IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant,	)	CASE NO. 2017-1463
	)	On Appeal from the 11th Dist. Court of Appeals Case Nos. 2017-T-0103, 2017-T-0104
-vs-	)	Trumbull County Court, Central District Case Nos. 15 TRC 01554 A and 15 CRB 00443 A
DANIELLE K. MARTIN, Defendant-Appellee.	)	

****

APPELLANT'S MERIT BRIEF

****

DENNIS WATKINS (#0009949)
Trumbull County Prosecuting Attorney
Deena L. DeVico (#0080796) (Counsel of Record)
Ashleigh J. Musick (#0096078)
Assistant Prosecuting Attorneys
160 High St. N.W., 4th Floor
Warren, Ohio 44481

Telephone: (330) 675-2426
Fax: (330) 675-2431
E-mail: psdevico@co.trumbull.oh.us

Counsel for Plaintiff-Appellant
The State of Ohio

Katherine R. Ross-Kinzie, Esq. (#0089762)
Office of the Ohio Public Defender
250 Broad Street, Suite 1400
Columbus, Ohio 43215

Telephone: (614) 466-5394
Fax: (614) 752-5167
E-mail: katherine.ross-kinzie@opd.ohio.gov

Counsel for Defendant-Appellee
Danielle K. Martin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page No.**

STATUTES

STATEMENT OF THE CASE AND FACTS

On November 21, 2015, following a pursuit by officers, Appellee Danielle K. Martin was charged with one count each of the following statutory violations: (1) Operating a Vehicle under the Influence of Alcohol and/or Drugs; (2) Operating a Vehicle under the Influence of Alcohol and/or Drugs; (3) Reckless Operation of a Motor Vehicle; (4) Driving in Marked Lanes; (5) Failure to Obey a Red Light; (6) Failure to Wear a Seatbelt; (7) Failure to Comply with the Order or Signal of a Police Officer; and (8) Open Container in a Motor Vehicle. *State v. Martin*, 11th Dist. Trumbull Nos. 2016-T-0103, 2016-T-0104, 2017-Ohio-7453, ¶2.

Appellee appeared with her attorney at her first pre-trial on December 14, 2015, at which time her attorney requested a continuance because he was new to the case. *Id*. Appellee appeared at her second pre-trial on January 13, 2016, again with her attorney, who stated on the record that he had just received discovery, he was again unaware of the pre-trial because he never filed a notice of appearance, and asked for another continuance of the pre-trial. *Id*. Appellee appeared with her attorney at the third pre-trial on February 8, where they asked for another pre-trial in 30 days because they wanted time to analyze and consider the plea agreement offered by the State. *Id*.

On March 14, Appellee and her attorney again appeared in court and asked for the matter to be set for trial. *Id*. Appellee appeared in court for trial on March 28; the judge noted in his journal entry that, for good cause shown, the trial was reset. *Id*. at ¶3. Specifically, the trial was continued at Appellee's request due to her attorney's serious illness and unavailability. *Id*. at ¶20. Appellee appeared for trial on May 2, but the court reset the trial date to May 16 "due to conflicting notices." *Id*. at ¶3.

On May 16, Appellee appeared in Court with counsel, who then sought leave to withdraw. *Id*. The trial court granted this motion and reset the matter to allow Appellee to secure new counsel. *Id*. On June 7, the court set the matter for a pre-trial on June 20. *Id*. Appellee retained new counsel on June 16, and the new counsel immediately requested a continuance of the upcoming pre-trial in a written motion, which the court granted. *Id*. Appellee on June 29 filed a Motion to Dismiss based on a violation of her right to a speedy trial. *Id*. The State filed a timely response in opposition to Appellee's motion. *Id*.

The trial court on August 18, 2016 entered a judgment denying Appellee's Motion to Dismiss based on the speedy-trial statute. *Id*. at ¶4. In its judgment entry, the trial court found that 22 days were charged against the State, from Appellee's arrest on November 22, 2015 through the date of the first pre-trial on December 14, when Appellee appeared with counsel. *Id*. The trial court found that speedy-trial time was tolled between December 14, 2015 and March 14, 2016 due to the continuances requested by Appellee's counsel. *Id*. It held the 14 days between March 14 and the date the court set the case for trial on March 28 against the State. *Id*. The time between the trial date on March 28 and the new trial date of May 2 was also tolled due to Appellee's counsel's illness. *Id*. On May 2, the trial court continued the case from May 2 until May 16 due to "conflicting notices sent" and time was again tolled for those 2 weeks. *Id*. Time was tolled again between May 16 and June 16 while Appellee looked for new counsel, as the old counsel was allowed to withdraw. *Id*. Again, speedy-trial time was tolled from June 16 through June 29 due to Appellee's request for a continuance through her new counsel, and then it tolled from June 29 because Appellee filed a motion to dismiss for failure to prosecute within speedy-trial time. *Id*.

Appellee's case was scheduled for jury trial on September 28, 2016, as only 36 days of her 90 days of speedy trial time had expired when the trial court denied her motion to dismiss on August 18. *Id.* at ¶¶4-5. Appellee on October 3, 2016 ultimately changed her plea to no contest to the OVI, failure to comply, marked lanes, and a seatbelt violation. *Id*. at ¶5.

Appellee appealed, and the Eleventh District Court of Appeals reversed the trial court's finding of guilt because it held that the speedy-trial time had run:

> [t]he record demonstrates, however, that from December 14, 2015 through March 14, 2016, speedy-trial time was tolled due to continuances which were sought by appellant's counsel. The only record of these requests, however, are transcripts from discussions between the court and defense counsel. It is well-settled that a court only speaks through its journal entries. The court's journal entries, however, fail to disclose that appellant's counsel made the request. Strictly construing these points against the state, we must conclude the speedy-trial clock continued to run between these dates. The trial court erred in concluding otherwise. 90 additional days must therefore be charged against the state, for a total of 112 days. In light of this calculation, appellant's statutory speedy trial time had elapsed and she was entitled to discharge.

Id. at ¶18.

Despite finding that speedy-trial time had already run against Appellee by the time the case was scheduled for pre-trial on March 14, 2016, the appellate court found an alternate speedy-trial time reason for dismissing the charges. "Even if, however, we were to conclude that the transcription of counsel's requests was sufficient to toll the speedy-trial clock, appellant would still be entitled to discharge." *Id*. There were 14 additional days charged to the State between March 14 and March 28, when the case was originally scheduled for trial. *Id*. at ¶19. As of March 28, 2016, thirty-six days of Appellee's speedy-trial time had elapsed. *Id*. Then on March 28, the trial was continued until May 2 "for good cause shown." *Id*. at ¶20. The Eleventh District held that this time should also be charged against the State and should not have been

tolled because the trial court failed to set forth a reason for continuing the trial. *Id*. At this point, the appellate court held, seventy-one days had elapsed. *Id*.

The appellate court found reasonable the trial court's justification on May 2 to reset trial until May 16 "due to conflicting notices sent," and held that speedy-trial time was tolled between May 2 and May 16. *Id*. at ¶21. On May 16, when Appellee's counsel was allowed leave to withdraw and the matter was reset until June 20, the Eleventh District found that speedy-trial time was tolled until that date. *Id*. Speedy-trial time was tolled from June 16, when Appellee hired new counsel requested and received a continuance until June 29. *Id*. Time tolled again from June 29, when Appellee filed a Motion to Dismiss for want of speedy-trial time, until August 18, when the trial court denied the motion. *Id*. at ¶22. The Eleventh District held that, at this point, seventy-one days of speedy-trial time had elapsed, and that, by the time Appellee filed her motion to reconsider on September 7, the speedy-trial time had again run, since 91 days had elapsed. *Id*.

The appeals court ultimately held that, regardless of the approach, the trial court's judgment was wrong, so its reversed and discharged Appellee. *Id*. at ¶5, ¶22. One judge strongly dissented and wrote an opinion accordingly, with which the State agrees. The dissenting judge argued that, "[t]he only conclusion that can be reached based on the facts of this case is that these periods [December 14, 2015-March 14, 2016] are chargeable to Martin. It is evident from the record that each of the continuances was requested by counsel in order to be fully prepared and that the State was not responsible for this delay." *Id*. at ¶27 (Grendell, J, dissenting). She continued, "[l]ike in the foregoing analysis, it is self-evident that the illness of the defendant's attorney [on March 28, 2016] is not time that should be taxed against the State. The same

concerns discussed above in relation to [*State v.*] *Mincy*[, 2 Ohio St.3d 6 (1982)] apply here as well; the continuance was not granted after the speedy trial time would have expired." *Id*. at ¶31.

The State filed a Motion to Certify a Conflict with the Eleventh District Court of Appeals on September 11, 2017. The State of Ohio also timely filed a *Notice of Appeal* and *Memorandum in Support of Jurisdiction* with this Court on October 18, 2017 along with a *Notice of Pending Motion to Certify a Conflict*. The conflict motion was denied, and the State notified this Court of that decision on November 20. On March 14, 2018, this Court accepted Appellant's appeal on the sole assignment of error.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW: Speedy-trial time is not chargeable to the State – and speedy-trial time is tolled – when a defendant's request for a continuance is made in open court and on the record or the reasons for the request are evident from the record, regardless of whether or not the trial court specifically journalizes those reasons on its docket sheet.

Continuances granted at the request of the defense are not chargeable to the State under R.C. 2945.72(H). *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-186, ¶40. The Eleventh District Court of Appeals completely ignored this well-settled principle of law in this case. The State respectfully asks this Court to reverse that decision and apply the *Myers* precedent, that the speedy-trial time was tolled when Appellee's counsel requested continuances on the record and in open court.

In *Myers*, this Court specifically held that it "has never required that the entry identify the defendant as the requesting party. Thus, the fact that the entry did not list Myers as the requesting party is irrelevant *since the record shows* that it was Myers who specifically requested this delay." *Id*. at ¶54 (emphasis added). This Court emphasized, "this court has never required such identification [of the party being granted a continuance] in the journal entry. Moreover, the *record in this case indicates* the party requesting the continuance and the reason behind the request. Where the trial *record* affirmatively demonstrates the necessity for a continuance and the reasonableness thereof, such a continuance will be upheld." *Id*. at ¶62 (emphasis added), citing *Aurora v. Patrick*, 61 Ohio St.2d 107, 109, 399 N.E.2d 1220 (1980). Thus, the current law is that, so long as the trial record indicates which party requested the continuance, a journal entry or the docket sheet need not specifically identify which party made the request.

A. The Eleventh District Court of Appeals ignored what happened in open court and on the record and misapplied the appropriate legal standard.

The Eleventh District's decision can be confusing to follow, but there are two distinct time periods at issue here: (1) December 14, 2015 to March 14, 2016; and (2) March 28, 2016 to May 2, 2016. The Eleventh District Court of Appeals erred here and misapplied the law to both time periods. Ignoring the *Myers* precedent, the two-judge majority disregarded the transcript of discussions between the court and defense counsel which demonstrated that Appellee was the party requesting the continuances at issue and the reasons for the various continuances. The appellate court instead relied on the general principle that a court only speaks through its journal entries, which did not reflect those discussions. *Martin* at ¶18. But, under *Myers*, the Eleventh District's holding – that speedy-trial time had run and that each of Appellee's continuances requested by her counsel in open court should run against the State – is clearly erroneous and results in a mockery of justice, ignoring what the record reflects actually occurred in open court.

The most serious offenses with which Appellee was charged here were the OVI and failure to comply, misdemeanors of the first degree, *Martin* at ¶8, so she had to be brought to trial within 90 days of her arrest. R.C. 2945.71(B)(2). A defendant first establishes a prima facie case for discharge of their case when she demonstrates that she was not brought to trial within the statutory time limits in R.C. 2945.71. *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986). The burden then shifts to the State to demonstrate that the time limits were extended pursuant to R.C. 2945.72. *Id*.

The Eleventh District should have reviewed the trial court's decision on Appellee's motion to dismiss for a violation of speedy-trial provisions by giving due deference to the trial court's findings of fact if they were supported by competent and credible evidence and then independently reviewing whether the trial court properly applied the law to those facts. *State v.*

Riley, 162 Ohio App.3d 730, 2005-Ohio-4337, ¶19 (12th Dist.). When reviewing the legal issues presented in a speedy-trial claim, a reviewing court must strictly construe those provisions against the State. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996). "When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71." *Riley* at ¶19.

Both of the approaches that the Eleventh District relied upon to discharge Appellee as to both time periods were wrong under these standards. The record clearly shows that the time between November 22, 2015 (when Appellee was arrested) and December 14, 2015 (when Appellee appeared with counsel at her initial pre-trial) should count against the State. *Martin* at ¶2. At that point, 22 days must be charged to the State.

1. The speedy-trial time in the first period did not run because each and every continuance requested by Appellee and her counsel was in open court and on the record.

As for the first time period in question, time should have been tolled due to requests for continuances made be Appellee. First, on December 14, 2015, Appellee appeared in open court with her trial counsel; he requested a continuance on the record because he was new to the case. *Id*. The trial court granted this request and reset the matter to January 13, 2016. *Id*. Appearing on that date for a pre-trial with counsel and in open court, Appellee's attorney requested a continuance on the record again because he had just received discovery. *Id*. The trial court granted this request, as well, and set the matter for another pre-trial on February 8, 2016. *Id*. On February 8, 2016, Appellee appeared in open court with her counsel and asked for a thirty-day continuance on the record to have time to fully consider a plea offer that was extended by the State. *Id.* The trial court again granted this continuance and set the matter for a pre-trial on

March 14, 2016. *Id*. On March 14, 2016, Appellee appeared in open court with her counsel and requested that the matter be set for trial. *Id*. Trial was then set for March 28, 2016. *Id*. at ¶3.

According to the Eleventh District's own factual findings from the trial court proceedings, it is evident that Appellee appeared at each of these pre-trials in December, January, and February and requested continuances of the pre-trials through her attorney in open court and on the record. These findings alone indicate that none of this time should have been charged against the State under the law as set forth in *Myers* and in R.C. 2945.72(H). This is clear-cut. The Eleventh District nevertheless held that all of these continuances requested by Appellee should count against the State and that Appellee's speedy-trial time had run by March 14, 2016 due to the lack of written entries on the docket. *Id*. at ¶18.

2. The delay in the second time period was caused by the serious illness of Appellee's counsel, so the speedy-trial time should be tolled.

The Eleventh District then engaged in an alternate "what-if" analysis, where the time in the first time period at issue (between December 14, 2015 and March 14, 2016) was tolled. *Id*. at ¶18-22. The parties agree that the 14 days between March 14 (Appellee appeared with counsel and asked that the case be set for trial) and March 28 (trial date) count against the State. The majority then erroneously charged another 35 days to the State for this second time period between March 28 and May 2, 2016. *Id*. at ¶20. So if the time between December 14, 2015 and March 14, 2016 are tolled, then only 36 days had elapsed on March 28. The Court of Appeals agrees with this calculation. *Id*. at ¶19.

And it was on March 28 that Appellee appeared and the trial was continued until May 2, 2016 "for good cause shown," *id*. at ¶3, because of the serious illness from which Appellee's attorney was suffering at the time that prevented him from going forward with trial. *Id*. at ¶20. The trial court specifically noted in its order that "the court learned that Atty Gessner was

suffering a serious medical condition making it impossible for him to proceed with the trial. For that reason, the court agreed to continue the trial until Atty Gessner's medical condition was resolved, and his office advised the defendant that the trial would be reset. The court deems this continuance as attributable to either the defendant's own motion or as otherwise reasonable, as per ORC Section 2945.72(H)." (8/18/16 J.E., Appendix A-18). Consequently, the speedy-trial time should have been tolled from March 28 until May 2. R.C. 2945.72(H) ("period of 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"). The request for continuance was made by Appellee through her counsel, and it was counsel's own severe illness that prevented him from going forward with the trial that day, which is unquestionably reasonable.

That the court rescheduled the trial not for two weeks later but five indicates the seriousness of counsel's medical condition. The trial court also made note of this in its journal entry, "[o]n May 16, 2016, Atty Gessner had sufficiently recovered and appeared with his client. However, as a result of his lingering medical difficulties, Atty Gessner indicated that he would be unable to proceed with trial. Atty Gessner was granted leave to withdraw." (8/18/16 J.E., Appendix A-18). In spite of this, the Eleventh District held that these 35 days should be added to the earlier 36 for a total of 71 days of speedy-trial time having elapsed as of May 2. *Martin* at ¶20.

a. Appellee waived any argument about the second time period when she did not raise it on the direct appeal below.

These 35 days in the second time period should not count against the State for three reasons. First, Appellee never raised this particular issue with these dates on the direct appeal. In her merit brief, Appellee only argued that her speedy-trial time had run as of March 14, 2016. [T.d. 7]. She never made an alternate argument that, even if the speedy-trial time had not run by

March 14, 2016, then the time between March 28, 2016 and May 2, 2016 was not tolled. And while Appellee never addressed that issue, the State did argue that speedy-trial time was still tolled during this time because Appellee was the party who made this request through her attorney because of his severe illness.

b. The trial court docketed its judgment entry explaining why it granted the earlier continuance before the speedy-trial time had run, complying with *Mincy*.

Second, the trial court's continuance of the trial was "for good cause shown." In a later journal entry it explained that this was due to trial counsel's severe illness that prohibited him from going forward with the trial on March 28. This subsequent entry was entered by the court on its docket before the speedy-trial time had expired. By so doing, the trial court complied with the requirements set forth in *Mincy* that "[w]hen *sua sponte* granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." *State v. Mincy* (1982), 2 Ohio St.3d 6, syllabus, 441 N.E.2d 571. But, as the State will show below, *Mincy* does not necessarily even apply to this situation.

The Eleventh District erroneously held that "even if the continuance was entered because of counsel's illness, the trial court's post hoc justification in a subsequent judgment is insufficient to meet the Supreme Court's mandate that the trial court *must* set forth its reasons in its journal entry." *Martin* at ¶20. This misapplies and completely misinterprets *Mincy*. This Court did not preclude a trial court from setting forth its reasons for a *sua sponte* continuance in a subsequent journal entry; it in fact contemplated it. The only stipulation was that the judgment entry setting forth the reasons for the continuance "be spread upon its journal prior to the expiration of the statutory time limit." *Mincy*, 2 Ohio St.3d at 8. In *Mincy*, the trial court did not

enter the judgment entry explaining the continuance until after the speed-trial time had run. *Id*. at 7 ("sole issue to be determined in this appeal is whether a trial court may wait until after the expiration of the statutory time within which a criminal defendant must be brought to trial to file its journal entry continuing the case and setting forth the reasons for granting the continuance"). This argument is also bolstered by another decision by this Court, "[t]he record of the trial court must in some manner affirmatively demonstrate that a *sua sponte* continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095.

If the Eleventh District had correctly applied its own logic and *Mincy* to this case, it would have concluded that, when the trial court's judgment entry on August 18 explained that the continuance of March 28 was granted to Appellee due to the severe illness of her trial counsel and his inability to go forward at that time, only 71 days of Appellee's 90 days had run. (The State still strongly contends that only 36 days of speedy-trial time had elapsed as of August 18). By meeting the requirements in *Mincy* and entering its reason for the continuance on the record before day 90, none of the 35 days between the March 28 and May 2 trial dates should count against the State.

All agree that the speedy-trial time was tolled between May 2 and August 18 for various reasons: May 2 to May 16 "due to conflicting notices"; May 16 to June 16 as Appellee's counsel withdrew and her new counsel filed an appearance; June 16 to June 29, as new counsel filed a written motion for a continuance; June 29 to August 18, while Appellee's motion to dismiss was pending. On August 18, the trial court denied the motion to dismiss and set the case for a jury trial on September 28. At this point, the speedy-trial time began to run again. The State contends that, on August 18, only 36 days had elapsed. The Eleventh District held that 71 had elapsed, the

difference being the 35 days between March 28 and May 2. *Martin* at ¶22 (as part of its alternate holding).

On September 7, Appellee filed a motion to reconsider the judgment on her speedy-trial calculation. *Id*. at ¶22. Between August 18 and September 7, 20 days had elapsed, all chargeable to the State. The majority below held in its alternate holding that Appellee's speedy-trial time had run on September 7, which it found to be the 91st day. *Id*.

But, pursuant to *Mincy*, it was really only the 56th day. And the jury trial was scheduled to start on September 28, the 77th day. When Appellee changed her plea to no contest and was found guilty on October 3, 82 days had elapsed. There was no speedy-trial violation.

c. The request for a continuance on March 28 was not sua sponte but at Appellee's request, so *Mincy* does not apply.

Third, the ruling in *Mincy* does not even apply because *Mincy* involved the trial court granting a continuance on its own volition and not at a party's request. The trial court here granted each and every one of these continuances at Appellee's request. The court in *Mincy* specifically stated that an accused, "prior to the expiration of the statutory time limit, was entitled to one of the following: (1) a trial on the charges or, (2) if his case was being continued by the court or prosecutor, the reason he was not being tried." *Mincy*, 2 Ohio St.3d at 8. Then, in these two limited cases of continuance of trial by the court or the prosecutor only, the court in *Mincy* reasoned that the journal entry explaining the reason for the continuance must be entered before the expiration of the speedy-trial date. *Id*. Although that journal entry was entered by the trial court here on August 18, 2016, when only 71 days of Appellee's speedy-trial time had expired, this entry explaining the reason for the continuance was unnecessary, as it was not a *sua sponte* continuance granted to the State or by the court of its own accord, but was requested by Appellee.

The fact that the instant case did not involve a *sua sponte* continuance by the court is bolstered by the holding in *State v High*, 143 Ohio App.3d 232, 757 N.E.2d 1176 (7th Dist. 2001). The court held that *Mincy* was inapplicable because, "the continuance here was not made *sua sponte* by the court, but rather, was based on the state's request and on appellant's consent to search. Thus, as the continuance was not initiated by the trial court, appellant's arguments based on case law regarding *sua sponte* continuances must fail." *Id*. at 244. *See also State v. Michael*, 114 Ohio App.3d 523, 528, 683 N.E.2d 435 (7th Dist. 1996) (holding that "*Geraldo* and *Mincy* involved an issue where the ninety-day period in which appellant was to be brought to trial expired before the court filed a journal entry continuing the case. In our case, clearly the motions of June 7, 1991, under R.C. 2945.72(H), which states that 'The period of any continuance granted on the accused's own motion' extend the time by which an accused must be brought to trial, were admittedly initiated by the appellant and not by the prosecution or the trial court. Hence the time between June 7, 1991 and June 18, 1991, which is eleven days, is tolled for the computation of speedy trial."). No matter how this Court looks at it, the Eleventh District misapplied the law when it held that the second time period of 35 days between March 28 and May 2 counted against the State, and as such should be reversed.

3. Affirming Appellee's discharge creates a mockery of justice and will hamper the efficient administration of justice.

Besides the tedious time calculations, this case raises the larger question of the manner by which trial courts grant continuances and operate their dockets. The other Courts of Appeal have correctly followed the law in Ohio by holding that any requests for continuance by a defendant, whether on the record or in a journal entry, toll speedy-trial time under R.C. 2945.72.

The First District Court of Appeals held that "[w]hen the defendant's request for a continuance is in the record, the absence of an explanation for the continuance in a journal entry

should not allow a defendant to use the speedy-trial statute as a sword rather than the shield that it was designed to be." *State v. Stamps*, 127 Ohio App.3d 219, 225, 712 N.E.2d 762 (1st Dist. 1998). The First District decried the "formalistic litany" that the Eleventh District would read from *Mincy*. *Id*. "Because a *defendant's* request for a continuance must be in the record, the trial court's reason for the continuance in a journal entry is merely cumulative and not necessary. But it would certainly be advisable for the trial court to record it anyway, to prevent the extension from becoming an issue on appeal." *Id*. at 226 (emphasis in original). The court then identified the three steps that a trial court must perform for a continuance to toll speedy-trial time: the trial court must (1) record the continuance before the expiration of the speedy-trial time, (2) identify the party to whom the continuance is chargeable, and (3) indicate the underlying reason for the continuance. *Id*. That was done here.

The Fifth District Court of Appeals had earlier made a similar finding, that "[i]n a situation where it is alleged that the defendant is the cause of the delay, the court stated that it would carefully examine the facts in the case to prevent a 'mockery of justice' by discharging defendants if in fact the delay was occasioned by their acts." *Mansfield v. Clateman*, 5th Dist. Richland No. CA-2700, 1990 WL 16042 at *1 (Feb. 13, 1990), citing *State v. Bauer* (1980), 61 Ohio St.2d 83, 399 N.E.2d 555. A defendant who has had a continuance granted at her request "may not escape responsibility under the speedy-trial when the trial court finds that [s]he requested, by counsel, the continuance." *Id*. "Under those circumstances," the court held, "the failure to file a separate 'judgment' or 'journal entry' is a distinction without a difference." *Id*.

This Court should affirm that the purpose of the speedy-trial statute is not to allow a defendant to game the system but ensure that justice is done in a timely fashion. Failing to toll speedy-trial time when it was clearly evident from the record each and every time that

continuances were requested by Appellee and her counsel "stretches the bounds of reasonableness in applying the speedy trial law." *Martin* at ¶27 (Grendell, J., dissenting). The decision below, if upheld, will establish a blanket rule and violate the basic principle that "[i]t is necessary for courts to examine the facts of each particular case to 'prevent a 'mockery of justice' by discharging defendants if in fact the delay was occasioned by their acts.'" *Id*. at ¶30, quoting *Bauer*, 61 Ohio St.2d at 84. Why should legal matters be conducted in open court with a court reporter or other recording device if the reviewing courts ignore the requests made in and decisions arrived at in open court?

If a trial court could only continue matters through a careful docket entry or separate judgment entry explaining which party requested a continuance and why, the courts' ability to conduct their business and efficiently complete cases would be severely limited. This is not an excuse or opportunity for courts to ignore the speedy-trial statute. But it is an acknowledgement of how the municipal courts actually operate. Not every motion is filed in writing, and not every motion is opposed in writing. Most actions in the municipal courts are done orally, on the record, due to the high volume of cases that go through these courts.

This Court has long-ago rejected attempts by defendants like Appellee to use the speedy-trial statute to her advantage. When "there is no evidence whatsoever from which it can be concluded that the rescheduling of appellee's trial date * * * emanated from anything other than his own conduct" and a defendant "through his own design" has "chose[n] to stun this [statutory right to a speedy trial] and impede the prompt administration of this cause," defendants "will not be permitted to enjoy the protection of these statutes, * * * when by his actions he has waived their benefits." *Bauer*, 61 Ohio St.2d at 84. Instead, this Court held, "the proper focus of a court in circumstances such as these is upon the underlying source of the delay." *Id*., citing *People v.*

Fosdick (1967), 36 Ill.2d 524, 528-529, 224 N.E.2d 242. If it is alleged that the defendant is the cause for delay, a court needs to "carefully examine the facts in the case to prevent a 'mockery of justice' by discharging defendants if in fact the delay was occasioned by their acts." *Id*.

The Eleventh District Court of Appeals did not do so here. Allowing the decision below to stand would ignore the precedent from this Court in *Myers* and *Bauer*. It would also create a mockery of justice by allowing Appellee to be discharged in this case when all of the continuances of pre-trials and trials in this matter were requested by and granted to Appellee and her counsel. Appellee was not prejudiced by allowing her case to be continued, as she was not in custody when any of these continuances were requested and granted. She appeared in open court with her counsel and concurred in his requesting each of these continuances.

