[Cite as *State v. Ignat,* 2011-Ohio-871.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2010-P-0037**
KRISTEN IGNAT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2009 TRC 15468R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Timothy J. Piero*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

J. Chris Sestak, Student Legal Services, Inc., Kent State University, 164 East Main Street, #203, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Kristen Ignat, appeals from the judgment entered by the Portage County Municipal Court, Ravenna Division, overruling her motion to dismiss the state of Ohio's complaint on speedy trial grounds. For the reasons below, we affirm.

{¶2} On November 22, 2009, appellant was stopped and charged with underage OVI, in violation of R.C. 4511.19(B)(3), a misdemeanor of the fourth degree; and speeding, a minor misdemeanor, in violation of R.C. 4511.21(C). On November 25,

2009, appellant entered a plea of not guilty to the charges and signed a speedy trial time-waiver. The matter was set for trial on February 23, 2010. Prior to trial, on January 25, 2010, the arresting officer, Trooper John Lamm, suffered a heart attack. On January 28, 2010, the state sought a continuance of trial due to the trooper's unexpected medical emergency. The trial court granted the motion and reset the trial for April 15, 2010.

{¶3} On February 16, 2010, appellant withdrew her speedy trial waiver, thereby demanding trial within 45 days pursuant to R.C. 2945.71. Trooper Lamm returned to active duty on March 24, 2010. The matter came on for trial on April 15, 2010, 23 days after the trooper had returned to work. Appellant moved to dismiss the charges, arguing 60 days had accrued against the state for purposes of speedy trial calculation.[1] Because the state could have brought appellant to trial after the trooper returned to work within the speedy trial window, appellant argued the delay was both outside the statutory timeframe and unreasonable. The trial court overruled appellant's motion, concluding the continuance was granted for good cause and the delay was not unreasonable. Appellant subsequently pleaded no contest to the charges and was sentenced. The trial court stayed execution of the sentence pending the instant appeal.

{¶4} Appellant assigns one error for this court's review:

1. While arguing that the charges should be dismissed, defense counsel asserted appellant's withdrawal of waiver was entered on February 17, 2010. The record indicates it was filed, however, on February 16, 2010. Reviewing the dates, 58 days passed between February 16, 2010, and April 15, 2010. Adding the three days which amassed between appellant's arrest and her initial appearance, the record reflects 61 days had actually accrued.

{¶5} "The trial court erred to the prejudice of appellant in overruling her motion to dismiss on grounds that she was denied her constitutional and statutory rights to a speedy trial."

{¶6} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution vouchsafe a defendant the right to "a speedy and public trial." In *Barker v. Wingo* (1972), 407 U.S. 514, 523, the United States Supreme Court declared that, with regard to fixing a time frame for speedy trials, "the States *** are free to prescribe a reasonable period consistent with constitutional standards ***." In light of *Barker*'s pronouncement, the Ohio General Assembly enacted R.C. 2945.71, codifying the timeframes within which a defendant must be tried to meet the demands of due process.

{¶7} Appellant was charged with, inter alia, a misdemeanor of the fourth degree, which is governed by R.C. 2945.71(B). That subsection required the state to bring appellant to trial within 45 days after appellant's arrest or service of summons. Where, as here, a defendant demonstrates she has not been brought to trial within the time constraints set forth in R.C. 2945.71, a prima facie case for discharge has been established. *State v. Ange*, 11th Dist. No. 2007-P-0108, 2008-Ohio-2314, at ¶28; see, also, *State v. Butcher* (1986), 27 Ohio St.3d 28, 31. Under such circumstances, the burden of production shifts to the state to demonstrate the defendant was not entitled to be tried within the statutory limits. Id. To this end, R.C. 2945.72 sets forth various tolling events which operate to stop the speedy trial clock if certain specified criteria are met.

{¶8} In this case, appellant contends the state failed to bring her to trial within the statutory timeframe without a reasonable justification for delay. In particular, appellant asserts the matter came on for trial 57 days after she withdrew her waiver. Adding the three days which had elapsed between appellant's arrest and her initial appearance (where she signed the time waiver), 61 days had elapsed without a tolling event. Given her construction of the record, appellant has demonstrated more than 45 days passed after she withdrew her waiver and thus has established a prima facie case for discharge.

{¶9} The state concedes that appellant was brought to trial outside the speedy trial window. In response to appellant's argument, however, the state maintains that R.C. 2945.72(H), the statutory subsection that permits an extension of the speedy trial time for purposes of a "reasonable continuance," operated to extend the speedy trial time. The state contends the continuance was reasonable in both purpose and length and, as a result, the trial court did not err in overruling appellant's motion.

{¶10} In reviewing a speedy trial issue, an appellate court must count the days of delay chargeable to either side, and determine whether the case was tried within the time restraints set forth in R.C. 2945.71. *State v. Kist*, 173 Ohio App.3d 158, 162, 2007-Ohio-4773. Such a calculation presents mixed questions of law and fact. Id. To the extent the facts as found by the trial court are supported by competent, credible evidence, we review the application of the law freely, without deference to the trial court. Id.

{¶11} The record is clear that more than 45 days passed subsequent to appellant's withdrawal of her waiver. We must determine, however, given the facts of

the case, whether all 61 days were chargeable against the state. Under the circumstances of this case, we hold they were not.

{¶12} The state sought a continuance on January 28, 2010, due to Trooper Lamm's medical emergency. The trial court granted the continuance and set the trial date for April 15, 2010. Appellant withdrew her waiver on February 16, 2010, and, as indicated above, more than 45 days passed before she was brought to trial. At the hearing on appellant's motion to dismiss, the state argued that R.C. 2945.72(H) justified an extension of the speedy trial time beyond the statutory time limits. The state agreed that the statutory time had passed, but the officer's unavailability did not render the delay unreasonable and therefore appellant was not entitled to be tried within the statutory limits. The record indicates the court agreed with the state's reasoning. We hold the court's ruling was proper.

{¶13} The speedy trial clock may be temporarily stopped, i.e., tolled, only for the reasons set forth under R.C. 2945.72. See *State v. Sanchez*, 110 Ohio St.3d 274, 277, 2006-Ohio-4478. R.C. 2945.72(H) allows for the tolling of an accused's speedy trial time upon the issuance of a continuance, "*** granted other than on the accused's motion ***," as long as the continuance is reasonable. A continuance, pursuant to R.C. 2945.72(H), must be reasonable in both purpose and length. See, e.g., *State v. Smith* (Aug. 10, 2001), 11th Dist. No. 2000-A-0052, 2001 Ohio App. LEXIS 3531, *14.

{¶14} In this case, the court granted the continuance due to Trooper Lamm's medical emergency and reset the case from February 23, 2010, to April 15, 2010. Courts, including this one, have repeatedly held that continuances sought pursuant to R.C. 2945.72(H) are reasonable if they are occasioned by witness unavailability. See

State v. Saffell (1988), 35 Ohio St.3d 90, 91 (arresting officer on vacation); *State v. Green*, 11th Dist. No. 2003-A-0111, 2005-Ohio-6715, at ¶35 (absence of "key witness"); *State v. Baker*, 12th Dist. No. CA2005-05-017, 2006-Ohio-2516, at ¶35 (unavailability of key prosecution witness); *State v. Elliott*, 10th Dist. No. 03AP-605, 2004-Ohio-2134, at ¶17 (absence of one of the state's key witnesses); *State v. Jones* (Aug. 31, 1994), 4th Dist. No. 93CA1989, 1994 Ohio App. LEXIS 4031, *9 (unavailability of critical witness due to illness). Accordingly, the January 28, 2010 continuance was justified by a reasonable purpose.

{¶15} With respect to the length of the continuance, the record is uncontroverted that Trooper Lamm was unavailable between January 28, 2010, and his return to work on March 24, 2010. The continuance reset trial for April 15, 2010. Given the circumstances of this case, i.e., the unavailability of the arresting officer occasioned by a medical emergency, we hold the continuance was reasonable in length.

{¶16} We recognize appellant withdrew her waiver after the continuance was granted. This fact, however, is irrelevant to whether the continuance acted to toll the speedy trial time. In *State v. Blackburn*, 118 Ohio St.3d 163, 167, 2008-Ohio-1823, the Supreme Court of Ohio discussed the distinction between and interplay of the concepts of a speedy trial waiver and the tolling provisions of R.C. 2945.72. The Court underscored that these concepts are separate and, as a result, affect speedy trial calculations in different ways. *Blackburn*, supra, at 166. To wit:

{¶17} "A waiver is an intentional relinquishment of a known right. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. 'As with other fundamental rights, a defendant can waive the right to a

speedy trial.' *State v. Adams* [(1989)], 43 Ohio St.3d [67,] 69. 'To be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record.' *State v. King* (1994), 70 Ohio St.3d 158, 1994-Ohio-412, syllabus. On the other hand, R.C. 2945.72 provides circumstances that extend or toll the time within which an accused must be brought to trial, but do not involve an intentional relinquishment of the fundamental right. R.C. 2945.72(H) extends the speedy trial time 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*].'" (Emphasis added.) *Blackburn*, supra.

{¶18} According to *Blackburn*, a speedy trial waiver will relinquish a defendant's right to be tried within the statutory timeframe *unless* the waiver is withdrawn. A tolling event under R.C. 2945.72 will not, however, operate to waive a defendant's right to be tried within the speedy trial window. It merely stops the clock from running. Given these differences, a waiver has no necessary effect on the operation of a tolling event. The Court consequently observed: "[t]he statute may be tolled whether or not a waiver has been executed." *Blackburn*, at 167. Thus, even though the continuance was sought at a time prior to appellant's withdrawal, it was still a valid tolling event under R.C. 2945.72(H) to the extent it was reasonable in both purpose and length.

{¶19} Given the foregoing analysis, we therefore hold the speedy trial clock tolled from February 16, 2010, through April 15, 2010. As a result, the three days which passed from the date of appellant's arrest to the date of her initial appearance were the only days which counted against the state for speedy trial purposes. Appellant was

therefore brought to trial well within the 45-day period required by statute. In this regard, appellant's argument is overruled.

{¶20} Appellant next argues that the trial court's judgment granting the continuance was legally insufficient because it failed to adequately identify the facts and circumstances justifying the delay.

{¶21} In *State v. Geraldo* (1983), 13 Ohio App.3d 27, 30-31, this court held:

{¶22} "For purposes of R.C. 2945.72, the unequivocal and repeated holding of the Ohio Supreme Court (and of this court) has been: (1) that the granting of a continuance *must* be recorded by the trial court in its journal entry; (2) that the journal entry *must* identify the party to whom the continuance is chargeable; and (3) that if the trial court is acting *sua sponte*, the journal entry *must* so indicate and must set forth the reasons justifying the continuance." (Emphasis sic. and citations omitted.)

{¶23} In this case, the state moved the court for the continuance and set forth its reasons for filing the motion. The motion incorporated a judgment entry for the trial court to sign in the event it found the state's basis reasonable. On February 1, 2010, the trial court granted the motion and the entry was journalized on the same date.

{¶24} With respect to the *Geraldo* factors, the trial court's entry was clearly journalized in the trial court record. Further, appellant has never disputed and the record indicates the continuance was chargeable to the prosecution. Finally, we need not address the court's justification for granting the continuance because the order was entered on the state's motion, not sua sponte. For these reasons, appellant's argument lacks merit.

{¶25} Appellant's sole assignment of error is overruled.

{¶26} The judgment of the Portage County Municipal Court, Ravenna Division, is hereby affirmed.

DIANE V. GRENDELL, J., concurs,

MARY JANE TRAPP, J., concurs with Concurring Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶27} While I find no fault with the well-reasoned majority opinion, I write separately as I arrive at the result in this case following a different path. I am also troubled by the bare-boned record in this case as it relates to the trial court's journal entry overruling the motion to dismiss specifically in that it does not provide any factual findings or discussion for a reviewing court.

{¶28} I begin the analysis of this case with the concept articulated in *State v. O'Brien* (1987), 34 Ohio St.3d 7: "the statutory speedy trial provisions of R.C. 2945.71 et seq. and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." Id. at 9. Thus, "*** the constitutional guarantees may be found to be broader than [the] speedy trial statutes in some circumstances." Id.

{¶29} It necessarily follows that "[a] person's speedy-trial time may be waived or the period may be tolled under certain circumstances[,]" *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, at ¶11, and that "*** these are two separate distinct concepts that affect speedy-trial calculations in different ways." Id. at ¶16. As noted by the majority, unlike waiver, tolling does not waive the speedy-trial right because "the statute may be tolled whether or not a waiver has been executed." Id. at ¶18.

{¶30} Next, we learn from *O'Brien* that "[f]ollowing an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time." Id., paragraph two of the syllabus.

{¶31} Lower courts applying *O'Brien* have determined that once a defendant revokes an unlimited waiver, as in this case, the strict requirements of R.C. 2945.71 et seq. no longer apply. See *State v. Carr*, 2d Dist. No. 22603, 2009-Ohio-1942, at ¶31; see, also, *State v. Skorvanek*, 9th Dist. No. 08CA009399, 2009-Ohio-3924, at ¶14.

{¶32} With these concepts in mind then, the trial court must engage in a dual analysis and answer two distinct questions when faced with a speedy trial challenge. The first question is whether the accused's statutory speedy trial right has been violated, and if it was not (because, as, for instance, in this case, the time was tolled from February 16, 2010 through April 15, 2010, when the court granted the state's motion for continuance because of the Trooper's medical emergency, which it later determined to be "good cause shown"), the trial court must still determine whether the accused's constitutional speedy trial right has been violated in that the accused has not been brought to trial within a reasonable time.

{¶33} This determination is made through the application of the balancing test set forth in *Barker v. Wingo* (1972), 407 U.S. 514; accord, *O'Brien*, supra, at 10.

{¶34} Reasonableness depends on the specific facts and circumstances of each case. See, generally, *State v. Saffell* (1988), 35 Ohio St.3d 90. The analysis requires a court to consider at least four *Barker* factors: (1) the length of the delay, (2) the reason

for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *O'Brien*, supra.

{¶35} The court "must weigh those factors together with any other relevant circumstances." *State v. Troutman*, 9th Dist. No. 09CA009590, 2010-Ohio-39, at ¶26, citing *State v. Gaines*, 9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶16. But, "[t]he initial consideration is that of the specific delay occasioned by the state. 'Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.'" *O'Brien*, supra, quoting, *Barker*, supra, at 530.

{¶36} So turning to the length of the delay for Ms. Ignat, I cannot find that being brought to trial sixty-one days after arrest on an M-4 is "presumptively prejudicial" and thus no further inquiry or discussion of the remaining factors is required in this case.

{¶37} But I remain troubled by the sparse record regarding the court's decision on the motion to dismiss. The journal entry on the motion to dismiss merely provides: "Oral motion to dismiss denied." The transcript of the motion hearing held on the day the matter was set for trial provides the following basis for the court's ruling: "The Court is under the impression, in review of the law, that for good cause shown and circumstances such as these, these cases can be tried outside of the time periods. The Court is going to overrule your oral motion to dismiss."

{¶38} Given that the motion to dismiss was presented to the court orally and on the day of trial and given the volume of cases heard in a day, it is understandable that a lengthy recitation that the court had engaged in the required dual analysis and what specific facts and circumstances the court considered in its reasonableness determination did not appear in the hearing transcript; however, such recitations should

appear in the court's journal entry so that reasonableness does not have to be inferred from the reasons advanced in the state's motion for continuance and the length of the delay.

{¶39} I also question why when a case is continued upon the state's motion and the court sets a new date outside the statutory time limit we do not apply the same requirement that the trial court must enter both the order of continuance *and the reasons therefor* by journal entry *prior to the expiration of the time*. We require this when the court sua sponte continues the trial beyond the limit and without it the time is not properly tolled. *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶37, citing *State v. Mincy* (1982), 2 Ohio St.3d 6. When it comes to protecting the right to a speedy trial, I see no substantive distinction between a state's request for continuance which, when granted, takes the case beyond the time limit and one granted on the court's own motion. If this were a requirement, then the record would be clear about the underlying facts and circumstances, it would not be an after-the-fact explanation for the extension, and there would be sufficient detail for a reviewing court.

{¶40} As the orders here granting the state's continuance and setting a trial date outside of the time window without any analysis were journalized before the time ran, I do not believe this issue is ripe for decision; thus, I concur with my colleagues and affirm the decision of the trial court.