[Cite as *State v. Robertson*, 2010-Ohio-2892.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93396

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MELVIN ROBERTSON

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521706

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

RELEASED: June 24, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Pursuant to R.C. 2945.67, the state of Ohio appeals from the order of the trial court that dismissed two counts of an indictment filed against defendant Melvin Robertson. For the reasons set forth below, we affirm.

{¶ 2} The record indicates that defendant was indicted on October 3, 2008, in Case No. CR-516228 for rape and kidnapping in connection with offenses that were alleged to have occurred on September 21, 2008.

{¶ 3} On March 9, 2009, defendant was indicted pursuant to a four-count indictment. Count One charged defendant with rape and in violation of R.C. 2907.02(A)(2), with a notice of prior conviction, a repeat violent offender specification, and a sexually violent predator specification and arose in connection with an alleged attack on Jane Doe I on or about September 21-23, 2008. Count Two charged defendant with the kidnapping of Jane Doe I on this same date, and set forth a notice of prior conviction, a repeat violent offender specification, and a sexually violent predator specification and a sexual motivation specification. Count Three set forth the same date and also charged defendant with unlawful sexual conduct with a minor, identified as Jane Doe II, whose date of birth is March 28, 1992. This Count was later amended to allege that the offense occurred in March 2008, i.e., the point at which Doe II conceived a child. Count Four charged defendant with having a weapon under disability and set forth the date of September 23, 2008.

{¶ 4} Defendant subsequently moved to dismiss Counts Three and Four,

arguing that Counts One and Two were first alleged in Case No. CR-516228 on October 3, 2008, and that the state was aware of the facts comprising Counts Three and Four at the time of the previous indictment.[1]

{¶ 5} In opposition, the state of Ohio asserted that it learned that the minor who is the subject of Count Three, Jane Doe II, was pregnant in September 2008 but the "State needed to investigate the allegation that the minor involved was sexually active when she was fifteen with the thirty-six year old defendant. The allegation does not stem from the same criminal acts as in counts One and Two. They are separate and apart, and further investigation was needed to determine the proper charges, as such the charge was properly brought in a timely manner."

{¶ 6} During a hearing on this matter, defendant stated that on September 23, 2008, while the police were investigating a report of the rape of Jane Doe I, they observed that Jane Doe II was approximately four months pregnant, and that the police confiscated the weapon that is the subject of Count Four at that time. In opposition, the state indicated that further investigation needed to be done as to Count Three to determine whether defendant was the father of Jane Doe II's child. Additional investigation was also necessary as to Count Four to determine if the weapon was operable.

{¶ 7} The trial court subsequently severed Counts One and Two from Counts Three and Four, finding them unrelated. Thereafter, the trial court

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[1] Defendant was convicted of rape and acquitted of kidnapping in CR-516228, and was sentenced to eighteen years to life imprisonment on December 18, 2009.

dismissed Counts Three and Four and held:

{¶ 8} "The state was aware of the alleged offense on 9/21/08 and therefore, 'when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time limitation on which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.' * * * *State v. Clay* (1983), 9 Ohio App.3d 216, 218."

{¶ 9} The state now appeals and assigns the following error for our review:

{¶ 10} "A trial court lacks authority to grant a defendant's motion to dismiss the indictment absent any infringement of a defendant's constitutional or statutory right."

{¶ 11} As an initial matter, we note that on appeal of a trial court's order granting a motion to dismiss for violation of the right to a speedy trial, we are to accord deference to the lower court's findings of fact but engage in a de novo review of the lower court's application of those facts to the law. *State v. Henley,* Cuyahoga App. No. 86591, 2006-Ohio-2728.

{¶ 12} With regard to the substantive law, we note that "[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment." *State v. Meeker* (1971), 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus. An unjustifiable delay in commencing prosecution violates a defendant's constitutional right to a speedy trial under Section 10 of Article I of the Ohio

Constitution, and under the Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. Id.

{¶ 13} Further, "[w]here it appears that there has been a violation of a defendant's constitutional right to a speedy trial as to some of the charges contained in an indictment, a motion to quash the counts of the indictment containing such charges should be sustained." *State v. Meeker*, paragraph two of the syllabus.

{¶ 14} In *State v. Clay* (1983), 9 Ohio App.3d 216, 459 N.E.2d 609, the court held that when new and additional charges arise from the same facts as did the original charge, and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charges is subject to the same statutory limitations period that is applied to the original charge. That is, all charges are subject to the original statutory limitations period, so the guarantees as to the time in which trial must commence are applied to any new and additional charges[2] arising from the same facts as the initial charge if the state is aware of such facts at the time of the first indictment. *State v. Cotton* (July 14, 1994), Cuyahoga App. Nos. 64361 and 64378. See, also, *State v. Parker,* 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032.

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[2] The statute is tolled, however, where the original charges are dismissed and new charges based on the same underlying facts as the original charge are refiled unless the defendant is being held in jail or released on bail pursuant to Crim.R. 12(I). *State v. DePue* (1994), 96 Ohio App.3d 513, 645 N.E.2d 745.

{¶ 15} However, "the state is not subject to the speedy-trial timetable of the initial [charges], [if the] additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial [charges]." *State v. Baker* (1997), 78 Ohio St.3d 108, 676 N.E.2d 883, syllabus. This test is disjunctive so "the state need only establish one of the two scenarios, either different facts or lack of knowledge." *State v. Smith,* Ashtabula App. No. 2004-A-0089, 2006-Ohio-5187; *State v. Thomas,* Adams App. No. 06CA825, 2007-Ohio-5340.

{¶ 16} However, as explained in *State v. Jones,* Montgomery App. No. 21974, 2008-Ohio-1603:

{¶ 17} "[W]e do not read *Baker* to hold that, where the State knew additional facts and circumstances warranting additional charges when the initial indictment was filed, it may nonetheless hold back on those charges simply because the offenses occurred on different dates, and then pursue multiple prosecutions, with the speedy trial time to run anew each time. 'The state should not be allowed multiple tries at convicting [a defendant] when it had the means and opportunity to address all issues within a single opportunity. *State v. Lloyd,* Cuyahoga App. Nos. 86501, 86502, 2006-Ohio-1356.' Accord *State v. Taylor,* Portage App. No. 2000-P-0121, 2007-Ohio-7120.

{¶ 18} Thus, the key questions that must be considered are whether the additional criminal charges arise from facts different from the original charges, and whether the state knew of these facts at the time of the initial charges. *State*

v. Baker. Thus, courts have considered the facts and circumstances of the original and additional charges, *State v. Davis,* dates on which the original and additional charges are alleged to have occurred and whether the additional charges are based on the same conduct for which the defendant is originally arrested, *State v. Taylor,* and whether the charges arose from a single investigation or different investigations, id.; *State v. Thomas,* Adams App. No. 06CA825, 2007-Ohio-5340.

{¶ 19} In this matter, the state argued that when the offenses that are the subject of Counts One and Two were investigated, investigators learned that Jane Doe II was pregnant but they did not know if defendant was the child's father. The state also did not know if the gun was operable. In addition, according to the state, defendant's family was hiding Jane Doe II. Thereafter, according to the state, "there was probable cause to go forward on that unlawful sexual conduct with a minor after interviewing [Jane Doe II] who finally came in for interviews within the last couple of weeks [i.e., the spring of 2009]." An exhibit proffered by the state indicates that in July 2008, a deputy interviewed Jane Doe II, who was approximately four months pregnant, and stated that defendant was her boyfriend. LEADS listed her as a missing child but she stated that she was emancipated. Papers in the home stated that she "loves Melvin" and the girl's mother reported that Doe II's boyfriend is "Mel." The child was born in December 2008.

