[Cite as *State v. Ondrusek*, 2010-Ohio-2811.]

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

STATE OF OHIO Appellee v. DANIEL WILLIAM ONDRUSEK Appellant	C.A. Nos. 09CA009626 09CA009673 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CR072698

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

MOORE, Judge.

{¶1} Appellant, Daniel Ondrusek, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In January of 2007, Ondrusek was serving a four-year prison term. During his incarceration, on January 25, 2007, a new indictment was filed, charging Ondrusek with fourteen counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), all third-degree felonies. In June of 2008, the indictment was served on Ondrusek. The parties agree that during all relevant times, Ondrusek was incarcerated in the State of Ohio. Ondrusek pled not guilty to the charges in the indictment.

{¶3} On August 5, 2008, Ondrusek filed a motion to dismiss on speedy trial grounds. On October 23, 2008, the trial court denied Ondrusek's motion. On April 2, 2009, Ondrusek changed his plea of not guilty to no contest. The trial court found Ondrusek guilty of the

charges, and on August 19, 2009, sentenced him to a total of two years of incarceration. He was classified as a Tier II sex offender. Ondrusek timely appealed from his conviction and sentence and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING [] ONDRUSEK'S MOTION FOR DISMISSAL OF THE INDICTMENT BASED UPON THE VIOLATION OF ONDRUSEK'S RIGHT TO A SPEEDY TRIAL[.]"

{¶4} In his sole assignment of error, Ondrusek contends that the trial court committed error when it denied his motion to dismiss the indictment based upon a violation of his right to a speedy trial. We do not agree.

{¶5} 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. When reviewing Ondrusek's claim that the trial court erred in denying his motion to dismiss, this Court applies the de novo standard of review to questions of law. *State v. Davis*, 9th Dist. No. 08CA009412, 2008-Ohio-6741, at ¶22; *State v. Thomas* (Aug. 4, 1999), 9th Dist. No. 98CA007058, at *4.

{¶6} Ondrusek first argues that the trial court violated the statutory speedy trial protections of R.C. 2945.71. Ondrusek'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." *State v. Skorvanek*, 9th Dist. No. 08CA009400, 2010-Ohio-1079, ¶18.

> "'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.')" Id. at ¶19.

{¶7} The parties agree that Ondrusek was incarcerated as a result of other charges. Accordingly, Ondrusek's contention that the trial court violated his speedy trial rights pursuant to R.C. 2945.71 is without merit.

{¶8} Ondrusek further contends that his speedy trial rights were violated pursuant to R.C. 2941.401, which states, in pertinent part, that:

> "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 ***.
>
> "***
>
> "The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof.
>
> "***
>
> "If the action is not brought to trial within the time provided, subject to continuance allowed pursuant to this section, no court any longer has jurisdiction thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice."

{¶9} Pursuant to 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.'" *Skorvanek*, supra, at ¶19, quoting *State v. Cox*, 4th Dist. No. 01CA10, 2002-Ohio-2382, at ¶25, citing *State v. Logan* (1991), 71 Ohio App.3d 292, 296.

{¶10} Ondrusek made only a passing reference to R.C. 2941.401 in his motion to dismiss. His contention, although not specifically made below with regard to R.C. 2941.401, was that the State had a duty to exercise due diligence to notify him of the indictment so that he could make the mandated request of the prosecuting attorney and the trial court. This contention is without merit.

{¶11} The Ohio Supreme Court has determined that the clear language of R.C. 2941.401 did not place a duty of reasonable diligence on the State. "Had the legislature wanted to impose such a duty on the state in similar cases, it could have done so." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶22. The statute "unambiguously impose[s] the initial duty upon the defendant to trigger action on the part of the state." Id. at ¶24; But see, *State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617, at ¶23 (concluding that the speedy trial time clock began to run, pursuant to R.C. 2941.401, when the evidence indicated that the State informed the warden of the inmate's pending indictment and the *warden* failed to comply with the mandate of R.C. 2941.401 to inform the inmate of the pending charges. Accordingly, the Court determined that in this case, the inmate's duty to provide the State with written request for final disposition was not triggered.) Therefore, Ondrusek's contention that the State bore the burden to inform him of the charges against him pursuant to R.C. 2941.401 is without merit.

{¶12} Ondrusek does not contend here or below that he complied with the mandate of R.C. 2941.401 to send a request to the prosecuting attorney and the trial court for final disposition of the untried indictment. Nothing in the record supports a conclusion that such a request was sent. Further, nothing in the record indicates that the State informed the warden of Ondrusek's pending indictment, thus placing a duty upon the warden to notify him of his

obligation. Accordingly, Ondrusek has failed to trigger the speedy trial timeline, as set forth in R.C. 2941.401. Ondrusek's sole assignment of error is overruled.

III.

{¶13} Ondrusek's sole assignment of error is 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.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY SAYING:

{¶14} I concur in the judgment of the Court. I do so because Ondrusek's argument in the trial court focused almost exclusively on R.C. 2945.71, instead of R.C. 2941.401, the section that applied to the facts of his case. In addition, even giving Ondrusek the benefit of the doubt and concluding that he argued under the proper statute, it is nevertheless appropriate to overrule his assignment of error.

{¶15} I do not believe that the Supreme Court intended *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, to universally preclude an incarcerated defendant from succeeding under a R.C. 2941.401 speedy trial argument in the absence of the defendant filing the requisite notice.

{¶16} In *Hairston*, the Supreme Court noted that:

> "[t]he facts here demonstrate that Hairston knew of his arrest, knew he had been apprehended in the bar, and knew that the police had removed from his waistband the money taken from the blue bag discovered during the robbery. He also knew that the prosecutor had charged him by information; despite this, he waited until June 2001 to seek to enforce R.C. 2941.401." Id. at ¶25.

Further, "the warden had no knowledge of any of the charges pending against [Hairston]." Id. at ¶21. Based upon those facts, the Supreme Court held that:

> "R.C. 2941.401 places a duty on an incarcerated defendant to 'cause[] to be delivered to the prosecuting attorney and the appropriate court * * * written notice of the place of his imprisonment and a request for a final disposition to be made of the matter[]' and that the duty to bring such a defendant to trial within 180 days of the written notice and request arises only after receipt of that statutory notice." Id. at ¶26.

{¶17} The Supreme Court later distinguished *Hairston* in *State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617. While Dillon was in prison on other charges, the prosecutor advised him that there was a pending indictment against him and of his right to request a speedy trial. Id. at

¶4. Dillon did not receive a copy of the indictment or written notification of his speedy trial rights. Id. at ¶20. The detective involved in the case requested that the warden serve Dillon with the indictment, but the warden failed to do so. Id. at ¶5.

{¶18} The Court concluded that "an inmate's awareness of a pending indictment and of his right to request trial on the pending charges [does not satisfy] the notification requirements of R.C. 2941.401." Id. at ¶1. R.C. 2941.401 instead demands that the warden provide written notification of any untried indictments against the inmate and of his speedy trial rights. Id. Thus, the Court concluded that because the warden failed to perform his or her duty, the defendant's duty under the statute was not triggered. Id. at ¶¶19-20. Moreover, the Court concluded that the speedy-trial time calculation began to run on the date that the warden was told to serve Dillon with the indictment. Id. at ¶23.

{¶19} Thus, it is clear that the defendant's failure to file a request under R.C. 2941.401 is not always fatal and is not the only event that will trigger the running of speedy trial time. Further, the Fifth District Court of Appeals has distinguished *Hairston* in a situation in which it was clear that "the State knew the location where [the defendant] was incarcerated." *State v. Centafanti*, 5th Dist. No. 2007-CA-00044, 2007-Ohio-4036, at ¶52. In sustaining Centafanti's assignment of error, the court of appeals concluded that

> "[t]he State cannot avoid the application of R.C. 2941.401 by neglecting to inform the custodial warden or superintendent of the source and content of an untried indictment when the State is aware of the defendant's location and the source and content of the untried indictment and the defendant has made a demand for speedy disposition of the same." Id.

{¶20} Thus, in my view there are situations in which *Hairston's* broad holding is clearly distinguishable. However, Ondrusek has not established when in time the State knew where he was. Alternatively, as in *Dillon*, there is no suggestion that once the State knew where Ondrusek

was, it asked the warden to inform Ondrusek of the indictment and his right to request a trial and the warden thereafter failed to do so. Ondrusek generally alleged that the State knew where he was because he had been sentenced on another offense in the Lorain County Court of Common Pleas. At the hearing held to address the issues Ondrusek raises on appeal, he did not actually provide evidence indicating that the State knew where Ondrusek was incarcerated. Therefore, it is appropriate to overrule Ondrusek's assignment of error.

APPEARANCES:

BRIAN J. DARLING, Attorney at Law, for Appellant.

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