

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee	:	On Appeal from the Richland
vs.	:	County Court of Appeals,
	:	Fifth Appellate District
TAJIE BOUNDS DAVISON,	:	Court of Appeals Case No.
Defendant-Appellant	:	2022-CA-0047

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT TAJIE
BOUNDS DAVISON

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THE COURT SHOULD GRANT LEAVE TO APPEAL IN THIS FELONY CASE

This felony case presents the Court with a series of questions involving the constitutional and statutory right to a speedy trial. Appellant Davison submits that “a constitutional right, reinforced by a criminal rule, a statute, and caselaw of this court” support his position and require reversal should the Court accept jurisdiction. *State v. Haynes*, 2022-Ohio-4473, ¶ 2. Moreover, his questions survive the recent changes to R.C. 2945.71-73 – Ohio’s speedy trial statutes that “implement [the] constitutional guarantee” – and remain relevant to determining speedy trial time as the amended R.C. 2945.73 still requires a person accused of a felony to compute “the day the person would become eligible for release pursuant to division (C)(1) of [R.C. 2945.73]” and additionally requires trial courts to sua sponte “determine[] [whether] the time for trial required by sections 2945.71 and 2945.72 of the Revised Code has expired.” It may create error assignable for the first time on appeal if a trial court fails to correctly make the finding.

Appellant asks the Court to address the following questions concerning speedy trial and the reasonableness of continuances of criminal trials in Ohio. These questions are of constitutional and public or great general interest, as this Court has deemed the the statutory and constitutional rights “coextensive.” *State v. O’Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987); *State v. Pudlock*, 44 Ohio St.2d 104, 105, 338 N.E.2d 524 (1975) (“The provisions of R.C. 2945.71 and 2945.73 implement that constitutional guarantee”).

Thus:

1) Whether a trial court granting a sua sponte continuance of a criminal trial must comply with Sup.R. 41(A)'s constraint that “[n]o court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing”;

2) Whether the requirements of both R.C. 2945.02 and Crim. R. 50 that “Criminal cases shall be given precedence over civil matters and proceedings” forbid a trial court from scheduling a civil trial ahead of a criminal trial when the court has continued the criminal trial due to a full docket; and

3) Whether a trial court sua sponte continuing a criminal trial must issue the order scheduling a new trial date prior to the expiration of speedy trial time under R.C. 2945.71.

First, Sup.R. 41(A) states in part that “No court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing.” The record of a continuance must show that it was ““reasonable in both purpose and length.”” *State v. Martin*, 56 Ohio St.2d 289, 293, 384 N.E.2d 239 (1978), quoting *State v. Lee* (1976), 48 Ohio St. 2d 208, 209.

Appellant contends that these require a sua sponte continuance of a criminal trial to include a new trial date, both explicitly due to Sup. R. 41 and implicitly because one cannot ascertain the reasonableness of the length of a continuance without knowing its length. *Lee* additionally applied the word “granted” in R.C. 2945.72(H) to sua sponte continuances, which suggests the same word in Sup.R. 41(A) also applies to sua sponte continuances. *Id.*

Next, both R.C. 2945.02 and Crim. R. 50 require trial courts to give criminal cases priority over civil matters. The question here is whether a trial court may reasonably continue a criminal trial beyond a civil trial when the criminal trial is being continued because of a full

docket. That is, if a trial court continues a criminal trial beyond a civil trial due to the court's full docket, can that continuance toll time under R.C. 2945.72(H)?

Finally, this Court in *State v. Pudlock* refused to allow a trial court to extend the time for bringing an accused to trial by entry issued after the expiration of speedy trial time and said that the trial court there "failed to set a date for trial within the 90-day period established by [the applicable subsection of R.C. 2945.71]." *State v. Pudlock*, 44 Ohio St.2d 104, 105, 338 N.E.2d 524 (1975). Appellant argues that this applies to any extension under R.C. 2945.72 as well.

STATEMENT OF THE CASE AND FACTS

Following an indictment of May 11, 2020 for miscellaneous felonies, the Richland County Ohio Common Pleas Court set Defendant-Appellant Taje Bounds Davison's case for jury trial on July 20, 2020. On July 20, 2020, and during the time of tolling pursuant to Am.Sub. H.B. 197, Section 22, the court continued Davison's trial "to the first available trial date[.]" The trial court by entry of September 1, 2020 set a jury trial for October 12, 2020. By entry of October 15, 2020, the court sua sponte continued that trial because another case proceeded to trial from October 9, 2020 through October 12, 2020. In that entry, the court found that "time is hereby tolled for speedy-trial purposes pursuant to O.R.C. 2945.72 to the first available trial date will be issued under separate order. [sic]" The court did not set a new trial date until its entry of November 6, 2020 set the trial for December 7, 2020. On December 2, 2020, Davison filed a motion to continue the December 7 trial, thereby tolling time from December 2 until his trial on January 25, 2021. He had remained in the Richland County Jail from April of 2020 until his trial. The jury found him guilty.

Davison appealed to the Fifth District Court of Appeals, which affirmed his conviction in all respects on November 24, 2021 in case number 2021 CA 0014. His trial counsel never raised speedy trial, and appellate counsel did not raise it in his ineffective assistance claim.

Davison sought re-opening of his appeal pursuant to App.R. 26(B) by application dated February 23, 2022, claiming ineffective assistance of counsel for failure to raise speedy trial. In that application, Davison asserted that Ohio law allows appellate counsel to assign as error ineffective assistance of trial counsel for failure to raise a meritorious speedy trial claim. *State v.*

Knight, 2d Dist. Greene No. 03-CA-014, 2005-Ohio-3179, ¶ 9 (“* * * if the State violated Defendant’s speedy trial rights, there is no justifiable reason for not having raised that issue in a timely manner.”); *State v. Irish*, 3d Dist. Mercer No. 10-17-10 (May 14, 2018). Davison then showed that following the end of statutory tolling on July 30, 2020, he spent 125 days in jail solely on the charges in this case before filing his motion to continue on December 2. He then attacked the reasonableness of the trial court’s sua sponte continuance of October 15, 2020 for 1) failing to comply with Sup.R. 41(A) for not setting a definite trial date; 2) setting his criminal trial behind a civil trial held in the same court on October 15, 2020, in contravention of Crim.R. 50; 3) unreasonably continuing Davison’s trial beyond October 13 – i.e., immediately after the conclusion of the prior jury trial. Davison additionally attacked the belated scheduling order of November 6, 2020 for coming after the expiration of speedy trial time on October 28, 2020, in contravention of *State v. Mincy* and *State v. Pudlock*. *State v. Mincy*, 2 Ohio St.3d 6, 8, 441 N.E.2d 571 (1982); *State v. Pudlock*, 44 Ohio St.2d 104, 105, 338 N.E.2d 524 (1975).

The Fifth District denied that application by entry dated March 25, 2022. It found that “Davison had failed to provide a ‘more particularized showing that counsel’s alleged deficient performance prejudicially affected the outcome of his appeal’ and therefor has not demonstrated a genuine issue of ineffective assistance.”” March 25, 2022 J.E., citing *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 38. In seeming contravention of *Leyh*, it evaluated the merits of Davison’s speedy trial claims, finding that 1) a defendant may not raise speedy trial for the first time on appeal; 2) *State v. Pudlock* did not require a “trial court to include a new date in a sua sponte entry continuing the trial past the speedy-trial deadline[;]” 3)

Sup.R. 41's rule requiring a new trial date does not apply to sua sponte continuances, as they are not granted to any party; and 4) it could not conclude that the trial court's continuance beyond October 15 was unreasonable. It additionally stated that the record was incomplete as the state had had no opportunity to establish tolling times or to show that Davison did not deserve the triple count of R.C. 2945.71(E), and it suggested a post conviction relief petition as the proper route for Davison to seek remedy.

Davison appealed to this Court, which declined jurisdiction.

Davison also, following the guidance of the Fifth District, timely filed a post conviction relief petition in the trial court on March 30, 2022, alleging ineffective assistance of trial counsel for trial counsel's failure to raise the speedy trial issue. Davison alleged substantive grounds for relief by showing that he was incarcerated for some 125 days, thereby establishing a *prima facie* case for a speedy trial violation, and he further alleged that his trial counsel's failure to move for dismissal can be grounds for an ineffective assistance claim. *State v. Ashbrook*, 5th Dist. Licking No. 06 CA 158, 2007-Ohio-4635, ¶ 49, citing *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986). ("A defendant establishes a *prima facie* case for discharge once he demonstrates that he has not been brought for trial within the time limits set forth in R.C. §2945.71."); *State v. Knight*, 2d Dist. Greene No. 03-CA-014, 2005-Ohio-3179, ¶ 9 ("* * * if the State violated Defendant's speedy trial rights, there is no justifiable reason for not having raised that issue in a timely manner."); *State v. Irish*, 3d Dist. Mercer No. 10-17-10 (May 14, 2018); *State v. Yu*, 1st Dist. Hamilton Nos. C-910771, C-910772, 1992 Ohio App. LEXIS 4366, *5 (August 26, 1992). Davison requested a hearing in order to give the state an opportunity to

present evidence of tolling, and he attached an affidavit stating that he was incarcerated solely on the pending felony charges at all times relevant. The state argued against holding a hearing, claiming that one was not necessary due to the Fifth District's legal conclusions regarding the merits of Davison's speedy trial claims in its March 25 Entry denying re-opening. The trial court denied the application without a hearing despite Davison's *prima facie* showing, citing in multiple instances the Fifth District's 26(B) denial. The trial court made findings of fact and conclusions of law, and curiously found "Defendant's claim that the Court tried a civil case ahead of the Defendant's criminal case in contravention of Crim.R. 50 is not well-taken. * * * The Defendant failed to provide any supporting evidence of a civil matter proceeding to trial before his criminal trial." Defendant had cited that civil case by name and case number.

