[Cite as *State v. Skorvanek*, 2010-Ohio-1079.]

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

STATE OF OHIO	C.A. No. 08CA009400
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN SKORVANEK	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 05CR067480

DECISION AND JOURNAL ENTRY

Dated: March 22, 2010

CARR, Judge.

{¶1} Appellant, John Skorvanek, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} While a criminal case was pending against him in case number 04CR065344, the State indicted Skorvanek on nine new counts in case number 05CR067480. Skorvanek subsequently was charged with additional crimes in case numbers 05CR069021 and 06CR072076, and for a period of time, all four criminal cases remained pending against him. This case involves only issues arising out of case number 05CR067480.

{¶3} On March 24, 2005, Skorvanek was indicted on nine drug-related charges. On April 7, 2005, he filed a motion to dismiss the charges on speedy trial grounds, arguing that the new charges arose out of the same facts and circumstances as the charge in case number 04CR065344 and that the State was aware of those facts and circumstances at the time of the

first indictment. The trial court granted the motion to dismiss and the State appealed. On January 11, 2006, this Court reversed in reliance on *State v. Baker* (1997), 78 Ohio St.3d 108, and concluded that both *Baker* exceptions were applicable so that the State was not subject to the speedy trial timetable of the initial indictment. *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69, at ¶16-17. On February 17, 2006, Skorvanek filed a notice of appeal in the Supreme Court of Ohio, which declined to accept the appeal for review on May 10, 2006.

{¶4} Upon remand, the matter proceeded through numerous pre-trials at Skorvanek's request. On February 2, 2007, Skorvanek filed a request that his statutory speedy trial rights be reinstated.

{¶5} On August 15, 2007, after he had been convicted, sentenced, and imprisoned on three drug-related charges in case number 06CR072076, Skorvanek filed a request for disposition of all remaining charges pending against him in case numbers 04CR065344, 05CR067480, and 05CR069021, pursuant to R.C. 2941.401. By statute then, the State had 180 days in which to bring him to trial on all pending charges, unless the trial court extended that time for good cause shown. Id.

{¶6} On September 13, 2007, the trial court issued a journal entry granting Skorvanek's apparently oral motions to dismiss his attorney and for a competency evaluation. After evaluation and hearing, the trial court found Skorvanek competent to stand trial in a journal entry issued on February 14, 2008. At a pre-trial on February 20, 2008, Skorvanek requested a continuance until March 6, 2008.

{¶7} On March 28, 2008, Skorvanek filed a motion to suppress. The parties appeared in open court for trial on March 31, 2008, at which time defense counsel informed the court that Skorvanek wished to dismiss her. The trial court denied Skorvanek's request to dismiss his

appointed counsel and refused to allow him to represent himself. Defense counsel then requested a continuance of any hearing on the motion to suppress, while the State asserted that it was prepared to proceed. Ultimately, defense counsel argued in support of the motion to suppress, the State orally responded, and the trial court denied the motion on the record.

{¶8} Defense counsel further informed the trial court that she had planned to orally make a motion to dismiss on speedy trial grounds immediately prior to trial. Although she initially asserted that she wished to submit a written motion to dismiss, defense counsel ultimately made and proceeded on her oral motion. The State argued against dismissal, and the trial court denied the motion to dismiss. Thereafter, counsel informed the court that they had reached a resolution, and the matter continued as a change of plea hearing, followed by sentencing.

{¶9} Skorvanek signed a plea statement, indicating that he understood his rights, wished to waive them, and that he would plead no contest to counts two through nine in case number 05CR067480. On April 1, 2008, the trial court issued a journal entry noting that Skorvanek withdrew his prior not guilty plea, entered a plea of no contest to the amended indictment, and the court found him guilty. On the judgment entry of conviction and sentence, also issued on April 1, 2008, and from which Skorvanek appeals, the trial court stated that Skorvanek withdrew his prior plea of not guilty and entered a plea of guilty to counts two through nine, count one having been dismissed.

