[Cite as *State v. Jenkins*, 2011-Ohio-837.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95006

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

WILLIAM JENKINS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522992

BEFORE: Kilbane, A.J., Jones, J., and Rocco, J.

RELEASED AND JOURNALIZED: February 24, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from the order of the trial court that dismissed charges against defendant, William Jenkins, for violation of his right to a speedy trial. For the reasons set forth below, we affirm.

{¶ 2} Defendant was arrested in this matter on July 14, 2008.[1] On August 4, 2008,

[1]It is not clear in the record whether defendant was incarcerated as of this date. Defendant's appellate counsel insists that defendant remained incarcerated from July 14, 2008 through October 16, 2008. The State maintains, however, that defendant was released following his arrest. The State notes that a capias was issued for defendant and recalled on August 25, 2008, the first day of his incarceration. As is explained infra, this dispute is not outcome-determinative herein.

defendant was indicted in Case No. CR-514001 for attempted abduction, in violation of R.C. 2905.02(A)(2), and criminal child enticement, in violation of R.C. 2905.05(A)(1). A capias was issued for him on August 18, 2008, and then recalled on August 25, 2008.

{¶ 3} A pretrial was scheduled for September 4, 2008. At the request of defendant, the pretrial was continued until September 18, 2008, and then again continued until September 24, 2008. On September 29, 2008, defendant filed a motion for discovery. He posted bond on October 16, 2008.

{¶ 4} Trial was scheduled for October 31, 2008. On this date, the State responded to defendant's discovery request and filed a demand for discovery from defendant. Defendant did not respond to this request until two and one-half months later. Also on October 31, 2008, the trial court continued the matter "at the request of the court" until November 11, 2008. On November 11, 2008, the trial court continued the matter again "at the request of the court" until November 21, 2008. For reasons that are unclear in the record, trial did not commence on November 21, 2008.

{¶ 5} A pretrial was held on December 8, 2008, and trial was then scheduled for December 30, 2008. At the request of the State, the trial was continued until January 16, 2009, then again until February 6, 2009, and continued again until February 27, 2009. The trial court ruled that no further continuances would be granted; however, for reasons that are unclear, the trial did not commence on February 27, 2009. Thereafter, on March 12, 2009, the trial court issued the following order:

"Defendant in court. Counsel [for defendant] present. Prosecutor * * * present. Court reporter present. State's motion to continue is opposed and is denied. Defendant's motion to dismiss is opposed by the state and is granted. Defendant is discharged."

{¶ 6} On April 9, 2009, defendant was subsequently reindicted in this case, Case No. CR-522992 for attempted abduction, in violation of R.C. 2905.02(A)(2), and criminal child enticement, in violation of R.C. 2905.05(A)(1). He was arraigned on April 23, 2009, and posted bond on May 4, 2009.

{¶ 7} On May 6, 2009, defendant filed a demand for discovery. A pretrial was scheduled for May 12, 2009, but was continued until June 3, 2009, at the request of defendant. On May 14, 2009, the State answered defendant's discovery demand and also filed a demand for discovery from defendant. The docket does not indicate that defendant filed a response to this demand.

{¶ 8} The June 3, 2009 pretrial was continued to June 15, 2009, at the request of defendant, and trial was set for July 1, 2009. Trial was then continued until August 12, 2009, continued again until September 10, 2009, and then again continued until September 22, 2009, at the request of the court, which was engaged in other trials on those dates.

{¶ 9} On September 22, 2009, the prosecuting attorney was engaged in another trial and not able to go forward. The defendant moved to dismiss the matter. In this motion, defendant outlined the proceedings from Case No. CR-514001 and this case, and maintained that a total of 340 days had elapsed from the time of defendant's initial indictment, thus violating his right to a speedy trial pursuant to R.C. 2945.71. The State filed a brief in

opposition on October 5, 2009, and argued that by operation of various tolling and waiver provisions, less than 200 speedy trial days had elapsed. On April 14, 2010, the trial court dismissed the matter. The State now appeals and assigns the following error for our review:

> **"The trial court erred when it granted defendant's motion to dismiss for violation of his right to a speedy trial."**

{¶ 10} When an appellate court reviews an allegation of a speedy trial violation, it "should apply a de novo standard of review to the legal issues but afford great deference to any findings of fact made by the trial court." *State v. Barnes,* Cuyahoga App. No. 90847, 2008-Ohio-5472, ¶17.

{¶ 11} The Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution, guarantee a criminal defendant the right to a speedy trial. See, e.g., *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101*; State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218. In *Barker,* the United States Supreme Court stated that "[a] balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis." Id. at 530. The court identified four factors that courts should consider in determining whether the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Id. at 530.

