

[Cite as *State v. Juarez-Hernandez*, 2012-Ohio-4835.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-95
v.	:	(C.P.C. No. 11CR-10-5446)
	:	
Guadalupe Juarez-Hernandez,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 18, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

Blaise G. Baker, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Guadalupe Juarez-Hernandez, appeals from his judgment of conviction following his plea of no contest in the Franklin County Court of Common Pleas. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} This appeal arises from the second of two indictments, which the parties agree arose from the same underlying facts. (Appellant's Brief, 11; State's Brief, 3.) The first indictment was filed on June 17, 2011 in case No. 11CR-06-3139. The indictment charged appellant with two counts of drug possession, second-degree felonies, for having both powder and crack cocaine. Appellant requested discovery on July 5, 2011, which the state provided on July 28, 2011. A trial date was scheduled for August 16, 2011, but

appellant obtained a continuance until September 15, 2011, for the stated purpose of considering a plea offer. Appellant obtained a new attorney on September 8, 2011 and obtained a continuance from September 15 until October 13, 2011. Appellant requested another continuance from October 13 until December 5, 2011.

{¶ 3} Meanwhile, after the granting of the third continuance, a second indictment was filed on October 17, 2011 in case No. 11CR-10-5446 (the present case). The indictment charged appellant with the same two counts but included a firearm specification for each. Appellant moved to dismiss the second indictment on November 8, 2011, arguing that the state failed to bring him to trial within the time required by R.C. 2945.71. After the state filed a memorandum in opposition, the trial court denied appellant's motion in a decision and entry filed December 22, 2011. That same day, the case was continued at the request of both parties until January 17, 2012.

{¶ 4} At the January 17, 2012 hearing, a nolle prosequi was entered in the first case, and appellant pleaded no contest to the second indictment. The trial court imposed an aggregate sentence of five years in prison.

II. DISCUSSION

{¶ 5} Appellant now appeals, raising the following assignment of error for our consideration:

The trial court violated Appellant's rights under the Sixth Amendment by failing to dismiss his case for violation of speedy trial rights.

{¶ 6} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. Ohio's speedy trial statute, R.C. 2945.71, endeavors to comply with constitutional standards by designating specific timetables for which an accused must be brought to trial. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 14.

{¶ 7} Although appellant's sole assignment of error references the Sixth Amendment right to a speedy trial, appellant's entire argument focuses on the alleged violation of his statutory right to a speedy trial. Specifically, appellant claims that the state failed to bring him to trial within the time required by R.C. 2945.71(C)(2). As such,

this court will address whether a violation of appellant's statutory speedy trial right occurred.

{¶ 8} Pursuant to R.C. 2945.71(C)(2), a person "against whom a charge of felony is pending" must be brought to trial within 270 days after the person's arrest. "A felony charge is not 'pending' under the statute until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance." *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶ 39, citing *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus (plurality opinion). When computing the time for purposes of applying R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail solely on the pending charge shall be counted as three days, meaning the accused must be tried within 90 days if he or she is incarcerated. R.C. 2945.71(E); *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 14. The arrest date is not chargeable to the state in computing speedy trial time. *State v. Madden*, 10th Dist. No. 04AP-1228, 2005-Ohio-4281, ¶ 28; Crim.R. 45(A); R.C. 1.14.

{¶ 9} Speedy trial time may be waived by the defendant or tolled by operation of law, namely R.C. 2945.72. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 11. "[A] speedy-trial waiver and the tolling provisions in R.C. 2945.72 are separate concepts." *Id.* at ¶ 21. While a defendant's waiver of speedy trial time requires an intentional relinquishment of a known right that must be expressed in writing or made in open court on the record, the tolling of speedy trial time under R.C. 2945.72 is automatic and extends the speedy trial time "whether or not a waiver has been executed." *Id.* at ¶ 18. For instance, time may be tolled for "[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." R.C. 2945.72(H). Unlike a waiver, which serves the defendant's interests in obtaining additional time, "the automatic tolling of time * * * operates to protect the state's ability to adequately prosecute persons who have committed crimes." *Id.* at ¶ 21.

{¶ 10} In the context of multiple indictments, an additional layer of speedy trial analysis may be required. Generally, " 'when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the

initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.' " *State v. Adams*, 43 Ohio St.3d 67, 68 (1989), quoting *State v. Clay*, 9 Ohio App.3d 216 (11th Dist.1983). "[T]he state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." *State v. Baker*, 78 Ohio St.3d 108 (1997), syllabus; see also *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, ¶ 19.

{¶ 11} Here, appellant argues that the state failed to bring him to trial on the second indictment within the time required by R.C. 2945.71(C)(2). Appellant claims that, although he waived his right to a speedy trial in the first case, those waivers cannot apply to the subsequent case in which he pleaded no contest. Appellant relies on the Supreme Court of Ohio's decision in *Adams*, wherein the Supreme Court of Ohio held that a defendant's prior speedy trial waivers could not apply to subsequent charges based on the same set of circumstances because the defendant lacked sufficient knowledge to voluntarily relinquish rights as to charges of which he had no knowledge. *Id.* at 69.

{¶ 12} However, it is unnecessary to determine whether appellant's waivers in the first case also apply to the subsequent case. See *State v. Barbour*, 10th Dist. No. 07AP-841, 2008-Ohio-2291, ¶ 16. While a defendant's prior waiver of speedy trial time may not apply to a subsequent indictment arising from the same facts, the Supreme Court of Ohio has recognized that periods of statutory *tolling* attributable to a defendant in a prior case will also apply in a subsequent case based on the same underlying facts and circumstances. *Blackburn* at syllabus. The *Blackburn* court explained that the *Adams* waiver analysis does not apply to situations in which a defendant has taken an action that tolls the speedy trial time because the tolling provisions in R.C. 2945.72 apply regardless of whether the defendant waived time. *Id.* at ¶ 22; see also *Barbour* at ¶ 16. Thus, under *Blackburn*, any tolling periods attributable to appellant in the first case also applied to the subsequent case.

{¶ 13} Upon review of the record and after accounting for the tolling periods attributable to appellant in the first case consistent with *Blackburn*, we find that appellant was brought to trial in the present case within 90 days as required by R.C. 2945.72(C)(2)

and the triple-count provision in R.C. 2945.72(E). Even if the speedy trial timeframe began on the date of the June 8, 2011 arrest, as appellant contends, the motions filed by appellant in the first case tolled all but 46 days before the second indictment was filed in the present case on October 17, 2011. First, appellant's July 5, 2011 discovery request tolled time until the state provided discovery 23 days later on July 28, 2011. *See State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus ("A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)."); *see also State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶ 36 (32-day delay between discovery request and state's reply constituted a tolling period under R.C. 2945.72(E)). The trial court then continued the first case several times at appellant's request, tolling time from August 16, 2011, until well after the second indictment was filed in the present case on October 17, 2011, 62 days later. *See Blackburn* at ¶ 19 (continuances requested by defendant toll time under R.C. 2945.72(H)).

{¶ 14} After the second indictment was filed in the present case, only 22 more days elapsed before appellant filed his motion to dismiss on November 8, 2011. Assuming *arguendo* that this 22-day period is chargeable to the state under R.C. 2945.71,¹ the balance of the case was tolled by motions filed by appellant. The filing of appellant's motion to dismiss tolled time until the date the trial court denied the motion on December 22, 2011. *See Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, ¶ 41. The final tolling event occurred when the trial court granted a continuance to both parties from December 21, 2011 until January 17, 2012, the date on which appellant pleaded no contest. Therefore, after accounting for the pertinent tolling periods in each case, only 68 days had elapsed for speedy trial purposes before appellant pleaded no contest, leaving the state with 22 days remaining to bring appellant to trial under R.C. 2945.71(C)(2) and 2945.71(E). Because the state did not violate the speedy trial provisions in R.C. 2945.71, appellant's sole assignment of error is overruled.

¹ Because *Blackburn* involved charges filed after the dismissal of previous charges, rather than charges filed while the previous charges were still pending, as in this case, the court did not address how tolling periods in the first case should be considered after an *intervening* indictment is filed. Nevertheless, even if we chose not to consider the tolling events obtained by appellant in the first case after the second indictment was filed, there would be no speedy trial violation.

III. CONCLUSION

{¶ 15} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