Davison appealed to the Fifth District, raising the same issues with a then-complete record. He additionally argued that the trial court erred in relying on the Fifth District's findings concerning the merits of his speedy trial claims, as the Fifth District's findings had not established the law of the case both due to the words that court had used in its opinion denying his 26(B) application and because of this Court's outline in *Leyh* of the two-step process App. R. 26(B) mandates. The Fifth District affirmed, finding that the trial court relied on its own reasoning and did not say that the Fifth District's prior opinion was the law of the case. It multiple times cited this Court's denial of jurisdiction of Davison's appeal from the 26(B) denial. It found that 1) the trial court did not violate Crim. R. 50 because "[t]here was no conflict between appellant's trial and a civil trial, as they were not scheduled for the same day"; 2) "the trial court did not commit error in finding the October 15, 2020 *sua sponte* continuance was

reasonable pursuant to R.C. 2945.72(H)”; 3) Sup. R. 41 does not apply to sua sponte continuances. The Fifth District referenced this Court’s denial of jurisdiction in its discussions of #1 and #3.

Davison now appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Appellant Davison submits that “a constitutional right, reinforced by a criminal rule, a statute, and caselaw of this court” support his position and require reversal should the Court accept jurisdiction to clarify when a continuance is reasonable under R.C. 2945.72(H). *State v. Haynes*, 2022-Ohio-4473, ¶ 2.

Proposition No. 1: A trial court granting a *sua sponte* continuance of a criminal trial must comply with Sup.R. 41(A)’s constraint that “[n]o court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing.”

Sup.R. 41(A) provides in part that “[n]o court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing.” This Court has stated that the record of a continuance must demonstrate that it was ““reasonable in both purpose and length.”” *State v. Martin*, 56 Ohio St.2d 289, 293, 384 N.E.2d 239 (1978), quoting *State v. Lee* (1976), 48 Ohio St. 2d 208, 209. *See also*, R.C. 2945.02 (“No continuance shall be granted for any other time than it is affirmatively proved the ends of justice require.”) The rule and this Court’s holding operate in conjunction, as one cannot know the length of a continuance – and by implication, its reasonableness – without knowing the new trial date.

Moreover, this Court in *State v. Lee* applied the word “granted” in R.C. 2945.72(H) to the *sua sponte* continuance in that case, suggesting that “granted” in Sup.R. 41(A) applies to *sua sponte* continuances as well. *State v. Lee*, 48 Ohio St.2d 208, 357 N.E.2d 1095 (1976). There, this Court found that “[t]he 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”

could apply to a *sua sponte* continuance of a criminal trial.

Applying Sup.R. 41(A)'s requirement to *sua sponte* continuances is consistent with this Court's long held position "that the burden to timely try a defendant rests upon the prosecution and trial courts[.]" *State v. Wentworth*, 54 Ohio St.2d 171, 173, 375 N.E.2d 424 (1978). That is, a *sua sponte* continuance is granted to the state, and it cannot be used to allow an accused to languish in jail while indefinitely awaiting trial.

Davison submits that his "constitutional right" is here "reinforced by" a superintendence rule, "a statute, and caselaw of this court." *State v. Haynes*, 2022-Ohio-4473, ¶ 2. He argues that as a consequence of the rule and *Martin*, a continuance is necessarily unreasonable for speedy trial purposes if it does not set a new trial date.

Proposition No. 2: The requirements of both R.C. 2945.02 and Crim. R. 50 that "Criminal cases shall be given precedence over civil matters and proceedings" forbid a trial court from scheduling a civil trial ahead of a criminal trial when the court has continued the criminal trial due to a full docket.

Crim.R. 50 succinctly states, in toto: "RULE 50. Calendars. Criminal cases shall be given precedence over civil matters and proceedings." R.C. 2945.02 in part states that "Criminal cases shall be given precedence over civil matters and proceedings."

Relying on that rule, the Tenth District has determined that "the mere circumstance that the judge was already in trial does not establish the reasonableness of [a] continuance[.]" *State v. Terra*, 74 Ohio App. 3d 189, 195, 598 N.E.2d 753 (10th Dist.1991). *Terra* implied that because of Crim.R. 50, a reasonable continuance must indicate whether the trial judge was in a

civil or criminal trial and, if in a criminal trial, whether the judge set the continued criminal case ahead of any pending civil cases. *Id.* It further implied that a reasonable continuance must indicate that the court “gave [a criminal defendant’s] case precedence over pending civil matters.” *Id.*

Here, Davison demonstrated by his affidavit and citation to the civil case name, number, and date of trial that the trial court held the trial in that civil case the same day that it continued Davison’s criminal trial. He thus showed that the trial court did not give his criminal matter precedence over at least one civil matter, in effect bumping a criminal trial in order to hold a civil one. The trial court could have held Davison’s trial the day after it was scheduled, as the October 15 continuance states that the preceding criminal trial ended on October 12. Davison’s October 12 trial had no doubt been expected to take more than one day, and the parties surely had issued subpoenas and otherwise prepared for the October 12 trial. According to *Terra*, then, that continuance was unreasonable.