{¶ 12} The *Barker* court determined, however, that the states are free to prescribe a reasonable period within which to bring criminal defendants to trial consistent with constitutional standards. To that end, in order to comply with the *Barker* decision, the Ohio General Assembly enacted R.C. 2945.71. *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854, citing *O'Brien*.

{¶ 13} R.C. 2945.71 requires that felony charges be brought to trial within 270 days after a person's arrest. R.C. 2945.71(C)(2). Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *State v. Howard* (1992), 79 Ohio App.3d 705, 607 N.E.2d 1121. At that point, the burden shifts to the State to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *State v. Geraldo* (1983), 13 Ohio App.3d 27, 468 N.E.2d 328. If the State has violated a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B).

{¶ 14} Pursuant to R.C. 2945.72, however, speedy trial time may be tolled by several events, including the following:

> **"(D) Any period of delay occasioned by the neglect or improper act of the accused;**
>
> **"(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;**
>
> **"* * *
>
> "(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;**

> **"(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[.]"**

{¶ 15} In accordance with the speedy trial provisions, the statutory time period begins to run on the date the defendant is arrested; however, the date of arrest is not counted when computing the time period. *State v. Masters,* 172 Ohio App.3d 666, 2007-Ohio-4229, 876 N.E.2d 1007, citing *State v. Stewart* (Sept. 21, 1998), Warren App. No. CA98-03-021. If the defendant is incarcerated following his arrest, each day spent in jail "on a pending charge" acts as three days toward speedy trial time. R.C. 2945.71(E). If he is not incarcerated following his arrest, the speedy trial time is counted on a one-for-one basis. *State v. Thieshen* (1977), 55 Ohio App.2d 99, 379 N.E.2d 622.

{¶ 16} If the defendant is not arrested for the offense, speedy trial time begins on the day he is served with the indictment. *State v. Pirkel,* Cuyahoga App. No. 93305, 2010-Ohio-1858. If a capias must be issued for the accused, speedy trial time is tolled for this time period. *State v. Ennist,* Cuyahgoa App. No. 90076, 2008-Ohio-5100.

{¶ 17} A defendant's demand for discovery or a bill of particulars tolls the speedy trial period for a "reasonable time," which this court has interpreted to mean 30 days. *State v. Byrd,* Cuyahoga App. No. 91433, 2009-Ohio-3283; *State v. Barb,* Cuyahoga App. No. 90768, 2008-Ohio-5877. Conversely, a defendant's failure to respond to a prosecution's request for reciprocal discovery, beyond a "reasonable time" for doing so, tolls the running of speedy trial time pursuant to R.C. 2945.72(D). *Byrd* at ¶15, citing *State v. Palmer,* 112 Ohio St.3d 457,

2007-Ohio-374, 860 N.E.2d 1011.

{¶ 18} Moreover, motions filed by the defendant tolls the speedy trial time under R.C. 2945.72(E) for a "reasonable period" to allow the State an opportunity to respond and the court an opportunity to rule. *State v. Sanchez,* 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283. The *Sanchez* court stated:

> "This does not imply that the state may prolong its response time or that a trial court has unbridled discretion in taking time to rule on a defense motion. Although outside time limits for response may be set by local rule, in many cases, the state will not need the entire time. Furthermore, as we have already stated, '[a] strict adherence to the spirit of the speedy trial statutes requires a trial judge, in the sound exercise of his judicial discretion, to rule on these motions in as expeditious a manner as possible.'" Id. at ¶27, quoting *State v. Martin* (1978), 56 Ohio St.2d 289, 297, 384 N.E.2d 239.

{¶ 19} Further, the period is also tolled by "[t]he 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[.]" R.C. 2945.72(H); *State v. Baker* (1993), 92 Ohio App.3d 516, 636 N.E.2d 363.

{¶ 20} Further, pursuant to R.C. 2945.72(H), sua sponte continuances requested by the court may toll speedy trial time. *Pirkel.*

{¶ 21} In *Pirkel,* this court explained:

> "A sua sponte continuance must be properly journalized before the expiration of the speedy trial period and must set forth the trial court's reasons for the continuance. *State v. Weatherspoon,* 5th Dist. No. 2006CA0013, 2006-Ohio-4794. 'The record of the trial court must * * * affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose.' *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095.