{¶10} Skorvanek filed an appeal, which was dismissed. He was subsequently granted leave to file a delayed appeal. Having noticed that the guilty plea enunciated in the judgment entry of conviction and sentence did not match the no contest plea entered on the record, this Court issued a journal entry on February 18, 2010, remanding the matter to the trial court and

granting the trial court fourteen days in which to correct the record. On March 4, 2010, the trial court issued a judgment entry of conviction and sentence, nunc pro tunc, noting that Skorvanek pleaded no contest to the charges.

{¶11} On appeal, Skorvanek raises two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS AND FOUND THAT THERE WAS SUFFICIENT PROBABLE CAUSE CONTAINED WITHIN THE AFFIDAVIT TO ISSUE THE SEARCH WARRANT."

{¶12} Skorvanek argues that the trial court erred by denying his motion to suppress. This Court disagrees.

{¶13} "The review of a motion to suppress presents a mixed question of fact and law for an appellate court." *State v. Farris*, 9th Dist. No. 03CA0022, 2004-Ohio-826, at ¶7; *State v. Long* (1998), 127 Ohio App.3d 328, 332. This Court must accept the trial court's factual determinations made during the suppression hearing, so long as they are supported by competent and credible evidence. *Farris* at ¶7; *State v. Robinson* (Oct. 25, 2000), 9th Dist. No. 19905. This Court, however, must review the trial court's application of the law to those facts de novo. *Farris* at ¶7; *State v. Searls* (1997), 118 Ohio App.3d 739, 741. In this case, the trial court made no findings of fact, but rather orally and summarily denied the motion to suppress at the March 31, 2008 hearing.

{¶14} Skorvanek argues that the search of his home on Jefferson Street was unreasonable because the search warrant was invalid due to a lack of indicia of probable cause in the supporting affidavit. This Court cannot consider whether the search warrant was based on probable cause because the warrant merely authorized the search of an apartment located on East

Erie Avenue, which Skorvanek acknowledged to be his girlfriend's residence, not his own. Skorvanek does not attack the search of his house on Jefferson Street other than on the basis that the search warrant and affidavit are defective.

{¶15} Moreover, on appeal, Skorvanek only challenges the propriety of the search of his Jefferson Street home, not the East Erie Avenue apartment. The only search warrant in the record is one which authorizes a search of Skorvanek's girlfriend's apartment. Therefore, the search warrant which Skorvanek has challenged for lack of probable cause does not implicate a search of his home on Jefferson Street. Accordingly, we cannot address his substantive arguments in that regard. Skorvanek's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"APPELLANT'S RIGHT TO A SPEEDY TRIAL, AS GUARANTEED BY R.C. 2945.71 AND THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND ART. I, SEC. 10 OF THE OHIO CONSTITUTION WAS VIOLATED."

{¶16} Skorvanek argues that the trial court erred by denying his motion to dismiss for violation of his right to speedy trial. This Court disagrees.

{¶17} A trial court's ruling on a motion to dismiss on speedy trial grounds presents a mixed question of law and fact. *State v. Murray*, 9th Dist. No. 03CA008330, 2004-Ohio-4966, at ¶13. "While giving due deference to the trial court, this Court must independently review whether the trial court properly applied the law to the facts of the case." Id.

{¶18} Skorvanek purports to invoke the statutory speedy trial protections of R.C. 2945.71. R.C. 2945.71(C)(2) provides that "[a] person against whom a charge of felony is pending *** [s]hall be brought to trial within two hundred seventy days after the person's arrest." Skorvanek's statutory speedy trial rights were no longer governed by R.C. 2945.71, however, once he was imprisoned as a result of other charges. Moreover, Skorvanek invoked the

statutory speedy trial protections of an alternate statutory provision when he filed his request for disposition of all remaining charges pursuant to R.C. 2941.401.