Appellant Davison submits that his “constitutional right” is here “reinforced by a criminal rule[] [and] a statute[.]” *State v. Haynes*, 2022-Ohio-4473, ¶ 2.

Proposition No. 3: A trial court sua sponte continuing a criminal trial must issue the order scheduling a new trial date prior to the expiration of speedy trial time under R.C. 2945.71.

Appellant asserts that this follows from two of this Court’s prior determinations. First, in *State v. Mincy*, this Court found that after-the-fact justifications for speedy trial violations “do[] not comport with the purposes of the speedy trial statutes.” *State v. Mincy*, 2 Ohio St.3d 6, 8, 441 N.E.2d 571 (1982). Second, this Court in *State v. Pudlock* determined that “allow[ing] a

trial court to extend the required time period * * * would render meaningless the provisions of R.C. 2945.71” where the court “failed to set a date for trial within the 90-day period established by R.C. 2945.71(B)(2).” *State v. Pudlock*, 44 Ohio St.2d 104, 105, 338 N.E.2d 524 (1975). Appellant concludes from these holdings that a trial court sua sponte continuing a criminal trial must, prior to the expiration of speedy trial time under R.C. 2945.71, both set forth its rationale for continuing the trial and set a new date for that trial. The trial court’s continuance of October 12, 2020 was incomplete and therefore unreasonable in that it did not set a trial date. Because the court did not do so until November 6 – that is, after the expiration of speedy trial time on October 28 – that continuance was therefore unreasonable under *Pudlock* and therefore failed to toll time under R.C. 2945.72(H).

The Fifth District found that the trial court had to “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.” March 25, 2022 J.E. at 7-8, quoting *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 32, quoting *State v. Mincy*, 2 Ohio St.3d 6, 441 N.E.2d 571 (1982), syllabus. Appellant argues that the “order of continuance” and “the reasons therefor” *Ramey* mentions are redundant if the “order for continuance” does nothing more than state that the trial cannot proceed on the previously set date; in other words, a continuance – especially in light of the requirement of Sup.R. 41(A) – must set a new trial date to constitute a different thing than the statement of reasons necessitating a change of trial date.

Appellant Davison submits that his “constitutional right” is here “reinforced by * * * caselaw of this court[.]” *State v. Haynes*, 2022-Ohio-4473, ¶ 2.

CONCLUSION

For the foregoing reasons, the case involves substantial constitutional questions and matters of public and great general interest, and the Court should grant leave to appeal in this felony case. The appellant therefore requests that this Court accept jurisdiction so that it can review the issues presented.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served upon the Richland County Prosecutor by email on April 14, 2023.

/s/ Darin Avery

304517249 Fifth District 18

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICTCOURT OF APPEALS
RICHLAND COUNTY, OHIO
FILED2023 FEB 28 P 3:13
LINDA H. FRARY
CLERK OF COURTS

STATE OF OHIO

Plaintiff-Appellee

-vs-

JUDGMENT ENTRY

TAJIE BOUNDS DAVISON

Defendant-Appellant

CASE NO. 2022 CA 0047

For the reasons stated in our accompanying Memorandum-Opinion, the May 26, 2022 judgment entry of the Richland County Court of Common Pleas is affirmed. Costs to appellant.



HON. W. SCOTT GWIN



HON. PATRICIA A. DELANEY



HON. ANDREW J. KING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served according to appellate rules and by

- Regular Mail.
- Placed in Counsel's box in Clerk of Courts

this _____ day of _____, _____

Clerk of Courts

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	JUDGES:
	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	Hon. Patricia A. Delaney, J.
	Hon. Andrew J. King, J.
-VS-	
TAJIE BOUNDS DAVISON	Case No. 2022 CA 0047
Defendant-Appellant	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Richland County Court of Common Pleas, Case No. 2020CR249

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 28, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Gwin, P.J.

{¶1} Appellant Tajie Bounds Davison appeals the May 26, 2022 judgment entry of the Richland County Court of Common Pleas denying his petition for post-conviction relief. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} Appellant was arrested on April 9, 2020. A preliminary hearing was held on April 17, 2020 in Mansfield Municipal Court, where appellant was bound over to the Richland County Court of Common Pleas. Appellant was indicted on May 11, 2020, with one count of aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1) & (B), one count of robbery, a felony of the second degree, in violation of R.C. 2911.02(A)(2) & (B), and one count of disrupting public services, a felony of the fourth degree, in violation of R.C. 2909.04(A)(1) & (C).

{¶3} Appellant filed a motion to modify bond on May 19, 2020, which was set for hearing on June 3, 2020 and then rescheduled to June 8, 2020. At his arraignment on May 26, 2020, appellant pled not guilty. The trial court issued a scheduling order on June 10, 2020, setting the matter for trial on July 20, 2020. In the entry, the trial court stated, “time is hereby tolled for speedy-trial purposes pursuant to O.R.C. 2945.72 and the Supreme Court Entry of March 27, 2020,” which was the COVID-19 tolling order.

{¶4} The trial court issued a judgment entry on July 20, 2020, stating the trial in this case was continued because the case of *State of Ohio v. Roscoe Hunter*, Case No. 19 CR 513, proceeded to trial. The entry continued, “the court had multiple jury trials scheduled on this date, consisting of cases in which the defendants were arraigned prior to this matter, are or have been incarcerated longer, and/or those which have been set

more times than the defendant's case." Finally, the court stated, "time is hereby tolled for speedy-trial purposes pursuant to O.R.C. 2945.72 and the Supreme Court entry of March 27, 2020 to the first available trial date [that] will be issued under separate order." On September 1, 2020, the trial court issued a judgment entry setting the trial for October 12, 2020.

{¶5} The trial court issued a judgment entry on October 15, 2020, stating the trial in this case was continued from October 12, 2020, because the case of *State of Ohio v. Terrance Jenkins*, Case No. 20 CR 214, proceeded to trial from October 9, 2020 through October 12, 2020. The court stated, "the court finds time is hereby tolled for speedy-trial purposes pursuant to O.R.C. 2945.72 to the first available trial date [that] will be issued under separate order." On November 6, 2020, the trial court issued a judgment entry setting the trial for December 7, 2020.

{¶6} On December 2, 2020, appellant filed a motion to continue the jury trial set for December 7, 2020 because a key witness for appellant's alibi defense tested positive for COVID-19. The motion states, "defendant has no objection to the continuance for this reason." In the motion, counsel and defendant requested a mid-February trial date. The trial court granted the motion, and continued the trial to January 25, 2021. A jury trial was held on January 25, 2021 through January 28, 2021. Appellant was found guilty by a jury of all three counts. Appellant was sentenced to an aggregate minimum term of twelve (12) years to a maximum of seventeen (17) years in prison, with five (5) years of mandatory post-release control.

{¶7} Appellant filed a direct appeal of his conviction, arguing: the trial court erred in allowing the prosecution to present demonstrative evidence on how to alter time stamps

on Snapchat without supporting testimony; ineffective assistance of trial counsel for the failure to properly object to the photographic demonstration; and the convictions were against the manifest weight of the evidence. In *State v. Davison*, this Court overruled appellant's assignments of error and affirmed his convictions. 5th Dist. Richland No. 2021 CA 0014, 2021-Ohio-4184, appeal not allowed, 167 Ohio St.3d 1460, 2022-Ohio-2446, 190 N.E.3d 646.

{¶8} Appellant filed an application for reopening of his direct appeal pursuant to Appellate Rule 26(B) on February 22, 2022. Appellant argued the case should be reopened because his appellate counsel was ineffective in failing to raise the following assignment of error: appellant received ineffective assistance of trial counsel in that trial counsel failed to move for dismissal on speedy trial grounds. Appellee filed a memorandum in opposition to appellant's application for reopening on March 4, 2022.

{¶9} On March 25, 2022, this Court issued a judgment entry denying appellant's motion to reopen. We held that appellant's claim for ineffective assistance in the context of a failure to file a motion to dismiss for a speedy trial violation was more appropriate for a post-conviction petition. This Court also found that appellant's arguments as to the alleged speedy-trial violations were not well-taken.

{¶10} Appellant appealed our denial of his motion to reopen to the Ohio Supreme Court. In his memorandum in support of jurisdiction, appellant asserted the following propositions of law: (1) a court of appeals may not require an appellant to conclusively establish ineffective assistance of counsel to allow reopening and argument of an ineffective assistance of counsel claim; (2) a defendant in a direct appeal of a criminal conviction may raise a speedy trial claim through an assertion of ineffective assistance of

trial counsel; (3) a sua sponte continuance of a criminal trial must comply with Sup.R. 41(A); (4) Criminal Rule 50 requires trial courts to schedule criminal trials ahead of civil trials; and (5) a trial court may not set a new trial date for a criminal matter by entry issued outside of the time allowed for trial by R.C. 2945.71. The Ohio Supreme Court did not accept appellant's appeal for review. *State v. Davison*, 167 Ohio St.3d 1460, 2022-Ohio-2446, 190 N.E.3d 646.

{¶11} Appellant filed a petition for post-conviction relief on March 30, 2022, arguing his trial counsel was ineffective for failing to file a motion to dismiss pursuant to the speedy trial provisions of the Ohio and United States Constitutions, and the Ohio Revised Code (R.C. Sections 2945.71 and 2945.72). Appellant specifically argued the following: the October 15, 2020 continuance entry failed to set a date for trial within the 90-day period established by R.C. 2945.71; the October 15, 2020 continuance was not a reasonable continuance under R.C. 2945.72(H) because it did not comply with Ohio Superintendence Rule 41(A); and the trial court tried a civil case ahead of appellant's criminal trial, in contravention of Criminal Rule 50. Appellant requested a hearing on his petition. Attached to the petition is appellant's affidavit, which states he was held in jail solely on the charges in this case.

{¶12} Appellee filed a memorandum in response to appellant's petition on April 11, 2022.