{¶ 20} This exhibit further states:

{¶ 21} "It was also discovered in a separate investigation in case CR 516228 in the common pleas court that [Jane Doe II] identified Melvin Robertson as the father of her child * * *. Evidence in that case revealed personal journals of [Jane Doe II] where she wrote an entry dated March 2, 2008 that she and Melvin have been trying to make a baby for six months * * *. [She] stated that she avoided Law Enforcement regarding the investigation in CR 516228 since November of 2008. Melvin Robertson is the accused in the investigation and [Doe II] has been living with him at the time of the offense. [Doe II] stated that she avoided Law Enforcement due to threats and prevention measures taken by defendant's family members."

{¶ 22} According the facts of record due deference, we agree with the trial court's conclusion that the State knew additional facts and circumstances warranting additional charges when the initial indictment in Case No. CR-516228 was filed. The state's exhibit indicated that during the investigation of Case No. CR-516228, Jane Doe II identified defendant as the father of her child. Evidence in that case revealed Doe II's journal entry dated March 2, 2008, noting that she and defendant have been trying to make a baby for six months, and this is the time period set forth in count three. Therefore, it appears that the additional charges were uncovered during the investigation of the initial charges. Although the state indicates that it could not complete its investigation into the additional charges until paternity was known, this is not an element of the offense of unlawful sexual contact with a minor. Likewise, with regard to the charge of

having a weapon while under disability, circumstantial evidence may be used including, but not limited to, the representations and actions of the individual exercising control over the firearm, by application of R.C. 2923.11(B)(2). In accordance with the foregoing, we concur with the trial court's determination that the delay in bringing the additional charges was not justifiable and that the speedy trial time began to run from the time of the indictment for the original charges.

{¶ 23} The assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

{¶ 24} 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.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS. (SEE ATTACHED DISSENTING OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶ 25} I respectfully dissent from the decision reached by the majority. The additional charges in this case did not arise from the same set of facts that lead to the original charges, so the majority's speedy trial analysis under *State v. Clay* (1983), 9 Ohio App.3d 216, 459 N.E.2d 609, is misplaced.

{¶ 26} The majority correctly cites *Clay* for the proposition that counts added subsequent to prior counts will be subjected to the same speedy trial time limits as the prior counts if those subsequent counts (1) arose from the same set of facts as the prior counts and (2) the state knew about the subsequent counts at the time it filed the prior counts. Id.

{¶ 27} But having correctly stated the rule, the majority ignores it by failing to address how the subsequent counts arose from the *same set of facts* as the prior counts. Counts 1 and 2 of the indictment arose from an allegation of rape and kidnapping against "Jane Doe I" that occurred in September 2008. Counts 3 and 4 of the indictment arose from conduct occurring in March 2008 and charged consensual, albeit unlawful, sexual conduct with a minor, "Jane Doe II." There is no factual nexus between Counts 1 and 2 and Counts 3 and 4 — they involved different victims and conduct occurring at different times. The majority's analysis concerning when the state first learned of the unlawful sexual conduct with a minor

charge is irrelevant because those charges plainly did not arise from the same set of facts as the rape. *Clay* requires that the state have knowledge of the subsequent counts at the time of filing *and* that the counts arose from the same set of facts.

{¶ 28} Robertson might more appropriately be arguing preindictment delay — that the state waited too long to bring charges against him for the conduct in Counts 3 and 4. Preindictment delay occurs when there has been an unjustifiable delay between the commission of an offense and a defendant's indictment for the offense, and there is actual prejudice to that defendant as a result of that delay. *State v. Luck* (1984), 15 Ohio St.3d 150, 472 N.E.2d 1097, paragraph two of the syllabus. Robertson did not seek dismissal on this basis, however, and it would be premature for us to consider that issue absent a motion raising it.

{¶ 29} I would sustain the state's assignment of error, reverse the court's decision to dismiss on speedy trial grounds, and remand for further proceedings.