**[Cite as *State v. Phillips,* 2018-Ohio-3732.]**

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LORETTA A. PHILLIPS,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 15 MA 0218**

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Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2014 CR 1135.

**BEFORE:**
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**
Affirmed in part; Reversed in part and Remanded.

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*Atty. Mike DeWine,* Attorney General*, Atty. Jonathan L. Metzler*, *Atty. Susan Schultz, Atty. Anna Haffner* Assistant Attorneys General, Health Care Fraud Section, 150 East Gay St., 17th Floor, Columbus, Ohio 43215 for Plaintiff-Appellee and

*Atty. Rhys B. Cartwright-Jones***,** 42 N. Phelps Street, Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: September 10, 2018

**Robb, P.J.**

**{¶1}** Defendant-Appellant Loretta Phillips appeals after being convicted of aggravated theft and tampering with evidence in the Mahoning County Common Pleas Court. She argues her trial counsel rendered ineffective assistance of counsel by failing to conduct discovery regarding electronic evidence to show who was logged in during each billing in order to support her defense that she was not responsible for the improper Medicaid billing. She also contends her speedy trial rights were violated. Lastly, Appellant contests the imposition of consecutive sentences. For the following reasons, Appellant's verdicts are upheld, but the sentence is remanded due to insufficient consecutive sentence findings at the sentencing hearing.

## STATEMENT OF THE CASE

**{¶2}** Appellant owned Solutions Counseling Center in Sebring. She was a counselor with plans to become a clinical psychologist. As a counselor, Appellant was not eligible to receive a provider number from the Ohio Department of Medicaid in order to directly seek reimbursement for rendering services to clients who used the traditional Medicaid option. (Under traditional Medicaid, a counselor had to work under the direct supervision of a physician; in addition, claims for the services of a counselor were to be coded and paid at a lesser rate than those of a physician or clinical psychologist.) Appellant could and did receive a reporting number to directly bill insurance companies of those clients who used Medicaid's managed care plan option.

**{¶3}** The state, represented by the Ohio Attorney General's Office, alleged four theft schemes: (1) under the provider number of a clinical psychologist who worked out of her business as an independent contractor, she billed and received from Medicaid nearly $87,000 for clients who were not treated by this provider; (2) she continued to bill (nearly $16,000) under his provider number after he resigned in April 2011; (3) she billed traditional Medicaid and its managed care plans for visits that never occurred (totaling nearly $81,000); and (4) under the provider number of a different clinical psychologist, who was considering a merger with her business in September 2012, she

billed for clients who were not treated by this provider and received over $17,000 from a managed care plan (who had terminated her contract). In response to an April 23, 2013 grand jury subpoena, Appellant allegedly responded with falsified patient records.

**{¶4}** On October 15, 2013, Appellant was indicted in Franklin County on three third-degree felonies. The first two counts involved conduct occurring from January 2, 2008 to August 17, 2013 and related to claims billed for clients covered by Medicaid. The first count charged Appellant with aggravated theft and contained the following elements: with purpose to deprive the owner of property or services, knowingly obtaining or exerting control over either the property or services by deception. *See* R.C. 2913.02(A)(3), (B)(2) (a felony of the third degree where the value of the stolen property was $150,000 or more but less than $750,000). The second count charged Appellant with falsification in a theft offense for: knowingly making a false statement, or knowingly swearing or affirming the truth of a false statement previously made, when the statement is made with purpose to commit or facilitate the commission of a theft offense. *See* R.C 2921.13(A)(9), (F)(2) (a felony of the third degree where the value of the property was $150,000 or more). The third count charged the offense of tampering with evidence alleging: between April 23, 2013 and September 9, 2013, Appellant knew an official proceeding or investigation was in progress or was about to be or likely to be instituted and she made, presented, or used any record, document, or thing, knowing it to be false and with purpose to mislead a public official who may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation. *See* R.C. 2921.12(A)(2).

**{¶5}** On June 2, 2014, Appellant filed a motion to change venue to Mahoning County. The court in Franklin County found venue would be proper in either county and observed there were many witnesses from Mahoning County. On October 29, 2014, the motion to change venue was granted, and the case was transferred to Mahoning County. A May 2015 trial date was continued as the court had another trial. The matter was referred to a visiting judge, and the parties were instructed to file speedy trial time computations. The defense argued 311 days counted against the state at the time of the June 16, 2015 pretrial date, while the state argued only 92 days counted toward the

speedy trial time of 270 days. On June 23, 2015, the court accepted the state's calculations and rejected the calculations of the defense.

**{¶6}** The jury trial commenced on October 26, 2015. The jury found Appellant guilty as charged. At sentencing, the court merged counts one and two. Appellant was then sentenced to 30 months on count one and 30 months on count three. The court ordered the sentences to run consecutively. Appellant filed a timely notice of appeal from the December 22, 2015 sentencing entry. Transcripts were filed containing 2,400 pages, and extensions were granted for briefing. Appellant's brief was filed in November 2017, and the state's brief was filed in February 2018.

ASSIGNMENT OF ERROR ONE: INEFFECTIVE ASSISTANCE

**{¶7}** Appellant's first assignment of error contends:

"Counsel's performance was deficient in violation of Phillips' Sixth and Fourteenth Amendment rights to effective assistance."

**{¶8}** Appellant believes her trial counsel failed to conduct electronic discovery or attempt a forensic analysis of her computer in order to ascertain who was logged in to the computer system at her business when the improper bills were generated in order to show who was responsible for the billing issues. Appellant concludes this failure to investigate and gather evidence could not be viewed as strategic and resulted in prejudice to her case where her defense turned on the theory that others were responsible for the billing problems and the system required a user name and password to generate the electronic documents.

**{¶9}** We review a claim of ineffective assistance of counsel under a two-part test, which requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs must be established; there is no need to review for prejudice if the performance has not been demonstrated to be deficient, and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

**{¶10}** In evaluating the alleged deficiency in performance, our review is highly deferential to counsel's decision as there is a strong presumption counsel's conduct falls

within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142-143. We are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Instances of debatable trial strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). There are "countless ways to provide effective assistance in any given case." *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689.

**{¶11}** To show prejudice, a defendant must prove his lawyer's errors were so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

**{¶12}** The state responds that counsel's trial tactic was to present Appellant's defense through cross-examination of the state's witnesses and presentation of its own witnesses, including Appellant who testified in her own defense. The state emphasizes that any decision to refrain from checking the credentials used for the thousands of bills over a long period could be considered strategic (for purposes of focus and time allocation) and lacking in prejudicial effect. The state points out: the case did not turn on who submitted each bill; the employees claimed Appellant directed them to bill for clients who were not on the schedule on the alleged day of service; there were allegations she caused bills to be issued under the code for a service to represent herbal supplements she was providing her clients that were not covered by Medicaid; clients testified to visiting less times than Medicaid or a managed care plan was billed; the employees were instructed how to perform the billing with the provider number set in the system; the employees changed over the years of improper billing, with Appellant as the only constant; various employees testified, including the ones she blamed; some employees were under the impression there was one communal password or the

system was regularly left signed in; two employees spoke of a posted list displaying all the available credentials for all employees to see; the credentials displayed electronically therefore do not shed light on who actually submitted each bill; the money was deposited into the bank account of Appellant's business for which she was the account owner and none of her employees were account owners; and a review of the accounts did not demonstrate that an employee was stealing from the account. In fact, on the issue of improperly billing under the provider numbers of two different clinical psychologists, Appellant's mother testified for the defense and suggested that she was told by Medicaid that Appellant was supposed to bill under the provider number of the clinical psychologist. (Tr. 1941-1943). Appellant testified she believed this was the proper procedure. (Tr. 2139).

**{¶13}** It is noted Appellant retained a succession of attorneys, and at the August 24, 2015 hearing on an attorney's motion to withdraw, there was a discussion of electronic evidence. Appellant complained her attorney expressed she was unlikely to win at trial, he did not interview all the witnesses, he did not respond to calls from her private investigator, and he did not attempt to spur the F.B.I. to investigate. (Tr. 9-11). The attorney noted this was a "very document-heavy case" with "thousands of thousands of pages of documents" and a multi-front prosecution theory. In terminating him, Appellant asked him "to bring back the file or thumb drives and any discovery disks that had been provided to me through the Attorney General's Office and any documents that she has provided to me." (Tr. 4). She said she asked counsel for "the USBs because I'm preparing my own case." (Tr. 12). She also claimed some of the state's evidence did not match the evidence on her computer. (Tr. 19). In granting the motion to withdraw, the court gave Appellant a chance to find an attorney for the upcoming trial, stating no continuances would be given; although, the court thereafter did grant her new attorney a continuance. We also note on August 10, 2015, Appellant's attorney at the time filed a notice of a "Forensic Expert Report" and attached a disc containing information from Appellant's computer system.

**{¶14}** There is no reason to believe her new counsel did not review the defense-generated report, the information on the flash drives Appellant retrieved from her former counsel, and the discovery provided by the state. In other words, it is not on the record

that counsel failed to reasonably investigate the defense that employees were responsible for the billing problems. It is not demonstrated on the record that counsel did not review the electronic documents or receive information thereon from Appellant; counsel may have reviewed the evidence and found the information was not ascertainable or not useful. Prejudice is also not demonstrated. For instance, it is possible the log-in credentials for the billing do not support Appellant's theory as they show multiple individuals submitted the improper bills as the state's evidence portrayed. Alternatively, the evidence may show the same user was on most bills corresponding to suggestions that the computer was always logged in or they all used the same log-in credentials.

**{¶15}** "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). "[T]he failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 66; *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001). Defense counsel's decision to refrain from calling an expert can be considered tactical since the potential expert may uncover evidence further inculpating the defendant or add no clarity to the case. *See State v. Telego*, 7th Dist. No. 16 MA 0171, 2018-Ohio-254, ¶ 33, citing *Hartman*, 93 Ohio St.3d at 299.

**{¶16}** Appellant cites *Wiggins* where the failure to investigate a defendant's background and present mitigating evidence on certain topics at his capital sentencing violated his Sixth Amendment right to counsel. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2531, 156 L.Ed.2d 471 (2003). The state points out *Wiggins* was a death penalty case concerning an insufficient investigation on mitigation evidence. In assessing counsel's investigation, the Court applied *Strickland* and stated the reasonableness of counsel's performance is reviewed objectively under prevailing professional norms and considering the context. *Id.* at 523. Importantly, *Wiggins* was a decision on post-conviction relief; it was not a direct appeal as we have before us.

**{¶17}** A court cannot infer defense counsel failed to investigate from a silent record. *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶

120. The appellate court is limited to what transpired as reflected by the record on direct appeal. *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978). Therefore, a claim of ineffective assistance of counsel in a direct appeal must be established by the evidence in the record. *Hartman*, 93 Ohio St.3d at 299. If establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal. *Id.* Appellant has not pointed to where in the record counsel's alleged failure to investigate is shown and where the record shows prejudice. As Appellant's argument is not demonstrated by the record, this assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: SPEEDY TRIAL

**{¶18}** Appellant's second assignment of error contends:

"The government failed to bring Phillips to trial timely in violation of her Sixth and Fourteenth Amendment rights to speedy trial and under the deadline of R.C. 2945.73."

**{¶19}** Appellant argues she was not brought to trial within 270 days as required by R.C. 2945.71(C)(2). She claims the general waiver of her speedy trial rights was entered after the statutory speedy trial time had already expired, and any prior waivers were only for the period of a requested continuance. As for tolling due to her own motions, she generally alleges the motions would not have impeded the state in its trial preparations. Appellant emphasizes the state's burden to produce evidence as to tolling events once she established the time limit in R.C. 2945.71 was exceeded. *See State v. Butcher*, 27 Ohio St.3d 28, 31, 500 N.E.2d 1368 (1986) (after defendant presents a prima facie case for discharge, a burden of production arises obligating the state to produce evidence demonstrating defendant was not entitled to be brought to trial within the statutory time limits). Appellant points out we are to construe the speedy trial statutes against the state.

Time Before Venue Change

**{¶20}** If the state fails to bring the accused to trial within the statutory speedy trial time limit, then the accused shall be discharged upon motion made at or prior to commencement of trial. R.C. 2945.73(B). When a defendant is not held in jail in lieu of bail, she must be brought to trial on a felony within 270 days after arrest. *See* R.C.

2945.71(C)(2),(E) (triple time if in jail in lieu of bail). The speedy trial time is extended by periods covered in R.C. 2945.72(A)-(I). For instance, speedy trial time is extended by: "Any period of delay necessitated by a removal or change of venue pursuant to law." R.C. 2945.72(F).

**{¶21}** As the state points out, this provision was interpreted in the Ohio Supreme Court's *Cook* case, which applied the Tenth District's *Partlow* case. The state urged the application of *Cook* and *Partlow* in its speedy trial calculations filed with the trial court, and the trial court adopted the state's calculations. Appellant does not specifically dispute the applicability of this law on appeal. *Cook* involved a minor misdemeanor with a 30-day try-by time that originated in mayor's court. First, the Supreme Court determined a transfer from mayor's court to municipal court under R.C. 1905.032[1] constitutes a "removal" under R.C. 2945.72(F) and causes speedy trial time to toll, just as a change of venue does under the same provision. *Brecksville v. Cook*, 75 Ohio St.3d 53, 56-57, 661 N.E.2d 706 (1996), citing *City of Gahanna v. Partlow*, 27 Ohio App.3d 267, 271, 501 N.E.2d 51 (10th Dist.1985) (transfer between courts "constitutes a removal within the contemplation of R.C. 2945.72(F), even though it does not constitute a change of venue").

**{¶22}** Next, the Supreme Court answered the question: "which events mark the beginning and the end of the tolled period?" *Id.* at 55. The Court considered two approaches used in the appellate courts. The Court rejected the approach which confined the tolling to the period of certification, including the time necessary to process the specific transfer from one court to the other. *Id.* at 57-58. The Supreme Court found the better rule was articulated in the Tenth District's *Partlow* case and concluded the tolling period extended from the date of arrest or summons until the date of certification to the new court. *Id.* at 58.

**{¶23}** In *Partlow*, the court held: "the entire prescribed time for trial is available after certification since the time between the arrest and prompt and timely certification by a mayor's court to the municipal court for a jury trial is excluded pursuant to R.C.

[1] R.C. 1905.032(A) provides a mayor's court shall promptly transfer a case to a municipal court, county court, or court of common pleas with jurisdiction if the violation is not within the court's jurisdiction under R.C. 1905.01 and may transfer a case to a court with concurrent jurisdiction at any time prior to final disposition. The case before the Supreme Court involved the mandatory provision. *See Cook*, 75 Ohio St.3d 53 at fn.1.

2945.72(F) as delay necessitated by the removal * * *." *Partlow*, 27 Ohio App.3d at 271 (the delay after the transfer does not toll the time unless a different tolling provision is invoked). *See also Gahanna v. Young*, 10th Dist. No. 12AP-890, 2013-Ohio-3012, ¶ 9-10 (applying the same holding to a discretionary transfer due to a defendant's motion). Upon a removal or change of venue under R.C. 2945.72(F), the case is considered to have a "new speedy trial time." *City of St. Clairsville v. Anderson*, 7th Dist. No. 16 BE 0038, 2017-Ohio-7703, ¶ 20.

**{¶24}** In addressing a concern about extending the period indefinitely, the *Cook* Court observed the transferring court would be required to certify the case before the speedy trial time expired in order to invoke the tolling period, and the transferee court would have to bring the defendant to trial within the applicable number of days from the date of certification. *Cook*, 75 Ohio St.3d at 59. "This approach has the advantage of guaranteeing the municipal court the full statutory period within which to bring the accused to trial." *Id.* at 58.

**{¶25}** It is also notable that the transfer here was prompted by Appellant's choice to file a motion to change venue, which could have been filed earlier. That is: the venue change was prompted by Appellant's motion to transfer venue to the location where the offenses originated and where many witnesses were located; these reasons were ascertainable soon after service of summons; and she waited until nearly eight months after service of summons to seek a venue change.

**{¶26}** Before restarting the clock at the date of venue transfer as urged by the state, the first question is whether the speedy trial had expired by the time the court in Franklin County granted the change of venue on October 29, 2014 and transferred the case to Mahoning County. If the defendant is not arrested for a felony offense, then speedy trial time is triggered by the day he is served with the summons and indictment. *City of Cleveland v. Collins*, 8th Dist. No. 105804, 2018-Ohio-958, ¶ 52. Both parties start their calculation on October 16, 2013, which was the date the summons on the indictment was issued (as the date it was served is not in the file provided by Franklin County). We note the day of arrest is not counted. *State v. Lawson*, 7th Dist. No. 12 MA 194, 2014-Ohio-879, ¶ 36. *See also* R.C. 2945.71(C)(2) (270 days after arrest).

**{¶27}** First, we review the requests for continuances prior to the October 29, 2014 venue change. Appellant filed a motion to continue on January 2, 2014, causing the January 28, 2014 trial date to be reset for March 19, 2014. Prior to that trial date, Appellant moved for another continuance. This was granted, and a new trial date was set for May 5, 2014. Before this date, Appellant again moved for a continuance, which was granted until the new trial date of August 11, 2014. Once again, Appellant moved to continue the trial date, which was granted until September 15, 2014. The speedy trial time is extended by "[t]he period of any continuance granted on the accused's own motion * * *." R.C. 2945.72(H).

**{¶28}** Before the clock began ticking again, the state moved for a continuance of the September 15, 2014 trial date due to witness unavailability, and the trial was rescheduled for November 3, 2014. The judgment stated Appellant was waiving speedy trial rights for the period of the continuance and was signed by Appellant's attorney. In addition, division (H) extended speedy trial time not only by "the period of any continuance granted on the accused's own motion" but also extended by "the period of any reasonable continuance granted other than upon the accused's own motion * * *." R.C. 2945.72(H). Appellant's motion to change venue was both filed and granted while the speedy trial time was already tolled by these continuances.[2]

**{¶29}** In sum, the speedy trial time was tolled for the period of continuances first requested on January 2, 2014 through the October 29, 2014 grant of Appellant's motion to change venue and transfer of the case. Before the January 2, 2014 tolling, the speedy trial time had not expired as the time accruing after the October 16, 2013 summons until the January 2, 2014 tolling event was well under 270 days.[3]

[2] Other tolling events occurring during the already-tolled period of continuances, besides Appellant's June 2, 2014 motion for change of venue, included: Appellant's January 3, 2014 motion in limine and motion to suppress; the February 28, 2014 motion to withdraw filed by Appellant's attorney, which was granted on March 11, 2014; and a September 4, 2014 motion to withdraw filed by Appellant's attorney, which was granted on September 12, 2014.

[3] There are 78 days between October 17, 2014 (the day after the agreed date of the service of summons) and the January 2, 2014 tolling motion. During this period, at least 21 days were tolled, meaning 57 days were on the speedy trial clock at the time venue was transferred. Specifically: Appellant's attorney filed a motion to withdraw on November 6, 2013, and new counsel entered notice of appearance the next day; Appellant filed a motion for discovery on November 7, 2013, asking the court to order discovery within ten days; Appellant filed a motion for a bill of particulars on November 18, 2013, asking the court to order the state to provide it within ten days; on November 18, 2013, the court ordered the state to provide discovery and a bill of particulars within ten days; and the state did so on November 27, 2013.

Accordingly, the October 29, 2014 order granting Appellant's motion to change venue and transferring venue from Franklin County to Mahoning County restarted the clock on October 30, 2014.

Time After Venue Change

**{¶30}** We now consider the time accruing after the October 29, 2014 venue change. Initially, we note the trial court in Mahoning County set the trial for May 11, 2015, which would have been 194 days after the venue change (i.e., the trial was set for a date within the speedy trial time of 270 days). The state contends only 92 days should be counted against the 270-day clock, arguing the following blocks of tolling after the venue change: (1) Appellant's motion to require the state to provide only relevant and exculpatory evidence; (2) Appellant's motion to take a deposition; (3) the trial court's sua sponte continuance; and (4) defense counsel's motion to withdraw and subsequent continuances.

**{¶31}** The first clear tolling event after the venue change was on December 30, 2014, when Appellant filed a motion to require the state to provide only relevant and exculpatory evidence. The state responded on January 14, 2015. The court overruled the motion on January 20, 2015. The speedy trial time is extended by "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused * * *." R.C. 2945.72(E). *See also State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶ 18, 26 (it is well established that requests for discovery and motions for bills of particulars are tolling events under this division; whether the trial date was required to be continued by the motion was not a consideration).

**{¶32}** Contrary to Appellant's suggestions, the court need not analyze whether each motion truly or substantially diverted the prosecutor's attention or generated a continuance of the trial date in order to toll speedy trial time. "It is the filing of the motion itself, the timing of which the defense can control, that provides the state with an extension." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 26. When Appellant's December 30, 2014 motion tolled the time, 62 days had passed on the speedy trial clock (subsequent to the venue transfer).

**{¶33}** After the court's January 20, 2015 ruling on the motion about relevant and exculpatory evidence, another 30 days were added to the speedy trial clock (for a total of 92 days), at which point Appellant filed her next tolling motion. Specifically, on February 19, 2015, Appellant filed a motion to depose her mother, proposing a deposition date of March 13, 2015. The state responded on March 9, 2015, objecting to the deposition unless medical documentation was provided. The deposition was taken on March 13, 2015, and filed with the court on May 6, 2015. Also on May 6, the pretrial was held, and the trial date was continued. A judgment entry filed June 2, 2015 memorialized the continuance, explaining the court was unavailable due to a previously scheduled jury trial, and referred the matter to a visiting judge. A pretrial before the visiting judge was set for June 16, 2015, and the parties were asked to compute speedy trial time by that date.

**{¶34}** As to the effect of Appellant's deposition motion, the state's speedy trial memorandum noted: the court had not ruled on the motion; 117 days elapsed from the date the motion was filed to the date of the June 16 pretrial; and 120 days could be considered a reasonable time of tolling, citing cases using the guideline in Sup.R. 40(A)(3) (which states a court shall rule on a motion within 120 days). Appellant's speedy trial memorandum filed in the trial court argued no time should be tolled from her deposition motion because it did not delay the trial or divert the prosecutor's attention. However, the prosecutor filed a response, noting medical documentation was lacking, and the prosecutor attended the deposition. Regardless, as aforementioned, the court need not analyze whether each motion diverted the prosecutor's attention or generated a continuance of the trial date in order to toll speedy trial time. *Sanchez*, 110 Ohio St.3d 274 at ¶ 26 (it is the filing of the motion itself that provides the state with an extension). At the very least, the time was tolled from Appellant's February 19, 2015 deposition motion through the taking of the deposition on March 13, 2015. At this time, the last count on the speedy trial clock was 92 days.

**{¶35}** As for the May 6, 2015 continuance of the May 11, 2015 trial date, the state's speedy trial memorandum filed in the trial court classified the sua sponte continuance as a tolling event. Speedy trial time is extended by "the period of any reasonable continuance granted other than upon the accused's own motion * * *." R.C.

2945.72(H). The state urged the trial date was reasonably continued due to the court's previously scheduled trial and the referral to a visiting judge. The state also noted the parties jointly agreed to August 31, 2015 as the new trial date based upon the parties' summer schedules. If the sua sponte continuance was reasonable (and if the clock restarted immediately after the taking of the deposition), this would add 54 days until the May 6 continuance, which would total 146 days on the 270-day speedy trial clock.

**{¶36}** However, before a sua sponte continuance can be evaluated for reasonableness, the timing of the judgment entry memorializing the continuance must be evaluated. A sua sponte continuance of the trial date beyond the statutory time limit is only permitted when the continuance is made by journal entry prior to the expiration of the time limit. *See State v. King*, 70 Ohio St.3d 158, 162-163, 637 N.E.2d 903 (1994). This is why a trial court should swiftly enter judgment memorializing the continuance. Here, the trial court did not memorialize its May 6, 2015 continuance until June 2, 2015. Fortunately for the state, the June 2, 2015 judgment entry memorializing the continuance was filed before the speedy trial time expired. Assuming the clock started the day after the deposition was taken, the time from March 14 through the June 2 judgment entry would be 80 days; if this is added to the aforementioned 92 days, the total would be 172 days. In accordance, the entry ordering a sua sponte continuance was filed prior to the expiration of the speedy trial time.

**{¶37}** The next consideration would be whether the continuance was reasonable, both in length and rationale. To recap, the June 2, 2015 entry explained the court was in a previously scheduled trial and referred the matter to a visiting judge. As a visiting judge was being utilized, a trial date was not immediately set. The parties were given notice of a June 16, 2015 pretrial hearing before the visiting judge and were instructed to compute speedy trial time. The state's speedy trial memorandum noted the parties arrived at a tentative trial date of August 31, 2015 through mutual planning upon exchanging their summer schedules, and this was the date set by the visiting judge in the June 23, 2015 entry rejecting Appellant's speedy trial calculations. *See generally State v. McRae*, 55 Ohio St.2d 149, 152-153, 378 N.E.2d 476 (1978) (agreeing to new trial date).

**{¶38}** The reasonableness of the continuance is for the trial court in the first instance. *See State v. Saffell*, 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988) (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). This was the first sua sponte continuance. The length of the continuance is not specifically challenged on appeal. And, no motion to dismiss was filed after the visiting judge set the trial date. *See* R.C. 2945.73(B) (upon motion made at or prior to trial). Appellant's speedy trial memorandum addressed the time up to the June 16, 2015 pretrial.

**{¶39}** Appellant's speedy trial memorandum argued the court failed to provide sufficient reasons for the continuance in the June 2, 2015 entry when it said the court was unavailable due to a previously scheduled jury trial and the case was referred to a visiting judge. Clearly, additional time is necessary to accomplish a referral to the visiting judge. *See generally Saffell*, 35 Ohio St.3d at 92 (noting the use of a visiting judge as a potential tool when continuing a case due to scheduling conflicts).

**{¶40}** The defense pointed out the trial court's entry did not state whether the previously scheduled trial was criminal or civil. The state argued this was irrelevant as a general scheduling conflict or crowded docket can be a valid reason. *Citing State v. Grose*, 5th Dist. No. 12CA109, 2013-Ohio-4387, ¶ 31 (holding a continuance due to an ongoing civil trial was reasonable); *State v. Glass*, 3d Dist. No. 2-04-01, 2004-Ohio-4402, ¶ 11 ("Scheduling and docketing conflicts have been held to be reasonable grounds for extending an accused's trial date beyond the speedy trial limit"). This court has explained: "reasonable trial delays due to scheduling conflicts, crowded dockets, or the lack of an available courtroom, toll the speedy trial clock." *State v. Fant*, 7th Dist. No. 14 MA 0067, 2016-Ohio-7429, 76 N.E.3d 518, ¶ 38, quoting *State v. Nottingham*, 7th Dist. No. 05 BE 39, 2007-Ohio-3040, ¶ 18.

**{¶41}** Regardless of the sufficiency of the reasons for the continuance, speedy trial time would not have expired even if (for the sake of argument) we refrain from stopping the clock for the May 6, 2015 continuance (memorialized in the June 2, 2015 entry) and even if we only toll the time for the deposition motion until the date the deposition was taken. To explain this, we move ahead. Appellant's attorney filed a motion to withdraw on August 24, 2015, a week before the trial. The state filed a

memorandum in opposition as this was her fourth attorney. A hearing was held the same day; at the hearing, Appellant asked to terminate this attorney. This was a tolling event. *See* R.C. 2945.72(C) (any period of delay necessitated by the accused's lack of counsel), (E) (any period of delay necessitated by reason of a motion of the accused), (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). Based on Appellant's motion, the jury trial was continued until September 21, 2015. At the September 15, 2015 pretrial, Appellant's new attorney filed a notice of appearance and requested a continuance, and Appellant signed an unlimited speedy trial waiver. The court granted the continuance and reset the trial for October 25, 2015, which is when the trial commenced.

**{¶42}** The tolling events after August 24, 2015 are not contested, and no speedy trial motion was filed after the defense filed the speedy trial memorandum arguing time expired prior to the June 16, 2015 pretrial. *See* R.C. 2945.73(B) (upon motion made *at or prior to commencement of trial*). In any event, once the time tolled for Appellant's August 24, 2015 motion, it clearly remained tolled. With this as the end date for the speedy trial clock, the reasonableness of the continuance would not be dispositive. That is, even if we used the minimum time on the deposition motion (by lifting tolling after the deposition was taken on March 13, 2014) and even if we then keep the clock ticking until Appellant's August 24, 2015 motion regarding counsel, this would add 164 days to the clock. Adding this to the 92 days on the clock before Appellant's deposition motion would result in a total of only 256 days. Therefore, even assuming arguendo we were to reject the state's argument about the reasonableness of the sua sponte continuance, the speedy trial time would not have run out.

**{¶43}** Finally, although Appellant's arguments focus on the statutory right to a speedy trial, Appellant also refers to the constitutional right to a speedy trial under the United States and Ohio Constitutions. A balancing test is used to analyze constitutional speedy trial claims, focusing on four factors: (1) the length of the delay; (2) the reason for the delay; (3) how and when the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *State v. Taylor*, 98 Ohio St.3d 27,

2002-Ohio-7017, 781 N.E.2d 72, ¶ 38-39. The length of delay, reasons for the delay, and tolling events were discussed supra. We note the trial commenced less than one year after the transfer of the case from Franklin County to Mahoning County. The venue change was prompted by Appellant's motion to transfer venue to the location where the offenses originated and where many witnesses were located, and these reasons were ascertainable soon after service of summons. Also notable is the fact that Appellant's speedy trial memorandum, filed at the prompting of the trial court, did not touch upon the constitutional right to a speedy trial, addressing only whether her statutory speedy trial time had run at a certain point. No further invocation of speedy trial rights was filed regarding time accruing thereafter. Lastly, Appellant has not demonstrated prejudice from the delay. The balancing test does not weigh in Appellant's favor.

**{¶44}** For all of the foregoing reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR THREE: CONSECUTIVE SENTENCES

**{¶45}** Appellant's third assignment of error provides:

"The trial court erred in imposing on Phillips consecutive sentences without making findings under R.C. 2929.14(C)(4)."

**{¶46}** There is a statutory presumption in favor of concurrent sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 654, ¶ 23, citing R.C. 2929.41(A). When a trial court imposes consecutive sentences for multiple convictions, it must make the required R.C. 2929.14(C)(4) findings at the sentencing hearing, and it must incorporate those findings into the sentencing entry. *Id.* at ¶ 29, 37. R.C. 2929.14(C)(4) contains three statutory findings: (1) consecutive service is necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public; and (3) one of the three alternative findings in subdivisions (a), (b), or (c). *State v. Beasley*, __ Ohio St.3d __, 2018-Ohio-493, __ N.E.3d __, ¶ 252. Here, the pertinent third finding is in subdivision (b): "At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single

prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct." R.C. 2929.14(C)(4)(b).

**{¶47}** The trial court's sentencing entry contains no consecutive sentencing findings. The state concedes this and agrees the case must be remanded for a nunc pro tunc entry. Where the court properly makes consecutive sentence findings at the sentencing hearing, the absence of findings in the sentencing entry is considered a clerical error that can be corrected by the trial court in a nunc pro tunc entry to reflect what occurred at sentencing. *Bonnell*, 140 Ohio St.3d 209 at ¶ 30.

**{¶48}** However, a nunc pro tunc entry cannot cure the trial court's failure to make the required findings at the sentence hearing. *Id.*; *Beasley*, 2018-Ohio-493 at ¶ 260-261. Appellant contends the record does not contain the required findings. The state counters by arguing the trial court made sufficient oral consecutive sentence findings.

**{¶49}** In evaluating the imposition of consecutive sentences, "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell*, 140 Ohio St.3d 209 at ¶ 29. In other words, the court is not required "to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record * * *." *Id.* at ¶ 37. The question here is whether we can discern the trial court engaged in the proper analysis before imposing consecutive sentences.

**{¶50}** At the sentencing hearing, the state asked the court to impose a prison term, and the defense argued for community control (and restitution). The court discussed the purposes of sentencing in R.C. 2929.11. (Tr. 10-11). The court reviewed the seriousness and recidivism factors in R.C. 2929.12 and found: the victim was the state and its citizens, including those who benefit from Medicaid; the victim suffered economic harm; Appellant's contractual relationship with the state allowed her to commit the offense; her reputation, occupation, license, and position allowed her to commit the offense and influence others to assist her; she shows no genuine remorse;

and the offense was committed over a long period with approximately 3,000 episodes. (Tr. 11-13). The court then stated:

> The court finds that the minimum sentence in this case would demean the seriousness of the offense and would not adequately protect the public from future crime by the offender or others, and that the offender committed the worst form of her offense, and the court has explained how her intent spanned many events.
>
> The court finds that the harm caused by the multiple offenses was so great or unusual, that no single prison term for any one of the offenses committed as part of the single course of conduct adequately reflects the seriousness of the conduct.

(T. 13-14). As to the third statutory finding, the state points out how the immediately preceding paragraph was nearly a direct statutory quote from R.C. 2929.14(C)(4)(b).

**{¶51}** The issue is whether the trial court sufficiently made the first and second consecutive sentence findings. Before reviewing these issues, we outline the trial court's remaining statements regarding sentencing.

**{¶52}** After the aforequoted findings, the court opined that fraud against Medicaid and similar government programs undermines the law and prevents the government from helping its citizens in need, describing Appellant's "greed" and lack of remorse. (Tr. 14-15). The court noted the large sum involved, stating the theft was a deliberate and calculated scheme to steal and defraud the system which was implemented many times over a period of time. The court said the "rationalization that went on in the defendant's mind is beyond the comprehension of this court." (Tr. 15). The court pointed out how she attempted to cover her crime by lying, and creating false records, noting the "theft is bad enough, but to have the intent to extricate herself by committing further crime is unpardonable." (Tr. 15-16). The court then imposed 30 months on count 1, merged count 2, imposed 30 months on count 3, and ordered count 1 and 3 to run consecutive. (Tr. 16).

**{¶53}** The first required consecutive sentencing finding is: "consecutive service is necessary to protect the public from future crime or to punish the offender." R.C.

2929.14(C)(4) (note the use of "or"). The state extracts the court's language, "would not adequately protect the public from future crime by the offender or others," from the first paragraph quoted supra and asserts this aligns with the first option in the first statutory finding. The state alternatively believes the court's declaration that a minimum sentence would "demean the seriousness of the offense" equated to the second option in the first finding, i.e., that consecutive service was necessary to punish the offender. Although the court expressly made these statements in a grammatical sentence explaining why a minimum sentence would be insufficient, the state claims the court's use of the term "minimum" was actually a reference to a concurrent sentence.

**{¶54}** However, the court was clearly speaking of its deviation from a minimum sentence when it made these findings. Notably, the language used by the trial court conformed to *former* division (B) of R.C. 2929.14, which provided if an offender has not previously served time in prison, the court shall impose the minimum sentence unless the court finds on the record that the minimum sentence would demean the seriousness of the offender's conduct or would not adequately protect the public. Similarly, *former* division (C) only allowed a maximum sentence if the court found the offender committed the "worst form" of the offense. These provisions for deviating from the minimum and imposing the maximum are no longer part of the law of this state.

**{¶55}** As to the "worst form" of the offense language, the state believes we can "glean" that the trial court considered proportionality under the second statutory finding which requires a sentencing court to find: "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4) (note the use of "and" rather than "or"). The state asks this court to find the seriousness element was satisfied by the trial court's description of Appellant's conduct along with the finding she committed the worst form of the offense. Although there was no mention of proportionality, the state emphasizes how magic words are not required.

**{¶56}** In *Bonnell*, the Supreme Court found it could "discern" that the trial court found a need to protect the public from future crime or to punish him due to the trial court's statement at sentencing that the defendant had "shown very little respect for society and the rules of society." *Bonnell*, 140 Ohio St.3d 209 at ¶ 33. The Court also

noted the trial court's reference to the defendant's "atrocious" record related to a criminal history demonstrating the need for consecutive sentences to protect the public from future crime under the first finding, yet the Court concluded it could not "glean" the trial court used the criminal history alternative as its third finding. *Id.* at ¶ 33, 36. The Court also concluded the trial court "never addressed the proportionality of consecutive sentences to the seriousness of Bonnell's conduct and the danger he posed to the public." *Id.* at ¶ 33. "We cannot glean from the record that the trial court found consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* at ¶ 36.

**{¶57}** Distinguishable from *Bonnell*, the trial court here made a third finding; as aforementioned, the trial court expressly set forth the subdivision (b) option in R.C. 2929.14(C)(4). The language in this subdivision discusses the "seriousness of the conduct" in a manner seemingly akin to a proportionality finding. That is to say: where it is found the harm caused by the multiple offenses was so great or unusual that no single prison term for one of the offenses will adequately reflect the seriousness of the conduct, this would seem to allow one to discern that consecutive sentences are not disproportionate to the seriousness of the offender's conduct.

**{¶58}** In any event, there is no direct discussion of the danger Appellant poses to the public, which is an additional part of the second finding. *See State v. Walisiak*, 7th Dist. No. 15 BE 0066, 2016-Ohio-8558, ¶ 24-28 (remanding as it was unclear whether the trial court considered proportionality and danger). In *Beasley*, the trial court made the first finding by stating consecutive sentences are necessary to protect the public and made the third finding by stating the offenses were committed while at large or awaiting trial. *Beasley*, 2018-Ohio-493 at ¶ 254. The trial court did not make "an explicit finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public." *Id.* at ¶ 255. The Supreme Court concluded the proportionality finding was missing. *Id.* at ¶ 253, 257. When the state proposed the trial court's views on proportionality could be discerned from its statements on the other two findings, the Supreme Court advised this "removes one of the separate statutorily required findings for consecutive sentences." *Id.* at ¶ 257. Quoting *Bonnell*, the Court concluded: "we cannot glean from the record

that the trial court found consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* at ¶ 259. The Court approved of "consistently remand[ing] for resentencing when the trial judge has failed to make a proportionality finding when imposing consecutive sentences." *Id.* at ¶ 260.

**{¶59}** Although a close case, we have concluded we cannot discern the court made all of the required consecutive sentencing findings at the hearing. We conclude remand is required due to the lack of the second consecutive sentence finding (on whether consecutive sentences were not disproportionate to the seriousness of the conduct and to the danger posed to the public) and the first finding (where the relevant language was connected to the court's findings to why a minimum sentence would be inappropriate instead of why a concurrent sentence would be inappropriate). Accordingly, this case is remanded for resentencing on the consecutive nature of the sentences

Donofrio,J., concurs.

Waite, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part. We hereby remand this matter to the trial court for resentencing according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**