[Cite as *State v. Dalton*, 2009-Ohio-6910.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. JOHN P. DALTON Appellant	C.A. No. 09CA009589 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05CR069429

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, John Dalton, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms in part, reverses in part, and remands for proceedings consistent with this opinion.

I.

{¶2} On March 2, 2006, Dalton was indicted on two counts of receiving stolen property, in violation of R.C. 2913.51(A), and one count of possession of criminal tools, in violation of R.C. 2923.24(A). Also on March 2, 2006, under a separate case number, Dalton was indicted on one count of receiving stolen property, in violation of R.C. 2913.51(A), one count of breaking and entering, in violation of R.C. 2911.13(B), and one count of attempted theft, in violation of R.C. 2923.02(A)/2913.02(A)(3). On May 23, 2006, the trial court granted the State's motion to consolidate these matters. Dalton initially pled not guilty to all of the charges. On March 7, 2007, Dalton filed a motion to suppress. On November 19, 2007, the trial court

denied the motion. On January 7, 2009, Dalton filed a motion to dismiss for lack of speedy trial. On February 2, 2009, the trial court held a hearing on his motion to dismiss. The trial court found that Dalton had waived his right to a speedy trial and denied the motion. Dalton then withdrew his not-guilty plea and pled no contest to two counts of receiving stolen property, one count of possession of criminal tools, and one count of breaking and entering. The remaining charge was dismissed. The trial court found Dalton guilty, and on April 30, 2009, sentenced him to a total of two years of community control.

{¶3} Dalton timely appealed his sentence and convictions, and has raised five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "[DALTON] WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF OFFENSES FOR WHICH NO CULPABLE MENTAL STATE WAS ALLEGED."

{¶4} In his first assignment of error, Dalton contends that he was denied due process of law when he was convicted of offenses for which no culpable mental state was alleged. We do not agree.

{¶5} Upon review of the indictments in this case we conclude that each charge contains a culpable mental state. Dalton does not explain to this Court where he believes the errors to exist in his indictments. He does not inform this Court whether he contends that the mental states listed in the indictment are incorrect or are incomplete. He simply cites case law that does not appear to be relevant to the case at hand. We have consistently held that we will not create an argument for an appellant. *Cardone v. Cardone*, (May 6, 1998), 9th Dist. No. 18349, at *8

("If an argument exists that can support [Appellant's contentions], it is not this court's duty to root it out").

{¶6} Further, we find Dalton's reliance upon the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ("*Colon I*"), is misplaced. We have explained that

> "In *Colon I*, the Supreme Court permitted a defendant to raise the issue of a defective indictment for the first time on appeal and concluded that the absence of a mens rea in the indictment, in conjunction with significant errors throughout the trial, warranted a reversal of the defendant's conviction for structural error. *Colon I* at ¶28-32. Recently, however, the Supreme Court readdressed the issue in *Colon I* on a motion for reconsideration. See *State v. Colon* ('*Colon II'*), [119 Ohio St.3d 204,] 2008-Ohio-3749. The Court clarified that 'when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate.' Id. at ¶7[]. 'Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment.' Id. at ¶8[]." *State v. Sandoval*, 9th Dist. No. 07CA009276, 2008-Ohio-4402, at ¶19.

{¶7} Dalton contends that the indictments in this case are void and therefore his convictions are invalid. Thus, it appears Dalton believes that, pursuant to *Colon I*, a structural error occurred below. A review of the record indicates that Dalton did not object in the trial court to any alleged defect in the indictments. Further, he ignores the Ohio Supreme Court's explanation in *Colon II* that structural error would only apply in the rarest of cases where multiple errors *at trial* followed the defective indictment. In this case, Dalton did not proceed to trial, instead electing to plead no contest. Therefore, a structural error analysis does not apply in this case. Finally, Dalton does not allege nor do we conclude that plain error occurred. Accordingly, Dalton's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[DALTON] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT DID NOT FULLY INFORM [HIM] CONCERNING WHICH

> CONSTITUTIONAL RIGHTS HE WAS WAIVING BY ENTERING A PLEA OF NO-CONTEST."

{¶8} In his second assignment of error, Dalton contends that he was denied due process of law when the trial court failed to fully inform him of the constitutional rights he waived by pleading no contest. We agree.

{¶9} Pursuant to Crim.R. 11(C), a trial court must inform a defendant of several enumerated constitutional and non-constitutional rights that he waives by pleading guilty or no contest.

> "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)" *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at syllabus.

{¶10} A review of the record reveals that during his plea colloquy, the trial court failed to inform Dalton that by pleading no contest he was waiving his right against compulsory self-incrimination. The State concedes this error and agrees that we must vacate Dalton's plea and remand. Accordingly, Dalton's second assignment of error is sustained. The plea is vacated and the matter is remanded for proceedings consistent with this opinion.

ASSIGNMENT OF ERROR III

> "[DALTON] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FAILED TO INFORM [HIM] THE EFFECT OF A PLEA OF NO-CONTEST AND DID NOT ACCEPT THE PLEA PERSONALLY FROM [HIM]."

{¶11} In his third assignment of error, Dalton contends that he was denied due process of law when the trial court failed to inform him of the effect of a plea of no contest and did not accept the plea personally from him. Our decision regarding Dalton's second assignment of error renders his third assignment of error moot. App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR IV

> "[DALTON] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED [HIS] MOTION TO SUPPRESS."

{¶12} In his fourth assignment of error, Dalton contends that he was denied due process of law when the trial court overruled his motion to suppress. We agree.

{¶13} In making its ruling on a motion to suppress, the trial court makes both legal and factual findings. *State v. Jones* (Mar. 13, 2002), 9th Dist. No. 20810, at *1. It follows that this Court's review of a denial of a motion to suppress involves questions of both law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. As such, this Court will accept the factual findings of the trial court if they are supported by some competent and credible evidence. *State v. Searls* (1997), 118 Ohio App.3d 739, 741. However, the application of the law to those facts will be reviewed de novo. Id.

{¶14} In its entry denying Dalton's motion to suppress, the trial court noted that the hearing on the motion had been continued six times. The trial court stated that because "the motion does not call any facts into question and is simply a question of law," the previously scheduled hearing was cancelled. The trial court denied the motion on the grounds that

> "GPS tracking devices are specifically excluded from the warrant requirement under R.C. 2933.51 *et seq.* Furthermore, the Supreme Court of the United States held that the use of a radio transmitter to monitor an automobile's progress on public roads is not a search within the meaning of the Fourth Amendment. *United States v. Knotts* (1983), 460 U.S. 276, 281[.]"

A careful reading of Dalton's motion to suppress, however, reveals that the motion does in fact call into question matters of fact requiring determination by the trial court.

{¶15} In his motion to suppress, Dalton argued that he had a reasonable expectation of privacy in the electrical system of his vehicle and that his "right to be free from unreasonable search and seizure was violated when police wired the GPS tracking device into his vehicle's

electrical system in order to gain information on the travels and locations of the vehicle." Therefore, Dalton was not only arguing that the information *gathered* from the GPS device amounted to an unlawful search and seizure, but also that the warrantless *placement* of the GPS device on his car was unconstitutional. Although, as we further explain below, we conclude that there is a second prong to the argument in Dalton's motion to suppress that the trial court did not consider, we note that this argument is not drafted as clearly as it could have been. Dalton does not fully delineate before the trial court the distinction between placement of the GPS and the collection of the information from the device. In any event, the nuance has important legal implications and the trial court neglected to consider the second prong of Dalton's argument.

{¶16} In *Knotts,* 460 U.S. 276, the United States Supreme Court concluded that the use of a radio transmitter to monitor the progress of an automobile on public roads was not a search for purposes of the Fourth Amendment. However, the Court specifically declined to address the issue that Dalton raised in his motion, stating that "Respondent does not challenge the warrantless installation of the beeper in the chloroform container ***. We note that while several Courts of Appeals have approved warrantless installations, we have not before and do not now pass on the issue." (Internal citations omitted.) *Knotts*, 460 U.S. at FN 1. Therefore, the trial court's reliance on this case does not, as a matter of law, dispose of Dalton's contention that the warrantless installation of the GPS device on his vehicle violated the Fourth Amendment.

{¶17} Further, the trial court's reliance on R.C. 2933.51, et seq., is also misplaced, in that it does not address the attachment of the device to Dalton's vehicle. This section, entitled "Interception of Communications; Warrants" specifically excludes "[a] communication from an electronic or mechanical tracking device that permits the tracking of the movement of a person or object" from the definition of electronic communication. R.C. 2933.51(N)(3). Simply

because the information gathered from a GPS device is not an "electronic communication" for purposes of the statute does not necessarily lead to a conclusion that a warrant would not be required to intercept the information. In any event, this section of the Revised Code does not speak to the warrantless *placement* of the GPS device on Dalton's vehicle. Neither the *Knotts* Court nor R.C. 2933.51, et seq., disposed of Dalton's contention that the actual warrantless placement of the device on his car was unconstitutional. Accordingly, the trial court failed to fully consider Dalton's arguments as presented in his motion to suppress. As a decision regarding the constitutionality of the *placement* of the GPS device is a necessary determination in the trial court's analysis, we do not pass on the constitutionality of the warrentless *gathering* of the information. If the placement of the GPS device is unconstitutional, then all evidence obtained thereafter could be determined to be fruit of the poisonous tree. *Wong Sun v. U.S.* (1963), 371 U.S. 471.

{¶18} We are without authority to determine for the first time on appeal whether a warrant was necessary to place the GPS device on Dalton's car, or whether the warrantless placement of the device was constitutional. "It is elementary that questions not raised or passed upon by the lower courts will not be ruled upon by [this Court]." *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control* (1982), 70 Ohio St.2d 95, 99. Accordingly, we reverse and remand to the trial court to hold a hearing to determine the facts necessary to properly pass upon this issue.

ASSIGNMENT OF ERROR V

"[DALTON] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED [HIS] MOTION TO DISMISS FOR LACK OF A SPEEDY TRIAL."

{¶19} In his fifth assignment of error, Dalton contends that he was denied due process of law when the trial court overruled his motion to dismiss for lack of a speedy trial. We do not agree.

{¶20} Both the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. *State v. Pachay* (1980), 64 Ohio St.2d 218, 219-20. Further, the courts must strictly enforce such rights. Id. at 221. This "strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial." Id., citing *State v. Pudlock* (1975), 44 Ohio St.2d 104, 105.

{¶21} R.C. 2945.71 dictates the time limits within which a defendant must be brought to trial. Under R.C. 2945.71(C)(2), a person charged with a felony "[s]hall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(E) further provides that each day a person is held in jail in lieu of bail counts as three days. Pursuant to R.C. 2945.73(B), if a defendant is not brought to trial within the prescribed time period, the trial court must discharge the defendant upon motion for dismissal prior to or at the commencement of trial. However, the time within which a defendant must be brought to trial can be tolled.

{¶22} R.C. 2945.72(E) provides that the statutorily prescribed time for a speedy trial may be lengthened by any period of delay necessitated by a motion instituted by the accused. Further, the time can be tolled by a continuance granted on the accused's own motion, or by any

reasonable period granted other than on a motion by the accused. R.C. 2945.72(H); see, also, *State v. Hamlet*, 9th Dist. No. 04CA008527, 2005-Ohio-3110, at ¶18.

{¶23} At the hearing on Dalton's motion to dismiss on speedy trial grounds, Dalton conceded that this motion was not based upon the statutory provisions for speedy trial. He acknowledged that he signed over 19 waivers prior to filing his motion to dismiss. On appeal, Dalton contends that at the hearing on this motion he "protested the coerced waiver of his right to a speedy trial. The prosecutor acknowledged that defendant claimed that he was under duress the last couple of months and had filed a written formal withdrawal of any time waiver." The transcript of the hearing of Dalton's motion is only eight pages long and reveals that Dalton did not allege that his waivers were involuntary. Instead, Dalton's *co-defendant* made these arguments. The prosecutor's acknowledgment related to the co-defendant's statements of coercion. Therefore, to the extent that Dalton's fifth assignment of error alleges violations of the statutory speedy trial provisions, it is overruled.

{¶24} Finally, Dalton contends that his right to a speedy trial under the United States and Ohio constitutions was violated. While he presents case law to this Court explaining the constitutional requirement for a speedy trial and the factors the trial court was required to consider to find a violation under the constitution, he has not provided this Court with any analysis applying the case law to his facts. Dalton fails to support any contention that a time waiver pursuant to the statutory provisions is not a time waiver pursuant to the constitution. Therefore, we do not decide this issue here.

{¶25} Finally, a review of the record before this Court reveals that Dalton's motion to dismiss on speedy trial grounds, while noted on the docket, is missing from the record. Pursuant to App.R. 9(A), the record on appeal must contain "[t]he original papers and exhibits thereto

filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court[.]" It is the appellant's duty to transmit the transcript of proceedings to the court of appeals. App.R. 10(A); Loc.R. 5(A). This duty falls to the appellant because the appellant has the burden of establishing error in the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. In the absence of an adequate record, we must presume regularity in the trial court proceedings. Id. The record before this Court does not contain the motion to dismiss. Therefore, we have nothing to review to determine whether Dalton properly made these arguments below. While he mentions at the hearing that a waiver of the statutory provisions does not amount to a waiver pursuant to the constitution, he refers the trial court to his motion to provide support for his argument. As this motion is necessary for a determination of Dalton's assignments of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. Accordingly, Dalton's fifth assignment of error is overruled.

III.

{¶26} Dalton's first and fifth assignments of error are overruled. His second and fourth assignments of error are sustained. Dalton's third assignment of error is rendered moot. The judgment of the Lorain County Court of Common Pleas is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, J.
CONCUR

APPEARANCES:

PAUL MANCINO, JR., Attorney at Law, for Appellant.

DENNIS P. WILL, Attorney at Law, for Appellee.