[Cite as *State v. Givens*, 2023-Ohio-2898.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GREG P. GIVENS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 BE 0041

Criminal Appeal from the
Belmont County Court, Eastern Division, of Belmont County, Ohio
Case No. 21 CRB 00247

BEFORE:
David A. D'Apolito, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Vacated and Dismissed.

Atty. Brent A. Clyburn, Assistant Prosecuting Attorney for Marshall County, West Virginia, Marshall County Courthouse, 600 7th Street, Moundsville, West Virginia 26041, Special Prosecutor appointed/ serving Belmont County Prosecutor's Office, for Plaintiff-Appellee and

Atty. Joshua Baumann, Fiat Lex, LLC, P.O. Box 208, East Palestine, Ohio 44413, for Defendant-Appellant.

Dated: August 18, 2023

D'Apolito, P.J.

{¶1} Appellant, Greg P. Givens, appeals his conviction for one count of criminal trespass in violation of R.C. 2911.21(A)(1), a misdemeanor of the fourth degree, following a jury trial in the Belmont County Court, Eastern Division. R.C. 2911.21(A)(1) reads, in its entirety, "No person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another."

{¶2} Home security video admitted at trial captures Appellant entering onto the front porch of his next-door neighbors, Clyde Yates, Jr. and Kimberly Yates, despite a "no trespassing" sign posted outside the front door, for the purpose of delivering two envelopes. At the time, the Yateses were defendants in two pending lawsuits filed by Appellant. The trial court imposed a 30-day sentence, suspended for three years with certain probationary terms and conditions, and a $250 fine.

{¶3} Appellant advances three assignments of error in this appeal. First, Appellant contends his statutory right to a speedy trial was violated. Second, he argues there was insufficient evidence offered at trial to establish that he was without privilege to enter onto his neighbors' front porch. Third, Appellant claims his court-appointed trial counsel was ineffective. Because Appellant was tried outside the statutory speedy-trial time limit, Appellant's conviction and sentence are vacated, the matter dismissed with prejudice, and any further prosecution for the same conduct is barred.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY DENYING [APPELLANT'S] OBJECTION ON SPEEDY TRIAL GROUNDS.

{¶4} Two distinct issues must be addressed to resolve the first assignment of error. First, we must determine whether Appellant was brought to trial within the 45-day time limit prescribed for misdemeanors of the fourth degree. Second, we must determine whether Appellant's pro se letter to the trial judge preserved his right to appeal the alleged speedy-trial violation.

{¶5} "An appellate court's review of a speedy trial claim is a mixed question of law and fact; a reviewing court gives due deference to the trial court's factual findings that are supported by competent, credible evidence and independently reviews whether the correct law was applied to the facts of the case." *State v. Baker*, 7th Dist. Mahoning No. 19 MA 0080, 2020-Ohio-7023, ¶ 98.

{¶6} The right to a speedy trial is a fundamental right of a criminal defendant guaranteed by the United States and Ohio Constitutions. (Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10.) States have the authority to prescribe reasonable periods in which a trial must be held, consistent with constitutional requirements. *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). "In response to this authority, Ohio enacted R.C. 2945.71, which designates specific time requirements for the state to bring an accused to trial." *State v. Hughes*, 86 Ohio St.3d 424, 425, 715 N.E.2d 540 (1999).

{¶7} The statutory speedy-trial provisions, R.C. 2945.71 et seq., were enacted to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and are to be strictly enforced. *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980). The prosecution and the trial court both have a mandatory duty to try an accused within the timeframe provided by the statute. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977); see also *State v. Cutcher*, 56 Ohio St.2d 383, 384, 384 N.E.2d 275 (1978).

{¶8} R.C. 2945.71, captioned "Time within which hearing or trial must be held," reads, in relevant part:

> (B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:
>
> (1) Within forty-five days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days; * * *.

{¶9} Because the General Assembly recognized that some degree of flexibility is necessary, it allowed for extensions of the time limits for bringing an accused to trial in certain circumstances. *State v. Lee*, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095 (1976). Accordingly, R.C. 2945.72 contains an exhaustive list of events and circumstances that extend the time within which a defendant must be brought to trial. "In addition to meticulously delineating the tolling events, the General Assembly jealously guarded its judgment as to the reasonableness of delay by providing that time in which to bring an accused to trial 'may be extended only by' the events enumerated in R.C. 2945.72(A) through (I)." *State v. Ramey*, 132 Ohio St.3d 309, 313, 2012-Ohio-2904, 971 N.E.2d 937, 942, ¶ 24. Therefore, extensions are to be strictly construed, rather than liberalized in favor of the state. *Id.*

{¶10} R.C. 2945.72, captioned "Extension of time for hearing or trial," reads, in relevant part:

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

> (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; * * *.

