
IN THE SUPREME COURT OF OHIO

CASE NO._____

STATE OF OHIO.
Plaintiff-Appellee

v.

GREGORY MCDOUGALL,
Defendant-Appellant

**ON APPEAL FROM THE 8TH DISTRICT COURT OF APPEALS,
CUYAHOGA COUNTY, CASE NO. CA-20-109738**

MEMORANDUM IN SUPPORT OF JURISDICTION

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MEMORANDUM IN SUPPORT

I. EXPLANATION OF SUBSTANTIAL CONSTITUTIONAL QUESTION.

Under the Sixth Amendment of the United States Constitution, in all criminal prosecutions, the accused shall enjoy the right to a speedy trial. Furthermore, speedy trial has never been a post-conviction right, rather a pre-Conviction right, as has been upheld in other courts and states. In *Betterman v. Montana*, 578 U.S. (2016), U.S Supreme Court held, “The Sixth Amendment’s speedy trial guarantee does not apply once a defendant has been found guilty or has pleaded guilty to criminal charges.”

The *Betterman* Court’s decision clearly outlines the Sixth Amendment’s Speedy Trial Clause is a pre-conviction constitutionally protected right. Further, the Court held, in another case, “The speedy Trial Clause right attaches upon a defendant’s arrest or indictment.” *United States v. Marion*, 404 U.S. 307, 320-321, (1984). The right detaches upon conviction. Before conviction the accused is shielded by the presumption of innocence, *Reed v. Ross*, 468 U.S. 1, 4, which the speedy trial clause implements by minimizing the likelihood of lengthy incarceration before trial, lessening the anxiety and concern associated with a public accusation, and limiting the effects of long delay on the defendant’s ability to mount a defense. *Marion*, 404 U.S., at 320.

This Cuyahoga County Court of Appeals dismissed Defendant-Appellant Gregory McDougall’s appeal, citing the absence of a final appealable order. *See Appendix*. Nonetheless, according to O.R.C. 2505.02(B)(2), an order is final and appealable if it is an order that affects a “substantial right” made in a special proceeding. A “substantial right” is defined as a right that the United States Constitution, the Ohio Constitution, applicable statutes, common law, or a rule of procedure entitles a person to enforce or protect that right. *Id.* The Speedy Trial Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by operation of the 14th Amendment, is a substantial right. The issue herein is whether or not the Appellate court

erred in declining to exercise jurisdiction over this matter, when Defendant-Appellant's speedy trial rights are held universally as a pre conviction issue, and a substantial right.

II. STATEMENT OF THE CASE AND FACTS

On or about December 27, 2018, the Cuyahoga County Gran Jury issued a True Bill for Indictment Defendant-Appellant on the following one count of domestic violence, a third degree felony, and three counts of child endangerment, a first-degree misdemeanor. The indictment alleged that Defendant-Appellant violated the domestic violence statute on December 1, 2018. The domestic violence allegation states that the Appellant "did knowingly cause or attempt to cause physical harm to Tina Hill, a family or household member." In addition, the allegations for the three counts of child endangerment never had a statement of how they occurred.

On or about February 25, 2020, Defendant-Appellant by and through his counsel, filed a Motion to Dismiss Charges based on Ohio Criminal Rule 12(C)(2). The basis for this motion was that the indictment against the Appellant was predicated on insufficient probable cause. Furthermore, at the time of the motion, the State had failed to provide any proof that the Appellant had caused any injuries to Tina Hill, whilst also leaving all discovery requests for this proof unanswered.

On or about February 28, 2020, Appellant by and through his counsel filed a *Motion to Dismiss* on speedy trial grounds. This motion asserted that the number of days between the time of the Defendant's arrest on December 19, 2018, to the Trial Date on April 6th, 2020 totaled 500 days, far more than the time period provided for by statute. Further, neither Defendant-Appellant, nor his counsel, waived Appellant's right to a speedy trial at any time during these proceedings. By the date of trial, the common pleas court had granted 27 continuances, which had the effect of delaying the trial.