{¶19} "R.C. 2941.401 controls the speedy trial rights of a defendant who is in prison." *State v. Smith* (2000), 140 Ohio App.3d 81, 89. In fact, R.C. 2941.401 supplants the provisions of R.C. 2945.71. See *State v. Stewart*, 2d Dist. No. 21462, 2006-Ohio-4164, at ¶22 ("the great weight of authority *** support[s] *** the proposition that once a person under indictment has begun serving a prison sentence in another case, the provisions of R.C. 2941.401 apply, to the exclusion of the provision of R.C. 2945.71, et seq., so that the running of speedy trial time under the latter statute is tolled.") Furthermore, "[u]nder [R.C. 2941.401], the speedy trial time does not begin to run until the incarcerated defendant sends a request to the prosecuting attorney and the trial court for final disposition of the untried indictment." *State v. Cox*, 4th Dist. No. 01CA10, 2002-Ohio-2382, at ¶25, citing *State v. Logan* (1991), 71 Ohio App.3d 292, 296. Only after Skorvanek filed his request for disposition of all remaining charges pursuant to R.C. 2941.401 on August 15, 2007, did speedy trial time begin to run. See *State v. Murphy*, 12th Dist. No. 2006-02-005, 2007-Ohio-2068, at ¶14 ("it is the incarcerated defendant who triggers the commencement of the 180-day speedy trial time under R.C. 2941.401.")

{¶20} R.C. 2941.401 states, in relevant part:

> "When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance."

{¶21} Numerous Ohio appellate districts have held that "the tolling provisions of R.C. 2945.72 apply to the 180-day speedy trial time limit of R.C. 2941.401." *Murphy* at ¶15, citing *State v. Shepherd*, 11th Dist. No. 2003-A-0028, 2006-Ohio-4315, at ¶50; *State v. Ray*, 2d Dist. No. 2004-CA-64, 2005-Ohio-2771, at ¶30; *State v. Roberts a.k.a. Brown*, 6th Dist. No. WD-04-028, 2004-Ohio-5509, at ¶11; *State v. Nero* (Apr. 4, 1990), 4th Dist. No. 1392. Without making that express holding, other courts, including this one, have recognized that a criminal defendant's actions may toll or extend the 180-day time limit imposed by R.C. 2941.401. See, e.g., *State v. McGowan* (June 21, 2000), 9th Dist. No. 19989 (agreeing with the State's assertion that certain time must be charged to the defendant for purposes of calculating time under R.C. 2941.401 based on the defendant's having moved for a continuance); *State v. Munns*, 5th Dist. No. 2005-CA-0065, 2006-Ohio-1852. The *Munns* court stated:

> "If the defendant shows that he was not tried within 180 days, he has established a prima facie case for dismissal. At that point, the burden is upon the state to demonstrate any tolling or extension of the time limit." (Internal citations omitted.) Id. at ¶17.

{¶22} In this case, time began to run for speedy trial purposes on August 15, 2007, when Skorvanek filed his request for disposition of the remaining charges. He orally moved to dismiss on speedy trial grounds on March 31, 2008, at which time 229 days had elapsed. Accordingly, Skorvanek has made a prima facie showing that he was not brought to trial within the requisite 180 days. Therefore, the burden shifted to the State to show that time had been tolled.

{¶23} On September 13, 2007, the trial court issued an order granting Skorvanek's motion for a competency evaluation. While there is no motion filed in the record, Skorvanek must have orally moved for a competency evaluation by September 13, 2007, the date the trial court granted the request. Accordingly, time tolled as of that date until the trial court issued its journal entry finding Skorvanek competent to stand trial on February 14, 2008. Time was tolled

for 154 days because of Skorvanek's request for a competency evaluation. Time again tolled on February 20, 2008, for 14 days when Skorvanek requested a continuance until March 6, 2008. Therefore, between September 13, 2007, and March 28, 2008, 168 of the 229 days were not chargeable to the State. Accordingly, only 61 days elapsed from the time Skorvanek filed his request for disposition on the remaining charges until he moved to dismiss the charges, an amount well within the 180 days allowed pursuant to R.C. 2941.401. Accordingly, the trial court did not err by denying Skorvanek's motion to dismiss on speedy trial grounds. The second assignment of error is overruled.

III.

{¶24} Skorvanek's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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 to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

PATRICK M. FARRELL, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.