[Cite as *Cleveland v. Beasley*, 2010-Ohio-769.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92539

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ERIK BEASLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008 CRB-013032

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

RELEASED: March 4, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Erik Beasley, appeals his conviction from the Cleveland Municipal Court for soliciting in violation of Cleveland Codified Ordinance 619.09 ("C.C.O. 619.09"). For the reasons stated herein, we affirm.

{¶ 2} Beasley was arrested on May 9, 2008, and the following day a complaint was filed against him in the Cleveland Municipal Court that charged one count of soliciting in violation of C.C.O. 619.09. The ordinance states in pertinent part as follows: "(a) No person shall solicit another to engage with such other person in sexual activity for hire. This section forbids the solicitations of paid sexual activity, whether the solicitor is the one buying or selling his or her favors. (ORC 2907.24)." C.C.O. 619.09(a).

{¶ 3} On October 6, 2008, Beasley filed a motion for discharge based on violation of speedy trial rights. The trial court denied the motion, and the case proceeded to a jury trial that commenced on October 20, 2008.

{¶ 4} At trial, Detective John Graves of the Second District Vice Unit of the Cleveland Police Department testified to his encounter with Beasley on May 9, 2008. Det. Graves was assigned to a prostitution detail in the area of West 29th Street and Detroit Avenue, an area that has received numerous complaints about prostitution and soliciting in the past. Det. Graves was in

an undercover vehicle posing as a "John," which is something he has done hundreds of times.

{¶ 5} Det. Graves testified that around 10:25 p.m., Beasley drove by, smiled at Det. Graves, began tapping his brakes, and then turned his vehicle into a parking lot known for prostitution activity. Det. Graves stated that, from his experience working in the area, brake-tapping is an indicator that the person wants to stop and meet.

{¶ 6} Det. Graves notified a back-up officer, Detective Rowland Mitchell, about what was transpiring. Det. Mitchell testified that before Det. Graves went off the air, he indicated that he was "going to try to have the male come to him or follow him to a location," which Det. Mitchell stated is "normally what happens."

{¶ 7} Det. Graves proceeded into the parking lot after Beasley. Det. Graves testified that Beasley backed up his vehicle next to Det. Graves and asked "what's up?" and "what do you want to do?" Det. Graves also claims that the question of "how much?" came up in the parking lot. Beasley told Det. Graves to follow him.

{¶ 8} Beasley led Det. Graves to West 29th Street and Clinton Avenue, where Beasley exited his vehicle, entered Det. Graves's vehicle, and asked Det. Graves what he wanted to do. According to Det. Graves, when he reciprocated the question, Beasley reached down into his pants, pulled out his

penis, and asked Det. Graves if he wanted to perform oral sex on him. Det. Graves stated he asked “how much?” and Beasley responded, “how much do you have?” Det. Graves said “$30,” and Beasley said “okay.” Det. Graves then signaled for his back-up officer, and Beasley was arrested.

{¶ 9} On cross-examination, Det. Graves acknowledged that there are a number of gay-friendly establishments in the area where he encountered Beasley and that it would not be unusual for a gay individual to be in that area on a Friday night. Det. Graves had never seen Beasley in the area before and did not know of Beasley prior to this encounter.

{¶ 10} Beasley testified that prior to his arrest, he was a teacher in the Cleveland Municipal School District, was active in his church, and had never been arrested or convicted of a crime. He also has four adopted children. Two character witnesses were called to testify for the defense.

{¶ 11} Beasley testified that on the night of the encounter, he was heading to an area bar and Club Cleveland. He testified that Det. Graves was at a stop sign tapping his lights, that the question of “how much?” was not asked in the parking lot, and that Det. Graves asked Beasley if he knew somewhere else they could go. Beasley also testified that after he entered Det. Graves’s vehicle on the side street, Det. Graves asked Beasley, “do you jack off[?]” while making a masturbation motion. Beasley stated that he asked if Det. Graves wanted to perform oral sex in response to Det. Graves’s

asking if he liked having that done. Beasley further testified that he thought he was going to "get some action," and that up to that point, money had not been mentioned. He denied exposing himself to Det. Graves, stated that he was "taken aback" when Det. Graves stated he only had $30, and claimed he had no intention of taking money in exchange for oral sex.

{¶ 12} The jury found Beasley guilty of soliciting. On December 2, 2008, the trial court convicted and sentenced Beasley.

{¶ 13} Beasley has appealed his conviction and raises four assignments of error for our review. His first assignment of error provides as follows: "The trial court erred in denying [Beasley's] motion to dismiss based on the court's violation of his speedy trial rights."

{¶ 14} Beasley claims that the trial court abused its discretion by failing to discharge him on speedy trial grounds. Ohio's speedy-trial provisions are mandatory, and a person not brought to trial within the relevant time constraints must be discharged, and further criminal proceedings based on the same conduct are barred. *State v. Palmer*, 112 Ohio St.3d 457, 459, 2007-Ohio-374, 860 N.E.2d 1011; R.C. 2945.72(D); R.C. 2945.73(B).

{¶ 15} Because the charged offense is a first-degree misdemeanor, Beasley was required to be brought to trial within 90 days of his arrest. R.C. 2945.71(B)(2). However, the time in which an accused must be brought to trial may be extended under certain circumstances. R.C. 2945.72. Further,

for purposes of computing this time, each day spent in jail in lieu of bail on the pending charge must be counted as three days. R.C. 2945.71(E).

{¶ 16} In this case, Beasley was arrested on May 9, 2008. He was held in jail for one day following his arrest, which counts as three days. Beasley filed a motion for discovery on May 14, 2008, which tolled the speedy-trial clock for a reasonable period of time for the city to respond. See *State v. Sanchez*, 110 Ohio St.3d 274, 281, 2006-Ohio-4478, 853 N.E.2d 283. The city responded to the discovery request on June 25, 2008. For purposes of our review, we shall consider 30 days to have been a reasonable period to respond. See *Palmer*, 112 Ohio St.3d at 462; *State v. Barb*, Cuyahoga App. No. 90768, 2008-Ohio-5877.

{¶ 17} The first scheduled trial date of July 16, 2008, was continued by the trial court, on its own motion, to September 10, 2008. However, on July 23, 2008, Beasley's counsel filed a notice of disqualification, indicating that he was under a court-ordered CLE suspension. At a minimum, once the court received notice of the disqualification, a period of delay was necessitated by Beasley's lack of counsel, which extended the speedy-trial time. See R.C. 2945.72(C).[1] The fact that a court-ordered continuance had already been

[1] Under R.C. 2945.72(C), "[t]he time within which an accused must be brought to trial * * * may be extended only by * * * any period of delay necessitated by the accused's lack of counsel * * *[.]" Also, because defense counsel filed a notice of disqualification, pursuant to R.C. 2945.72(E), time is extended for "[a]ny period of delay necessitated by * * * motion, proceeding, or action made or instituted by the accused[.]"

entered did not alter the fact that a delay was otherwise necessitated by Beasley's lack of counsel. Accordingly, the trial court later corrected the record to reflect the same. At no time during this delay did Beasley provide notice of substitute counsel. Beasley's counsel did not re-enter an appearance in the action until September 10, 2008, the second scheduled trial date.[2] At that time, the speedy-trial clock again began to run.

{¶ 18} Upon counsel's return, the trial was continued until September 19, 2008. On September 19, 2008, the court again continued the trial date to October 20, 2008, the date trial actually commenced.

{¶ 19} Upon considering the allowable extensions, we find that Beasley was brought to trial within the 90-day period. Therefore, the trial court did not abuse its discretion by failing to discharge him on speedy trial grounds. Beasley's first assignment of error is overruled.

{¶ 20} Beasley's second assignment of error provides as follows: "The trial court erred in denying [Beasley's] Crim.R. 29 motions for acquittal based on the City's failure to prove a prima facie case of 'solicitation.'"

{¶ 21} Within his argument, Beasley raises both a sufficiency and a manifest weight challenge. Therefore, we shall address both challenges under this assignment of error.

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[2] Under R.C. 2945.72(D), time is extended for "[a]ny period of delay occasioned by the neglect * * * of the accused[.]"

{¶ 22} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) Id.

{¶ 23} C.C.O. 619.09 forbids the solicitation of paid sexual activity. Beasley argues that the city failed to show that Beasley made an "offer" to engage in sex for hire and that his "acceptance" of money does not constitute solicitation. In support of his argument, Beasley cites to the cases of *State v. Howard* (Hamilton M.C.1983), 7 Ohio Misc.2d 45, 455 N.E.2d 29, and *State v. Swann* (2001), 142 Ohio App.3d 88, 753 N.E.2d 984.

