

[Cite as *State v. Smith*, 2010-Ohio-5354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94227

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

GEORGE SMITH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502638

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: November 4, 2010

ATTORNEY FOR APPELLEE

John P. Parker
988 East 185th Street
Cleveland, Ohio 44119

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Sanjeev Bhasker
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals the trial court's granting of defendant-appellee's, George Smith ("Smith"), motion to dismiss based on speedy trial. Finding no merit to the appeal, we affirm.

{¶ 2} In 1985, Smith was convicted of rape. In 2001, he was classified as a sexual predator. On August 4, 2007, he was charged with failure to register, in violation of R.C. 2950.04(E). A lengthy pretrial process ensued, and in 2009, Smith's counsel moved to dismiss his case based on the argument that, among other things, the Adam Walsh Act could not be applied retroactively to his client. Smith also filed a pro se motion to dismiss his case arguing that his speedy trial

rights were violated. The trial court granted Smith's pro se motion, dismissing the case based solely on Smith's speedy trial argument.

{¶ 3} The state now appeals, raising two assignments of error:

{¶ 4} "I. Defendant's speedy trial rights are not violated under statutory grounds.

{¶ 5} "II. Defendant's speedy trial rights are not violated under constitutional grounds."

Statutory Speedy Trial

{¶ 6} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing time under R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. See R.C. 2945.71(E). Consequently, "[a] felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail." *State v. Coleman* (1989), 45 Ohio St.3d 298, 304, 544 N.E.2d 622. If the state violates a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B). But "[i]f the defendant is in jail on a separate unrelated case, the three-for-one provision does not apply, and the speedy trial time is counted on a one-for-one basis." *State v. Pond*, Cuyahoga App. No. 91061, 2009-Ohio-849, ¶14.

{¶ 7} The speedy trial statute may be tolled by several events, set forth in R.C. 2945.72:

“(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

“(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

“(C) Any period of delay necessitated by the accused’s lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

“(D) Any period of delay occasioned by the neglect or improper act of the accused;

“(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

“(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

“(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

“(H) The 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;

“(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.”

{¶ 8} Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *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. *State v. Geraldo* (1983), 13 Ohio App.3d 27, 468 N.E.2d 328.

{¶ 9} Smith was charged in the current case on August 4, 2007. On November 8, 2007, the trial court issued a *capias* and ordered him returned from prison. Smith was arraigned on November 20, 2007. Although the record is not entirely clear, it appears as though Smith was incarcerated on another case.

{¶ 10} Pretrials were held on December 5 and 20, 2007, and December 20, and January 11, 2008 at Smith's request. On December 26, 2007, Smith filed his motion for discovery. Two more pretrials were continued at Smith's request and a final pretrial was held on February 1, 2008. The court scheduled trial for March 11 and continued it to March 17 at the request of the defendant. On March 6, the state responded to discovery. On March 20 the trial court referred Smith to the court psychiatric clinic for a competency evaluation.

{¶ 11} Smith was supposed to appear for a pretrial on April 18, 2008, but he failed to show and the trial court issued a *capias* for his arrest on April 30. Again, it appears as though Smith was imprisoned. On May 5, 2008, the bondsmen located Smith in prison. On September 2, 2008, the trial court ordered Smith returned from prison. On September 15, 2008, Smith's new counsel filed a motion for discovery.

{¶ 12} On December 23, 2008, the trial court issued another *capias* for Smith. On April 2, 2009, the trial court ordered Smith returned; thus, it appears

that Smith was once again in prison. On April 28, 2009, Smith was again referred to the court psychiatric clinic for a competency evaluation.

{¶ 13} On May 1, 2009, new counsel for Smith moved for discovery. On May 22, Smith was found incompetent and he was sent to be restored to competency. Pretrials were held on August 7, August 18, August 27 and September 1, 2009; all continuances were at Smith's request.

{¶ 14} On September 3, 2009, Smith's attorney moved to dismiss the case based on the Adam Walsh Act. A week later, Smith filed a pro se motion to dismiss the case based on his allegation that speedy trial time had expired.

{¶ 15} On October 13, 2009, the trial court granted Smith's motion to dismiss based on speedy trial.

{¶ 16} First, we note that during the hearing, the state did no more than tell the court that based on its calculations, Smith's speedy trial time had not expired.

The state failed to enter its calculations into evidence, indicate to the trial court how the calculations were made, or otherwise place any evidence on the record as to *why* Smith's time had not expired. As mentioned supra, the burden is on the state to show that the statutory speedy trial time has not expired. The state did not meet its burden, and it is not within this court's province to now make the state's argument.

{¶ 17} We also note that the record reflects that Smith was imprisoned during the time the capiases were issued by the court. The state has provided no evidence that it did anything to try and locate Smith. As the Fifth Appellate

District recently stated in *State v. Stowe*, Delaware App. No. 09CAA050046, 2010-Ohio-4646, “the State has the burden of ensuring that institutions comply with R.C. 2963.30 and ensuring that defendants are tried within the time constraints imposed by law. The State cannot simply allow a defendant to remain in prison in another jurisdiction for months or years on end when there are pending charges against the defendant and the State knows, or should know, where the defendant is located. To allow this would circumvent the purpose of R.C. 2963.30 which is the orderly and expeditious disposition of charges outstanding against a prisoner. R.C. 2963.30.” *Id.* at ¶16.

{¶ 18} Based on the foregoing, we find that the trial court did not err in granting Smith’s motion to dismiss. The first assignment of error is overruled.

Constitutional Speedy Trial Rights

{¶ 19} Based on our disposition of the first assignment of error, the second assignment of error is moot. See App.R. 12(A).

{¶ 20} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR