

[Cite as *State v. Loder*, 2010-Ohio-3085.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93242 and 93865

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CASEY LODER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED, VACATED, AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-506482 and CR-508930

BEFORE: Kilbane, P.J., Blackmon, J., and Stewart, J.

RELEASED: July 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Casey Loder (“Loder”), appeals his plea and conviction in two cases. He argues, inter alia, that his conviction after a bench trial violated his right to a speedy trial. He also argues that the trial court failed to advise him of his right to subpoena witnesses in his own defense before accepting his guilty plea in a separate case.

{¶ 2} After reviewing the facts and the appropriate law, this case is reversed, vacated, and remanded. The apposite facts follow.

{¶ 3} On February 5, 2008, a Cuyahoga County Grand Jury charged Loder in Case No. CR-506482 with drug trafficking, a second degree felony, in violation of R.C. 2925.03(A)(1).

{¶ 4} On April 3, 2008, Loder was charged in Case No. CR-508930 with drug possession, a fifth degree felony, in violation of R.C. 2925.11(A).

{¶ 5} On March 10, 2009, Loder’s counsel filed a motion to dismiss Case No. CR-506482, arguing that the State violated Loder’s right to speedy trial.

{¶ 6} On March 24, 2009, the trial court held a hearing on the speedy trial motion in Case No. CR-506482. After the trial court denied Loder’s speedy trial motion in Case No. CR-506482, he executed a written jury waiver and proceeded to trial before the bench, where the trial court found him guilty of drug trafficking as charged in the indictment. Prior to trial, Loder pled

guilty to drug possession as charged in the indictment in Case No. CR-508930.

{¶ 7} On April 6, 2009, the trial court sentenced Loder to two years of incarceration in Case No. CR-506482, and a concurrent one-year term of incarceration in Case No. CR-508930.

{¶ 8} Loder assigns the following two errors for our review in Appeal Nos. 93242 and 93865, which were consolidated by this court for hearing and disposition.¹

Appeal No. 93242:

“The trial court erred by not commencing trial in a timely fashion in violation of R.C. 2945.71, the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution.”

Appeal No. 93865:

“The trial court erred when it did not advise Casey Loder in CR-508930 [that] he was waiving certain constitutionally guaranteed trial rights by pleading guilty

¹On May 1, 2009, Loder appealed CR-506482. That case was designated Appeal No. 93242. On September 3, 2009, he filed a motion for leave to file a delayed appeal in CR-508930, which this court granted on September 3, 2009, and designated as Appeal No. 93865. That same day, this court consolidated Loder’s appeals for hearing and disposition. On September 18, 2009, Loder filed his supplemental brief in Appeal No. 93865.

in violation of the fifth, sixth and fourteenth amendments to the U.S. Constitution and Article 1 Section 10 of the Ohio Constitution and Crim.R. 11.”

{¶ 9} Our review of a trial court’s decision on a motion to dismiss for a speedy trial violation involves a mixed question of law and fact. *State v. Easley*, 4th Dist. No. 03CA2910, 2005-Ohio-767, citing *State v. Brown* (1998), 131 Ohio App.3d 387, 391, 722 N.E.2d 594; *State v. Kuhn* (June 10, 1998), 4th Dist. No. 97CA2307. We accord due deference to a trial court’s findings of fact if supported by competent, credible evidence, but determine independently if the trial court correctly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, we must strictly construe the relevant statutes against the State. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996-Ohio-171, 661 N.E.2d 706; see, also, *State v. Mustard*, 4th Dist. No. 04CA724, 2004-Ohio-4917, at 10.

{¶ 10} Trial must be held within 270 days of arrest in order to effectuate a speedy trial. See R.C. 2945.71(C)(2). However, pursuant to R.C. 2945.71(E), each day spent in jail “on a pending charge” acts as three days toward speedy trial time, thus 90 days time in jail would equate to 270 days using the triple-count provision. Further, the date of arrest itself is not

counted. See, e.g., *State v. Stewart*, Montgomery App. No. 20462, 2006-Ohio-4164, at ¶16.

