 92nd day of the speedy trial clock, two days after the expiration of speedy trial, could not constitute a tolling event for purposes of the statute and should have been granted by the trial court. The trial court committed plain error by not granting this motion.

{¶ 26} For the foregoing reasons, Byrd's sole assignment of error is well taken.

{¶ 27} Judgment of the trial court is reversed, and this matter is remanded to the trial court to vacate appellant's conviction.

It is ordered that appellant recover from appellee 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MELODY J. STEWART, J., CONCUR