

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 07 CA 37
WILLIAM M. LOWRY, JR.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Cambridge Municipal Court Case Nos. 04CRB00147 and 04TRC00593

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 20, 2009

APPEARANCES:w

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, William M. Lowry, Jr., appeals a judgment of the Cambridge Municipal Court convicting him of operating a vehicle under the influence of alcohol (R.C. 4511.19(A)(1)) and child endangering (R.C. 2919.22), after overruling his motion to dismiss the charges for violation of his right to a speedy trial under R.C. 2945.71(B)(1). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On January 30, 2004, appellant was charged with operating a vehicle under the influence of alcohol, a first degree misdemeanor. The offense was his second OVI offense in six years. He was also charged with child endangering, a first degree misdemeanor, speeding (R.C. 4511.21) and failure to wear a seat belt (R.C. 4513.263(B)(1)). On February 14, 2004, appellant entered pleas of not guilty to the charges and posted bond. Trial was scheduled for March 16, 2004.

{¶3} The state filed a motion on February 11, 2004, to continue the trial, as the arresting officer would be out of town on vacation. The court granted the motion, setting a new trial date of March 30, 2004.

{¶4} Appellant failed to appear for his pretrial hearing on February 23, 2004. Counsel appeared on appellant's behalf, and the court's pretrial memo indicates counsel negotiated a plea on appellant's behalf. The plea offer would remain open until March 23, 2004.

{¶5} On March 30, 2004, appellant failed to appear for trial and a bench warrant was issued for his arrest. On April 1, 2004, his bond was ordered forfeited. American Contractors Indemnity Company and Charles J. Miller Bonding Inc. moved to

continue the forfeiture hearing for 30 days to allow them an opportunity to recapture appellant. The motion was granted. The bond was forfeited on May 14, 2004.

{¶6} Appellant filed a pro se request to proceed in absentia pursuant to R.C. 2945.12 on September 22, 2004. In a memorandum attached to the motion, appellant represented that he was incarcerated at the Mansfield Correctional Camp serving a six-month sentence from the Summit County Common Pleas Court and expected to be released December 15, 2004. He recited the terms of the negotiated plea agreement entered into by counsel at the pretrial hearing and stated that, if such terms were still acceptable, he would like to enter a plea of guilty in absentia. He stated that he was truly remorseful for his conduct and was making changes in prison to allow him to become a productive citizen upon his release. He further represented that after release, he planned to return to work as a drywall finisher for No Koai, where he had worked for ten years, allowing him to meet his child support obligations and pay the fine levied as part of the negotiated plea. The motion was served on the prosecutor, but not on appellant's counsel. The court overruled the motion on June 15, 2005.

{¶7} The bench warrant remained in effect, and was returned on March 13, 2007. On that date, appellant appeared in court on the warrant and was released on his own recognizance. The court's entry states that trial would be rescheduled in approximately five weeks. On March 14, 2007, an assignment notice was filed setting trial for April 24. On that date, trial was continued to May 30 upon appellant's request. On May 7, 2007, appellant filed a motion to continue, and the trial was continued to June 27, 2007. On June 27, the trial was again continued at appellant's request, and a new trial date of August 17, 2007, was set.

{¶8} Appellant filed a motion to dismiss the charges on speedy trial grounds on June 22, 2007. The court overruled the motion on June 29, 2007.

{¶9} On August 17, 2007, pursuant to a negotiated plea agreement, appellant entered pleas of no contest to the charges of OVI and child endangering. The remaining charges were dismissed. On the OVI charge, appellant was sentenced to 60 days incarceration with 40 days suspended, his driver's license was suspended for 24 months effective January 30, 2004, and he was fined \$350. On the child endangering charge, appellant was sentenced to 20 days incarceration to be served concurrently with the OVI sentence. The sentence was stayed pending appeal.

{¶10} Appellant assigns a single error to the judgment of the trial court:

{¶11} "THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS WHEN THE STATE OF OHIO DID NOT PROVE THAT THE TRIAL COURT BROUGHT THE DEFENDANT TO TRIAL WITHIN SPEEDY TRIAL LIMITS OF R.C. 2945.71."

{¶12} Appellant argues that the court should have dismissed the charges against him because he was not brought to trial within ninety days, as is required for a first degree misdemeanor pursuant to R.C. 2945.71(B)(1).