{¶ 11} Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *Cleveland v. Jeric*, Cuyahoga App. No. 89687, 2008-Ohio-1825, citing *State v. Howard* (1992), 79 Ohio App.3d 705, 607 N.E.2d 1121. At that point, the burden shifts to the State to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Id.*, citing *State v. Geraldo* (1983), 13 Ohio App.3d 27, 468 N.E.2d 328. In this case, the State concedes that the 270-day statutory limit has expired; Loder has therefore established a prima facie case for dismissal under *Jeric*.

{¶ 12} While the State argues that sufficient time was tolled by the provisions of R.C. 2945.72, Loder argues that, even excluding tolling provisions, more than 270 days passed between the date of his arrest on September 15, 2007 and the date of his speedy trial motion on March 10, 2009. Specifically, Loder contends that none of the intervening continuances between May 22, 2008 and March 10, 2009, constitute tolling events that can be attributed to him for speedy trial purposes. We agree.

{¶ 13} A review of the record on appeal indicates the following procedural events in Case No. CR-506482:

1. On September 15, 2007, Loder was arrested. The speedy trial clock begins September 16, 2007. See *Stewart*, *supra*.

2. On September 19, 2007, Loder was arraigned in Berea Municipal Court and posted bond. From September 16 to September 19, four days elapsed. However, based upon the triple-count provisions of R.C. 2945.71(E), each of these days counts for three days, as Loder was in jail. Therefore, 12 days elapsed from the speedy trial clock. The State had 258 days remaining.
3. On September 21, 2007, a preliminary hearing was held in Berea Municipal Court. Loder requested a continuance until September 24, 2007, in order to obtain counsel. The State concedes that this continuance does not toll the speedy trial clock. As of September 21, 2007, 14 days had elapsed. The State had 256 days remaining.
4. On September 24, 2007, the preliminary hearing was reset for October 12, 2007, at the State's request. As of September 24, the State had 253 days remaining within which to try Loder. Eighteen days elapsed between September 24, 2007 and October 12, 2007. Thus, on October 12, 2007, the State had 235 days remaining.
5. On October 12, 2007, Loder requested a continuance in Berea Municipal Court until November 2, 2007. This tolls the speedy trial time pursuant to *State v. Baker* (1993), 92 Ohio App.3d 516, 636 N.E.2d 363. Thus, as of November 2, 2007, the State still had 235 days within which to try Loder.
6. On November 2, 2007, the municipal prosecutor requested a continuance until November 7, 2007, elapsing five more days from the speedy trial clock. As of November 7, 2007, the State had 230 days remaining.
7. On November 7, 2007, Loder filed a motion to continue the preliminary hearing, which the court granted until December 14, 2007. This constituted a tolling event under *Baker*. Therefore, as of December 14, 2007, the State still had 230 days within which to try Loder.
8. On December 14, 2007, the preliminary hearing was reset until after February 1, 2008. There is no record that Loder requested this continuance, so it does not toll the speedy trial clock.

Between December 14, 2007 and February 1, 2008, 49 days elapsed. Therefore, as of February 1, 2008, the State had 181 days remaining.

9. On February 5, 2008, Loder was indicted on Case No. CR-506482. Between February 1 and February 5, 2008, four days elapsed from the speedy trial clock. Thus, on February 5, 2008, the State had 177 days remaining.
10. Fourteen days elapsed between February 5, 2008 and February 19, 2008. As of February 19, 2008, the State had 163 days remaining within which to try Loder. On February 20, 2008, Loder was arraigned and held until he could post bond on February 22, 2008. Since the triple-count provisions of the statute apply to the three days Loder was in jail between February 20 and February 22, 2008, nine additional days elapsed from the speedy trial clock. R.C. 2945.71(E). As of February 22, 2008, the State had 154 days remaining to try Loder.
11. On March 19, 2008, an initial pretrial was held. Between February 22 and March 19, 2008, 26 days elapsed from the speedy trial clock, since 2008 was a leap year. Therefore, on March 19, 2008, the State had 128 days remaining within which to try Loder. The pretrial was held and continued to April 15, 2008, at Loder's request, thus tolling the speedy trial clock. See *Baker, supra*.
12. On April 15, 2008, another pretrial was held and continued to April 22, 2008, at Loder's request.
13. On April 22, 2008, Loder's counsel requested a second continuance. When it was revealed that Loder failed to appear, a *capias* was issued for his arrest. The speedy trial clock remained tolled at 128 days. *Id.*
14. On April 25, 2008, the *capias* was recalled and the case was continued to May 1, 2008, at Loder's request. The speedy trial clock remained tolled at 128 days. *Id.*

15. On May 1, 2008, another pretrial was held and continued to May 22, 2008, at Loder's request. The speedy trial clock remained tolled at 128 days. Id.