CONCLUSION

For these reasons, the State respectfully asks this Court to reverse the decision of the Eleventh District Court of Appeals and find that Appellee's speedy-trial time was tolled when she, through her counsel, requested continuances of her case. Continuances of pre-trial and trial dates that are requested by and granted to a defendant should not be charged against the State, and to do so would create a mockery of justice.

Respectfully submitted,

DENNIS WATKINS #0009949
Trumbull County Prosecuting Attorney

/s/ Deena L. DeVico
DEENA L. DeVICO #0080796
Assistant Prosecuting Attorney
(COUNSEL OF RECORD)

ASHLEIGH MUSICK #0096078
Assistant Prosecuting Attorney
160 High St. N.W., 4th Floor
Warren, Ohio 44481
Telephone No. (330) 675-2426
Fax No. (330) 675-2431
psdevico@co.trumbull.oh.us

COUNSEL FOR APPELLANT,
THE STATE OF OHIO

PROOF OF SERVICE

I do hereby certify that a copy of the foregoing *Appellant's Merit Brief* was sent by regular U.S. Mail and email (if noted) on May 3, 2018, to the attorney for the Appellee, Katherine R. Ross-Kinzie, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, katherine.ross-kinzie@opd.ohio.gov, and to Danielle K. Martin, 2399 Bazetta Road, Warren, Ohio 44481.

/s/ Deena L. DeVico
DEENA L. DeVICO (#0080796)
Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

	)	
	)	CASE NO.
	)	
STATE OF OHIO,	)	
Plaintiff-Appellant	)	
	)	
	)	
	)	On appeal from the Trumbull County
-vs-	)	Court of Appeals Nos. 2016-T-0103
	)	2016-T-0104
	)	
DANIELLE K. MARTIN,	)	
Defendant-Appellee	)	Trumbull County Court,
	)	Central District Case Nos. 2015
	)	TRC-01554, 2015-CRB-00443

****

NOTICE OF APPEAL
STATE OF OHIO

****

DENNIS WATKINS (#0009949)
Trumbull County Prosecuting Attorney
DEENA L. DeVICO (#0080796)
ASHLEIGH J. MUSICK (#0096078)
Assistant Prosecuting Attorneys
160 High St. N.W., 4th Floor
Warren, Ohio 44481

Telephone: (330) 675-2426
Fax: (330) 675-2431
E-mail: DeenaLDevico@gmail.com

Counsel for Appellant,
The State of Ohio

ALBERT PALOMBARO, ESQ.
4822 Market Street, Suite 301
Boardman, Ohio 44512

Telephone: (330) 629-9030

Counsel for Appellee,
Danielle K. Martin

Appellant, the State of Ohio, hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Judicial District, entered in 11th District Court of Appeals Case Nos. 2016-T-0103, 2016-T-0104, on September 5, 2017.

This case is one of public or great general interest and involves a substantial constitutional question. Leave to appeal should be granted.

Respectfully submitted,
DENNIS WATKINS (#0009949)
Trumbull County Prosecuting Attorney by:

/s Deena L. DeVico
DEENA L. DeVICO (#0080796)
ASHLEIGH J. MUSICK (#0096078)
Assistant Prosecuting Attorneys
160 High St. N.W.
Warren, Ohio 44481
Phone: (330) 675-2426
Fax: (330) 675-2431

COUNSEL FOR APPELLANT,
THE STATE OF OHIO

PROOF OF SERVICE

I do hereby certified that a copy of the foregoing Notice of Appeal was sent by ordinary U.S. Mail to Albert Palombaro, Esq, Counsel for Defendant-Appellee, Danielle K. Martin, at 4822 Market Street, Suite 301 Boardman, Ohio 44512, on this 18th day of October, 2017.

/s Deena L. DeVico
DEENA L. DeVICO (#0080796)
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2016-T-0103 2016-T-0104
DANIELLE K. MARTIN,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Trumbull County Court, Central District, Case Nos. 15 TRC 01554 A and 15 CRB 00443 A.

Judgment: Reversed and vacated.

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Albert A. Palombaro, 4822 Market Street, Boardman, OH 44512 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Danielle K. Martin, appeals from the trial court's final judgments following her no-contest pleas to operating a vehicle while impaired, failure to comply, marked lanes, and a seat belt violation. At issue is whether the trial court erred in denying her motion to dismiss all charges due to a violation of her right to a speedy trial. We reverse the trial court's judgment and vacate her convictions.

{¶2} Following a pursuit by officers on November 21, 2015, appellant was charged with operating a vehicle under the influence, no seatbelt, failure to stop at a red light, reckless operation, a marked lanes violation, open container, and failure to comply. A pretrial was set for December 14, 2015. On that date, appellant appeared with her attorney who, because he was new to the case, requested the matter be reset for pretrial. The court granted the request and reset the case for January 13, 2016. On that date, appellant again appeared with her attorney, who advised the court he had only received notice of the pretrial the previous day; he stated he had just received discovery and, as a result, again requested the court to reset the matter. The court granted the request and a pretrial was reset for February 8, 2016. On that date, appellant appeared with counsel. Counsel advised the state had extended a plea offer to appellant and, in order to fully consider the offer, requested a thirty-day continuance. The court granted the request. The matter was set for another pretrial on March 14, 2016. On that date, counsel for appellant indicated plea negotiations had not been "resolved." Counsel therefore requested the court to set the matter for trial.

{¶3} Trial was set for March 28, 2016. On that date, appellant appeared with counsel, but, "for good cause shown," the court reset the trial for May 2, 2016. On May 2, 2016, the trial court reset the trial date "[d]ue to conflicting notices" for May 16, 2016. On that date, appellant appeared with counsel. Counsel, however, sought leave to withdraw. The court granted counsel's motion and "reset [the] matter * * * to allow [appellant] to secure new counsel." On June 7, 2016, the matter was set for pretrial on June 20, 2016. On June 16, 2016, appellant retained new counsel and requested a continuance of the June 20 pretrial, which was granted. On June 29, 2016, appellant's

counsel filed a motion to dismiss based upon a violation of her right to a speedy trial, to which the state duly responded.

{¶4} On August 18, 2016, the trial court entered judgment denying appellant's motion. The court found 22 days were charged against the state from the date of the commencement of the speedy-trial clock, November 22, 2015 through the date of the first pretrial, December 14, 2015. The court determined speedy-trial time tolled from December 14, 2015 through March 14, 2016, due to motions to continue made by appellant's counsel. The court found 14 days charged against the state between March 14, 2016, when counsel requested the matter be set for trial, and March 28, 2016, when appellant appeared with counsel for trial, but the matter was reset for May 2, 2016. The court found the speedy-trial clock tolled from May 2, 2016 through May 16, 2016, the newly-set date of the trial, due to an illness from which appellant's counsel was suffering. The trial court further found the clock tolled from May 16, 2016, the date counsel was granted leave to withdraw, through June 16, 2016, due to appellant's lack of counsel. Finally, the court determined the speedy trial clock tolled from June 16, 2016, the date new counsel moved for a continuance, through June 29, 2016, the date of the filing of appellant's motion to dismiss. In total, the court found 36 days had passed for the purpose of speedy-trial calculation and concluded appellant's motion to dismiss must be denied.

{¶5} The trial court set appellant's case for jury trial on September 28, 2015. Appellant filed a motion to reconsider the trial court's judgment on September 7, 2016. It does not appear the trial court entered a formal ruling on the motion but, on October

3, 2016, appellant changed her plea to no contest to OVI, failure to comply, marked lanes and a seatbelt violation. Appellant filed this appeal assigning the following error:

{¶6} "The court erred when it denied the defendant's motion to dismiss for want of speedy trial."

{¶7} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Pachay*, 64 Ohio St.2d 218, 219 (1980). Ohio's speedy trial statute codifies the constitutional guarantee of a speedy trial. *Id.* Speedy trial issues present mixed questions of law and fact. *State v. Hiatt*, 120 Ohio App.3d 247, 261 (4th Dist.1997). We review questions of law de novo and apply the clearly erroneous standard to questions of fact. *State v. Evans*, 11th Dist. Trumbull No. 2003-T-0132, 2005-Ohio-1787, ¶32. Due deference is accorded the trial court's factual findings if they are supported by competent, credible evidence, but we freely review the application of law to the facts. *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773 (11th Dist.) When reviewing the legal issues presented in a speedy-trial challenge, appellate courts must strictly construe the relevant statutes against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57 (1996). Appellate courts must count the days of delay chargeable to either side and determine whether the matter was tried within the time limits set by R.C. 2945.71. *State v. Blumensaadt,* 11th Dist. Lake No. 2000-L-107, 2001 WL 1116458, *6 (Sept. 21, 2001).

{¶8} R.C. 2945.71(B)(2) requires that a defendant charged on a first-degree misdemeanor be brought to trial within 90 days after arrest or service of summons. Appellant's highest charge was a misdemeanor of the first degree; thus, the state was

required to bring her to trial within 90 days of her arrest. Moreover, R.C. 2945.72 provides, in relevant part:

> {¶9} "The time within which an accused must be brought to trial * * * may be extended only by the following:
>
> {¶10} "* * *
>
> {¶11} "(C) Any period of delay necessitated by the accused's lack of counsel * * *;
>
> {¶12} "* * *
>
> {¶13} "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;
>
> {¶14} "* * *
>
> {¶15} "(H) The period of 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."

{¶16} The Ohio Supreme Court has held the granting of a continuance must be recorded by the trial court in its journal entry. *See e.g. State v. Siler*, 57 Ohio St.2d 1, 2 (representations made by defense counsel that he was unable to proceed with the case until a later time, and trial was scheduled for a later time, were insufficient to toll speedy-trial time because no entry was journalized indicating the motion was made.); *see also State v. Ignat*, 11th Dist. Portage No. 2010-P-0037, 2011-Ohio-871, ¶22. Moreover, "'the journal entry must identify the party to whom the continuance is chargeable.'" *Id.*, quoting *State v. Geraldo*, 13 Ohio App.3d 27, 30-31 (6th Dist.1983); *see also* R.C. 2945.72(H). And, finally, if the trial court is acting sua sponte, the journal entry must so indicate and must set forth the reasons supporting the continuance. *State v. Mincy*, 2 Ohio St.3d 6 (1983), syllabus. "The record of the trial court must in some manner

affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee*, 48 Ohio St.2d 208 (1976).

{¶17} In this case, appellant did not waive her right to a speedy trial; and, because she was not brought to trial within 90 days after her arrest, she established a prima facie case for a speedy-trial violation. Hence, the burden shifts to the state to establish any applicable tolling exceptions under R.C. 2945.72. If the state fails to meet its burden, the defendant must be discharged. R.C. 2945.73; *State v. Gray*, 2d Dist. Montgomery No. 20980, 2007-Ohio-4549, ¶15.

{¶18} It is clear that the period between November 22, 2015, the commencement of the speedy-trial clock, through December 14, 2015, 22 days, must be charged against the state. The record demonstrates, however, that from December 14, 2015 through March 14, 2016, speedy-trial time tolled due to continuances which were sought by appellant's counsel. The only record of these requests, however, are transcripts from discussions between the court and defense counsel. It is well-settled that a court only speaks through its journal entries. *Mincy*, *supra*, at 8. The court's journal entries, however, fail to disclose that appellant's counsel made the request. Strictly construing these points against the state, we must conclude the speedy-trial clock continued to run between these dates. *See Siler*, *supra*. (Supreme Court declined to accept state's argument that defense counsel's statements that he was unable to proceed until a later time and trial was, in fact, scheduled for a later time, insufficient to function as a formal continuance.) The trial court erred in concluding otherwise. 90 additional days must therefore be charged against the state, for a total of 112 days. In light of this calculation, appellant's statutory speedy trial time had elapsed and she was

entitled to discharge. Even if, however, we were to conclude that the transcription of counsel's requests was sufficient to toll the speedy-trial clock, appellant would still be entitled to discharge.

{¶19} On March 14, 2016, counsel appeared with appellant and the matter was set for trial on March 28, 2016, these 14 days were chargeable to the state. Assuming the time period between December 14, 2015 and March 14, 2016 was tolled, a total of 36 days had elapsed for the purpose of speedy-trial calculation.

{¶20} On March 28, 2016, counsel appeared with appellant and, "[f]or good cause shown," continued the matter until May 2, 2016. In its judgment entry, the trial court stated it continued the trial due to a serious illness from which appellant's attorney was suffering which prevented him from proceeding with trial. The trial court's journal again fails to reflect whether appellant's counsel or the state requested the continuance or whether the continuance was entered sua sponte. If it was the court, its statement that it was entered for "good cause" fails to set forth the reason justifying the conclusion. In *Mincy*, *supra*, the Supreme Court determined that a trial court's sua sponte entry of a continuance, without a journal entry setting forth the reasons for the decision, is improper and contrary to law. *Id.* at syllabus. Hence, even if the continuance was entered because of counsel's illness, the trial court's post hoc justification in a subsequent judgment is insufficient to meet the Supreme Court's mandate that the trial court *must* set forth its reasons in its journal entry. *Id.* Accordingly, the 35 days between March 28 and May 2 are chargeable to the state. At this point, accordingly, 71 days had elapsed.

{¶21} On May 2, 2016, the court reset trial for May 16, 2016, "due to conflicting notices sent." Although it is not entirely clear to whom conflicting notices were sent, this justification may also be deemed as an otherwise reasonable basis to continue the matter. This justification was entered in the court's journal. Next, on May 16, 2016, appellant's counsel sought to withdraw. According to the court, this motion was occasioned by his lingering medical difficulties. The court consequently granted the motion and reset the matter for June 20, 2016. On June 16, 2016, appellant obtained new counsel, who moved for a continuance, which was granted. And, on June 29, 2016, counsel moved to dismiss. Pursuant to R.C. 2945.72(C) and (H), the period between May 16, 2016 and June 29, 2016 was tolled.

{¶22} On August 18, 2016, the trial court denied the motion, erroneously finding 36 days had elapsed for the purpose of speedy-trial calculation. At this time, if we do not charge the time between December 14, 2015 and March 14, 2016, 71 days had elapsed. With this assumption in mind, the trial court properly denied appellant's motion. Appellant filed a motion to reconsider the judgment on September 7, 2016. Between the judgment and the filing of the motion 20 days had elapsed. Charging the additional 20 days, 91 days are chargeable to the state. At this time, appellant's speedy-trial clock had elapsed. Although the court did not expressly rule on appellant's motion for reconsideration, its silence requires us to assume it was overruled. Appellant, however, was entitled to discharge upon the date of its filing. We accordingly hold that, to the extent the time between December 14, 2015 and March 14, 2016 is chargeable to the state, because the court failed to journalize who moved for the continuance, the trial court erred in failing to grant appellant's June 29, 2016 motion to

dismiss for speedy-trial violation. If, however, we deemed the evidence of counsel's oral motions sufficient, appellant's speedy-trial time had ran upon the date counsel filed the motion for reconsideration on September 7, 2016. We accordingly hold appellant is entitled to discharge due to a speedy-trial violation. The trial court's judgment is reversed and appellant's pleas and convictions are accordingly vacated.

{¶23} Appellant's assignment of error has merit.

{¶24} For the reasons discussed in this opinion, the judgment of the Trumbull County Court, Central District, is reversed and appellant's convictions are vacated.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶25} I dissent from the majority's decision to reverse and vacate Martin's conviction based on the conclusion that her right to a speedy trial was violated. Given that Martin was responsible for several lengthy delays which tolled time in this matter, dismissal is unwarranted since the time for a speedy trial had not yet expired.

{¶26} The conclusion that Martin's speedy trial rights were not violated is based on a careful evaluation of multiple periods of delay. The first extended period of delay was caused when several requests for continuances were made by Martin or her counsel. On December 14, 2015, defense counsel stated that he was unaware the case was set for pretrial, was new to the case, and discussed setting a new pretrial, scheduled for January 13, 2016. At that pretrial, counsel again requested the matter to

be reset, noting that he had just received discovery. On the rescheduled date, February 8, 2016, counsel advised that he needed an additional thirty-day continuance to consider a plea offer, and the matter was reset for March 14, 2016.

{¶27} The only conclusion that can be reached based on the facts of this case is that these periods are chargeable to Martin. It is evident from the record that each of the continuances was requested by counsel in order to be fully prepared and that the State was not responsible for this delay. The majority contends that time was not tolled since the trial court's journal entries "fail to disclose that appellant's counsel made the request." This stretches the bounds of reasonableness in applying the speedy trial law. All parties, as well as this court, can plainly discern from the transcript the exact reasons why the continuances were granted and time was tolled: appellant's counsel requested the continuances. This court should not ignore what is evident from the record. While it is accurate that the court speaks through its journal entries, the court clearly stated it granted the continuances. The fact that it did not provide the reasons in the entries does not mean that it had some justification other than the one evident from the record.

{¶28} The majority cites *Mincy* and *Siler, supra,* in support of the argument that a journal entry's failure to charge the delay to a party prevents time from tolling. Courts have properly distinguished these cases under similar circumstances.

{¶29} For example, in *State v. Michael*, 114 Ohio App.3d 523, 683 N.E.2d 435 (7th Dist.1996), the defendant argued that *Mincy* applied since the court did not identify the party against whom the continuance was chargeable or the reasons justifying the continuance, and thus, no delay could be charged to him. The Seventh District properly explained that *Mincy* involved a matter "where the ninety-day period in

which appellant was to be brought to trial expired before the court filed a journal entry continuing the case." *Id.* at 528. It further noted that the motions in question were initiated by the appellant and not sua sponte, as was the case in *Mincy*. *Id.* at 528-529. The same circumstances are present here, where Martin requested each of the delays described above.

{¶30} Other opinions have also emphasized that compliance with *Mincy* is not necessary where the continuance issued under R.C. 2945.72(H) did not extend the trial beyond the speedy trial deadline and was not issued sua sponte. *Mansfield v. Clateman*, 5th Dist. Richland No. CA-2700, 1990 WL 16042, *1-2 (Feb. 13, 1990); *State v. High*, 143 Ohio App.3d 232, 244-245, 757 N.E.2d 1176 (7th Dist.2001). Thus, the requirement to explain the basis for charging the delay has no reasonable or necessary applicability when it is clear, as it was here, who has requested the delay. It is necessary for courts to examine the facts of each particular case to "prevent a 'mockery of justice' by discharging defendants if in fact the delay was occasioned by their acts." *State v. Bauer*, 61 Ohio St.2d 83, 84, 399 N.E.2d 555 (1980), citing *People v. Fosdick*, 36 Ill.2d 524, 528-529, 224 N.E.2d 242 (1967).

{¶31} The majority also determines that time should not have tolled for the period during which the trial court granted a continuance for "good cause," which it described as based on an illness by Martin's attorney, since the court failed to clarify which party requested a continuance or whether it was granted sua sponte. According to the trial court, this tolled time for approximately two months from March to May of 2016. Like in the foregoing analysis, it is self-evident that the illness of the defendant's attorney is not time that should be taxed against the State. The same concerns

discussed above in relation to *Mincy* apply here as well; the continuance was not granted after the speedy trial time would have expired.

{¶32} Interestingly, Martin's brief does not even provide argument as to whether the delay in March to May was proper, but instead advanced only the incorrect argument that time did not toll during the various continuances her counsel requested to prepare, conduct discovery, and review a plea offer.

{¶33} The decision to vacate Martin's conviction is part of a common and troubling trend by certain judges on this Court of allowing criminal defendants to go free and not be held accountable due to perceived procedural deficiencies. *See Girard v. Giordano*, 11th Dist. Trumbull No. 2016-T-0071, 2017-Ohio-5647 (discharging a defendant in relation to charges of cruelty to animals when the court failed to require an explanation of facts at the plea hearing, rather than remanding for the court to follow the proper procedure in accepting the defendant's plea). While it is necessary for this court to uphold procedural rules relating to criminal matters, stretching the application of these rules to absolve defendants of any wrongdoing, in cases where dismissal of the charges is unnecessary to protect the rights of defendants, is improper.

{¶34} For the foregoing reasons, including that Martin's right to a speedy trial was not violated and delays were based on her own counsel's requests, the judgment of the lower court should be affirmed. I respectfully dissent.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

DANIELLE K. MARTIN,

Defendant-Appellant.

CASE NOS. 2016-T-0103
2016-T-0104

MANDATE - Reversed & Vacated
Court T.C. Central District
Case No. 15 TRC 01554A
15 CRB 00443A

For the reasons stated in the opinion of this court, the sole assignment of error has merit. It is the judgment and order of this court that the judgment of the Trumbull County Court, Central District, is reversed and appellant's conviction vacated.

Costs to be taxed against appellee.

PRESIDING JUDGE CYNTHIA WESTCOTT RICE

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

DANIELLE K. MARTIN,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NOS. 2016-T-0103
2016-T-0104

For the reasons stated in the opinion of this court, the sole assignment of error has merit. It is the judgment and order of this court that the judgment of the Trumbull County Court, Central District, is reversed and appellant's conviction vacated.

