IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.
Plaintiff-Appellee,	:	On Appeal From the Franklin County Court of Appeals
vs.	:	Tenth Appellate District
PHILLIP B. DAY,	:	Court of Appeals Case Nos. 18AP-265
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT PHILLIP B. DAY

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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This case raises a substantial constitutional question and matters of public or great general interest. This Honorable Court should accept jurisdiction to address the role an appellate court should take when determining whether a trial court has properly analyzed a defendant's claim that his Sixth Amendment right under the United States Constitution to a speedy trial has been violated in light of numerous Ohio cases that state that an appellate court will not analyze an issue that a trial court failed to analyze.

Ohio courts have consistently held that an appellate court should not analyze an issue that a trial court was presented with and failed to analyze. Inasmuch as evidence must be presented in support of or against a claim of a speedy trial violation, the analysis must necessarily begin with the trial court. The trial court in this matter, as will be discussed below, failed to even cite the seminal case on this issue, *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), much less conduct a full analysis as is required under that case. Despite this, the appellate court proceeded to conduct its own analysis of the *Barker* factors without the benefit of having evidence presented to the trial court. Trial counsel properly requested a hearing pursuant to the local rule to present evidence which the trial court never permitted. The Tenth District should have remanded the case to the trial court to conduct a hearing and gather evidence.

This Honorable Court should accept jurisdiction to determine if an appellate court errs when it conducts its own analysis of a speedy trial violation when the trial court failed to permit a hearing to gather evidence or to conduct a proper analysis under *Barker*.

STATEMENT OF THE CASE AND FACTS

On August 1, 2013, the Franklin County Grand Jury indicted appellant Phillip Day with two counts of Nonsupport of Dependents, both felonies of the fifth degree in violation of O.R.C. 2919.21. (R. #3) A warrant was issued to 4835 Malibu Drive in Lake Wales, Florida. (R. #1)

On February 24, 2017, this warrant was withdrawn and a summons was issued to the appellant at 678 Mason Street in Mason, WV. (R. #7) An arraignment was held on March 29, 2017 where the appellant entered a not guilty plea and the matter was scheduled for trial. (R. #16) On June 28, 2017, counsel for appellant filed a motion to dismiss alleging a violation of his constitutional right to a speedy trial. (R. #29) The state filed a memo contra on July 20, 2017. (R. #36) On September 11, 2017, the court issued a decision and entry denying the appellant's motion to dismiss. (Appendix, A-12) On October 27, 2017, defense counsel filed a motion to reconsider (R. #43) and the state responded on November 7 (R. # 47). On March 13, 2018, the court briefly heard oral arguments on defense counsel's motion to reconsider. The court again denied the motion. (Tr. 3/13/18, p. 2-5)

After a brief recess, the appellant entered no contest pleas to both counts of the indictment. (R. #57) Upon agreement of the parties, the court proceeded immediately to sentencing and placed Mr. Day on community control for thirty six months. The court notified Mr. Day that he would receive a twenty-four month sentence if he violated the terms of his community control. (R. #64) The appellant perfected a timely appeal to the Tenth District Court of Appeals.

The facts forming the basis of the indictment are that, on February 6, 2003, the appellant was ordered to pay child support for his son B.G. in the amount of $176.35 per month effective August 16, 2002. He failed to pay more than 26 out of 104 consecutive weeks during the

indictment periods. (Tr. 3/13/18, p. 14-15)

The trial court did not hold an oral hearing on appellant's motion to dismiss. The only facts available were those alleged in the appellant's motion. Counsel for appellant alleged that Mr. Day was making fairly regular payments during the pendency of the indictment and that he "maintained a reasonably stable residence." (Defendant's motion to dismiss, p. 3). The state did not counter these allegations in its memo contra but alleged that the case was "largely dependent on preserved records such as his child support history, employment, and medical condition during the time set forth in the indictment." (State's memo contra, p. 3)

Counsel filed a timely appeal and, on April 9, 2019, the Tenth District issued a 2-1 ruling upholding the trial court's denial of appellant's motion to dismiss. *State v. Day*, 10th Dist. No. 18AP-265, 2019-Ohio-1327. (Appendix, A-3) The majority opinion did not agree that the trial court failed to adequately analyze the *Barker* factors but also did its own consideration of the *Barker* factors and determined that the factors weighed in favor of the state and the trial court did not err in overruling appellant's motion to dismiss. (Appendix, A-8-9) The dissenting judge would have remanded the matter to the trial court to determine if evidence should be taken and to conduct a proper analysis under *Barker*. The dissenting judge noted that "I cannot find that the trial court in any real sense considered the *Barker* factors or performed the required analysis." The dissenting judge did not believe it was appropriate for the appellate court to perform the analysis for the first time on appeal. (Appendix, A-10)

LAW AND ARGUMENT

Proposition of Law: An appellate court errs when, for the first time, it analyzes a speedy trial claim under *Barker v. Wingo* that the trial court was required to analyze but either declined to consider or failed to fully analyze.

"Appellate review of a trial court's decision on a motion to dismiss for a violation of the speedy trial requirements presents a mixed question of law and fact. *State v. James*, 4th Dist. Ross No. 13CA3393, 2014-Ohio-1702, ¶ 23; *State v. Brown*, 131 Ohio App.3d 387, 391, 722 N.E.2d 594 (4th Dist. 1998). Thus, appellate courts will defer to a trial court's findings of fact as long as competent, credible evidence supports them. *Brown*, 131 Ohio App.3d at 391, 722 N.E.2d 594. Appellate courts then independently determine whether the trial court properly applied the law to the facts." *State v. Anders*, 4th Dist. Ross No. 17CA3595, 2018-Ohio-1375, ¶ 29. Inherent in this notion, however, is that the trial court must have given full and fair consideration to the factual and legal issues prior to an appellate court ruling as numerous Ohio courts have held that an appellate court will not rule on an issue the trial court failed to properly consider. In this matter, the trial court did not conduct any meaningful analysis of the factual or legal issues prior to issuing a decision. The court of appeals erred in conducting its own analysis when the trial court failed to do a proper analysis of the factual and legal issues.

In the trial court, counsel for appellant filed a motion to dismiss on June 28, 2017. In it he alleged that his speedy trial rights under the United States Constitution were violated and cited to *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The motion went into detail regarding the four-part test that the *Barker* court stated trial courts must engage in when deciding a Constitutional speedy trial case. In its decision overruling the appellant's motion, the trial court never mentioned *Barker v. Wingo* and appeared to only reference one of the *Barker* factors (prejudice) discussed *infra*. (Appendix, A-12) Counsel had asked in his original motion

for an oral hearing pursuant to Franklin County Common Pleas Court Local Rule 75.01 which provides in relevant part that "[a] party may request a hearing in advance of trial to consider a motion. If this is not done, the motion will be considered on the day of trial." (R. #29, p. 1) The trial court neither held an oral hearing nor waited until the day of trial to rule on the motion. The trial court ruled on the motion on September 11, 2017 when the next trial date was not until October 30, 2017. (R. # 39 and 40)

Counsel filed a motion for reconsideration on October 27, 2017. The court heard brief arguments on this motion on March 13, 2018. In its oral decision denying the motion to reconsider, the court again did not even mention *Barker* and only appeared to reference two of the factors (responsibility for delay and prejudice). (Tr. 3/13/18, p. 5) The four factors under *Barker* are all related and must be considered together with other relevant circumstances. *Barker* at 533. The appellate court erred when it proceeded to do its own analysis of the *Barker* factors when the trial court clearly failed to do so.

It is well settled that an appellate court will not analyze an issue that a trial court failed to consider. The dissenting judge below stated

> I cannot find that the trial court in any real sense considered the *Barker* factors or performed the required analysis. "Generally, appellate courts do not address issues which the trial court declined to consider." *Young v. Univ. of Akron*, 10th Dist. No. 06AP-1022, 2007-Ohio-4663, ¶ 22, citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89 (1992); *Lakota Local School Dist. Bd. Of Edn. V. Brickner*, 108 Ohio App.3d 637 (6th Dist.1996). As we are a reviewing court, rather than perform that analysis for the first time on appeal, I believe the sounder course is to remand the matter to the trial court so that it may determine if evidence should be taken in order for it to properly perform the necessary analysis and to thereafter perform the *Barker* analysis. As an appellate court we are not in a position to do that.