Further, the issue of what is reasonable or necessary cannot be established by a per se rule, but must be determined on a case-by-case basis. *State v. Saffell* (1988), 35 Ohio St.3d 90, 518 N.E.2d 934; *State v. Mosley* (Aug. 15, 1995), 10th Dist. No. 95APA02-232. However, a continuance due to the trial court's engagement in another trial is generally reasonable under R.C. 2941.401. *State v. Doane* (July 9, 1992), Cuyahoga App. No. 60097; see, also, *State v. Judd* (Sept. 19, 1996), 10th Dist. No. 96APA03-330. However, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted. See *State v. Nichols,* 5th Dist. No. 2009-CA-0032, 2009-Ohio-3160, citing *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476."

{¶ 22} A motion to continue that is filed by the State may toll speedy trial time so long as the trial record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof. *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186. A prosecuting attorney's motion to continue based on the unavailability of a witness acts to extend the speedy trial provisions if the length of the delay is reasonable. *Saffell.* Moreover, if the State's continuance is not reasonable, the continuance must be charged against the State for speedy trial purposes. *State v. Nelson,* Clinton App. No. CA2007-11-046, 2009-Ohio-555, citing *State v. Baker*, Fayette App. No. CA2005-05-017, 2006-Ohio-2516.

{¶ 23} Finally, as here, where the original charges were dismissed without prejudice and the defendant was reindicted, the time period between the dismissal without prejudice and the date on which the new indictment was filed is tolled and not counted in the speedy trial computation, unless the defendant remained in jail or was released on bail pursuant to Crim.R. 12(I). *Byrd* at ¶16, citing *State v. Azbell,* 112 Ohio St.3d 300, 2006-Ohio-6552, 859 N.E.2d 532. However, "the speedy trial clock does not start anew" with the reindictment, but continues from the point of the dismissal of the original indictment. Id. The State is not subject to the speedy trial timetable of the initial indictment when additional criminal charges arise from facts different from the original charges, and the State did not know of these facts at the time of the initial indictment. *State v. Baker* (1997), 78 Ohio St.3d 108, 676 N.E.2d 883; *State v. Robertson*, Cuyahoga App. No. 94883, 2010-Ohio-6185.

{¶ 24} Applying all of the foregoing, we note that defendant was first arrested in Case No. CR-514001, for attempted abduction and criminal child enticement on July 14, 2008. At this point, the State maintains that defendant was not incarcerated, so time is counted on a one-for-one basis until a capias was issued for defendant on August 18, 2008, bringing the total to 35 days. Time was then tolled until the capias was recalled and defendant was arraigned on August 25, 2008. Time ran on a three-for-one basis from that date until the pretrial scheduled for September 4, 2008, bringing the speedy trial days to 65.

{¶ 25} Conversely, defendant asserts that he remained incarcerated following his July 14, 2008 arrest in Case No. CR-514001. At this point, according to defendant, time ran on a three-for-one basis from that date until the pretrial scheduled for September 4, 2008, for a total of 156 days.

{¶ 26} Time was then tolled until September 24, 2008, the period during which pretrials were continued at the request of defendant. Time continued to run on a three-for-one basis from September 24, 2008 until September 29, 2008, the date on which defendant filed a motion for discovery, bringing the speedy trial days to 80 under the State's calculations and 171 under defendant's calculations. Time was then tolled for a "reasonable time" within which the State could respond, i.e., 30 days or until October 29, 2008. During this tolling period, on October 16, 2008, defendant posted bond. Therefore, when time continued to run on October 30, 2008, time was no longer counted on a three-for-one basis.

{¶ 27} On October 31, 2008, or the 82nd day according to the State, or the 173rd day

according to defendant, the trial court continued the matter "at the request of the court" until November 11, 2008, but did not set forth its reasons for the continuance. On November 11, 2008, the trial court again continued the matter "at the request of the court" until November 21, 2008, but did not set forth its reasons for the continuance. Because the trial court failed to articulate the reason for these continuances and did not indicate that it was engaged in another trial, there is no indication that the continuance was reasonable. *Pirkel*. Accordingly, we conclude that time continued to run on a one-for-one basis during this time period. Therefore, accepting the State's claim that defendant was not initially incarcerated following his July 14, 2008 arrest, 103 days accrued. Accepting the defendant's claim that he was immediately incarcerated, 191 days accrued.

{¶ 28} Thereafter, with regard to the calculation, the record contains no indication that defendant responded to the State's October 31, 2008 demand for discovery, so following a "reasonable time," i.e., 30 days, or after November 30, 2008, tolling would occur, marking 112 speedy trial days according to the State and 200 days according to defendant.

{¶ 29} A pretrial was held on December 8, 2008, and trial was then scheduled for December 30, 2008. Time continued to toll, however, by the defendant's failure to provide discovery as of November 30, 2008. On December 30, 2008, the State requested that the matter be continued, which in our view stopped the tolling that was then impliedly occurring by reason of defendant's failure to respond to the State's demand for discovery. Cf. *O'Brien* (following defendant's express written speedy trial waiver of unlimited duration, accused must

file a formal written objection to any further continuances and makes a demand for trial in order to invoke speedy trial rights).

{¶ 30} Trial was continued from December 30, 2008, until January 16, 2009, "at the request of the State." On January 16, 2009, trial was continued yet again until February 6, 2009 "at the request of the State." On February 6, 2009, the trial court put on another entry indicating that the matter was continued until February 27, 2009, at the request of the State, and that no further continuances would be granted. Trial did not go forward on February 27, 2009, and the record contains no entries on this date to continue the matter or otherwise explain the court's actions. Therefore, because the court's journal entries do not explain the reason for the State's continuances, there is no basis upon which we may find them to be reasonable. This entire 59-day period is therefore not tolled. Moreover, we conclude that these entries do not set forth reasonable periods of continuances since they were granted over 19 months after defendant's initial arrest.

{¶ 31} This brings the total to 150 days using the State's date of incarceration and 241 days according to defendant's date of incarceration. The trial court ruled that no further continuances would be granted, but trial did not commence on February 27, 2009. Thereafter, on March 12, 2009, or on the 161 speedy trial days according to the state, or 252 days under defendant's count, the State sought an additional continuance after the victim failed to appear. The trial court dismissed the matter on that date.

{¶ 32} On April 9, 2009, defendant was subsequently reindicted in this case in Case

No. CR-522992 on identical charges of attempted abduction, in violation of R.C. 2905.02(A)(2), and criminal child enticement, in violation of R.C. 2905.05(A)(1). The time period between the dismissal without prejudice and the date of the new indictment is tolled and not counted in the speedy trial computation, since defendant did not remain in jail or on bail pursuant to Crim.R. 12(I). *Byrd* at ¶16; *Azbell.*

{¶ 33} However, the speedy trial clock did not "start anew" with the reindictment, but continues from the point of the dismissal of the original indictment. Id. Therefore, following defendant's April 9, 2009 indictment and arraignment, according to the state 161 speedy trial days had passed, and time was again counted in the three-for-one manner until he posted bond on May 4, 2009. By that date, 75 additional days passed, for a total of 236 days using the state's date of incarceration and 327 days under the defendant's calculations.

{¶ 34} On May 6, 2009, defendant filed a demand for discovery, thus tolling speedy trial accrual for a "reasonable time." A pretrial was scheduled for May 12, 2009, but was continued until June 3, 2009, and again until June 15, 2009, at the request of defendant, again tolling time.

{¶ 35} Also within this time period, on May 14, 2009, the State answered defendant's discovery demand and also filed a demand for discovery from defendant. Defendant did not answer this request for discovery until September 16, 2009. Although defendant's failure to respond to discovery caused the speedy trial to toll by his inaction as of June 15, 2009, we note that trial was set for July 1, 2009, thus stopping tolling as of that date.

{¶ 36} On July 1, 2009, the trial court then continued the matter until August 12, 2009, noting that it was "engaged in trial." On August 12, 2009, the trial court again continued the matter until September 10, 2009, again noting that it was "engaged in trial." The trial court continued the matter yet again until September 22, 2009, stating that it was "engaged in trial." Under the facts of this case, and in light of defendant's arrest in July 2008, we find this 83-day period too lengthy to constitute the reasonable continuance of this matter. Therefore, we conclude that no tolling occurred during this entire 83-day period.

{¶ 37} On September 22, 2009, after the 319 days given the State's date of incarceration, and 410 days using defendant's date of incarceration, the State sought a continuance because the prosecuting attorney was in trial in another matter, and on that same day, defendant moved for dismissal of the indictment for violation of his right to a speedy trial. On April 14, 2010, 200 days later, the trial court granted the motion to dismiss. Allowing for a reasonable period, i.e., 30 days for the court to rule on this motion, an additional 170 speedy trial days accrued at this time.

{¶ 38} In accordance with all of the foregoing, we conclude that this matter was properly dismissed in light of the failure to bring defendant to trial within the statutory time period. According to our calculation, and recognizing tolling to the extent permitted by law, at least 489 speedy trial days elapsed in this matter, well outside the statutory limit of 270 days.

{¶ 39} The State's assignment of error is not well taken and 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 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 Rues of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
KENNETH A. ROCCO, J., CONCUR