[Cite as *State v. Toler*, 2009-Ohio-6669.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA3103
vs.	:	
NIKITA D. TOLER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Benjamin J. Partee, 137 South Paint Street, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney, and Richard W. Clagg, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-11-09

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas court judgment of conviction and sentence. Nikita D. Toler, defendant below and appellant herein, entered a no contest plea to six counts of trafficking in cocaine. The trial court found her guilty and sentenced her to serve eighteen months in prison.

{¶ 2} Appellant raises the following assignment of error for review.

> "THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO DISMISS ON STATUTORY SPEEDY TRIAL GROUNDS."

{¶ 3} On June 2, 2008, the Ross County Grand jury returned an indictment charging appellant with six counts of trafficking in cocaine in violation of R.C. 2925.03. On June 7, 2008, she was arrested. On June 27, 2008, she appeared before the trial court and was committed to the Ross County Jail.

{¶ 4} On August 19, 2008, the court set the matter for a September 15, 2008 jury trial. On that same date, appellant requested the court to: (1) order the prosecuting attorney to reveal the identity of any confidential informant; and (2) order the prosecuting attorney to reveal before trial "any promises, considerations, deals, or agreements made or given to any testifying confidential informant * * * in exchange for said informant's cooperation and/or assistance."

{¶ 5} On August 25, 2008, appellant posted bond and was released from the Ross County Jail. Upon her release, she somehow apparently ended up in the Franklin County jail. She was released from confinement on September 4 or 5, 2008.

{¶ 6} On September 16, 2008, the trial court continued the trial to November 5, 2008. The court observed that a wind storm had passed through the area and left the courthouse without electricity to conduct the trial. On November 5, 2008, appellant filed a motion to continue the trial.

{¶ 7} On November 13, 2008 the trial court held a hearing. At this hearing, appellant first raised an argument about whether the time to bring her to trial had expired. Defense counsel thought he had filed a written motion to dismiss on speedy trial grounds, but had not. In reviewing appellant's argument, the court explained:

"The period from June 7 to the 28th would be twenty-one days, would be

> three for one, that's sixty-three. Bond was fixed, I believe at ten thousand dollars here. She made that bond on, I believe, August 25. She posted bond so from June 28 to August 25, she was held, that would be two days, June plus thirty-one in July, twenty-five in August, that would be a total of fifty-eight times three is a hundred seventy-four added to the sixty-three, that's two thirty seven. The question then becomes–her jury trial was scheduled to September fifteenth, two thousand eight. We had no power on that date due to a windstorm which occurred on September fourteenth, two thousand eight and the jury trial was continued from that date until November fifth so the court believes that the period from September fifteenth to November fifth was tolled properly and the court did that by entry and then the motion to continue tolled speedy trial time from there so the question is what happened between August twenty-fifth and September fifteenth, that would be a period of twenty days, excuse me, twenty-one days. If those ran day for day, she would still be twelve days within speedy trial."

{¶ 8} Apparently, some issue remained as to whether appellant was in jail on these same trafficking in cocaine charges in Franklin County between August 25, 2008 and September 4 or 5, 2008. Thus, on January 8, 2009, the trial court held a further hearing on the matter. Franklin County Common Pleas Court Intensive Mental Health Officer Ken Stubrick stated that appellant was one of his probationers. He testified that from August 25 to September 4, appellant was under house arrest for a forgery conviction.

{¶ 9} On January 9, 2009, appellant filed a written motion to dismiss on the basis of a speedy trial violation. On January 27, 2009, the trial court denied appellant's motion. The court found: (1) appellant was arrested on June 7, 2008 in Franklin County pursuant to a holder issued in the immediate case; (2) a Rule 4 hearing was held on June 11, 2008 and bond set at $10,000; (3) appellant was transported to Ross County and arraigned on June 25, 2008, where bond was continued; (4) on August 19, 2008, appellant filed a motion that requested the prosecutor to reveal the identity of any

confidential informant; (5) on August 19, 2008, the court scheduled a September 15, 2008 jury trial; (6) on August 25, 2008, appellant posted bond, but for unknown reasons, was transported to Franklin County where she was held until September 5, 2008; (7) on September 16, 2008, the court continued the trial until November 5, 2008 due to a power outage; and (8) on November 5, 2008, appellant filed a motion to continue the trial.

{¶ 10} The trial court calculated the speedy trial time as follows: (1) from June 7, 2008 to August 19, 2008, two hundred nineteen speedy trial days elapsed; (2) appellant's August 19, 2008 motion tolled the speedy trial time; (3) the court's continuance of the September 15, 2008 trial date tolled the speedy trial time until November 5, 2008; (4) appellant's November 5, 2008 motion to continue the trial further tolled the speedy trial time; and (5) appellant's January 9, 2009 motion to dismiss for a speedy trial violation further tolled the speedy trial time. The court determined that the speedy trial time had been tolled since August 19, 2008, and that fifty-one days remained to try appellant. It, therefore, denied her motion to dismiss.

{¶ 11} The trial court set the matter for a February 9, 2009 trial. On January 29, 2009, appellant filed a motion to continue the February 9, 2009 trial date. On February 2, 2009, the court continued the trial date to February 25, 2009. On March 2, 2009, the court continued the trial until March 12, 2009.

{¶ 12} On March 13, 2009, appellant entered a no contest plea to the six counts of the indictment. On March 18, 2009, the court sentenced appellant. This appeal followed.

{¶ 13} In her sole assignment of error, appellant asserts that the trial court erred by denying her motion to dismiss due to a violation of the speedy trial statute. See R.C. 2945.71. Appellant asserts that if the trial court had included the time between August 25, 2008 to September 4, 2008, when she was incarcerated in Franklin County, it would have determined that the statutory speedy trial period had expired. Appellant further argues that appellee waived its contention that her August 19, 2008 motion to request the identity of a confidential informant tolled the statute.

{¶ 14} Appellee asserts that once appellant filed her August 19, 2008 motion, time was tolled until September 15, the scheduled trial date. Thus, her argument regarding her purported incarceration from August 25, 2008 to September 4, 2008 is moot.

{¶ 15} Our review of a trial court's decision regarding a motion to dismiss for an alleged speedy trial violation involves mixed questions of law and fact. See, e.g., State v. Alexander, Scioto App. No. 08CA3221, 2009-Ohio-1401, at ¶15. We accord due deference to the trial court's findings of fact if they are supported by competent, credible evidence. Id. However, we independently determine whether the trial court properly applied the law to the facts of the case. Id.

{¶ 16} "The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. R.C. 2945.71 implements this guarantee with specific time limits within which a person must be brought to trial." State v. Blackburn, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, at ¶10. If the state fails to bring a defendant to trial within the

time required by R.C. 2945.71 and 2945.72, the trial court must discharge the defendant upon motion made at or prior to the start of trial. R.C. 2945.73(B). The Ohio Supreme Court has "imposed upon the prosecution and the trial courts the mandatory duty of complying" with the speedy trial statutes. State v. Singer (1977), 50 Ohio St.2d 103, 105, 362 N.E.2d 1216; see, also, State v. Parker 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032, at ¶¶14-15. We must strictly construe the speedy trial statutes against the state. See Brecksville v. Cook (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706.

{¶ 17} R.C. 2945.71 requires the state to try a person accused of a felony "within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). Under R.C. 2945.71(E), each day that a defendant is incarcerated in lieu of bond on the pending charge counts as three days. An accused presents a prima facie case for discharge by demonstrating that his case was pending for a time exceeding the statutory limits provided in R.C. 2945.71. See, e.g., State v. Butcher (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368. The burden then shifts to the state to show that the time limit was extended under R.C. 2945.72. Id. at 31.

{¶ 18} R.C. 2945.72 sets forth certain circumstances under which the time for bringing a criminal defendant to trial may be extended, including: "Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused"; and "[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(E) and (H).

{¶ 19} "When computing any period of time prescribed by an applicable statute,

the date of the act or event from which the period begins to run is not included." Alexander, at ¶18, citing State v. Staffin, Ross App. No. 07CA2967, 2008-Ohio-338, ¶9; R.C. 1.14; Crim.R. 45(A). Additionally, we do not include the date a motion was filed when calculating speedy trial time, unless that date also was the date the court entered an order resolving the motion. Staffin.