{¶11} The statute is clear that "[u]pon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B). Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986). At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55-56, 661 N.E.2d 706 (1996). If the state has violated a defendant's right to a speedy trial, then the trial court must dismiss the charges against the defendant. R.C. 2945.73(B).

{¶12} We have repeatedly held that a defendant's failure to file a motion to dismiss on speedy trial grounds waives the issue on appeal. *State v. Allen*, 7th Dist. Columbiana No. 22 CO 0002, 2022-Ohio-4360, ¶ 21, citing *Partsch v. Haskins*, 175 Ohio St. 139, 140, 191 N.E.2d 922 (1963) (the right to a speedy trial is "a right which must be claimed or it will be held to have been waived."). "[T]he failure to raise the question of such a violation denies the [state] the opportunity to establish that tolling of the statute occurred." *Id.*

{¶13} Three-hundred-and-seventy-five days elapsed from the issuance of the complaint and summons in this case on June 17, 2021 and the first day of trial. The summons orders Appellant to appear on July 8, 2021, and reads that failure to appear may result in arrest.

{¶14} In Ohio, the speedy-trial clock begins to run on the date of the accused's arrest or the service of summons. Here, Appellant was not arrested and the return of service was not docketed. There is a notation on the docket on September 29, 2021, which reads, "RETURNED MAIL – NOT DELIVERABLE AS ADDRESSED." Presumably, the failed service relates to the summons and complaint as it is the only pleading mailed by the county court at that point in the pre-trial proceedings.

{¶15} In *Conneaut v. Babcock*, 11th Dist. Ashtabula No. 2021-A-0045, 2022-Ohio-2101, ¶ 9, appeal not allowed, 168 Ohio St.3d 1406, 2022-Ohio-3546, 195 N.E.3d 1048, ¶ 9, the Eleventh District held that service is perfected despite the failure of certified mail

service when a defendant charged with a misdemeanor appears for arraignment. Relying on the rule announced in *Babcock*, and based on Appellant's appearance at arraignment, we find the speedy-trial clock in this case began to run on July 8, 2021.

{¶16} At arraignment, Appellant appeared pro se. According to the journal entry dated July 8, 2021, Appellant was released on his own recognizance and instructed to "secure private counsel." (7/8/21 J.E., p. 1.) There is no transcript of the arraignment in the record.

{¶17} Based on the trial court's instruction to Appellant to retain counsel, tolling pursuant to subsection (C) of the statute began on July 8, 2021 due to a period of delay necessitated by Appellant's lack of counsel. Therefore, we deduct no time from the 45-day speedy-trial clock. At the next pretrial conference on July 29, 2021, Appellant appeared pro se and the matter was continued for a month due to a joint request by the parties. On August 26, 2021, Appellant again appeared unrepresented and the pretrial conference was continued for a month based on a request by Appellant. The trial court cautioned the parties that no further continuances would be granted.

{¶18} At the September 16, 2021 pretrial conference, Appellant remained unrepresented and requested another continuance of the conference. The trial court granted the continuance, rescheduling it for October 7, 2021, but also appointed the public defender's office to represent Appellant.

{¶19} No transcripts from the pretrial conferences appear in the record. The foregoing information is taken from journal entries filed by the trial court. The journal entries do not reflect any discussion regarding Appellant's efforts to retain counsel, however, they establish that Appellant either requested or jointly-requested the continuances. Therefore, pursuant to subsection (H) of the statute, we find that tolling continued uninterrupted from the day of the arraignment and we deduct no time from the speedy-trial clock.

{¶20} On September 28, 2021, Appellant filed a pro se application for disqualification of the trial judge with the Ohio Supreme Court, which caused the trial court to continue the October 7, 2021 pretrial conference until the application was resolved. While the application was pending, the public defender appointed to represent Appellant filed a motion to withdraw as counsel based on his representation of a party opponent of

Appellant's in a previous case. The application for disqualification was denied on October 20, 2021. On November 5, 2021, the trial court set the matter for a pretrial conference on December 2, 2021 at which time the motion to withdraw would be addressed.

{¶21} In its brief, the state concedes "there was no event which worked to interfere with [October 20, 2021 to December 2, 2021.]" (Appellee's Brf., p. 6-7.) Although the public defender's motion to withdraw was pending, we find a delay of 43 days to address a motion to withdraw as counsel to be unreasonable. Nonetheless, we find it unnecessary to calculate the excess time and deduct it from the speedy-trial clock in light of the fact that the clock expires prior to trial regardless of unreasonable delay.

{¶22} At the pretrial conference on December 2, 2021, the trial court sustained the motion to withdraw by the public defender and appointed Attorney Joseph Rine. The trial court likewise sustained Appellant's motion to continue the pretrial conference to December 9, 2021.

{¶23} On December 7, 2021, Attorney Rine filed three pretrial motions, a request for discovery, a request for evidence notice, and a request for a bill of particulars, as well as a jury demand. However, there is no entry on the docket that reflects the date when the state responded to the discovery requests. No bill of particulars was ever provided.

{¶24} A defendant's demand for discovery tolls the speedy-trial time until the state responds to the discovery, or for a reasonable time. *State v. Savors*, 7th Dist. Columbiana No. 21 CO 0007, 2022-Ohio-894, 2022 WL 833377, ¶ 22. We have held that 30 days is a reasonable time. *State v. Runner*, 7th Dist. Belmont No. 22 BE 0004, 2022-Ohio-4756, 204 N.E.3d 162, ¶ 25.

{¶25} At the pretrial conference on December 9, 2021, the trial court set a final pretrial date of January 6, 2022 "pursuant to Appellant's request." (1/6/22 J.E., p. 1.) Consequently, we find that the speedy-trial clock would have begun to run for the first time on December 9, 2021, but was tolled for 30 days from the filing of Appellant's discovery motions until January 8, 2022.

{¶26} At the final pretrial hearing on January 6, 2022, Appellant appeared with Attorney Steven Stickles. There is no explanation for Attorney Stickles' appearance on Appellant's behalf. A status conference was set for February 17, 2022 with a trial date of March 7, 2022.

{¶27} Due to a change in the trial court's schedule, the status conference was advanced to February 10, 2022. However, on February 8, 2022, Attorney Rine filed a motion to withdraw. The motion indicated that Attorney Rine was "unsuccessful in communicating" the substance of the motion with Appellant. The motion was granted that same day, and Attorney John Jurco was appointed to represent Appellant. Likewise on February 8, 2022, Attorney Jurco filed a motion to withdraw citing an overwhelming caseload. Accordingly, we find the clock was tolled on February 8, 2022, with the filing of the motion to withdraw by Attorney Rine then Attorney Jurco.

{¶28} As previously stated, the speedy-trial clock began to run on January 8, 2022 (30 days after Attorney Rine's motions were filed) and was tolled on February 8, 2022 (Attorney Rine's motion to withdraw). Therefore, 31 days of the speedy-trial clock expired during Attorney Rine's representation.

{¶29} At the February 10, 2022 status conference, Attorney Rine appeared on behalf of the state. Evidently, Attorney Rine withdrew from his representation of Appellant having accepted a position with the prosecutor's office. Appellant appeared pro se. Although Attorney Jurco's motion to withdraw was never sustained, the trial court appointed Attorney Joshua Norman to represent Appellant that same day. The trial court on its own motion continued the status conference to February 24, 2022. We find that the trial court's continuance was reasonable based on the appointment of new counsel.

{¶30} On February 18, 2022, Appellant filed a second application to disqualify the trial judge predicated on various pre-trial issues including Attorney Rine's appearance on behalf of the state. On February 22, 2022, Attorney Norman filed a motion to continue the status conference due to a conflict with a jury trial in another court schedule to begin on February 24, 2022. On February 22, 2022, Appellant's second application to disqualify the trial judge assigned in this case was denied. Thereafter, Appellant's pending motion to continue the status conference was sustained, and the status conference was rescheduled for March 3, 2022.

{¶31} At the March 3, 2022 status conference, a final status conference was scheduled for April 7, 2022 with the trial set for April 25, 2022. Therefore, the speedy-trial clock began to run again on March 3, 2022.

{¶32} On March 28, 2022, Attorney Norman filed a motion to withdraw as counsel due to his previous employment with the Ohio County, West Virginia Prosecutor's Office. Attorney Norman predicated his motion on the fact that Appellant "was previously prosecuted by the office for various criminal offenses and, after the conclusion of that case, filed multiple civil claims against the [prosecutor's office.]" The trial court sustained the motion to withdraw in a journal entry filed on March 25, 2022, and appointed Attorney Brandon Lippert. The final status conference and trial dates were not rescheduled.

{¶33} Nevertheless, an additional 24 days of the speedy-trial clock expired, between the March 3, 2022 status conference and Attorney Norman's motion to withdraw as counsel on March 28, 2022, bringing the speedy-trial clock total to 55 days. Accordingly, we find the 45-day speedy-trial clock for the fourth-degree misdemeanor charged in this case expired in March of 2022.

{¶34} Attorney Lippert filed a notice of appearance and several pre-trial pleadings on March 30, 2022. Then on April 5, 2022, he filed a motion to continue the April 7, 2022 pre-trial conference and the April 25, 2022 trial based on conflicts with pre-trials in other cases and an OVI defense conference. The trial court granted the motion, rescheduling the status conference for May 12, 2022. The jury trial was "continued generally."

{¶35} On April 6, 2022, the state filed a motion to appoint a special prosecutor. The trial court sustained the state's motion the following day.

{¶36} Although Attorney Lippert had filed an appearance and several pre-trial pleadings, Appellant filed a pro se letter to the trial judge on April 11, 2022, in which he sought to "preserve his right to self-representation." Appellant asserted that he had not received any "quantifiable" representation from his appointed counsel, and further asserted "nearly 300 days in the Tolling since the Commencement of This Action, and 270 days Tolling of [his] Arrest and Arraignment in this Case!" In addition to the letter, Appellant filed a motion for sanctions based on Attorney Rine's appearance on behalf of the state at the February 10, 2022 status conference. Although the pleadings are separate, the clerk docketed them as a single pleading, captioned, "CORRESPONDENCE AND NOTICE AND MOTION FOR SANCTIONS AGAINST THE

STATE AND FOR EVIDENTIARY HEARING ON TYPHOID COUNSEL[1] FILED 'PRO SE' BY GREG GIVENS."

{¶37} As a general rule, "a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel," but "these two rights are independent of each other and may not be asserted simultaneously." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, paragraph one of the syllabus. Consistent with this general rule, we have held that a trial court may disregard pro se motions filed when the defendant is represented by counsel and counsel does not join in the motion. *State v. Runner*, 7th Dist. Belmont No. 22 BE 0004, 2022-Ohio-4756, 204 N.E.3d 162, ¶ 34.

{¶38} Attorney Lippert did not join in the pro se letter and motion for sanctions. Nonetheless, the trial court set the motion for sanctions against the state and for evidentiary hearing on Typhoid counsel for hearing on April 21, 2022. The journal entry setting the motion for hearing did not address the request for self-representation and the speedy-trial challenge in the letter.

{¶39} At the April 21, 2022 hearing, Appellant appeared pro se and the trial court overruled his motion for sanctions. The hearing transcript for the April 21, 2022 hearing is a part of the record. The April 21, 2022 hearing is the only hearing transcript in the record, other than the trial and sentencing hearing. The hearing was conducted by a retired judge.

{¶40} The retired judge explained to Appellant that he must either accept the appointment of Attorney Lippert or proceed pro se. Appellant expressed his frustration with the series of attorneys appointed by the trial court, must notably Attorney Rine, who Appellant characterized as "switching sides to the prosecution after he had full knowledge of [Appellant's] defense in this case." (4/21/22 Hrg. Tr., p. 4.)

[1] In the letter, Appellant referred to Attorney Rine as a "Typhoid Mary." The reference is taken from *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St.3d 1, 6, 688 N.E.2d 258 (1998), wherein the Ohio Supreme Court explained that "[i]f past employment in government results in the disqualification of future employers from representing some of their long-term clients, it seems clearly possible that government attorneys will be regarded as 'Typhoid Marys.'" *Id.* at 263, quoting *LaSalle Natl. Bank v. Lake Cty.*, 703 F.2d 252, 258 (7th Cir. 1983).

{¶41} The visiting judge spent the majority of the hearing endorsing Attorney Lippert. Appellant expressed concern that he had not met Attorney Lippert and Appellant feared their trial strategies might conflict.

{¶42} The visiting judge responded, "I'm not going to, nor will Judge Trouten, continue to reappoint counsel for you because you merely disagree with how they want to handle the case." (*Id.*, p. 6.) However, not one of the four attorneys that had been appointed then withdrew as Appellant's counsel did so due to a personality or trial-strategy conflict with Appellant.

{¶43} The visiting judge instructed Appellant to speak with Attorney Lippert and decide upon his representation because Attorney Lippert would be the last court appointment. In other words, Appellant would be required to proceed pro se should he decline Attorney Lippert's representation. Although the visiting judge overruled Appellant's pro se motion, he did not address that portion of Appellant's letter in which Appellant asserted his speedy-trial rights.

{¶44} In the journal entry memorializing the April 21, 2022 hearing, the trial court instructed Appellant "to contact his Court appointed Attorney Brandon Lippert as soon as possible." A pretrial was scheduled for May 5, 2022, the status hearing remained set for May 12, 2022. (4/21/22 J.E., p..1.)

{¶45} At the May 5, 2022 pretrial conference, a final status conference was set for May 26, 2022 and the jury trial set for June 20, 2022. Lippert appeared telephonically. Appellant appeared in person. The journal entry reads, "[Appellant] and *potential* counsel, Brandon Lippert, to meet on May 12, 2022 * * * Any motions to be filed by May 19, 2022." (Emphasis added)(5/5/2022 J.E., p. 1.)

{¶46} There is no pleading or docket entry documenting the date when Attorney Lippert formally began his representation of Appellant. Consequently, it cannot be gleaned from the record when the speedy-trial clock resumed.

{¶47} On June 7, 2022, the trial court issued a journal entry rescheduling the jury trial to June 27, 2022, as the previously-scheduled June 20, 2022 trial date fell on a court holiday. On June 22, 2022, the clerk's office docketed another pro se letter to the trial judge in which Appellant asserted that he and his mother were being harassed by the

alleged victim in this criminal case. Police reports filed with the Village of Shadyside were attached. The jury trial began on June 27, 2022.

{¶48} Based on the foregoing procedural history, we find that Appellant's statutory speedy-trial rights were violated. We further find that Appellant successfully preserved the issue for appeal.

{¶49} Attorney Lippert had been appointed and filed pre-trial materials on Appellant's behalf, however he did not join in the pro se letter and motion for sanctions. Typically, Attorney Lippert's appointment would be sufficient to render Appellant's pro se letter a nullity. However, the state of Attorney Lippert's representation was in flux until the first day of trial, based on various statements made by the trial court in the record, as well as the fact that the trial court entertained pro se motions filed by Appellant after Attorney Lippert was appointed.

{¶50} The state argues that Appellant is responsible for the delay due to his lack of diligence with respect to accepting Attorney Lippert's representation. However, the trial court scheduled the pro se motion for sanctions for a hearing and overruled it. Further, the trial court's representations to Appellant at the April 21, 2022 hearing establish Appellant was not represented by Attorney Lippert at the time, and he would be pro se unless and until he accepted Attorney Lippert's representation. Further, in the May 5, 2022 journal entry, the trial court identifies Attorney Lippert as "potential counsel."

{¶51} Based on the trial court's representations and actions, we find Appellant was not represented by Attorney Lippert when he filed the pro se letter. We further find the pro se letter constituted a motion to dismiss based on speedy-trial grounds.

{¶52} The state has not alleged there exists information outside the record that would establish additional tolling periods. Consequently, we find the state suffers no prejudice based on the trial court's failure to consider the pro se letter as a motion to dismiss.

{¶53} Accordingly, we find that the first assignment of error has merit. Accordingly, Appellant's conviction and sentence are vacated, this matter is dismissed with prejudice, and any further prosecution for the same conduct should be barred.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY CONVICTING [APPELLANT] WITHOUT SUFFICIENT EVIDENCE.

ASSIGNMENT OF ERROR NO.3

TRIAL COUNSEL'S ASSISTANCE WAS INEFFECTIVE.

{¶54} Based on our conclusion that Appellant's statutory right to a speedy trial was violated, we find that Appellant's second and third assignments of error are moot.

CONCLUSION

{¶55} Because Appellant was tried outside the statutory speedy-trial time limit, Appellant's conviction and sentence are vacated, this matter is dismissed with prejudice, and any further prosecution for the same conduct is barred.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the first assignment of error is sustained and it is the final judgment and order of this Court that Appellant's conviction and sentence imposed by the Belmont County Court, Eastern Division, of Belmont County, Ohio, is vacated and this matter is dismissed. Costs to be taxed against the Appellee.

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.