State v. Day, 10th Dist. No. 18AP-265, 2019-Ohio-1327, ¶ 5 of dissenting opinion. The majority opinion found that the trial court adequately analyzed the *Barker* factors which is an untenable position in light of the fact that the trial court never even cited *Barker* nor remotely considered at

least two of the factors in its written decision (Appendix, A-12) or its oral decision on the motion for reconsideration. *Day* at ¶ 21.

In *Lakota Local Sch. Dist. Bd. of Educ. V. Brickner*, 108 Ohio App.3d 637, 671 N.E.2d 578 (6th Dist. 1996), the court stated

> We note at the outset that the trial court did not consider some of the issues raised by appellees' motion for summary judgment and the memorandum in opposition. Generally, appellate courts do not address issues which the trial court declined to consider. *Oakwood v. Clark Oil & Refining Corp*. (1986), 33 Ohio App. 3d 180, 183-184, 515 N.E.2d 1. In *Bowen v. Kil-Kare, Inc*. (1992), 63 Ohio St. 3d 84, 89, 585 N.E.2d 384, the Supreme Court of Ohio specifically noted that where the trial court declined to consider one of the arguments raised in a motion for summary judgment, but granted the motion for summary judgment solely on the basis of a second argument, the first argument was not properly before the court of appeals. Accordingly, we will not address those aspects of this case which were not considered by the trial court in reaching its decision.

Id. at 643. See *Young v. Univ. of Akron*, 10th Dist. No. 06AP-1022, 2007-Ohio-4663, ¶ 22 citing *Warner v. Uptown-Downtown Bar* (Dec. 20, 1996), Wood App. No. WD-96-024, 1996 Ohio App. LEXIS 5730 (appellate court declined to review argument made in summary judgment motion but not addressed by the trial court's decision); *Manda v. Stratton* (Apr. 30, 1999), Trumbull App. No. 98-T-0018, 1999 Ohio App, LEXIS 2018 (it would be premature for appellate court to address claims of common law negligence that were not addressed by trial court, where trial court resolved summary judgment only on strict liability claims); *Stratford Chase Apts. v. Columbus* (2000), 137 Ohio App. 3d 29, 33, 738 N.E.2d 20 (appellate court's independent review of summary judgment decision should not replace trial court's function of initially determining propriety of summary judgment).

Counsel submits that the Tenth District should have reversed and remanded the case to the trial court to receive evidence and conduct a proper analysis under *Barker*. The appellate court should have proceeded to do its own analysis under *Barker* only if the trial court

sufficiently analyzed all of the *Barker* factors. See *State v. Saxon*, 9th Dist. Lorain No 09CA009560, 2009-Ohio-6905, ¶ 12-13 (where the trial court failed to address findings as to whether defendant suffered prejudice, but found state's reason for delay was unreasonable, trial court did not implement the correct legal standard, and remand back to the trial court was appropriate.) See also *State v. Dixon*, 8th Dist. Cuyahoga No. 100332, 2014-Ohio-2185, ¶ 11-13 (trial court abused its discretion in not requiring defendant to present evidence establishing prejudice and remand for evidentiary hearing on the issue of prejudice ordered). Only if the trial conducted a full analysis should the appellate court have analyzed the factors itself. Otherwise, the matter should be remanded.

In *State v. Pierce*, 1st Dist. Hamilton No. C-160699, 2017-Ohio-5791, the First District reversed a trial court's denial of a motion to dismiss under very similar circumstances to the current case. Pierce was indicted for two counts of nonsupport of dependents in January of 2015. The state issued a warrant on the same day as the indictment. Pierce resided in Kentucky and was arrested on the warrant in April of 2016. Pierce filed a motion to dismiss arguing that the 14 1/2 month delay between indictment and execution of the warrant was unreasonable. *Id*. at ¶ 2. The parties disputed whether Pierce's address had remained current with the Juvenile Court but no evidence was offered for either position. The court denied Pierce's motion to dismiss finding that the state exercised reasonable diligence in forwarding the arrest warrant to Kentucky authorities and that Pierce did not suffer particularized prejudice. *Id*. at ¶ 3-4.

Importantly, the court noted that "the state indicted Pierce on two charges of nonsupport of dependents, which are not complex charges and are low-level felonies, meaning less delay will be tolerated. *Selvage* [citation omitted], quoting *Barker* [citation omitted]. Therefore, we determine that the length of delay in prosecuting Pierce is presumptively prejudicial and requires

this court's inquiry into the remaining factors." *Id.* at ¶ 10. The appeals court found that two counts of nonsupport of dependents, as in Mr. Day's case, were not complex and a 14 1/2 month delay was presumptively prejudicial. The 3 ½ year delay in this case is far more than that in *Pierce* and substantially more than the almost 2 year delay the Tenth District tolerated in *State v. Keaton*, 10th Dist. No. 16AP-716, 2017-Ohio-7036, ¶ 11. (While affirming denial of motion to dismiss, this court found the 22 month delay "excessive").

Generally, a delay of one year is presumed prejudicial. *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520, fn. 1 (1992). Once a delay is determined to be presumptively prejudicial, then the court should proceed to analyze the other *Barker* factors. The factors are balanced "in a totality of the circumstances framework, and no one factor is controlling." *State v. Williams*, 10th Dist. Franklin No. 13AP-992, 2014-Ohio-2737, ¶ 15; *State v. Watson*, 10th Dist. Franklin No. 13AP-148, 2013-Ohio-5603, ¶ 26; *Barker, supra*, at 530.

The trial court never even determined that there was a presumptively prejudicial delay which is required to trigger a *Barker* analysis. It was at this point that the trial court should have proceeded to analyze the other *Barker* factors. The court in its decision only appeared to reference the fourth factor incorrectly penalizing Mr. Day for not showing prejudice when he was not required to do. (Appendix, A-13) In its oral decision on the motion to reconsider, the court appeared to reference the second factor by stating the delay was not deliberate. The court also again incorrectly penalized the appellant for not showing prejudice by stating "[t]here's no showing of prejudice as well." (Tr. 3/13/18, p. 5)

After the consideration of the length of the delay, the second factor focuses on the reason for the delay, and considers whether the defendant or the government is more to blame for the delay. *Williams* at ¶ 17, *Watson* at ¶ 28. This factor clearly weighed against the state and in

favor of Mr. Day. Again, the court only briefly referenced this in overruling appellant's motion to reconsider but seemingly and incorrectly found it weighed against Mr. Day because "the delay was not deliberate." (Tr. 3/13/18, p. 5). The state must pursue a defendant with reasonable diligence. *State v. Selvage*, 80 Ohio St. 3d 465, 469, 687 N.E.2d 433 (1997), *Ashmore v. State*, 19 Ohio St.2d 181, 182, 249 N.E.2d 919 (1969). Additionally, *Doggett* specifically found that negligence is inexcusable.

> *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. Ibid. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, cf. *Arizona v. Youngblood*, 488 U.S. 51, 102 L.Ed.2d 281, 109 S.Ct. 333 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

Id. at 657.

Again, the issue is not whether the delay was deliberate, but who was more to blame for the delay. *Williams* at ¶ 17, *Watson* at ¶ 28. In this matter, appellant was indicted on August 1, 2013. A warrant was issued to 4835 Malibu Drive in Lake Wales, Florida. (R. #1) There is nothing in the record, the state made no allegation in its memo contra, nor was there any evidence introduced (as the court did not hold a hearing) that there were ever any attempts to serve this warrant upon Mr. Day. The next action on the case is when the warrant was recalled on February 24, 2017, over three and a half years later. There is simply nothing in the record to

suggest that Mr. Day was at fault for creating this delay, especially in light of defense counsel's allegations in his motion that Mr. Day was making fairly regular payments and had a reasonably stable residence during the period of the indictment. (R. #29, p. 3) The court stated at the hearing on the motion for reconsideration that the delay was not deliberate which, in light of the above case law, is clearly an incorrect standard.

The third factor analyzes the defendant's assertion of his right to a speedy trial. "Generally, when a defendant has filed a motion to dismiss based on speedy trial violations, courts will weigh the third *Barker* factor in the defendant's favor." *Watson* at ¶ 29; *State v. Johnson*, 12th Dist. Butler No. CA2011-09-169, 2013-Ohio-856, ¶ 40 ; *State v. Hilyard*, 4th Dist. Vinton No. 05CA598, 2005-Ohio-4957, ¶ 19; *State v. Turner*, 7th Dist. Mahoning No. 93 CA 91, 2004-Ohio-1545, ¶ 38; *State v. Stevens*, 3rd Dist. Logan No. 8-14-09, 2014-Ohio-4875, ¶ 18. This factor weighed heavily in Mr. Day's favor in that his counsel filed both a motion to dismiss (R. # 29) and a motion to reconsider in this matter (R. # 43).

Additionally, a defendant's lack of knowledge of a pending case should not be held against him as one cannot assert his speedy trial rights on an indictment he's not even aware of. In *Doggett*, *supra*, there was no evidence introduced showing that he knew of the charges against him prior to his arrest. The Supreme Court held that this caused the third factor to weigh heavily against the government. The court stated that had there been evidence that Doggett knew of the charges against him, the factor would weigh heavily against him but otherwise Doggett was "not to be taxed for invoking his speedy trial right only after his arrest." *Id*. at 653-654. See also *United States v. Molina-Solorio*, 577 F.3d 300, 306-307 (5th Cir. 2009). In this matter (as in *Doggett*), there is no evidence, nor even any allegation by the state in its memo contra, that Mr. Day was aware of the charges pending against him. "[A] person who is not in a position to

demand a speedy trial could not be considered to have waived his rights to a speedy trial by failure to make such a demand." *State v. Meeker*, 26 Ohio St. 2d 9, 18, 268 N.E.2d 589 (1971). The third factor weighed heavily in appellant's favor.

The fourth *Barker* factor concerns prejudice. Courts should assess prejudice "in light of the interest of defendants which the speedy trial right was designed to protect." *Barker, supra*, at 532. These interests include prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the accused and limiting the possibility that the defense will be impaired. *Id*. "[A]ffirmative proof of particularized prejudice is not required in every speedy-trial case." *Pierce, supra,* at ¶ 15, *Selvage, supra,* at 469, *Doggett, supra,* at 655. "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial[.]" *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). In *State v. Sears*, 1st Dist. Hamilton No. C-050150, 2005-Ohio-5963, 166 Ohio App.3d 166, 849 N.E.2d 1060, the court determined that prejudice was presumed when the state failed to exercise reasonable diligence in notifying the criminal defendant of a complaint or indictment. "Therefore, we hold that Sears' defense was prejudiced by the delay of nine months. Where, as here, the state has made an official accusation, but fails to use any reasonable diligence to let its accusation be known to the defendant, prejudice is presumed. *Id*. at ¶ 16. "*Barker* explicitly recognized that impairment of one's own defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett, supra,* at 655, *Barker, supra*, at 532.

The court was incorrect to base any part of its ruling on whether Mr. Day had shown prejudice. Again, the court in its ruling on counsel's motion to reconsider explicitly stated "[t]here's no showing of prejudice as well." (Tr. 3/13/18, p. 5) In this matter, the allegation was

made in defense counsel's motion that the appellant had been making payments during the period of the indictment and had a reasonably stable address. (R. # 29, p. 3) As the state clearly did not exercise reasonable diligence in pursuing Mr. Day, prejudice is presumed and the fourth factor weighs heavily in Mr. Day's favor. *Sears*, *supra*, at ¶ 16.

The mere allegation that Mr. Day had been making payments suggests that the state knew or should have known of his whereabouts. This allegation was not rebutted by the state in its memo contra. (R. # 36) This would likely mean Mr. Day would have had a caseworker through the Franklin County Child Support Enforcement Agency who may have had a current address. This would potentially show that the state did not exercise reasonable diligence in exercising the warrant sufficient to show prejudice or at least sufficient enough that the court should have held a hearing to ascertain additional facts.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to accept jurisdiction and reverse the judgment of the Franklin County Court of Appeals. The appellant asks this Court to remand this matter to the trial court so that it may conduct the hearing that appellant properly asked for in order to present evidence in support of his claims under *Barker*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following by Electronic Mail this 24th day May, 2019:

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