[Cite as *State v. Murray*, 2004-Ohio-4966.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. ANTHONY MURRAY Appellant	C.A. No. 03CA008330 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 02CR061732

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} This matter is before this Court on appeal from the Lorain County Common Pleas Court's ruling permitting the preliminary hearing testimony of an absent witness to be introduced at trial and the court's denial of appellant's motion to dismiss the case for speedy trial violations. This Court finds that the trial court's ruling in both instances was proper and affirms.

I.

{¶2} The facts pertinent in this appeal are not in issue. On October 17, 2002, appellant Murray and other co-defendants engaged in activities which were criminal in nature. He was arrested and jailed on October 18, 2002. A

preliminary hearing was held on October 28, 2002, in the Elyria Municipal Court at which appellant and a co-defendant were present and represented by counsel. Both counsel for appellant and counsel for the co-defendant cross-examined the witness, Charles Farris, who was under oath. The trial court did not limit the scope of his examination which was quite extensive. On November 5, 2002, appellant's bond was set at $80,000. He was unable to post bond and remained incarcerated.

{¶3} On October 8, 2002, ten days prior to the offenses charged in this state, a parole detainer was issued against appellant from a court in Pittsburgh, Pennsylvania. Also, on August 29, 2002, five arrest warrants for different offenses were issued against appellant from the same court.

{¶4} On December 10, 2002, the Lorain County Grand Jury returned a four-count indictment against appellant containing four charges, all of which were either first or second degree felonies. Appellant was arraigned on December 19, 2002, and pled not guilty.

{¶5} During the preparations for trial, appellant filed numerous motions:

1. Motion for a bill of particulars. Filed on December 19, 2002, State responded on January 2, 2003. Time for Motion: 14 days.

2. Motion for Discovery and to Examine Exculpatory and Mitigatory Materials. Filed on December 19, 2002, State responded on January 2, 2003. Time for Motion: 14 days.

3. Motion for Transcript at Public Expense. Filed on December 23, 2002. Transcript filed on January 17, 2003. Time for Motion: 25 days.

4. Motion to Dismiss for Speedy Trial Violations filed on July 14, 2003. Judge ruled on Motion August 4, 2003. Time for Motion: 21 days.

{¶6} Prior to trial, the court held a hearing at which it determined that the witness, Charles Farris, was unavailable for trial. The court decided to admit his preliminary hearing testimony. Appellant was tried on August 4, 2003, and the jury found him guilty on three of the four counts. Appellant has appealed his convictions on two grounds.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AND DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WHEN IT DID NOT COMPEL THE VICTIM, FARRIS, TO TESTIFY AT TRIAL."

{¶7} A trial court has broad discretion with respect to the evidence it permits at trial, and the court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶43; *State v. Roelle*, 8th Dist. No. 83687, 2004-Ohio-4352, at ¶37. An abuse of discretion means more than just an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151, at 157; *State v Marbury*, 2nd Dist. No. 19226, 2004-Ohio-1817, at ¶29.

{¶8} Prior to the trial, the court held a hearing at which time it determined that witness Charles Farris was not available and that his prior preliminary hearing testimony could be introduced at trial.[1] Appellant argues that the trial court erred in admitting this testimony because it violated his Sixth Amendment right to confrontation.

{¶9} Appellant argues that the Supreme Court case, *Crawford v. Washington* (2004), 124 S.Ct. 1354, 158 L.Ed.2d 177, overruled *Ohio v. Roberts* (1980) 448 U.S. 56, 65 L.E.2d 597. In *Roberts*, the Supreme Court considered whether prior preliminary hearing testimony could be admitted at trial if the witness is unavailable. The Court held that prior testimony may be admitted if it contained adequate *indicia of reliability*. *Roberts*, 448 U.S. at 65. *Indicia of reliability* could be established if the prior testimony fell within either a firmly rooted hearsay exception or bore *particularized guarantees of trustworthiness*. Id at 66. Usually, a court would apply its rules of evidence in determining whether the prior testimony would meet this test. In *Roberts*, the Supreme Court held that admitting preliminary hearing testimony was proper because it met the test of reliability.

{¶10} In *Crawford*, the Supreme Court overruled the reliability test completely. The *Crawford* Court held that the test for admissibility of prior

[1] Appellant does not argue that the state has not proven that the witness was unavailable.

testimony is rooted solely in the Sixth Amendment right to confrontation. *Crawford*, 124 S.Ct. at 1365. The Sixth Amendment permits prior testimony to be admitted *only* if the witness is unavailable *and* the defendant had prior opportunity to cross-examine. Id.

{¶11} The Supreme Court in *Crawford* did overrule *Roberts*, but only in the manner in which the lower court is to analyze whether prior testimony may be admitted at trial**.** The Court in *Crawford* did *not* hold that preliminary hearing testimony was not admissible, only that it had to meet the Sixth Amendment requirements of witness unavailability and opportunity for cross examination.

{¶12} In this case, both prongs of the Sixth Amendment confrontation clause requirements have been met. Appellant does not dispute that the witness was unavailable. He claims, however, that his Sixth Amendment rights were violated because he did not have the opportunity to cross examine the witness *at trial*. The Sixth Amendment, however, does not require cross-examination only at trial. It merely requires that appellant have a prior opportunity to cross examine. *Crawford* 124 S.Ct. at 1366. In this case, appellant and a co-defendant both cross-examined the witness through their counsel at the preliminary hearing. The trial court did not limit the cross examination in any way and it was quite extensive. Under these circumstances, appellant's Sixth Amendment right to confrontation has been satisfied. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS/SPEEDY TRIAL."

{¶13} This Court's review of the trial court's determination of speedy trial issues is a mixed question of law and fact. *State v. Davis*, 5th Dist. No. 01CA67, 2002-Ohio-2502, at ¶9, appeal denied, 99 Ohio St.3d 1438, 2003-Ohio-2902. While giving due deference to the trial court, this Court must independently review whether the trial court properly applied the law to the facts of the case. Id.

{¶14} In his second assignment of error, appellant argues that his speedy trial rights were violated because he was not tried within 90 days of his incarceration.

{¶15} R.C. 2945.71 provides the time in which a criminal defendant must be brought to trial:

"Time within which hearing or trial must be held***

"(C) A person against whom a charge of felony is pending***

"(2) Shall be brought to trial within two hundred seventy days after the person's arrest***

"(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section."

{¶16} Under R.C. 2945.71(C)(2), a criminal defendant must be brought to trial within 270 days, unless he is held in jail in lieu of bond. If he is so held, R.C.

2945.71(E) provides he must be brought to trial within 90 days because each day in jail is counted as 3 days toward the 270 days (the 3 for 1 rule).

{¶17} Appellant claims that 90 days is the appropriate trial time limit because he was held in jail in lieu of bond. In fact, the time between his incarceration on October 18, 2002, and his trial on August 4, 2003 is 290 days. Therefore, he claims his speedy trial rights have been violated.

{¶18} R.C. 2945.71(E), however, applies the 3 for 1 rule only if appellant is held in jail *solely* on the pending charge. If there are other outstanding matters, the 3 for 1 rule does not apply. *State v. Martin*, (1978) 56 Ohio St.2d 207, 209; *State v. Lawless*, (March 2, 1994), 9th Dist. No. 2260-M, appealed denied, 70 Ohio St.3d 1415.

{¶19} In this case, appellant does not qualify for the 3 for 1 provision contained in R.C. 2945.71(E) because, while being held in jail in lieu of bond, he also had other pending criminal matters in Pittsburgh, Pennsylvania. He had 5 arrest warrants and a parole detainer outstanding. These were attached to the State's Response to appellant's Motion to Dismiss filed on July 24, 2003[2]. Consequently, he does not qualify for the 90 day speedy trial provision.

[2] Appellant argues that the state has failed to meet its burden of proving that the parole detainer and arrest warrants were outstanding because on January 2, 2003, a prosecutor was not certain whether the detainer and warrants were outstanding. He stated that he was going to inquire. However, these matters were later proven and are part of the record on appeal.

{¶20} Appellant must therefore be brought to trial within 270 days. R.C. 2945.72 provides for extensions of time in which to try a defendant:

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:***
>
> "(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[.]"

{¶21} This Court's standard of review is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71. *Davis* 2002 Ohio 2502, at ¶ 9.

{¶22} In this case, appellant filed four motions. These were a motion for a bill of particulars which took 14 days to resolve; a motion for discovery and to examine exculpatory and mitigatory materials which took 14 days to resolve; a motion for a transcript at public expense which took 25 days to resolve and a motion to dismiss for speedy trial violations which took 21 days to resolve. All can be charged to appellant against the time in which he must be brought to trial. They total 60 days of delay caused by appellant.[3] Appellant was incarcerated for a total of 290 days. As such, the period pertinent under the statute is 230 days (290 days less 60 days of delay attributable to appellant), thus falling within the

[3] The time attributed to appellant for his motion for a bill of particulars and the motion to examine exculpatory and mitigatory material run concurrently because they were filed together and answered together.

statutory requirements. Appellant's assignment of error on speedy trial grounds is overruled.

III.

{¶23} The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

MARY E. PAPCKE, Attorney at Law, 1288 N. Abbe Road, Suite B, Elyria, Ohio 44035, for appellant.

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