{¶ 24} In *Columbus v. Myles*, Franklin App. No. 04AP-1255, 2005-Ohio-3933, the court discussed *Swann* and *Howard*, as follows:

> **"In determining that the defendants in *Swann* and *Howard* were not guilty of soliciting, the courts stated that, in a soliciting case, the crime is in the asking. *Swann* at 90, 753 N.E.2d 984; *Howard* at 45, 455 N.E.2d 29. However, these courts did not limit soliciting cases to situations where a defendant explicitly asks for sexual activity for hire, as appellant suggests. See *Swann* at 89,**

> **753 N.E.2d 984; *Howard* at 45, 455 N.E.2d 29. Instead, the courts in *Swann* and *Howard* recognized that soliciting may also involve a defendant enticing, urging or luring another to engage in sex for hire. See *Swann* at 89, 753 N.E.2d 984; *Howard* at 45, 455 N.E.2d 29. Likewise, the courts in *Swann* and *Howard* did not exonerate the defendants on the basis that the undercover law enforcement officers, and not the defendants, suggested the particular sexual activity and price. Rather, these courts concluded that the defendants were not guilty of soliciting because they merely agreed to the law enforcement officers' advances and did nothing more that rose to the level of enticing, urging, luring or asking the officers to engage in sex for hire. See *Swann* at 90, 753 N.E.2d 984; *Howard* at 45, 455 N.E.2d 29.**
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> **"Thus, we reject appellant's contention that *Swann* and *Howard* compel us to reverse her convictions because [the detective], and not appellant, suggested the particular sexual activity and price."**

{¶ 25} We agree with the above analysis of *Swann* and *Howard*, and we find that this case is factually distinguishable. The evidence presented by the city was that (1) Beasley initiated contact with Det. Graves by tapping on his brakes after smiling at Det. Graves; (2) Beasley pulled up next to Det. Graves in the parking lot; (3) Beasley initiated a conversation with Det. Graves during which the question of "how much?" came up; (4) Beasley told Det. Graves to follow him and lead Det. Graves to another location; (5) Beasley entered Det. Graves's vehicle and asked Det. Graves what he wanted to do; (6) Beasley exposed himself to Det. Graves and asked Det. Graves if he

wanted to perform oral sex on Beasley; and (7) when the question of money arose, Beasley asked how much Det. Graves had and responded "okay" to $30. Upon such evidence, a rational trier of fact could find that Beasely had done more than "merely [agree] to the law enforcement officers' advances" and did engage in conduct that rose to the level of "enticing, urging, luring or asking the officers to engage in sex for hire." See *Myles*, supra, at 24. We further find that there was sufficient evidence upon which the jury could find Beasley intended to solicit sex for hire.

{¶ 26} Insofar as Beasley asserts that he demonstrated a lack of predisposition to engage in solicitation and that he established an entrapment defense, we are not persuaded by this argument. Entrapment is an affirmative defense that a defendant has the burden of proving by a preponderance of the evidence. *State v. Doran* (1983), 5 Ohio St.3d 187, 449 N.E.2d 1295, paragraph two of the syllabus; R.C. 2901.05(A). "[E]ntrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." Id. at paragraph one of the syllabus. However, there is no entrapment "when government officials merely afford opportunities or facilities for the commission of the offense and it is shown that the accused

was predisposed to commit the offense." (Internal quotations and citation omitted.) Id. at 192.

{¶ 27} After reviewing the record, we find that Beasley failed to present evidence that Det. Graves planted in Beasley's mind the possibility of engaging in sex for hire. Even though Beasley claims he did not explicitly ask the detective to engage in sex in exchange for money and the detective suggested the particular sexual activity and price, such explicit conduct is not required to establish soliciting. The evidence in this matter reveals that Beasley engaged in "enticing, urging, and luring" conduct, that he readily acquiesced in the inducements offered by the police, and that he displayed a willingness to involve himself in sexual activity for hire. Beasley admitted to an encounter with Det. Graves in an area known for prostitution; he led the detective to a more private area where he left his car and entered the detective's vehicle; he did not respond negatively to any opportunities for sex or money; he asked for oral sex; and he responded affirmatively to $30. Although Beasley lacked a criminal record and offered favorable character witnesses, the evidence did not support a finding that Beasley's conduct in soliciting sex for hire was the result of police entrapment.

{¶ 28} Construing the evidence in a light most favorable to the prosecution, we find any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Therefore, we

conclude there was sufficient evidence to establish that Beasley solicited Det. Graves in violation of C.C.O. 619.09.