{¶13} The trial court issued a judgment entry overruling appellant's petition for post-conviction relief on May 26, 2022. The court found the October 15, 2020 continuance complied with the statutory requirements set forth in R.C. 2945.71 and R.C. 2945.72. Further, the trial court found appellant's claim that it tried a civil case ahead of

appellant's criminal case to be not well-taken, as the continuance entry states the jury trial was continued from October 12, 2020 because of the case of *State of Ohio v. Terrance Jenkins*, a criminal case that proceeded to trial from October 9, 2020 through October 12, 2020. The court noted that appellant failed to provide any supporting evidence of a civil matter proceeding to trial before his criminal trial. The trial court determined appellant's speedy trial rights were not violated and, as such, appellant failed to establish that he received ineffective assistance of counsel, or that he was prejudiced by counsel's ineffectiveness. Finally, the trial court found there were no substantive grounds sufficient to warrant a hearing on appellant's post-conviction petition.

{¶14} Appellant appeals the May 26, 2022 judgment entry of the Richland County Court of Common Pleas and assigns the following as error:

{¶15} "I. THE TRIAL COURT ERRED IN TREATING THIS COURT'S DISCUSSION OF THE UNDERLYING LEGAL ISSUES APPELLANT PRESENTED IN HIS APP. R. 26(B) APPLICATION AS THE LAW OF THE CASE RATHER THAN NONBINDING DICTA.

{¶16} "II. THE TRIAL COURT ERRED IN FINDING THAT IT TRIED NO CIVIL CASE AHEAD OF APPELLANT'S CRIMINAL TRIAL.

{¶17} "III. THE TRIAL COURT ERRED IN FINDING NO SPEEDY TRIAL VIOLATION DUE TO THE COURT'S HOLDING A CIVIL TRIAL AHEAD OF APPELLANT'S CRIMINAL TRIAL.

{¶18} "IV. THE TRIAL COURT ERRED IN FINDING THAT SPEEDY TRIAL TIME TOLLED CONTINUOUSLY FROM JULY 20, 2020 TO OCTOBER 12, 2020 AND FROM OCTOBER 15, 2020 TO JANUARY 25, 2021.

{¶19} “V. THE TRIAL COURT ERRED IN FINDING THAT ITS OCTOBER 15, 2020 CONTINUANCE WAS REASONABLE UNDER R.C. 2945.72(H).

{¶20} “VI. THE TRIAL COURT ERRED IN DENYING APPELLANT’S PETITION FOR POST-CONVICTION RELIEF.

I.

{¶21} In his first assignment of error, appellant contends the trial court erred in treating our analysis in this Court’s judgment entry denying his motion to reopen as law of the case. While the trial court referenced the analysis contained in our judgment entry denying his motion to reopen, the trial court never states in the judgment entry denying appellant’s post-conviction petition that the analysis contained in our judgment entry was law of the case. Rather, the trial court undertook an independent analysis of appellant’s petition for post-conviction relief. Accordingly, appellant’s first assignment of error is overruled.

II., III., IV., V., VI.

{¶22} In the remainder of his assignments of error, appellant argues the trial court committed error in denying his petition for post-conviction relief and in denying his request for an evidentiary hearing. We disagree.

{¶23} R.C. 2953.21 affords a petitioner post-conviction relief “only if the court can find that there was such a denial or infringement on the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the United States Constitution.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). The appropriate standard of review for reviewing a trial court’s decision to dismiss or deny a petition for post-conviction relief, without an evidentiary hearing, involves a mixed question of law

and fact. *State v. Durr*, 5th Dist. Richland No. 18CA78, 2019-Ohio-807. This Court must apply a manifest weight standard in reviewing a trial court's findings on factual issues underlying the substantive grounds for relief, but we must review the trial court's legal conclusions de novo. *Id.*

{¶24} In his petition for post-conviction relief, appellant alleges that trial counsel rendered ineffective assistance because he failed to file a motion to dismiss pursuant to the speedy trial provisions of the Ohio Constitution, the U.S. Constitution, and the Ohio Revised Code.

{¶25} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). In an effective assistance analysis, we must determine whether counsel's assistance was ineffective, i.e., whether counsel's performance fell below an objective standard of reasonable representation and violated any of his essential duties to the client. *Id.* If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. *Id.* This requires a showing there is a reasonable probability that, but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶26} Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 693 N.E.2d 267 (1998). Even debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980).

{¶27} Appellant contends the trial court committed error in denying the petition without a hearing. The Ohio Supreme Court has recognized, “[i]n post-conviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. Under R.C. 2953.21, a petitioner seeking post-conviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999). Before a petitioner can be granted a hearing in proceedings for post-conviction relief upon a claim of ineffective assistance of counsel, petitioner bears the initial burden to submit evidentiary quality material containing sufficient operative facts that demonstrate a substantial violation of any of trial counsel’s essential duties in addition to prejudice arising from that ineffectiveness. *State v. Church*, 5th Dist. Stark No. 2017CA00216, 2018-Ohio-368, citing *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999).

