IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2011-597
Plaintiff-Appellee,	:	
	:	
v.	:	On appeal from the Clark County
	:	Court of Appeals, Second Appellate
Keith Ramey,	:	District, Case No. 2010CA19
	:	
Defendant-Appellant.	:	

Reply Brief of Appellant Keith Ramey

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Proposition of Law:

The filing of a motion to suppress by a co-defendant does not, by itself, automatically toll the other co-defendant's speedy-trial time.

I. Introduction.

This case is simple. Under Ohio's speedy trial statute, there are two ways to toll time that are relevant to this case—first, an automatic tolling if the defendant files a motion, R.C. 2945.72(E); second, a discretionary tolling if the trial court finds on the record that a reasonable continuance is needed. R.C. 2945.72(H). The error of the State, the court of appeals, and the trial court was to treat a co-defendant's motion as an event that *automatically* tolled time, instead of as an event that could justify a continuance in the trial court's discretion. As a result, the State did not seek a continuance and the trial court did not grant a continuance or explain why a continuance was reasonable.

II. Discussion.

A. A trial court has discretion to grant and explain a continuance based on a co-defendant's motion, but the motion does not *automatically* toll the time.

The lower court cases cited by the State confirm that a co-defendant's motion may be the basis for a reasonable continuance, but the motion does not toll time when it is filed. For example, *State v. Deltoro*, 7th Dist. No. 07MA90, 2008-Ohio-4815, ¶23, cited on page 5 of the State's brief, held that a "motion by a co-defendant *may* operate to extend the speedy trial time for another co-defendant." The Seventh District explained this language in *State v. Davis*, 7th Dist. No. 08 MA 80, 2009-Ohio-4639 at ¶25, discretionary appeal not allowed, *State v. Davis*, 123 Ohio St.3d 1525, 2009-Ohio-6487, which the State also

cited. *Davis* specifically demonstrates that the extension of speedy trial in this situation is discretionary rather than automatic:

> Our *Deltoro* case's specific use of the word *may* indicates that a co-defendant's motion does not always extend the speedy trial time of another co-defendant. It is a case by case determination that depends not only on the type of motion involved, but also, pursuant to R.C. 2945.72(H), on the length of delay that the motion causes.

Just as in *Davis*, this case falls in the speedy trial category that requires a continuance with findings on the record to explain a delay. The state failed to meet that burden.

As this Court has repeatedly ruled, findings justifying a continuance must affirmatively state the reasons on the record before the expiration of speed trial time. *State v. Mincy*, 2 Ohio St.3d 6, 8 (1982) ("condemn[ing]" an "after-the-fact extension"), cited in *State v. Saffell*, 35 Ohio St. 3d 90, 92 (1988) and *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶62. But here, the trial court gave no reason justifying a delay in the case beyond the speedy trial deadline either before or after setting the trial date. Accordingly, the State cannot meet its burden to show that the record affirmatively demonstrates the reasonableness of the continuance, and this Court should reverse the decision of the court of appeals and vacate Mr. Ramey's conviction.

B. Legislative history does not help the State.

The State's resort to legislative history does not support its position. First, legislative history becomes relevant only if a statute is ambiguous, and there is no ambiguity in R.C. 2945.72. But even if this

Court looks to the legislative history, that history says nothing about whether a co-defendant's motion automatically tolls speedy trial time, or whether a court may grant a continuance based on a co-defendant's motion with an explanation on the record in advance.

C. If the co-defendant's motion had been successful, the suppressed evidence would still be admissible against Mr. Ramey.

The State is incorrect when it asserts that the co-defendant's motion to suppress would have helped Mr. Ramey if it had been successful. Brief at 8. At a joint trial, evidence admissible against only one defendant can be admitted against the other, as long as a limiting instruction is provided. "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly." Evid. R. 105. *See also State v. Fox*, 133 Ohio St. 154, 160-161 (1938) (evidence admissible against only one co-defendant can be admitted with a limiting instruction), and *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶44 (citing *Fox* and quoting Evid.R. 105). As a result, even if the trial court had suppressed the evidence as to his co-defendant, the State could still have used it against Mr. Ramey.

D. The State's "invited error" argument is legally and factually incorrect, and the State did not raise it below.

This Court should not address the State's invited error argument because the State did not advance this argument below, and this Court generally does not take resolve issues presented to it for the first time. *See,*

e.g., Vinci v. American Can Co., 9 Ohio St.3d 98, 100 n.2 (1984) (declining to address an argument raised for the first time before this Court). Further, as demonstrated below, this Court has set a clear rule for lower courts to follow, so reviewing this issue would be mere error correction. And finally, the State's argument is based on a faulty factual premise. Contrary to the State's assertion that "the trial date was moved into the future[,]" Brief at 5, the first trial date set was February 1, 2010—already outside the speedy trial deadline. Entry, Jan. 6, 2010. The case was only delayed one day longer, for the justifiable reason that the courtroom was not available. Entry, Jan. 8, 2010.

This Court need not address this issue because it has set clear law on the question of how to treat an initial trial date that is set outside the speedy trial time:

> When a trial date is set beyond the time limits of R. C. 2945.71 and the accused does not acquiesce in that date but merely fails to object to that date, the trial court's action does not constitute a continuance pursuant to R. C. 2945.72(H). However, the trial court has the discretion to extend the time limits of R. C. 2945.71 where counsel for the accused voluntarily agrees to a trial date beyond the statutory time limits. Moreover, the trial court's exercise of that discretion constitutes a "'continuance granted other than upon the accused's own motion' under the second clause of R. C. 2945.72(H)," and, as long as that continuance is reasonable, it extends the time limits of R. C. 2945.71 and does not deny an accused the right to a speedy trial. Whether such a continuance is reasonable must be affirmatively demonstrated in some manner in the trial court.

State v. McRae, 55 Ohio St. 2d 149, 152-153 (1978), quoting *State v. Davis*, 46 Ohio St.2d 444, 449 (1975).

Regardless, Mr. Ramey prevails even if the Court reaches the issue. The trial court's factual finding that Mr. Ramey "agreed" to the trial date is contrary

to the record. When the trial court set the trial date, it journalized an entry noting that trial counsel had "stated their respective availability for trial" on February 1, 2010. Entry, Jan. 6, 2010. Only after Mr. Ramey filed a speedy trial motion did the trial court state that because the lawyers had "essentially agreed" to the date. T.p. 7 (Feb. 1, 2010). The equivocation "essentially" is important, because stating "availability" for a date is far different than "agreeing" to that date. Because the record shows only that Mr. Ramey's counsel was available for the initial trial date, the trial court never granted a "continuance" and he must be discharged under *McRae*.

Finally, Mr. Ramey prevails even if his counsel had "agreed" to the trial date.[1] Assuming that counsel agreed to the trial date, the trial court was authorized to continue the case if the record affirmatively shows a reason. R.C. 2945.72(H). But in this case, neither the trial court nor the State has even proffered a reason why the trial could not have been held on the 90th day of speedy trial time instead of the 93rd. And neither the State nor the trial court has ever proffered a reason why the co-defendant's motion actually affected the ability of the State to provide a speedy trial to Mr. Ramey. The State and the trial court simply, and mistakenly, set the trial day outside the speedy trial time with no explanation. That, the statute does not allow.

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[1] If this Court determines that the State should have an opportunity to brief the issue of invited error, the Court should send this case back to the court of appeals. This Court has set clear law, and it is the role of lower courts to apply that law to specific cases. *See, e.g., Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 492 (2000) (Cook and Lundberg Stratton, JJ., concurring and citing Oh. Const. Art. IV Sec. 2) (noting that this Court "sits to settle the law, not to settle cases").

Conclusion

The State, the trial court, and the court of appeals mistakenly assumed that a co-defendant's motion automatically tolls the speedy trial time of other co-defendants. That may be the law under the speedy trial statutes of other jurisdictions, but it is not under R.C. 2945.67.

This Court should reverse the decision of the court of appeals and discharge Mr. Ramey.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing has been served by regular U.S. Mail upon, Andrew R. Picek, Assistant Clark County Prosecuting Attorney, 50 E. Columbia Street, Springfield, Ohio 45502, on this 3rd day of February, 2012.

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Assistant Public Defender

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Appendix to
Reply Brief of Appellant Keith Ramey

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1 of 1 DOCUMENT

*** This data is current through legislation passed by the 129th Ohio General Assembly and filed with the Secretary of State through File 69. The annotations are current through January 9, 2012. ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE IV. JUDICIAL

Go to the Ohio Code Archive Directory

Oh. Const. Art. IV, § 2 (2012)

§ 2. The supreme court

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

HISTORY:

(Amended November 8, 1994)

*** This data is current through legislation passed by the 129th Ohio General Assembly and filed with the Secretary of State through file 69.
The annotations are current through January 9, 2012. ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
BILL OF EXCEPTIONS

Go to the Ohio Code Archive Directory

ORC Ann. 2945.67 (2012)

§ 2945.67. Appeal by state

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24* of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with *section 2953.08 of the Revised Code*, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

HISTORY:

137 v H 1168 (Eff 11-1-78); 146 v S 2. Eff 7-1-96.

*** Rules current through rule amendments received through January 5, 2012 ***
*** Annotations current through November 7, 2012 ***

Ohio Rules Of Evidence
Article I General Provisions

Ohio Evid. R. 105 (2012)

Review Court Orders which may amend this Rule.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.