On or about April 22, 2020, the Court held a hearing on Defendant-Appellant's two motions to dismiss. The Court denied both motions. The first *Motion to Dismiss*, filed on February 25, 2020, was denied as the Court found that the burden for probable cause fell on the Grand Jury, and that the Court had no authority to alter or reject the findings of the Grand Jury. The second *Motion to Dismiss*, filed on February 28, 2020, was also denied because:

The Defendant's second motion was a motion to dismiss for violation of speedy trial rights. This motion can best be characterized as being meritless due to self-inflicted wounds. Very little, if any of the time for speedy trial has elapsed as a result of the Defendant's own actions. He has either fired or caused three previously assigned counsel to withdraw from his representation. It is important to note that all three counsel are highly respected criminal defense attorneys, and it is highly unusual for any of the three to request withdrawal from representing a client. Each time new counsel appeared, there was a period of tolling of the time for speedy trial. While the Defendant denies agreeing to any continuances, each of his assigned counsel did request continuances. The Court accepted those requests and they were each documented and journalized on the Court's docket. This is consistent with the finding of the Ohio Supreme Court in *State v. Martin* 2019 Ohio 2010, cited by Defendant. The Ohio Supreme Court stated that a continuance is valid if made in open court and on the record or the reasons for the request are evident from the record, whether the trial court specifically journalized those reasons. Here, the court journalized on 27 occasions, a continuance at the request of the defendant for ongoing discussions between defense counsel and the state. All of the time for continuances is tolled for purposes of speedy trial. In addition to all of this, the Defendant has never provided the state with discovery dating back to February 2019. The failure to respond in a timely fashion causes time to be tolled for purposes of speedy trial. The Defendant is responsible for all the delays in this matter and has caused nearly all the time for speedy trial to be tolled. The motion is denied.

See Docket Journal Entry April 24, 202.

On or about May 21, 2020, the Appellant filed his Notice of Appeal through counsel in the 8th District Court of Appeals. The Appellant looked to appeal the Judgment Entry of April 24, 2020. The basis for the appeal was that by denying the Appellant's Motion to Dismiss, he was denied his Sixth Amendment right to a speedy trial.

On or about June 12, 2020, the Plaintiff-Appellee State filed its *Motion to Dismiss for Want of Final Appealable Order*. A week later, on June 19, 2020, the Appellate Court released their Judgment Entry dismissing Defendant-Appellant's appeal, and stating that the denial of a Motion to Dismiss on speedy trial grounds is not a final appealable order. The Appellate Court further goes on to state that "The alleged speedy trial violation is subject to appellate review after the appellant is convicted and sentenced." *See Judgment Entry*.

On or about July 14, 2020, Defendant-Appellant filed a Motion for Reconsideration through counsel with the Appellate Court. The reasoning for this motion was to prove that the Judgment Entry released by the Trial Court on April 24, 2020 was in fact a final appealable order. This motion was later denied on July 17, 2020 for being untimely filed pursuant to App. R. 26(A).

III. ARGUMENT.

PROPOSITION OF LAW: THE EIGHTH DISTRICT COURT OF APPEALS ERRED IN DENYING THE APPELLANTS APPEAL FOR LACK OF FINAL APPEALABLE ORDER.

This case is of paramount importance, it involves an egregious violation on an appellant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, which guarantee the accused the right to a speedy and fair trial, which is of greatest importance under the Sixth Amendment to the United States Constitution. Appellant was denied and deprived those basic rights. In the Appellate Court's Judgment Entry, it states, "The alleged speedy trial violation is subject to appellate review after the appellant is convicted and sentenced." However, speedy trial has never been a post-conviction issue. In *Betterman v. Montana*, 578 U.S. (2016), it holds: "The Sixth Amendment's speedy trial guarantee does not apply once a defendant has been found guilty or has pleaded guilty to

criminal charges.” The Defendant-Appellant to this date has yet to be convicted of anything, making this a pre-conviction issue.