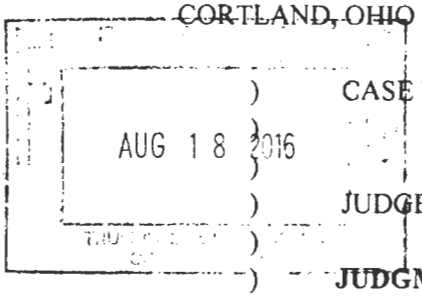
Costs to be taxed against appellee.

PRESIDING JUDGE CYNTHIA WESTCOTT RICE

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

IN THE TRUMBULL COUNTY COURT
CENTRAL DISTRICT
~~CORTLAND, OHIO~~



STATE OF OHIO,	)	CASE NO. TRC 1501554A-F
	)	CRB 1500443A&B
vs.	)	JUDGE THOMAS A. CAMPBELL
DANIELLE K. MARTIN.	)	**JUDGMENT ENTRY**

This matter came on before the court upon Defendant's Motion to Dismiss based upon alleged violation of Defendant's speedy trial rights.

It is true that the Defendant never filed a waiver of her right to a speedy trial in this action. However, that is not necessarily the end of the inquiry. The court has examined the record, including video recordings of all appearance before the court, and determines as follows:

From November 22 to December 14, 2015: **22 days elapsed**;

On December 14, 2015, defendant appeared with Atty Gessner and requested the matter be "reset for pretrial." The court believes this request to reset the pretrial can be fairly characterized as being a request to continue in accordance with ORC Section 2945.72 (H). That reset pretrial came on before the court on January 13, 2016. **0 days elapsed.**

On January 13, 2016, defendant appeared with Atty Gessner. The court noted some apparent confusion existed about the notices of this pretrial. Nevertheless, Atty Gessner requested the matter again be "reset for pretrial." The court believes this request to reset the pretrial can be fairly characterized as being a request to continue in accordance with ORC Section 2945.72 (H). That reset pretrial came on before the court on February 8, 2016. **0 days elapsed.**

On February 8, 2016, Atty Gessner appeared without his client, advised the court of a possible plea offer being considered, and requested the matter be reset for pretrial in approximately 30 days. The court believes this request to reset the pretrial can be fairly characterized as being a request to continue in accordance with ORC Section 2945.72 (H). The reset pretrial came on before the court on March 14, 2016. **0 days elapsed.**

On March 14, 2016, Atty Gessner appeared with the defendant for the reset pretrial, and indicated the matter was still not resolved. The judge ordered the matter set for trial. The trial date was scheduled for March 28, 2016. **14 days elapsed between March 14 and March 28, 2016.**

On some unknown date between March 14 and March 28, 2016, the court learned that Atty Gessner was suffering a serious medical condition making it impossible for him to proceed with the trial. For that reason, the court agreed to continue the trial until Atty Gessner's medical condition was resolved,

and his office advised the defendant that the trial would be reset. The court deems this continuance as attributable to either the defendant's own motion or as otherwise reasonable, as per ORC Section 2945.72 (H). The court reset the trial date for May 2, 2016. **0 days elapsed.**

On some unknown date between March 28, 2016 and May 2, 2016, the court learned that Atty Gessner was still suffering a serious medical condition making it impossible for him to proceed with the trial. For that reason, the court again agreed to continue the trial until Atty Gessner's medical condition was resolved, and his office advised the defendant that the trial would be reset. The court deems this continuance as attributable to either the defendant's own motion or as otherwise reasonable, as per ORC Section 2945.72 (H). The court reset the trial date for May 16, 2016. **0 days elapsed.**

On May 16, 2016, Atty Gessner had sufficiently recovered and appeared with his client. However, as a result of his lingering medical difficulties, Atty Gessner indicated that he would be unable to proceed with the trial. Atty Gessner was granted leave to withdraw, and the matter was ordered reset to allow defendant the opportunity to secure new counsel. The court deems this reset as a continuance attributable to either the defendant's own motion or as otherwise reasonable, as per ORC Section 2945.72 (H).

After May 16, 2016, the clerks attempted to determine who would be defendant's new counsel, for the purpose of rescheduling. Either Atty Gessner, his office or the defendant apparently suggested that Atty Robert Burkey would be defendant's new counsel. Therefore, the clerk did speak with Atty Burkey, who requested an "extension of time to prepare" and give the defendant "time to decide." Ultimately, on June 1, 2016, Atty Burkey informed the clerk that he would not be representing defendant in this matter.

Having received no information as to defendant's new counsel, on June 7, 2016 the clerk scheduled the matter for a pretrial on June 20, 2016, and sent notice of same directly to defendant.

On June 16, 2016, Atty Palombaro made his first appearance in this matter and requested a continuance of the pretrial scheduled for June 20, 2016. The clerk, in consultation with Atty Palombaro, or his office, accordingly reset the pretrial on June 29, 2016.

On June 29, 2016, Atty Palombaro appeared with the defendant for that pretrial, and filed a Motion to Dismiss based upon defendant's speedy trial rights. The court granted the State seven (7) days to review defendant's motion and file responsive pleadings, which it did on July 6, 2016. On July 12, 2016, Atty Palombaro filed supplemental pleadings addressing State's Answer to his motion.

The court believes that the time period between May 16, 2016 and June 16, 2016 is attributable to defendant's lack of counsel in accordance with ORC Section 2945.72 (C). Therefore, **0 days elapsed.**

The time between June 16, 2016 and June 20, 2016 is attributable to defendant's own motion to continue in accordance with ORC 2945.72 (H). Therefore, **0 days elapsed.**

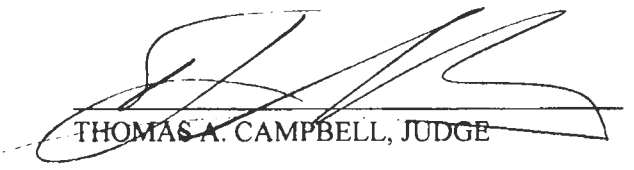
The time subsequent to June 20, 2016 is attributable to defendant's motion here in accordance with ORC Section 2945.72 (E). Therefore, **0 days elapsed.**

Reviewing the periods set forth above, it appears that, for purposes of defendant's speedy trial rights, **only thirty-six (36) days have elapsed.**

Therefore, Defendant's Motion to Dismiss is denied. The clerk is ordered to set this matter for jury trial.

IT IS SO ORDERED.

DATED: 8-19-16



THOMAS A. CAMPBELL, JUDGE

2945.71 Time for trial.

(A) Subject to division (D) of this section, a person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after the person's arrest or the service of summons.

(B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

(1) Within forty-five days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after the person's arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after the person's arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401 or sections 2963.30 to 2963.35 of the Revised Code.

Effective Date: 10-29-1999.

2945.72 Extending time for hearing or trial.

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

(C) Any 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 accused upon his request as required by law;

(D) Any period of delay occasioned by the neglect or improper act of the accused;

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

(H) The period of 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;

(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.

Effective Date: 11-01-1978.