

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee	:	On Appeal from the Richland
vs.	:	County Court of Appeals,
	:	Fifth Appellate District
ABRAM WARE,	:	Court of Appeals Case No.
Defendant-Appellant	:	2022-CA-0048

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT ABRAM
WARE

Jodie Schumacher, #77725
Attorney for Plaintiff-Appellee
38 S Park St. #2
Mansfield, OH 44902
419-774-5676

Darin Avery, #0085528
Attorney for Defendant-Appellant
105 Sturges Avenue
Mansfield, OH 44903
419-953-4773, darinavery@gmail.com

TABLE OF CONTENTS

EXPLANATION OF WHY THE COURT SHOULD GRANT LEAVE TO APPEAL IN THIS FELONY CASE.....	3
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	8
Proposition No. 1: A prisoner satisfies the "causes to be delivered" requirement in R.C. 2941.401 by providing written notice of the place of his imprisonment and a request for final disposition to the warden of the institution where he is incarcerated.....	8
Proposition No. 2: A request for discovery does not toll speedy trial time when local rules require the provision of discovery.....	8
Proposition No. 3: A continuance tolls time under R.C. 2941.401 only when granted "for good cause shown in open court, with the prisoner or the prisoner's counsel present[.]"	8
CONCLUSION.....	10
PROOF OF SERVICE.....	10

EXPLANATION OF WHY THE COURT SHOULD GRANT LEAVE TO APPEAL IN THIS FELONY CASE

The Court should grant leave in this felony case because Defendant-Appellant Abram Ware executed his statutory duty under R.C. 2941.401 and was short-shrifted by the warden of his correctional institution – who delayed some three months in sending the request and certificate – the trial court – which relied on nonbinding appellate caselaw – and the court of appeals – which made an incorrect legal deduction from the letter the Richland Clerk received from the Lorain Warden and unsurprisingly arrived at a conclusion prejudicial to Ware.

Ohio has a particularized statutory scheme protecting the speedy trial rights of incarcerated accuseds, and Ware completed his duty, as a legal matter, under that scheme. However, he did not receive the protection of that scheme.

This Court should accept jurisdiction to demonstrate Ohio's commitment to fair treatment under the law of all persons.

Moreover, should the Court accept this case to correct the treatment of Ware, the Court should, as a policy matter, hold that for a continuance to toll time under R.C. 2941.401, it must, in accordance with the words of R.C. 2941.401, it must be “for good cause shown in open court, with the prisoner or the prisoner's counsel present[.]” R.C. 2941.401.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Abram Ware had been in Lorain Correctional for a parole violation at the time of his June 9, 2020 Indictment in Richland County case no. 2020-CR-369. His prison time began after April 13, 2020, lasted nine months, and therefore ended on January 14, 2021. Ware took action that caused the warden at Lorain to prepare a certificate containing the statutorily mandated elements necessary to trigger the 180-day speedy trial timeline – Ware’s “term of commitment,” his “time served and remaining to be served on the sentence,” the warden’s letterhead, and in three places a date of June 19, 2020. The third page of the docketed letter contains one of the occurrences of that date in the date column of a table with a heading stating that “This request is made under ORC 2941.401 * * *” That is, it strongly suggests that Ware made his request on June 19 of 2020. The letter’s “time remaining on sentence” computation of 209 days calculates back from January 14, 2021 to June 19, 2020. However, the letter also contains, on two separate pages, signature blocks for both Ware and a prison official, and those signature blocks bear the date 9/24/2020. The document bears a timestamp of September 30, 2020 from the Richland County Clerk of Courts.

180 days after June 19, 2020, not counting June 19, fell on December 16, 2020.

Ware was arraigned in Richland County by video on November 5, 2020, was appointed counsel (“Counsel #1”) the same day, and had a first trial date set for December 21, 2020, outside of the speedy trial time limit under R.C. 2941.401. Counsel #1 demanded discovery – despite Richland County’s Local Rule 3.03 requiring the prosecutor to “mail or otherwise deliver a discovery packet to defense counsel no later than two weeks after arraignment, unless speedy trial concerns require a shorter time period” and Crim. R. 16 imposing a reciprocal duty on defense counsel – by motion of November 16, 2020. Counsel #1 requested a continuance of Ware’s trial by motion of December 16, which stated:

Comes now counsel for defendant, and respectfully moves the Court for an

Order continuing the Jury Trial scheduled in the within case on Monday,

December 21, 2020 at 9:00 a.m., for the reason counsel needs more time.

The trial court's entry of May 26, 2022 stated that that continuance was granted. However, to the undersigned's knowledge, after reviewing the docket and inquiring with the Richland Clerk of Courts, no entry exists stating that it was granted, "that [] good cause [was] shown in open court," that "the prisoner or his counsel [was] present," or that the continuance was "necessary or reasonable[,"] as R.C. 2941.401 requires. The docket does not reflect that the court conveyed Ware from Lorain Correctional any time near December 16, 2020.

Ware ultimately proceeded to a bench trial pro se on May 26, 2022, with attorney Josh Brown sitting as standby counsel. The trial court had removed Counsel #1 as Ware's counsel by entry of March 29, 2021 and appointed Counsel #2; the court removed Counsel #2 by entry of November 1, 2021 and appointed Counsel #3 by Magistrate's Order (captioned Judgment Entry) of October 27, 2021; the court removed Counsel #3 by entry of February 16, 2022 and appointed Brown by the same entry.

Neither Counsel #1's fee application of April 8, 2021 nor Counsel #2's fee application of November 23, 2021 contains Ware's signature on the Financial Disclosure Form. The undersigned was unable to obtain a disclosure form from Counsel #3's March 23, 2022 fee application. Only attorney Brown's contained a financial disclosure form, and it bears Ware's signature dated February 21, 2022. Ware told the trial court at his trial that he "never talked to [Counsel #1] or [Counsel #2]." Tr. 108.9. When Ware "asked to withdraw [Counsel #3], [the court] had a hearing." Id. He additionally stated at his May 23, 2022 hearing that he "ha[dn't] seen the attorneys that was on [his] case before. * * * [He] never even saw them. * * * [He] couldn't identify who [Counsel #2] is. [He] can't identify – the only attorney that [he has] seen is – Josh Brown and [Counsel #3] are the only attorneys that [he] saw." Tr.

86.24-87.7.

Ware filed a motion to dismiss for the speedy trial violation on May 16, 2022. The trial court overruled that motion. The trial court correctly relied on R.C. 2941.401, but it used September 20, 2020 as its starting date, relying on a *State v. Wagner* from the Second District, decided before *Williams*, that started the 180 day clock on the day that the trial court received the inmate's notice. *State v. Wagner*, 2d Dist. Miami No. 2020-CA-6, 2021-Ohio-1671, ¶ 13. This contravened then controlling Fifth District caselaw stating that the warden's three month delay was attributable to the state, not Ware: "the act of giving or sending the written notice and request for disposition to the warden satisfies the 'causes to be delivered' requirement of the R.C. 2941.401." *State v. Lear*, 5th Dist. Licking No. 15-CA-72, 2016-Ohio-2675, ¶ 17.

Ware was convicted following a bench trial and sentenced. He timely appealed, but appellate counsel did not raise the speedy trial issue, and the Fifth District Appellate Court affirmed his conviction and sentence. The undersigned timely applied for reopening under App. R. 26(B) on August 28, 2023, alleging that appellate counsel had been ineffective for failing to raise the speedy trial violation, and the appellate court denied that application by entry of October 23, 2023. The appellate court stated that:

Ware argues he made this request [to try untried indictments] on June 19, 2020 because the cover letter and one line on another page of the three-page document contains [sic] that typed-in date. Yet the signature page which indicates Ware is requesting disposition of any untried indictment is dated September 24, 2020 by both Ware and the witness immediately beside their signatures. We cannot speculate as to why the date of June 19, 2020 appears in parts of the document. However, it does not appear that Ware actually made the request until the [sic]

September 24, 2020.

The Fifth District then reasoned using September 24, 2020 as its start date.

Ware on November 2, 2023 sought reconsideration in light of this Court's intervening ruling in *State v. Williams*, and the appellate court denied that application by entry of December 1, 2023. *State v. Williams*, Slip Opinion No. 2023-Ohio-3647.

Ware appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition No. 1: A prisoner satisfies the "causes to be delivered" requirement in R.C. 2941.401 by providing written notice of the place of his imprisonment and a request for final disposition to the warden of the institution where he is incarcerated.

This Court stated this proposition recently in *State v. Williams*. *State v. Williams*, 2023-Ohio-3647, ¶ 18. Ware adds only that, under the facts of his case, *State v. Hairston* implies that, as a legal matter, the warden must have had Ware's request for disposition in hand in June of 2020 when he prepared the certificate dated June 19, 2020 and which he sent to the Richland Clerk in late September. As this Court is well aware, *Hairston* "place[d] the initial duty on the defendant to cause written notice to be delivered * * *" *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 20, 26. The warden, as a state agent, had no duty to prepare the certificate until he received the letter.

Proposition No. 2: A request for discovery does not toll speedy trial time when local rules require the provision of discovery.

Richland Local Rule 3.03, as stated above, requires the state to "mail or otherwise deliver a discovery packet to defense counsel no later than two weeks after arraignment, unless speedy trial concerns require a shorter time period." Providing that discovery automatically requires defense counsel to reciprocate. Counsel #1's discovery demand, therefore, did not "divert the attention of prosecutors from preparing their case for trial, thus necessitating delay" because the prosecutor had the obligation whether counsel made the demand or not. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶ 23. The demand did "not involve any intervention by the court and d[id] not necessitate delay on the part of the court in the scheduling of the trial." *State v. Cook*, 5th Dist. Licking No. 03-CA-0019, 2003-Ohio-5589, ¶ 14 (Hoffman, J., concurring).

Proposition No. 3: A continuance tolls time under R.C. 2941.401 only when granted "for

good cause shown in open court, with the prisoner or the prisoner's counsel present[.]”

This follows from the unique occurrence of that phrase in this statute. R.C. 2945.72, the list of tolling provisions for speedy trial time in the case of non-incarcerated individuals, nowhere mentions open court or having the prisoner or his counsel present. That is, the General Assembly plainly indicated by its word choice a desire to expedite the cases of persons already imprisoned and to only continue the trial of such persons when absolutely necessary. As this Court is aware, “[t]he primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. That intent is first determined, of course, “in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.” *Slingluff v. Weaver*, 66 Ohio St. 621, 621, 64 N.E. 574 (1902).

At least one appellate court has agreed. In *State v. Doane*, the 8th District found that this language controlled when it declined to count a certain continuance against Doane. *State v. Doane*, 8th Dist. Cuyahoga No. 60097, 1992 Ohio App. LEXIS 3579, at *8 (July 9, 1992), fn. 3. (“We do not find that the trial court's continuance of the trial from May 18, 1990 to May 29, 1990 tolled the statutory period, because neither appellee nor her counsel was present in open court. R.C. 2941.401 specifically provides that a continuance may be granted when the defendant or her counsel is present in open court.”)

Such a rule here would cancel the tolling brought about by the “farce and sham” representation of Counsels #1 and #2, who requested continuances but did not meet with Ware. *State v. McBreen*, 54 Ohio St.2d 315, 319, 376 N.E.2d 593 (1978), quoting *Townsend v. Superior Court of Los Angeles* (1975), 15 Cal. 3d 774, 543 P. 2d 619. Had Counsel #1 not requested the first continuance of December 16, time would have run, as the first trial date was outside of the 180 day window that began

on June 19, 2020.

Even were the Court to not require the prisoner or counsel appear in open court, it is questionable, under *McBreen*, whether the initial continuance requested by Counsel #1 would have tolled time, as *McBreen* allowed trial counsel to waive speedy trial time “for reasons of trial preparation[.]” *State v. McBreen*, 54 Ohio St.2d 315, 315, 376 N.E.2d 593 (1978). Ohio law requires that, even under the more general rule of R.C. 2945.72(H), the determination whether a continuance is reasonable “must be affirmatively demonstrated in some manner in the trial court.” *State v. McRae*, 55 Ohio St.2d 149, 153, 378 N.E.2d 476 (1978). To the undersigned’s knowledge, no such determination exists in the trial court record, and Counsel #1 did not state that his request was for purposes of trial preparation.

CONCLUSION

180 days after June 19, 2020, fell on December 16, 2020, well after July 30, 2020, so that the time limit was unaffected by Am. Sub. H.B. 197, Section 22. Ware did not receive his trial until May 26, 2022, despite communicating his request to the warden in June of 2020. Ware thus made a *prima facie* showing of a speedy trial violation.

This Court should accept this felony case to correct the manifest injustice and breach of the statutory and constitutional scheme that occurred in the lower courts.

/s/ Darin Avery
Darin Avery, Attorney for Appellant
#0085528
105 Sturges Avenue, Mansfield, OH 44903
419-953-4773
darin.avery@gmail.com

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served upon the Richland County Prosecutor by hand delivery or email on January 16, 2024.

/s/ Darin Avery