[Cite as *State v. Lewis*, 2020-Ohio-5294.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

v.

ELDON LEWIS,
MARQUISE LEWIS,
MARKIESE SMITH,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case Nos. 19 MA 0100, 19 MA 0101, 19 MA 0102,
19 MA 0104, 19 MA 0105, 19 MA 0106

Criminal Appeal from the
Youngstown Municipal Court of Mahoning County, Ohio
Case Nos. 2019 CRB 158, 2019 CRB 160, 2019 CRB 500,
2019 CRB 501, 2019 CRB 670, 2019 CRB 502

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

JUDGMENT:
Reversed and Remanded.

Atty. Kathleen Thompson, Sr. Assistant. Law Director, 9 West Front Street, 3rd Floor, Youngstown, Ohio 44503; *Atty. Jeffrey Moliterno*, Assistant. Prosecutor, 26 South Phelps Street, Fourth Floor, Youngstown, Ohio 44503 for Plaintiff-Appellant and

No Brief Filed, for Defendants-Appellees.

Dated: September 28, 2020

Robb, J.

{¶1} The City of Youngstown appeals the decision of Youngstown Municipal Court sua sponte dismissing the public indecency complaints against Defendants-Appellees Eldon Lewis, Marquise Lewis, and Markiese Smith. The trial court determined it did not have jurisdiction over the complaints because Appellees are inmates at the Ohio State Penitentiary in Youngstown and pursuant to the language of R.C. 2941.39 and two Ohio Attorney General opinions, there was no authority to order the removal of Appellees from the penitentiary to stand trial for the misdemeanor charges. The arguments raised by the City in this appeal address whether the trial court's sua sponte dismissal of the complaint was an abuse of discretion and whether the trial court incorrectly determined that it did not have jurisdiction. For the reasons expressed below, the trial court abused its discretion when it dismissed the complaints without allowing the state, at the minimum, to file a brief on the issue of whether the municipal court had subject matter jurisdiction. Furthermore, the municipal court incorrectly determined it was without jurisdiction based on a 1987 Ohio Attorney General Decision. The trial court's dismissal orders are reversed and the matters are remanded for further proceedings consistent with this opinion.

Statement of the Facts and Cases

{¶2} This is a consolidation of six appellate cases involving three Appellees. Each Appellee is an inmate at the Ohio State Penitentiary in Youngstown, Ohio and was charged with public indecency under either subsection (A)(1) or (A)(2) of R.C. 2907.09 for either masturbating in front of prison employees or for the exposure of private parts (penis) to prison employees.

{¶3} Appellee Eldon Lewis was charged with R.C. 2907.09(A)(2) (masturbation) for incidents that occurred on January 8, 2019 and January 21, 2019. 1/28/19 Complaints. He was charged with R.C. 2907.09(A)(1) (exposure of private parts) for an

incident that occurred on March 15, 2019. 3/21/19 Complaint. He was arraigned for the first two incidents on February 13, 2019. He was arraigned on May 7, 2019 for the third offense. Appellee Eldon Lewis pled not guilty, waived his right to a speedy trial, and requested a jury trial.

{¶4} Appellee Marquise Lewis was charged with R.C. 2907.09(A)(1) (exposure of private parts) for incidents that occurred on March 19, 2019 and April 12, 2019. 3/21/19 Complaint; 4/16/19 Complaint. He was arraigned on May 7, 2019 for both offenses. He pled not guilty and waived his speedy trial rights.

{¶5} Appellee Markiese Smith was charged with R.C. 2907.09(A)(1) (exposure of private parts) for an incident that occurred on March 15, 2019. 3/21/19 Complaint. He was arraigned on May 7, 2019. He pled not guilty and waived his right to a speedy trial.

{¶6} The trial court held status court only hearings in each of these cases in June, July and August; a total of four court only status hearings were held in each case. Two weeks after the last status hearing, the trial court sua sponte dismissed the cases stating the court had no jurisdiction to hear the matter. 8/15/19 J.E. Based on the 1987 and 2002 opinions from the Ohio Attorney General the trial court found, "a prisoner in a state correctional institution may not be removed to stand trial on a pending misdemeanor charge." 8/15/19 J.E. It then stated, "Therefore, it is in the interest of justice that the cases be dismissed, as this Court has been given no jurisdiction to hear such a matter by the General Assembly." 8/15/19 J.E.

{¶7} The state filed a timely appeal from the trial court's decisions.

First Assignment of Error

"The trial court abused its discretion in dismissing the complaint without holding an evidentiary hearing or affording the state an opportunity to object."

{¶8} The city asserts the trial court abused its discretion when it dismissed the charges without giving it the opportunity to object and argue against dismissal. It asserts this amounted to an abuse of discretion.

{¶9} A trial court's dismissal of criminal charges is reviewed for an abuse of discretion. *State v. Cole,* 9th Dist. Summit Nos. 26190, 26191, 2012–Ohio–4027, ¶ 7, citing *State v. Busch,* 76 Ohio St.3d 613, 616, 669 N.E.2d 1125 (1996). An abuse of

discretion "implies that a trial court's decision is unreasonable, arbitrary or unconscionable." *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶10} We have previously explained:

> Generally, "[a] court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings.'" *State v. Busch,* 76 Ohio St.3d 613, 615, 669 N.E.2d 1125 (1996), quoting *Royal Indemn. Co. v. J.C. Penney Co.,* 27 Ohio St.3d 31, 33–34, 501 N.E.2d 617 (1986). Crim.R. 48(B) provides that "[i]f the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal." The Ohio Supreme Court explained the effect of Crim.R. 48(B) in the *Busch* decision: "Crim.R. 48(B) recognizes by implication that trial judges may *sua sponte* dismiss a criminal action over the objection of the prosecution, since the rule sets forth the trial court's procedure for doing so. *The rule does not limit the reasons for which a trial judge might dismiss a case,* and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice." (Emphasis added.) *Id.* * * * Generally, it is an abuse of discretion for the court to dismiss charges under Crim.R. 48(B) solely for the reason that the evidence is insufficient to support conviction. *State v. Nihiser,* 4th Dist. No. 03CA21, 2004-Ohio-4067, 2004 WL 1737862, ¶ 17. Nevertheless, a trial judge is allowed great flexibility in determining when the judicial process is no longer useful in a given case such that a dismissal under Crim.R. 48(B) is warranted. *State v. Montiel,* 185 Ohio App.3d 362, 2009-Ohio-6589, 924 N.E.2d 375 (2d Dist.), ¶ 15.

State v. Sanders, 7th Dist. No. 12 CO 35, 2013-Ohio-5220, 3 N.E.3d 749, ¶ 13.

{¶11} Crim.R. 48(B) does not indicate the process for dismissal, but given the language of the rule that it can be dismissed over objection of the state, it is implied that the rule contemplates an evidentiary hearing or at minimum the opportunity to respond to the intent to dismiss. *See State v. Harris*, 2nd Dist. No. 23231, 186 Ohio App.3d 359, 2010-Ohio-837, 928 N.E.2d 456, ¶ 15 (Donovan, J., concurring opinion), citing *State v.*

Montiel, 185 Ohio App.3d 362, 2009-Ohio-6589, 924 N.E.2d 375 (Grady, J., concurring opinion). Likewise, this court has stated:

> [I]t is both appropriate and necessary to proffer evidence at a Crim.R. 48(B) dismissal hearing since it is, by its very nature, an evidentiary hearing. *State v. Anguiano,* 2d Dist. No.2011 CA 9, 2012-Ohio-2094, 2012 WL 1657549, ¶ 12. The trial court is required to state on the record its findings of fact supporting the dismissal. Crim.R. 48(B). Therefore, "[Crim.R. 48(B)] contemplates an evidentiary hearing from which findings of fact may be made, and which is necessary for subsequent appellate review of any error assigned by the state regarding an objection by the state that the court overruled." *State v. Montiel,* 185 Ohio App.3d 362, 2009-Ohio-6589, 924 N.E.2d 375, ¶ 22 (J. Grady, concurring).

