

IN THE SUPREME COURT OF OHIO

SCT NO.

:

IN RE: C.C.

Defendant-Appellant

: On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District Court of
: Appeals
CA: 110651

:

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT C.C.**

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS ONE OF
GREAT GENERAL AND GREAT PUBLIC INTEREST**

Thirteen-year-old C.C. was arrested on September 21, 2020 pursuant to a criminal complaint for aggravated murder. The complaint lodged against him included an allegation that he should be treated as a Serious Youth Offender, thus eligible for a blended sentence whereby if he did not make satisfactory progress in the service of any juvenile sentence that might be imposed, an adult prison sentence would then be triggered. This was the most severe punishment C.C. could face as a 13-year-old. And, because an SYO sentence draws from both the juvenile and adult forms of punishment, it comes with several guarantees that most juvenile delinquency cases do not have, including the right to speedy trial, the right to indictment and the right to a jury trial. While the right to speedy trial under R.C. 2945.71 *et seq.* triggered upon arrest, the right to a jury trial did not come into play until after C.C. was indicted.

For the nine months that followed his arrest, C.C. was incarcerated in a juvenile facility while awaiting proceedings on his SYO case. During that time, he could have been indicted, as guaranteed an SYO defendant. Once indicted, he could have exercised his right to decide whether he wanted the jury trial to which he was entitled.

Instead, the prosecution did not indict. C.C. just sat, with occasional pretrials. He was charged but not indicted, knowing he could be facing an SYO trial at some time down the road, and not able to do a thing to move the case along because there was no indictment.

What the juvenile court did during that time was to continue the case on several occasions. This included issuing a continuance in March, 2021 that was based on the COVID-19 pandemic having made it impracticable to conduct jury trials in Cuyahoga County. The juvenile court order, which was based on a Cuyahoga County Common Pleas Court administrative order that had

suspended jury trials from February 10 to April 26, 2021,¹ put the cart before the horse – there was no need to continue a jury trial when the case had yet to be indicted. Indeed, once he had the opportunity to be arraigned, C.C. might well have waived indictment, particularly because he had not previously waived speedy trial. Meanwhile, bench trials were continuing to be conducted in Cuyahoga County even when jury trials were suspended, so C.C. could have gone to trial – but only if he were indicted.

Moreover, the March 2021, juvenile court continuance order was open-ended. Even though the Cuyahoga County Common Pleas Court order on which the juvenile court continuance order was premised stated that jury trials would resume on April 26, 2021, the juvenile court order of continuance in this case simply continued trial to an unspecified date in the future and further ordered that all time would be tolled until the next trial date. But the juvenile court order scheduled nothing else to ensure that a trial date would be set in the future, or that the court would hold any future pretrial to monitor when jury trials could be resumed. Instead, the juvenile order simply suspended the right to a speedy trial indefinitely.

About one month after the aforementioned juvenile court order, in April, 2021, jury trials began to be heard. But the juvenile court took no steps to bring C.C. back to court – and because the March, 2021 continuance order was open-ended, C.C. did not have another court date. Moreover, C.C. still had not been indicted (which would have brought him back to court for an arraignment). Instead, C.C. just sat.

Finally, on June 15, 2021 (after a new judge was assigned to the case and inquired about the delay), C.C. was indicted. For the first time, he could go to trial -- and decide whether he wanted a bench trial or a jury trial. By that time, and before the arraignment could take place, the case was

¹ The March, 2021 order of continuance mistakenly cited to an earlier version of the administrative order.

dismissed for want of speedy trial. The new judge realized that the March, 2021, open-ended order continuing the case indefinitely before it had ever been indicted was not a reasonable continuance order and thus could not toll the speedy trial time.

The Eighth District reversed, holding that the March, 2021 continuance stopped the clock until the trial court conducted further proceedings.

This case is about two different issues. First, is a continuance reasonable under R.C. 2945.72(H) when it is open-ended and does not assure that the speedy trial time will resume as soon as the circumstance necessitating the continuance is over?

Second, does a court administrative order continuing all jury trials provide a basis to toll the speedy trial time for cases that have yet to be indicted? More broadly, is a continuance reasonable under R.C. 2945.72(H) when it is premised on a circumstance (in this case, the temporary inability to hold jury trials) that is not present in a particular case (in this case, because the case had yet to be indicted and it was thus unknown whether C.C. would waive his right to a jury trial)?

These are important issues. The first applies in every case where R.C. 2945.72(H) is implicated and the defendant has not requested the continuance. Trial courts need to know that there is a difference between a reason for a continuance and an excuse to kick the can down the road. This comes up quite often when courts are required to invoke R.C. 2945.72(H) because they are already in trial. It has also come up since the COVID-19 pandemic has required interruptions to the commencement of jury trials. Trial courts need to know that continuances of trial dates must be for a sum certain, not a blank check.

The second issue is also important. Simply because a jury trial cannot commence does not mean that the State can delay in indicting a case. Defendants have a right to know in due course whether their cases will be indicted. For adults, a no bill means the case is over. For juveniles, few

decisions are more life altering than the grand jury's decision to treat a child as an adult defendant. The indictment of a child deprives the child of the restorative orientation of the juvenile courts, and instead subjects them to conditions that jeopardize physical and emotional well-being. Contrary to a national trend not to treat children as adults, the number of children tried as adults in Cuyahoga County is ever increasing and the highest in the State, having doubled since 2017. Shaffer, Cory, *Cuyahoga County Prosecutor Michael O'Malley Charges More Teens as Adults Than Any Other Prosecutor in Ohio*, cleveland.com, Oct. 26, 2019 (last viewed August 15, 2022); Weill-Greenberg, Elizabeth, The Appeal, *Despite Flat Crime Rates, More Cleveland-Area Young People Are Being Tried as Adults* (Oct. 22, 2019). Had this case been indicted during the time contemplated by Ohio's speedy trial statutes, C.C. could have waived a jury and gotten on with life. Instead, he is still sitting.

More fundamentally, a continuance is not "reasonable" under R.C. 2945.72(H) when it is conditioned on a circumstance that may not exist in a particular case – here, the granting of a continuance because a jury cannot be convened -- when it is unknown whether a defendant even wants a jury to begin with.

None of us know what, if any wide-ranging circumstances may arise that will cause our courts to again have to resort to R.C. 2945.72(H) on a wide-spread basis, as was done during the first waves of the COVID-19 pandemic. Accepting this case, a case involving a 13-year old boy who still faces incarceration until age 21 even if he prevails on his speedy trial claim, provides an opportunity to give lower courts needed guidance on how and when to invoke R.C. 2945.72(H). This case also provides an opportunity to gently admonish prosecutors not to tarry during the charging process so that trials can proceed without unreasonable delay.

STATEMENT OF THE CASE AND FACTS

On September 17, 2020, pursuant to R.C. 2152.13(A)(3), the State filed a four-count complaint in the Cuyahoga County Juvenile Court against then 13-year-old C.C. Count One charged aggravated murder with one- and three-year firearm specifications, Count Two charged murder with one- and three-year firearm specifications. Count Three charged felonious assault with one- and three-year firearm specifications. Count Four charged having weapons while under disability. In addition, Counts One and Two each contained a discretionary serious youthful offender (SYO) dispositional request pursuant to R.C. 2152.11(B)(2), and R.C. 2152.13(A)(3).

On September 18, 2020, a warrant was issued for C.C. On September 21, 2020, C.C. was arrested and brought to the juvenile detention center in Cuyahoga County. On September 22, 2020, C.C. entered a denial as to all charges, following which he was remanded to secure detention where he remained throughout the pendency of the case.

On October 2, 2020, C.C. filed a demand for discovery and a bill of particulars. On October 3, 2020, the State responded to C.C.'s discovery motion. On October 15, 2020, C.C. filed a motion requesting the juvenile court appoint a guardian-ad-litem. On October 27, 2020, the court granted the request and appointed C.C. a guardian-ad-litem.

On October 28, 2020, and November 16, 2020, the court held attorney conferences via telephonic communications.

At the in-person hearing held on December 9, 2020, the parties agreed to continue the matter to January 5, 2021 for SYO arraignment on the complaint. On January 5, 2021, the child was arraigned on the SYO complaint. The child did not complete a waiver of jury trial or speedy trial. The court set a bond in the amount of \$500,000 cash or surety. The child was remanded to

secure detention and the case was continued to February 18, 2021 for trial, even though the case had yet to be indicted.

On February 4, 2021, an attorney conference was held via telephonic communications. The February 18, 2021 trial date was converted to an attorney conference and the court determined that, due to health concerns relating to the ongoing COVID-19 pandemic, the matter could not proceed to trial on February 18 2021 as previously scheduled.

An attorney conference was held on February 18, 2021 and the case was continued to March 15, 2021, for an in-person pre-trial hearing.

An in-person hearing was held on March 15, 2021 at which time the visiting judge presiding over the matter (“the first visiting judge”) continued the matter to a future date. The court stated the continuance was required for the administration of justice.

Due to the continued risk of community spread of the coronavirus and the resulting COVID-19 disease, and in order to maintain the safety of the public, court employees, case parties, attorneys, and all others whose business takes place at the Cuyahoga County Juvenile Justice Center, this Court is acting in accordance with the guidelines and procedures adopted by the Cuyahoga County Court of Common Pleas which, by Administrative Order dated November 18, 2020, has limited its operations and set parameters for the selection of cases for jury trial.

The Administrative Order is intended to allow the Court to safely and reasonably continue operations. The Court has considered reasonable alternatives to conducting the jury trials in areas other than the Juvenile Justice Center. However, the serious threat to the public health constitutes good cause to continue this jury trial. Cases of COVID-19 continue to remain at high levels, placing Cuyahoga County in the Public Alert Level of Red. This Order considers both the alleged delinquent’s right to a speedy jury trial, and determines that a continuance of trial which supersedes the right to a defendant’s speedy trial right is hereby considered permissible by all judges of the General Division under the Ohio Constitution and O.R.C. sect 2945.72(H) as a “reasonable continuance granted other than upon the accused’s own motion.”

The court ordered that the time between the date of the last journalized pre-trial through the day before the next scheduled trial date would not be counted when calculating speedy trial time in this matter.

The court further ordered that the matter should be continued for jury trial "on a date and time that would be set by this Court when additional guidance is received from the General Trial Division of the Cuyahoga County Court of Common Pleas regarding the resumption of jury trials." No date was set for a future pretrial or status conference.

On June 2, 2021, a second visiting judge, *sua sponte*, set the matter for a preliminary hearing for June 16, 2021, pursuant to R.C. 2152.13(B). The second visiting judge noticed that, even though an SYO defendant is entitled to a preliminary hearing (if not yet indicted) and a grand jury indictment, no preliminary hearing or indictment had yet occurred.

On June 15, 2021, the Cuyahoga County grand jury indicted C.C. as an SYO case, charging him with aggravated murder, murder, felonious assault and having weapons while under disability. The indictment also contained one- and three-year firearm specifications and a discretionary SYO specification. The charges and specifications in the indictment are identical to the charges and specifications in the complaint.

When the parties met on June 16, 2021, for the preliminary hearing, the court determined that the hearing was no longer necessary as an indictment had been filed against C.C. That same day, trial counsel made an oral motion to dismiss the indictment for failure to comply with the speedy trial statute. The case was continued for briefing on the issue.

On June 21, 2021, trial counsel for C.C. filed a Motion to Dismiss on Speedy Trial Grounds. The State filed a written reply on June 25, 2021. A motion hearing was held on June

28, 2021. On July 1, 2021, the second visiting judge issued an Order Dismissing Indictment and striking the SYO request. The court made the following determination.

Between September 22, 2020 and March 15, 2021, none of the speedy trial time was tolled by the suspension of jury trials due to the juvenile and general division orders issued in response to the COVID pandemic. And the court's March 15, 2021 order indefinitely continuing the case for jury trial did not toll any time. The juvenile did not have the right to a jury trial until he was indicted; "Once a child is indicted...the child is entitled to a speedy public jury trial in juvenile court." R.C. 2151.12(C)(1). His right to a jury trial did not arise until June 15, 2021. No actual delay occurred due to the pandemic orders. "Because no actual delay occurred, R.C. 2945.72 cannot exceed the 90-day limit of R.C. 2945.71."

The State appealed to the Eighth District Court of Appeals. The issue on appeal was whether the juvenile court erred by dismissing the Serious Youthful Offender component for a speedy trial violation. The State argued that, throughout the pendency of the case, jury trials were not possible due to the pandemic-related administrative orders which tolled speedy trial. In response, C.C. argued that the administrative orders did not and could not have been responsible for the delay in his case because the orders did not apply to him until after he was indicted, which was not until after the speedy trial time had expired.

The Eighth District Court of Appeals determined that the trial court erred by failing to toll the time period between the pretrial hearing on March 15, 2021 and the parties' return to court in June, 2021. "The indefinite continuance did not cease to be a valid tolling event upon the resumption of jury trials in Cuyahoga County on April 26, 2021." Opinion Below at ¶ 40. The juvenile court's order was reversed and the case remanded for the juvenile court to reinstate the SYO dispositional request and indictment.

C.C. now timely appeals to this Court.

LAW AND ARGUMENT

Proposition of Law I: In order to be a “reasonable continuance granted other than upon the accused’s own motion” under R.C. 2945.72(H), the trial court’s continuance order must provide a date certain by which trial will occur or a hearing will take place; an indefinite tolling of the speedy trial time that provides lack of certainty as to when the tolling ceases or will be re-visited is not “reasonable” for purposes of tolling speedy trial time.

The Eighth District determined that the trial court’s entry of March 16, 2021, which continued the case for an indefinite period of time was reasonable and in accordance with the prior administrative orders of the court which suspended jury trials. This finding is erroneous as jury trials resumed, per court order, a month later on April 26, 2021. The indefinite continuance violated C.C.’s statutory right to speedy trial.

Normally, statutory speedy trial time periods do not apply to cases initiated in juvenile court. *State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St. 2d 433, 434-435, 329 N.E. 2d 680 (1975). One exception to the non-applicability of the statutory speedy trial time periods to juveniles is when the state seeks a SYO dispositional sentence as occurred here -- in these cases, the SYO portion of the charge is subject to the speedy trial provisions of the Revised Code although the remainder of the charge is not. R.C. 2152.13(C)(1), which governs SYO dispositional sentences, provides in relevant part that:

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX of the Revised Code commences on whichever of the following dates is applicable:

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

Speedy trial is governed by R.C. 2945.71(C)(2) which requires that the state bring a person charged with a felony to trial within 270 days after the person's arrest. Under subsection E of R.C. 2945.71, each day the person is held in jail counts as three days. The time to bring a defendant to trial can be waived, extended, or tolled under R.C. 2945.72. If the state does not bring a defendant to trial within the speedy trial limits, the court, upon motion, must discharge the defendant. R.C. 2945.73(B). A defendant establishes a *prima facie* case for discharge based on speedy trial when he or she demonstrates that more than 270 days elapsed before trial. *See State v. Butcher*, 27 Ohio St. 3d 28, 500 N.E.2d 1368 (1986). The burden then shifts to the state to show that R.C. 2945.72 extended the time limit. *Brecksville v. Cook*, 75 Ohio St. 3d 53, 55-56, 661 N.E. 2d 706 (1996).

C.C. submits, and the State has not challenged, that under R.C. 2152.13(C)(1)(b), his speedy trial time began to run on September 21, 2020, when he was arrested on the complaint that contained a request for a discretionary SYO dispositional sentence. And the Eighth District correctly found that C.C. has presented a *prima facie* case for discharge based on the expiration of his statutory speedy-trial time. Opinion at ¶ 31

C.C. was arrested on September 21, 2020 and remained in custody throughout the pendency of the case. Therefore, he needed to be brought to trial within 90 days from September 21, 2020, the start of his speedy trial time.

The Eighth District correctly determined that a total of 98 speedy-trial days were tolled, pursuant to R.C. 2945.72, between the filing of the juvenile complaint on September 17, 2020, and the indefinite continuance filed on March 16, 2021. And a total of 81 speedy-trial days had expired by the time the juvenile court ordered an indefinite continuance to commence on March 15, 2021. Opinion at ¶ 34.

The question in this case is whether the March 15, 2021 continuance order tolled time indefinitely, as it purports to do. If it does, then C.C.'s speedy trial claim loses. If it does not, then the SYO-portions of the homicide charges (and only the SYO portions) must be dismissed.

The Eighth District's determination that the indefinite continuance was reasonable, is erroneous. As this Court has held in *State v. Saffell*, 35 Ohio St. 3d 90, 91, 518 N.E. 2d 934 (1988):

"It is difficult, if not unwise, to establish a *per se* rule of what constitutes "reasonableness" beyond the ninety-day stricture of R.C. 2945.71. Invariably, resolution of whether the reason for which the continuance was granted justifies the actual delay depends on the peculiar facts and circumstances of a particular case."

Here, the need for a continuance was tethered to a temporary condition – the inability to convene a jury because of the pandemic. The possibility of jury trials had resumed as a general matter after July 31, 2020, when statutory tolling had ended pursuant to S.B. 174, subject to each county's individual circumstances. When the continuance order in this case was issued in March, 2021, everyone understood that jury trials would be resuming at some point in the future -- the administrative order slated April 26, 2021 as the date that jury trials would resume. And that is what happened in Cuyahoga County -- jury trials resumed on April 26, 2021.

But because the continuance order in March, 2021 in this case was indefinite in nature, nothing happened until the second visiting judge discovered the problem in June, 2021, by which time it was too late.

Nor can it be claimed that C.C. had a right to assert his speedy trial rights under these circumstances. This Court's long-established precedent makes clear that a defendant has no duty to assert his right to speedier proceedings under R.C. 2945.71 et seq. *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971).

Proposition of Law II: Under R.C. 2945.72(H), the cause for a continuance must be reasonably related in scope and length to the facts and circumstances of the case being continued; thus, a continuance due to a court's inability to accommodate jury trials will not toll time for cases not yet indicted.

The March 15, 2021 continuance order was not supported by the facts and circumstances of this case. On September 17, 2020, the State filed the original complaint in juvenile court with a request for an SYO dispositional sentence. This date started C.C.'s speedy trial time. Before C.C. ever had a right to a jury trial and thus before C.C. could ever decide whether to proceed with a jury or to waive a jury, he had to be indicted. Significantly, there were no administrative orders which prevented the State from seeking an SYO indictment. The general division administrative judge's order of March 16, 2020 kept the 2020 January Term grand jury empaneled and ordered the May Term grand jury empaneled on May 4-5, "if possible." No subsequent general division orders suspended the grand jury or restricted its proceedings.

Here, the juvenile docket reflects that at no time during the pendency of the case did the State request that the trial court hold a preliminary hearing in this matter, as it was also required to do if it did not indict the case within 15 days of the complaint being filed. Instead, realizing that the State was not attending to its responsibility to seek an indictment, the second visiting judge *sua sponte* set a preliminary hearing for June 16, 2021.

The State then chose to present the case to the grand jury to obtain an SYO indictment on June 15, 2021, a day prior the preliminary hearing, thus negating the need for the preliminary hearing to be held in juvenile court on the SYO request.

Thus, by the time the State got around to charging the case in a manner that implicated the right to trial by jury, *i.e.* by indicting the case, the speedy trial time had expired. Moreover, had the case been indicted when it should have been, C.C. could have waived his right to a jury trial, which would have made the administrative orders irrelevant as well. Accordingly, the trial

court was correct when it determined that, “no actual delay occurred due to the pandemic orders,” and that C.C.’s right to jury trial did not commence until he was indicted on June 15, 2021.

As the juvenile court memorialized in its order dismissing the indictment, nothing prevented the juvenile court from setting the case for preliminary hearing, binding the case over to the grand jury and arraignment the juvenile on an indictment. The State’s failure to request a preliminary hearing on the SYO request and its failure to seek an SYO indictment caused the delay in this case, not the administrative orders.

In the end, the filing of a compliant with a request for a discretionary SYO dispositional sentence does not entitle a juvenile to a jury trial. It does however, start the time for the juvenile’s right to a speedy trial pursuant to R.C. 2945.71. With the passage of more than 90 days, the time in which the State had to bring C.C. to trial had expired. As such, this court should affirm the decision of the trial court dismissing the SYO request.

CONCLUSION

Wherefore, this Court should accept jurisdiction over this case.

Respectfully submitted,

/s/ John T. Martin
Assistant Public Defender
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was served upon Assistant Prosecuting Attorney Ben McNair, Cuyahoga County, at email address bmcnair@prosecutor.cuyahogacounty.us on this 15th day of August, 2022.

/s/ Britta Barthol
BRITTA BARTHOL