{¶ 29} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 30} Deferring to the fact-finder's assessment of witness credibility, we cannot say that the court clearly lost its way in convicting Beasley of solicitation. There was substantial evidence in the record that Beasley engaged in solicitation: Beasley lured Det. Graves, entered the detective's vehicle, and negotiated a price for a sexual favor. We do not find that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Accordingly, Beasley's conviction is not against the manifest weight of the evidence.

{¶ 31} Beasley's second assignment of error is overruled.

{¶ 32} Beasley's third assignment of error provides as follows: "The trial court committed prejudicial error by refusing to give jury instructions on the entrapment defense and the mental elements of recklessness versus negligence."

{¶ 33} A trial court is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 326, 2008-Ohio-936, 883 N.E.2d 1052. A trial court does not err in failing to instruct the jury on an affirmative defense where the evidence is insufficient to support the instruction. *State v. Palmer*, 80 Ohio St.3d 543, 564, 1997-Ohio-312, 687 N.E.2d 285.

{¶ 34} As we have already found that Beasley failed to provide sufficient evidence to demonstrate the affirmative defense of entrapment, we find the trial court did not err by refusing to give an instruction on entrapment. We further find no merit to Beasley's argument that he was entitled to a comparative instruction on criminal recklessness and negligence. Beasley's third assignment of error is overruled.

{¶ 35} Beasley's fourth assignment of error provides as follows: "The trial court committed prejudicial error by failing to obtain or preserve a jury verdict form."

{¶ 36} Beasley argues that "there is no written record that a jury returned a guilty verdict against Beasley, let alone a unanimous one." The

record in this matter was supplemented to include the jury verdict form. The jury verdict form demonstrates a unanimous verdict finding Beasley guilty of soliciting in violation of C.C.O. 619.09 as charged (Docket Entry 46). Accordingly, Beasley's fourth assignment of error is overruled.

Judgment 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 municipal 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
MELODY J. STEWART, J., CONCURS WITH
CONCURRING OPINION

MELODY J. STEWART, J., CONCURRING:

{¶ 37} I concur with affirming Beasley's conviction, but write separately to address in more detail Beasley's arguments that defense counsel's suspension did not constitute a tolling event for the speedy trial time.

{¶ 38} As noted by the majority, R.C. 2945.72(C) states that the speedy trial time is tolled during any "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[.]"

{¶ 39} Beasley maintains that this suspension did not constitute a period of delay necessitated by his lack of counsel because the suspension did not affect any pretrial proceedings or otherwise prevent the trial from going forward in a timely manner.

{¶ 40} This contention is refuted by Gov.Bar. R. V(8)(E)(1)(a), which states a disbarred or suspended attorney has the duty to "[n]otify all clients being represented in pending matters and any co-counsel of his or her disbarment, suspension, or resignation and consequent disqualification to act as an attorney after the effective date of the order, and, in the absence of co-counsel, notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his or her place[.]" The supreme court's admonition that suspended attorneys inform their clients to "seek legal service elsewhere" plainly indicates that an

attorney suspension means that a client is no longer represented by an attorney. So Beasley truly "lacked" counsel during this period of suspension and this constituted a tolling event for speedy trial purposes.

{¶ 41} Beasley also maintains that the trial date was not delayed by counsel's suspension, but by the court's July 16, 2008 decision to continue the trial until September 10, 2008. He argues that the court erred by trying to justify this continuance after-the-fact by claiming that it had been ordered due to defense counsel's suspension.

{¶ 42} Although the courts should not make after-the-fact justifications for continuances, *State v. Mincy* (1982), 2 Ohio St.3d 6, 441 N.E.2d 571, syllabus, the court's order correcting its July 16, 2008 continuance to show that it was ordered due to counsel's suspension is not erroneous under the circumstances.

{¶ 43} The parties had a July 16, 2008 trial date, which the court had scheduled on June 3, 2008. The supreme court suspended Beasley's attorney on June 16, 2008. Defense counsel did not give the court notice of the suspension until July 24, 2008 — 37 days after the imposition of the suspension and after the scheduled trial date.[3] The court not only had no notice of the suspension, but would not have any reason to suspect counsel's

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[3] Gov.Bar R. V(8)(E)(1)(d) states that upon being suspended, counsel has the duty to "file a notice of disqualification of counsel with the court or agency before which the litigation is pending for inclusion in the respective file or files."

suspension because counsel filed a set of proposed jury instructions on July 11, 2008. Had the court known about counsel's suspension before July 16, 2008, there is little doubt that it would have granted a continuance on the basis of that suspension. The court's correction of the record simply memorialized that fact and was, under these circumstances, fully justified.