{¶ 20} A defendant's filing of a motion for discovery tolls the speedy trial clock. See State v. Brown, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, syllabus; State v. Jensen, Pickaway App. No. 07CA21, 2008-Ohio-5228; State v. Baucom, Highland App. No. 06CA33, 2008-Ohio-562. Additionally, a defense motion tolls the time, for a reasonable time, even if the trial date is not rescheduled. See, State v. Sanchez, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶25-26 (state need not show motion in limine diverted state's attention or caused delay of trial date to be entitled to tolling and that time tolled by defendant's motion can be lifted at the point the time taken to rule on the motion becomes unreasonable). Moreover, courts recognize that a motion to disclose the identity of a confidential informant tolls the speedy trial clock.[1] See State v.

[1] A motion to disclose the identity of a confidential informant is similar to a Crim.R. 16(B)(1)(e) motion, which states:

> (e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination.

Nelson, Clinton App. No. CA2007-11-046, 2009-Ohio-555; State v. Deltoro, Mahoning App. No. 07-MA-90, 2008-Ohio-4815.

{¶ 21} In the case at bar, two hundred seventy days from appellant's arrest would have been March 4, 2009 (starting the count on June 8, 2008, the date after appellant's arrest). Appellant, however, was in jail for part of that time, thus making the triple-count provision applicable. Appellant was in jail in Ross County from June 7, 2008 to August 25, 2008. During this time, two hundred thirty-seven elapsed under the triple-count provision. However, on August 19, 2008 appellant filed a motion to request the court to order appellee to produce the identity of a confidential informant. This motion tolled the speedy trial clock. See Nelson; Deltoro. Additionally, under the plain language of R.C. 2945.72(E), a motion that the defendant files tolls the speedy trial clock. Thus, appellant's August 19, 2008 motion tolled the speedy trial clock.

{¶ 22} Consequently, under the triple-count provision, two hundred nineteen days elapsed between June 7, 2008 and August 19, 2008, when appellant filed her discovery request. The speedy trial time was tolled until at least September 15, 2008 – the date the court originally scheduled the trial. The next day, the trial court noted that it had to continue the trial due to a wind storm that caused a power outage at the courthouse. The court thus continued the trial until November 5, 2008. During this time, the speedy trial clock remained tolled. On November 5, 2008, appellant filed a motion to continue the trial, again tolling the speedy trial clock. At a November 13,

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> A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

2008 hearing, appellant raised the issue of the speedy trial time. The court held several hearings on the matter and appellant filed a written motion to dismiss due to a speedy trial violation on January 9, 2009. The speedy trial time thus remained tolled until January 27, 2009, when the court ruled on the issue. At that point, appellant had to be tried within a fifty-one day window, or March 18, 2009. The court set the matter for a February 9, 2009 trial. Between January 27, 2009 and the February 9, 2009 scheduled trial date, six days elapsed (because on February 2, 2009 the court continued the trial date to February 25, 2009, and then again continued it until March 12, 2009). During this time, the speedy trial clock remained tolled. On March 13, 2009, when appellant entered her no contest plea, sufficient time remained on the speedy trial clock. Consequently, we conclude that no speedy trial violation occurred in the case sub judice.

{¶ 23} Due to our calculation set forth above, we need not address appellant's argument that the time she spent in jail in Franklin County should be included in our speedy trial calculation. The reason for this confinement is not entirely clear. Appellant's Franklin County probation officer stated that she was on house arrest during this time for a forgery conviction. Appellant asserts that when she posted bond in Ross County, Franklin County improperly continued to confine her for the Ross County charges. Even if appellant is correct, however, we agree with the trial court's analysis that the speedy trial clock tolled when appellant filed her August 19, 2005 motion. Thus, even if we accept for purposes of argument that appellant was in a Franklin County jail for these same charges during this period, those days were tolled under her August 19, 2008 motion.

{¶ 24} Appellant also argues that because appellee failed to specifically argue during the trial court proceedings that her August 19, 2008 motion tolled the speedy trial clock, appellee cannot raise this argument on appeal. We disagree. Our duty when reviewing an alleged speedy trial violation is to independently review the record and to calculate the speedy trial time. Consequently, whether the appellee raised this particular argument during the trial court proceeding is inconsequential. Moreover, we observe that the trial court relied upon appellant's filing of this motion when ruling that no speedy trial violation occurred.

{¶ 25} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.