{¶28} Broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions. *Rivera v. United States*, 318 F.2d 606 (1963). The Ohio Supreme Court has held that the proper basis for dismissing a petition for post-conviction relief without holding an evidentiary hearing includes the failure of the petitioner to set forth specific operative facts to establish substantive grounds for relief. *State v. Lentz*, 70 Ohio St.3d 527, 639 N.E.2d 784 (1994). A trial court’s decision to deny a petition for post-conviction relief without holding an evidentiary hearing is left to the sound discretion of the trial court. *State v. Lichtenwalter*, 5th Dist. Guernsey Nos. 20CA000013, 20CA000023, 2021-Ohio-1394. To find an abuse of discretion, we must determine the trial court’s decision was unreasonable, arbitrary, or unconscionable and not merely an

error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

Speedy Trial Violation – Civil Trial

{¶29} In his second and third assignments of error, appellant contends the trial court committed error in denying his petition because trial counsel was ineffective in failing to file a motion to dismiss on speedy trial grounds because the trial court held a civil trial before appellant's criminal trial. Appellant relies upon the Tenth District Court of Appeals' reference to Criminal Rule 50 in *State v. Terra*, 74 Ohio App.3d 189, 598 N.E.2d 753 (10th Dist. 1991), which states that "criminal cases shall be given precedence over civil matters and proceedings." Appellant contends the matter should have been rescheduled for October 15, three days after the original trial date.

{¶30} The focus in *Terra* was on the reasonableness of the original *sua sponte* entry continuing the matter which simply stated "judge in trial" and "court in trial, no other courtrooms available." We find *Terra* inapposite to the facts in this case, as the relevant entry here specifically states the case was continued due to the case of *State v. Terrance Jenkins* going to trial. Further, we cannot conclude the trial court's selection of a date other than October 15 was unreasonable. Appellant does not direct us to any portion of the record to indicate the trial court knew that the criminal trial that began on October 9 would conclude prior to October 15, or whether counsel would have been prepared to proceed on October 15.

{¶31} This not a case where a criminal case and civil case were set for the same day and the trial court gave the civil trial precedence. *State v. Cross*, 7th Dist. Mahoning No. 07-MA-74, 2008-Ohio-3240. There was no conflict between appellant's trial and a

civil trial, as they were not scheduled for the same day. The trial court did not have to reschedule the criminal trial for the civil trial to proceed. Additionally, there is nothing in the record to suggest that eliminating the civil docket would have altered the necessity of the continuance. *State v. Davis*, 5th Dist. Richland No. 2019 CA 0112, 2020-Ohio-3617; *State v. Mosley*, 10th Dist. Franklin No. 95AP02-232, 1995 WL 491391 (Aug. 15, 1995) (such a literal reading of Criminal Rule 50 that a trial court cannot continue to hear civil matters or devote time to the civil docket prior to holding a criminal trial is “impractical and unreasonable”).

{¶32} Appellant made this same argument to the Ohio Supreme Court in an appeal of our decision denying his motion for reopening. However, the Ohio Supreme Court declined jurisdiction of appellant’s appeal, including his assignment of error regarding Criminal Rule 50 as it applies to this case. *State v. Davison*, 167 Ohio St.3d 1460, 2022-Ohio-2446, 190 N.E.3d 646.

{¶33} We are not persuaded that trial counsel’s decision not to pursue the issue fell below an objective standard of reasonable representation under the facts and circumstances presented. We find appellant failed to set forth specific operative facts to establish a substantial violation of trial counsel’s essential duties. Appellant’s second and third assignments of error are overruled.

Speedy Trial – Reasonableness

{¶34} In his fourth assignment of error and in a portion of his sixth assignment of error, appellant contends the trial court committed error in denying his petition because the October continuance was not reasonable pursuant to R.C. 2945.72(H).

{¶35} A person charged with a felony must be brought to trial within 270 days unless they waive that right to a speedy trial. R.C. 2945.71(C). If a person is held in jail in lieu of bond, then each day that the suspect is in custody counts as three days. R.C. 2945.71(E). Pursuant to R.C. 2945.73, a person who is not brought to trial within the time periods found in R.C. 2945.71 and R.C. 2945.72 “shall be discharged” and further criminal proceedings based on the same conduct are barred.

{¶36} However, courts may *sua sponte* continue a trial beyond the statutory speedy-trial limit pursuant to R.C. 2945.72(H) which states: “[t]he time within which an accused must be brought to trial may be extended only by the following *** (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.” A continuance must be reasonable in both purpose and length. *State v. Martin*, 56 Ohio St.2d 289, 384 N.E.2d 239 (1978). “[W]here the trial record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof, such a continuance will be upheld.” *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186.

{¶37} We find the trial court did not commit error in finding the October 15, 2020 *sua sponte* continuance was reasonable pursuant to R.C. 2945.72(H).

{¶38} Appellant was arrested on April 10, 2020, in the midst of the Supreme Court’s Order tolling the running of speedy-trial time limits until July 30, 2020. The deadline to bring appellant to trial after the expiration of the COVID-19 pandemic tolling order was October 28, 2020. Appellant’s jury trial was set for October 12, 2020, which was prior to the October 28th deadline.

{¶39} The record clearly indicates that the trial court specifically stated the reason for its sua sponte continuance. In the October 15, 2020 judgment entry, the trial court stated the case was continued, “because the case of *State of Ohio v. Terrance Jenkins*, Case No. 20 CR 214 proceeded to trial from October 9, 2020 through October 12, 2020.” The trial was continued because another criminal trial was occurring on the date of appellant’s scheduled trial. The trial court re-set the trial date for December 7, 2020, approximately forty days after the October 28, 2020 speedy trial deadline. Appellant himself filed a motion to continue the December trial because his key witness contracted COVID-19. Appellant suggested a trial date of mid-February 2021, and the trial was held on January 25, 2021. Based on these facts and circumstances, we find the trial court record affirmatively demonstrates the continuance was reasonable. *State v. Beal*, 5th Dist. Richland No. 21CA3, 2021-Ohio-3812 (trial court’s COVID-19 sua sponte continuances, and the court’s subsequent continuances related to a crowded docket were reasonable and tolled speedy trial time); *State v. Redelman*, 12th Dist. Clinton No. CA2012-04-010, 2013 WL 684451, 2013-Ohio-657 (finding 39-day continuance due to crowded docket and scheduling conflict to be reasonable).

{¶40} Based on the facts and circumstances presented by this case, we find the trial court’s judgment entry explains the necessity and reasonableness of the continuance, and conforms to R.C. 2945.72(H). Because the continuance was reasonable and necessary pursuant to R.C. 2945.72(H), the running of speedy trial time was tolled. Trial counsel’s decision not to pursue the issue did not fall below an objective standard of reasonable representation. Appellant’s fourth and sixth assignments of error are overruled.

Speedy Trial – New Trial Date and Ohio Rule of Superintendence 41

{¶41} In his fifth assignment of error and in a portion of his sixth assignment of error, appellant argues the trial court committed error in denying his petition because the trial court did not issue a new trial date in the October 15, 2020 judgment entry, and the failure to do so mandates dismissal.

{¶42} Appellant relies on the Ohio Supreme Court's decision of *State v. Pudlock*, 44 Ohio St.2d 104, 338 N.E.2d 524 (1975) and the text of Ohio Rule of Superintendence 41 in support of his argument. In *Pudlock*, the trial court allowed the 90-day limitation to expire and thereafter, *sua sponte*, found a crowded docket warranted a continuance. *Id.* The Supreme Court found that to allow a trial court to extend the time period under these circumstances “would render meaningless the provisions of R.C. 2945.71, and thwart the intent of the General Assembly to provide specified time limits within which an accused must be brought to trial.” *Id.* Appellant relies on the notation in *Pudlock* that the trial court “failed to set a date for trial within the 90-day period established by R.C. 2945.71(B)(2)” in support of his argument. However, we do not find that comment must be interpreted as obligating the trial court to include a new date in a *sua sponte* entry continuing the trial date past the speedy trial deadline.

{¶43} More recently, the Ohio Supreme Court has held, “[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. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937. In this case, the trial court satisfied the requirement stated in *Ramey* in its October 15, 2020 judgment entry because, prior

to the expiration of the time limit prescribed in R.C. 2945.71 for bringing appellant to trial, the trial court journalized an entry setting forth its reasons for the continuance. *State v. Young*, 5th Dist. Stark No. 2020CA00155, 2021-Ohio-1999.

{¶44} Further, we find appellant's argument regarding Superintendence Rule 41 to be not well-taken, as the rule is inapplicable to this case. The rule provides, "no court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing." The rule does not provide that the trial court must issue a new trial date with any order continuing a trial as appellant contends. In this case, the trial court did not grant a continuance "to any party," but issued a continuance *sua sponte*. Accordingly, the rule is inapplicable. See *State ex rel. Swanson v. Grigsby*, 6th Dist. Lucas No. L-85-316, 1985 WL 7596 ("a clear reading of the above rule applies to motions for continuance filed by a party. In the instant case, the trial court exercised its sound discretion in *sua sponte* continuing the matter pending appeal.").

{¶45} We additionally note that in appellant's appeal to the Ohio Supreme Court, he argued that a *sua sponte* continuance of a criminal trial must comply with Superintendence Rule 41(A), and that a trial court may not set a new trial date for a criminal matter by entry issued outside of the time allowed for trial by R.C. 2945.71. The Ohio Supreme Court did not accept appellant's appeal for review. *State v. Davison*, 167 Ohio St.3d 1460, 2022-Ohio-2446, 190 N.E.3d 646.

{¶46} We are not persuaded that trial counsel's decision not to pursue these issues fell below an objective standard of reasonable representation under the facts and circumstances presented. We find appellant failed to set forth specific operative facts to

establish a substantial violation of trial counsel's essential duties. Appellant's fifth and sixth assignments of error are overruled.

{¶47} Based on the foregoing, appellant's assignments of error are overruled.

{¶48} The May 26, 2022 judgment entry of the Richland County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Delaney, J., and

King, J., concur