{¶ 14} It is undisputed that the tolling events between March 19, 2008 and May 22, 2008, are all attributable to Loder. Therefore, as of May 22, 2008, the State still had 128 days left within which to try Loder.

{¶ 15} At the May 22, 2008 pretrial, trial was set for June 23, 2008, at Loder's request. Between May 22 and June 23, 2008, 31 days passed. These days are not attributable to Loder. Therefore, on June 23, 2008, the State had 97 days remaining on the speedy trial clock.

{¶ 16} On June 23, 2008, the trial court sua sponte continued trial for 45 days, until August 7, 2008, as it was engaged in trial.

{¶ 17} On August 7, 2008, the trial court sua sponte continued trial for 19 days, until August 26, 2008, because the State's witnesses failed to appear.

{¶ 18} On August 26, 2008, the trial court placed the case on "standby" because it was engaged in trial and sua sponte continued the trial. No new date was given. Based upon the court's journal entries, we assume the trial court set the case for the next available date—August 28, 2008. Two additional days passed.

{¶ 19} On August 28, 2008, the trial court sua sponte continued the trial for 21 days until September 18, 2008. No reason was given for the continuance.

{¶ 20} On September 18, 2008, the trial court sua sponte continued the trial for 62 days, until November 20, 2008, because it was engaged in trial.

{¶ 21} On November 20, 2008, the trial court continued the trial for 77 days, until February 5, 2009, again because it was engaged in trial.

{¶ 22} On February 5, 2009, the trial court continued the trial for 47 days, until March 24, 2009, once more because it was engaged in trial.

{¶ 23} On March 10, 2009, Loder's counsel filed a motion to dismiss based upon speedy trial grounds, thereby tolling the speedy trial clock.

{¶ 24} From Loder's original June 23, 2008 trial date and the filing of Loder's motion to dismiss on March 10, 2009, 260 days passed.

{¶ 25} Between Loder's arrest on September 15, 2007, and his eventual trial on March 24, 2009, 556 days passed. As the State concedes that the 270-day statutory limit has been passed, the only question before us is whether the seven intervening sua sponte continuances by the court and the State were reasonable in light of the surrounding circumstances. We hold that they were not.

{¶ 26} On June 23, 2008, the State had 97 days remaining within which to try Loder. The court's sua sponte continuances extended Loder's speedy trial time by 261 days from his original trial date, when only 97 days were remaining on the speedy trial clock.

{¶ 27} At the outset, we note that “[t]he record of the trial court must * * * affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose.” *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095.

{¶ 28} In *State v. Pirkel*, 8th Dist. No. 93305, 2010-Ohio-1858, this court recently summarized the state of the law on sua sponte continuances as follows:

“A sua sponte continuance must be properly journalized before the expiration of the speedy trial period and must set forth the trial court’s reasons for the continuance. * * * Further, the issue of what is reasonable or necessary cannot be established by a per se rule, but must be determined on a case-by-case basis. * * * [A] continuance due to the trial court’s engagement in another trial is generally reasonable under R.C. 2941.401. * * * However, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted.” *Id.* at ¶16-17. (Internal citations omitted.)

{¶ 29} In *Pirkel*, we concluded that an extension of a defendant’s speedy trial time by 247 days was unreasonable, even when, as here, the trial court is consistently engaged in trial and documents those continuances. In *Pirkel*, five of the eight sua sponte continuances issued by the court were because the trial court was engaged in other trials; three of the continuances were because the court was unavailable. In the instant case, the trial court was in other trials on five occasions, unavailable once, and the State’s witnesses

failed to appear once. These events sua sponte extended Loder's trial for 260 days when only 97 days remained on the speedy trial clock, breaching the statutorily mandated 270-day time limit by 163 days.

{¶ 30} Under *Pirkel*, such repeated extensions were found unreasonable.