Betterman v. Montana opinion holds, “The speedy Trial Clause right attaches upon a defendant's arrest or indictment. See *United Stales v. Marion* 404 U.S. 307, 320-321, (1984). The right detaches upon conviction. Before conviction, the accused is shielded by the presumption of innocence, *Reed v. Ross*, 468 U.S. 1, 4, which the speedy Trial Clause implements by minimizing the likelihood of lengthy incarceration before trial, lessening the anxiety and concern associated with a public accusation, and limiting the effects of long delay on the accused's ability to mount a defense, *Marion*, 404 U.S., at 320.”

The onus was on the State of Ohio to present its case in a timely fashion pursuant to Ohio Revised Code 2945.71, which reads that the accused must be brought to trial under R.C. 2945.71,270 or 90 days and where the State of Ohio has failed to meet this requirement, Ohio Revised Code 2945.73 (B) dictates, “Upon motion made at or prior to commencement of the Trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by section 2945.71 of the Revised Code,”, i.e. 90 dyas for the incarcerated, and 270 days for those out on bond.

Appellant's right to a speedy trial comes within the purview of a “substantial right” for purposes of applying R.C. 2505.02(B)(2). Pursuant to R.C. 2505.02(B)(2) , an order is final and appealable if it is “[a]n order that affects a substantial right made in a special proceeding***.” A “substantial right” is “a right that the United States Constitution, Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” An order affects a substantial right only if it is one that, “if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt.Sinai Med. Ctr.*, 67 Ohio St3d. 60, 63 (1993). In other

words, a substantial right is affected if an immediate appeal is necessary to protect the interests of the appealing party. Appellant urges this Honorable Court to follow *stare decisis* of *Betterman v. Montana*, (2016), which clearly explains that appellant's Speedy Trial right under the Sixth Amendment to the United States Constitution is a Pre-Conviction right and not a Post-Conviction issue.

According to O.R.C. 2505.02(B)(2), an order is final and appealable if it is an order that affects a “substantial right” made in a special proceeding. For an order to meet this standard, an appellate court must establish that the right may not be vindicated on appeal after a final judgment. A substantial right is not affected merely because an order has the immediate effect of restricting or limiting that right. Rather, a substantial right is affected when there is virtually no opportunity for an appellate court to provide relief on appeal after final judgment from an order that allegedly prejudiced a legally protected right. With speedy trial being a substantial right, and a final appealable order being one that affects a substantial right, the 8th District Court of Appeals erred in dismissing Defendant-Appellant’s appeal.

IV. CONCLUSION

The Eighth District Court of Appeals erred in refusing to take Jurisdiction over this matter for lack of a final appealable order. A final appealable order is one that affects a substantial right. Speedy trial is considered a substantial right under the United State Constitution. This Court should reverse the decision of the Appellate Court based on the facts outlined in this Memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellee	COA NO.	LOWER COURT NO.
	109738	CR-18-635524-A

COMMON PLEAS COURT

-VS-

GREGORY McDougall

Appellant MOTION NO. 539219

Date 06/19/20

Journal Entry

Motion by appellee to dismiss appeal for lack of a final appealable order is granted. The denial of a motion to dismiss on speedy trial grounds is not a final appealable order. State v. Orr, 8th Dist. Cuyahoga No. 100931, 2014-Ohio-4814. The alleged speedy trial violation is subject to appellate review after the appellant is convicted and sentenced. Likewise, an order denying a defendant's motion to dismiss an indictment, that is not premised on double jeopardy, is an interlocutory order that is not immediately appealable. State v. Mitchell, 8th Dist. Cuyahoga No. 104314, 2017-Ohio-94, P 10. This is because an order denying a defendant's motion to dismiss an indictment does not determine the action as required by R.C. 2505.02(B)(1). State v. Shaffer, 8th Dist. Cuyahoga No. 87552, 2006-Ohio-5563, P21. A granting of a motion to amend an indictment also does not determine the action as required by R.C. 2505.02(B)(1) and is not a final appealable order. Appeal is dismissed.

Judge Mary J. Boyle, Concurs

Eileen T. Gallagher
Eileen T. Gallagher
Administrative Judge

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