{¶13} An accused is guaranteed the right to a speedy trial by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. To determine whether an accused's right to a speedy trial has been violated, the United States Supreme Court has devised a balancing test that requires courts to balance and weigh the conduct of the prosecution and that of the accused by examining four factors: the length of the delay, the reason for the delay, whether the

accused has asserted his speedy trial rights, and any resulting prejudice to the accused. *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101.

{¶14} In Ohio, the right to a speedy trial has been implemented by statutes that impose a duty on the State to bring a defendant, who has not waived his rights to a speedy trial, to trial within the time specified by the particular statute. R.C. 2945.71 *et seq.* applies to defendants generally. R.C. 2941.401 applies to defendants who are imprisoned.

{¶15} The provisions of R.C. 2945.71 *et seq.* and R.C. 2941.401 are mandatory and must be strictly complied with by the trial court. *State v. Cloud* (1997), 122 Ohio App.3d 626, 702 N.E.2d 500; *State v. Pudlock* (1975), 44 Ohio St.2d 104, 338 N.E.2d 524. This “strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial.” *State v. Pachay* (1980), 64 Ohio St.2d 218, 221, 416 N.E.2d 589, 591.

{¶16} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin*, Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, we apply a *de novo* standard of review and thus freely review the trial court’s application of the law to the facts. *Id.*

{¶17} R. C. 2945.72(D) extends the time within which an accused must be brought to trial by any period of delay occasioned by the neglect or improper act of the accused. Thus, the speedy trial time in this case was tolled when appellant failed to appear for trial on March 30, 2004, a trial date set well within the 90-day statutory limitation.

{¶18} On September 22, 2004, the court became aware of appellant's incarceration on other charges when appellant filed a motion to enter a plea in his absence. When a defendant is incarcerated in this state on other charges, R. C. 2941.401, a specific statute, prevails over the general speedy trial provisions of R.C. 2945.71 *et seq.*, and governs the time within which the state must bring the defendant to trial. *State v. Munns*, Richland App. No. 2005-CA-0065, 2006-Ohio-1852, at ¶ 16; *State v. Stewart*, Montgomery App. No. 214652, 2006-Ohio-4164, at ¶ 21. The one hundred eighty day speedy trial deadline under R.C. 2941.401 does not begin to run until the defendant sends written notice of the place of his imprisonment and a request for a final disposition of the matter to the prosecuting attorney, and the appropriate court. *Id.*

{¶19} R.C. 2941.401 provides in pertinent part:

{¶20} "When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the warden or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the

time served and remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner.

{¶21} The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.”

{¶22} Appellant’s motion to enter a plea in his absence does not comply with the statutory requirements of a demand for trial. The motion specifically states that it is a request to enter a plea in absentia pursuant to R. C. 2945.12. While the motion and accompanying memorandum state that appellant is being held in the Mansfield Correctional Camp on a conviction from another jurisdiction, the motion was not accompanied by a certificate of the warden or superintendent in compliance with the statute, nor was the notice forwarded by the warden having custody of appellant. The 180-day statute of limitations found in R.C. 2941.401 therefore did not begin to run during appellant’s incarceration.

{¶23} A defendant who fails to appear at a scheduled trial, and whose trial must therefore be rescheduled for a later date, waives his right to assert the provisions of R.C. 2945.71 through 2945.73 for that period of time which elapses from his initial arrest to the date he is subsequently rearrested. *State v. Bauer* (1980), 61 Ohio St.2d 83, 85. There is no justification for a rule which could require a court to reschedule, within a few days after his rearrest, the trial of a defendant who has forfeited his appearance bond. *Id.*

{¶24} In the instant case, because appellant failed to appear for a scheduled trial and a bench warrant was issued for his arrest, and because he did not make a proper demand for trial during his incarceration to trigger the statutory time limitations of R.C. 2941.401, the state had 90 days to bring appellant to trial from March 13, 2007, the date he was arrested on the bench warrant. The trial was initially scheduled for April 24, 2007, well within 90 days. The case was subsequently continued three times on appellant's own motion, which extends the time within which he must be brought to trial pursuant to R.C. 2945.72(H). When appellant entered a plea on August 17, 2007, no additional days chargeable to the state had elapsed, because the case had been continued each time on appellant's motion.

{¶25} The assignment of error is overruled. The judgment of the Cambridge Municipal Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

JUDGES

JAE/r0805