State v. Sanders, 7th Dist. No. 12 CO 35, 2013-Ohio-5220, 3 N.E.3d 749, ¶ 21.

{¶12} Consequently, given the law, at minimum there was a requirement for the state to be permitted to file a brief in opposition to dismissal. In the case at hand, the state was not given the opportunity to present an argument opposing dismissal. While there were multiple status hearings, the court characterized those hearings as court only hearings. This assignment of error has merit.

Second, Third, and Fourth Assignments of Error

"The trial court erred as matter of law in describing its basis for dismissing the complaint in this matter."

"The trial court erred as a matter of law in relying on the Ohio Attorney General opinion stating that misdemeanants incarcerated in a penitentiary may not be transported."

"Assuming arguendo that the trial court did not err as a matter of law in interpreting R.C. 2941.39, dismissal was nevertheless improper."

{¶13} These three assignments of error address the trial court's decision that it was without jurisdiction. The trial court relied on two Ohio Attorney General opinions - 1987 opinion and 2002 opinion - to conclude that it did not have jurisdiction.

{¶14} At the outset it is noted that opinions from the Ohio Attorney General have no precedential effect and are not binding. *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.,* 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 40. However, they are considered persuasive authority. *Id*.

{¶15} In the 1987 decision, two questions were posed to the Attorney General. The first was whether an inmate in a penitentiary can be removed from the institution to be tried on a misdemeanor charge. Ohio Attorney General Opinion 87-068 (1987). The second question was if the removal was proper, what statutory authority enables a law director to prosecute the inmate. *Id*. The Ohio Attorney General answered the first question by indicating the inmate could not be removed. *Id*. Therefore, the Attorney General did not answer the second question. *Id*.

{¶16} In deciding the first question, the Attorney General referenced R.C. 2941.39 and R.C. 2941.40 and stated the language used limits the removal of the inmate to instances where the inmate is to stand trial for a felony. *Id*. R.C. 2941.39 states, "When a convict in a state correctional institution is indicted for a felony committed while confined in the correctional institution, the convict shall remain in the custody of the department of rehabilitation and correction, subject to sections 2941.40 to 2941.46 of the Revised Code." This is similar to the version of the statute that was in effect at the time the Ohio Attorney General issued its decision in 1987. The Ohio Attorney General indicated that specifically referencing felonies implies the exclusion of misdemeanors. *Id*. It applied the maxim expressio unius est exclusio alterius:

> R.C. 2941.39 and .40 specifically apply only where the inmate has been formally charged with the commission of a felony. Thus, by expressly providing for the removal of inmates who have committed felonies, the General Assembly has demonstrated that it did not intend to allow for the removal of inmates who have committed misdemeanors.

Id.

{¶17} The Attorney General specifically noted that its resolution of the first question rendered it unnecessary to determine under what authority would the Municipal Law Director be able to prosecute inmates. *Id*.

{¶18} The 1987 Attorney General opinion, only addressed R.C. 2941.39 and R.C. 2941.40. It did not address R.C. 2941.401, even though there was a version of that statute in effect at the time.

{¶19} In 2002, the Ohio Attorney General issued a second decision specifically noting the above and provided an analysis regarding the application of R.C. 2941.401 to inmates in a state correctional facility to answer pending misdemeanor charges. In the opinion, the Ohio Attorney General concluded that when a prisoner in a state correctional institution properly demands final disposition of a pending misdemeanor charge, R.C. 2941.401 imposes a duty on the court and the prosecutor to bring the prisoner to trial within 180 days unless a continuance is granted by the court or the prisoner waives his speedy trial rights. Ohio Attorney General Opinion 2002-027. The following analysis was then provided:

> The duty to bring a prisoner in a state correction institution to trial within the time specified in R.C. 2941.401 clearly implies the power to remove the prisoner from the institution and transport the prisoner to the court at the time of trial. If the court and prosecuting authorities are not able to have a prisoner in a state correctional institution transported to the court for prosecution of a pending misdemeanor charge, the court and the prosecutor would not be able, in most cases, to bring the prisoner to trial within 180 days. As a result, the court would no longer have jurisdiction over the matter, the charging instrument would be void, and the court would have to enter an order dismissing the action with prejudice.
>
> The General Assembly assuredly did not intend to impose a duty on courts and prosecutors that could not be performed. It is a basic principle of statutory interpretation that "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose." Thus, the General Assembly must have intended for a prisoner in a state correctional institution to be removed from the institution and taken to a court for final

disposition of a pending misdemeanor charge that is set forth in a complaint when the prisoner exercises his right to a speedy trial under R.C. 2941.401. Moreover, the statutory framework authorizing the removal of a prisoner in a state correctional institution for a final disposition of a pending felony charge was already in place at the time R.C. 2941.401 was enacted. It is well settled that the General Assembly is presumed to act with knowledge of existing statutes. Thus, it must be assumed further that, when the General Assembly enacted R.C. 2941.401, the General Assembly was aware of the existing statutes authorizing the removal of a prisoner in a state correctional institution for final disposition of a pending felony charge.

Nevertheless, the General Assembly did not limit the application of R.C. 2941.401 to situations in which a prisoner in a state correctional institution has a pending felony charge against him. As discussed previously, R.C. 2941.401 applies in any situation in which "there is pending in this state any untried . . . complaint against [a] prisoner" serving a term of imprisonment in a state correctional institution. By not limiting R.C. 2941.401 to pending felony charges, the General Assembly has further demonstrated that it intended for a prisoner in a state correctional institution to be removed from the institution and taken to a court for final disposition of a pending misdemeanor charge that is set forth in a complaint when the prisoner exercises his right under R.C. 2941.401 to a speedy trial. If the General Assembly had intended to limit R.C. 2941.401's application to situations involving pending felony charges, the General Assembly could have used the term "felony" in R.C. 2941.401, having used that term in other instances.

Accordingly, pursuant to R.C. 2941.401, when a prisoner in a state correctional institution provides appropriate officials written notice of his place of imprisonment and a request for a final disposition of a pending misdemeanor charge that is set forth in a complaint filed with a municipal court, the prisoner may be removed from the institution and taken to the municipal court for final disposition of the matter.

(Internal citations omitted). *Id*.

{¶20} The Attorney General also considered the issue of whether a municipal court is authorized to order a bailiff, county sheriff, or municipal police officer to transport a prisoner in a state correctional institution to the municipal court for final disposition of a pending misdemeanor charge. The Attorney General opined that in general there is no statute explicitly requiring a municipal officer or county sheriff to transport the prisoner. However, it explained R.C. 1901.23 authorized a municipal court to issue an arrest warrant in a criminal case to either a bailiff of the court, a municipal police officer, or a sheriff. *Id*. The Ohio Attorney General then explained Crim.R. 4(P) and R.C. 2935.02 authorize a police officer or sheriff under R.C. 2941.401 to go to an institution and arrest and transport the prisoner to the court. *Id*. In making this advisement, the Ohio Attorney General stated that the municipal court in exercising its discretion in regards to R.C. 1901.23, should consider local practices for transporting prisoners, whether the pending misdemeanor charges constitute a violation of a state statute or municipal ordinance and any other information relevant. *Id*. at footnote 7.

{¶21} The Ohio Attorney General then made two advisements:

> 1. Pursuant to R.C. 2941.401, when a prisoner in a state correctional institution provides appropriate officials written notice of his place of imprisonment and a request for final disposition of a pending misdemeanor charge that is set forth in a complaint filed with the municipal court, the prisoner may be removed from the institution and taken to the municipal court for final disposition of the matter.
>
> 2. When, pursuant to R.C. 2941.401, a prisoner in a state correctional institution provides appropriate officials written notice of his place of imprisonment and a request for final disposition of a pending misdemeanor charge that is set forth in a complaint, a municipal court, in which the matter is pending may issue a warrant that requires a bailiff of the court, a municipal police officer, or a county sheriff to transport the prisoner to the court for final disposition of the matter.

Id.

{¶22} The reasoning in the 2002 Ohio Attorney General opinion is sound. Furthermore, there is case law suggesting that municipal courts have jurisdiction over misdemeanors committed within its jurisdiction while the inmate is in a state correctional facility under R.C. 2941.401. *State v. Craft*, 5th Dist. Licking No. 97CA00130, 1998 WL 430528 (June 29, 1998) (a person is incarcerated in a state correctional facility, not a county jail, the person is subject to the mandates of R.C. 2041.401).

{¶23} Given the above, we conclude the trial court incorrectly determined it did not have jurisdiction over Appellees. Generally, a municipal court has both personal and subject matter jurisdiction over persons committing misdemeanors within its jurisdiction. The fact that it occurs at a penitentiary while an offender is serving a felony sentence does not negate that jurisdiction. The 1987 Ohio Attorney General opinion did not indicate the Municipal Court did not have jurisdiction over the inmate. Rather, the 1987 opinion stated R.C. 2941.39 provided no authority for the Municipal Court to remove the inmate from the state penitentiary to answer misdemeanor charges. Furthermore, R.C. 2941.401 applies to misdemeanors and to the situation at hand. Thus, we agree with the 2002 Ohio Attorney General decision and find the 1987 decision to be unpersuasive due to its lack of consideration of R.C. 2941.401.

{¶24} Under R.C. 2941.401, an inmate has the right to demand speedy disposition and demand under that statute gives the Municipal Court authority to remove the inmate to stand trial for misdemeanors.[1] That statute states, "The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof." The inmate then can make a written notice and request for final disposition to the prosecuting attorney and court. R.C. 2941.401. This request must be "accompanied by a certificate of the warden or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time

[1]R.C. 2941.401 indicates it does not apply "to any person adjudged to be mentally ill or who is under sentence of life imprisonment or death, or to any prisoner under sentence of death." The public record from the Ohio Department of Rehabilitation and Correction indicates none of these exceptions apply.

served and remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner." R.C. 2941.401. The warden or superintendent is required to send the written notice and request for final disposition along with the certificate promptly to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested. R.C. 2941.401. The inmate must be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court, written notice of the place of his imprisonment and a request for a final disposition. R.C. 2941.401.

{¶25} This statute allows inmates to resolve the misdemeanor charges against themselves while serving a felony sentence. Since, the misdemeanor sentence would most likely run concurrent to the felony sentence, the misdemeanor sentence may be completed prior to the completion of the felony sentence. This permits an inmate to be released from incarceration without having active detainers and warrants. It also prevents the duplication of services. Many times the supervision that would be ordered as sentence for the misdemeanor will be fulfilled and/or have the opportunity to be fulfilled while the inmate is serving his sentence on the felony. Furthermore, this process allows for the municipality to determine whether or not it will pursue or dismiss the charges. The municipality may dismiss the charges, since the offender is already serving a felony sentence.

{¶26} Consequently, the trial court should not have dismissed the charges sua sponte unless a request under R.C. 2941.401 for speedy disposition was made and the 180 day time limit for bringing them to trial had elapsed. In this case, the record is devoid of any indication that Appellees moved for a speedy trial under R.C. 2941.401. Thus, from the record, it does not appear there was a basis for the municipal court to dismiss the charges sua sponte.

{¶27} For the above stated reasons, the assignments of error have merit. The municipal court erred in dismissing the charges sua sponte and not following the procedures of R.C. 2941.401.

Conclusion

{¶28} All assignments of error have merit. The municipal court abused its discretion in sua sponte dismissing the charges. The matter is remanded for further proceedings consistent with this opinion.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and the final judgment and order of this Court is that the dismissal orders of the Youngstown Municipal Court of Mahoning County, Ohio, is reversed. We hereby remand these matters to the trial court for further proceedings 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.