Between the original trial date and Loder's motion to dismiss on March 10, 2008, 249 days had elapsed. This delay, coupled with the number of continuances for which the trial court sua sponte continued Loder's trial was unreasonable and violated Loder's right to speedy trial.

{¶ 31} Loder's first assignment of error is sustained.

{¶ 32} In his next assigned error, Loder argues that when the trial court accepted his guilty plea in a separate case, Case No. CR-508930, on March 24, 2009, it failed to advise him of his right to use the subpoena power of the court to call witnesses and compel their testimony on his behalf.

{¶ 33} A review of the record indicates that during the plea colloquy, the trial court advised Loder that he was giving up certain nonspecific constitutional rights by entering a plea. It also advised him of the State's burden of proof at trial and the consequences of postrelease control upon Loder's sentence. The court also mentioned a document it issued to Loder called a plea agreement, which Loder was required to sign. In this document, Loder's constitutional rights were outlined in detail to him,

including his right to use the court's subpoena power and to compel witnesses to appear and testify on his own behalf. Loder signed this agreement.

{¶ 34} Crim.R. 11(C) governs the acceptance of guilty and no contest pleas in felony cases and states in pertinent part:

“(C) Pleas of guilty and no contest in felony cases.

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶ 35} In Ohio, adherence to the provisions of Crim.R. 11(C)(2) requires an oral dialogue between the trial court and the defendant that enables the

court to determine fully the defendant's understanding of the consequences of his plea of guilty or no contest. *State v. Caudill* (1976), 48 Ohio St.2d 342, 358 N.E.2d 601, at syllabus. Crim.R. 11(C)(2) requires that a trial court conduct an oral dialogue with the defendant to determine that a plea is voluntary, that the defendant understands the nature of the charges and the maximum penalty involved, and to personally inform the defendant of the constitutional guarantees he waives by entering a guilty plea. *State v. Ortiz*, 8th Dist. No. 91626, 2009-Ohio-2877, citing *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450.

{¶ 36} Notification of the right of compulsory process to obtain witnesses has long been recognized as a constitutional right in Ohio. See *State v. Ballard* (1982), 66 Ohio St.2d 473, 423 N.E.2d 115, at paragraph one of the syllabus.

{¶ 37} A court must strictly comply with the dictates of Crim.R. 11(C)(2) regarding the waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Strict compliance with Crim.R. 11(C)(2) does not require “a rote recitation of the exact language of the rule; rather, the focus on review is whether ‘the record shows that the judge explained these rights in a manner reasonably intelligible to the defendant.’” *State v. Parks*, 8th Dist. No. 86312, 2006-Ohio-1352, quoting *Ballard*.

{¶ 38} The issue before this court is whether a trial court strictly complies with Crim.R. 11 when it does not explain to a defendant in open court the specific constitutional rights he is waiving when entering a guilty plea, even when the court obtains a signed waiver of those rights. We hold it does not.

{¶ 39} In this case, while the trial court informed Loder of certain constitutional and nonconstitutional rights, the trial court neglected to explain to Loder his right to compulsory process, i.e., he could subpoena witnesses, or the trial court could use its subpoena power to compel witnesses to testify on his behalf. This is a clear violation of the standard set forth in *Ballard*, supra.

{¶ 40} In *Veney*, supra, the Ohio Supreme Court reaffirmed the strict compliance standard as it pertains to a defendant's constitutional rights under Crim.R. 11(C)(2), stating in part, "a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant." *Id.* at 182. Here, the issue is not that the trial court's explanation was too vague, the trial court did not explain to Loder his right to compulsory process under *Ballard*. Its failure to do so vitiates Loder's plea and violates Crim.R. 11.

Waiver of all constitutional rights must be orally explained to defendants in order to comply with Crim.R. 11(C)(2). *Veney*.

{¶ 41} For the foregoing reasons, this assignment of error is well taken. We vacate Loder's plea in Case No. CR-508930 and remand the case to the trial court for further proceedings consistent with this opinion.

{¶ 42} In addition, Loder's first assignment of error regarding the violation of his right to speedy trial is well taken. The judgment of the trial court is reversed in that case, and the matter is remanded to the trial court to vacate appellant's conviction in Case No. CR-506482.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR

