

[Cite as *State v. Elam*, 2017-Ohio-5567.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103122

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES ELAM

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-14-587865-A
Application for Reopening
Motion No. 502305

RELEASE DATE: June 27, 2017

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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ANITA LASTER MAYS, J.:

{¶1} On November 29, 2016, the applicant, Charles Elam, applied pursuant to App.R. 26(B) to reopen this court’s judgment in *State v. Elam*, 8th Dist. Cuyahoga No. 103122, 2016-Ohio-5619, in which this court affirmed his convictions for two counts of gross sexual imposition and one count of kidnapping with a sexual motivation.¹ Elam asserts that his appellate counsel should have argued that his speedy trial rights were violated and that his trial counsel was ineffective for not arguing a speedy trial violation.²

The state has filed its brief in opposition. For the following reasons, this court denies the application to reopen.

{¶2} Elam argues that his case should have been dismissed for lack of a speedy trial. R.C. 2945.71(C)(2) requires that the state bring a person charged with a felony to trial within 270 days after the person’s arrest. Under subsection (E), each day the person is held in jail counts as three days. However, this time period may be waived, extended, or tolled under R.C. 2945.72. Subsection (C) provides that the time may be extended by “[a]ny 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

¹In a bench trial, the judge found Elam guilty of gross sexual imposition and kidnapping of a six-year old girl in 2008. The judge also found him guilty of gross sexual imposition of the girl’s aunt in 1997 when the aunt was 15 years old. The judge imposed a total 15-years-to-life sentence.

²Elam filed a pro se motion to dismiss on speedy trial grounds, but his appointed counsel moved to strike the motion because of the prohibition on hybrid counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227.

accused upon his request as required by law.” “Any period of delay occasioned by the neglect or improper act of the accused” would also toll the time period. R.C. 2945.72(D). Similarly, any “delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused” tolls the period. R.C. 2945.72(E). Finally, subsection (H) provides that the period is tolled by “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.” Thus, any continuance granted at the defendant’s request tolls the period. *State v. Brelo*, 8th Dist. Cuyahoga No. 79580, 2001-Ohio-4245, and *State v. Ferrell*, 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882. The court further notes that defense counsel’s actions in waiving the time period is attributable to the defendant, even if the defendant did not consent to the waiver. *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978).

{¶3} Elam never made bail, so each day is subject to the triple-count provisions. If he can establish that more than 90 days elapsed after allowing for all waivers and extensions, his claim may have merit. The time for speedy trial begins to run when the accused is arrested, but the actual day of arrest is not counted. *State v. Canty*, 7th Dist. Mahoning No. 08-MA-1565, 2009-Ohio-6161.

{¶4} Elam was arrested on September 23, 2014, after the grand jury indicted him on September 5, 2014. The trial court arraigned Elam on September 24, 2014, set bail at \$100,000, and appointed counsel. So one day ran toward the 90 days.

{¶5} On September 25, 2014, his counsel moved for a bill of particulars and requested evidence. The state responded on September 29, 2014. Thus, these days are tolled for purposes of speedy trial. R.C. 2945.72(E).

{¶6} The court conducted the first pretrial on October 1, 2014. Thus, two more days, September 30 and October 1, counted toward speedy trial.

{¶7} The pretrial was then continued to October 8, 2014, at the request of the defendant. The October 8, 2014 pretrial was continued to October 22, 2014, at the defendant's request. The October 22, 2014 pretrial was continued to October 30, 2014, at the defendant's request. The October 30, 2014 pretrial was again continued to November 12, 2014, at the request of the defendant. Thus, no time ran for speedy trial from October 2 to November 12, 2014.

{¶8} The November 12, 2014 pretrial was continued to November 18, 2014, but the journal entry memorializing the pretrial did not specify that the continuance was at defendant's request. However, it did state that the court was in trial that date and that the prosecutor and the defense counsel met to discuss speedy trial and setting a trial date. Thus, the six days from November 13 to November 18 are problematic. They are not continued at defendant's request, but the continuance of six days because the judge was in trial could be a reasonable continuance granted other than upon the accused's own motion under R.C. 2945.72(H) and *Brelo*, 8th Dist. Cuyahoga No. 79580, 2001-Ohio-4245.

{¶9} The November 18, 2014 hearing was continued until November 24, 2014. The journal entry memorializing the hearing did not specify why the continuance was

granted. Thus, viewing the record in the light most favorable to Elam, 12 more days, November 13 to November 24, elapsed, putting the total at 15.

{¶10} The November 24, 2014 hearing was continued to December 10, 2014, at defendant's counsel's request and noted that the discovery exchange was ongoing. Thus, no more time elapsed from November 25 to December 10.

{¶11} At the December 10, 2014 pretrial, the pretrial was continued to January 13, 2015, at the defendant's request. More importantly, the trial was set for February 9, 2015, at the request of the defendant. Thus, no more time would elapse until at least February 9, 2015.

{¶12} In January 2015, Elam's defense counsel withdrew because of a conflict of interest. The trial court immediately appointed new counsel, who filed a motion for bill of particulars, a demand for discovery, and a motion for disclosure of the state's intention to use Evid.R. 404(B) evidence. Elam filed his pro se motion to dismiss for violation of speedy trial on January 27, 2015.

{¶13} At a pretrial on January 28, 2015, the court noted Elam's need for discovery of Summit County Welfare Department records. Upon defense counsel's motion, the February 9, 2015 trial was continued and the date converted to a pretrial; the trial was to be rescheduled at a later date.

{¶14} On February 9, 2015, the pretrial was continued to February 17, 2015, at defendant's request. On February 17, 2015, the court set trial for

April 13, 2015, at the request of the defendant because that was the first date defense counsel was available for trial. The court also noted the need for further discovery, especially the Summit County records.

{¶15} Trial began on April 13, 2015. Therefore, because of the continuances at defendant's request, the change in counsel, and the defense motions filed, only 15 days of the 90 days had actually elapsed. Elam's speedy trial claims are meritless.

{¶16} Accordingly, the application to reopen is denied.

ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR