

FILED: January 09, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CHARLES WINSTON MURR,
Defendant-Appellant.

Multnomah County Circuit Court
090950545

A146073

Edward J. Jones, Judge.

Argued and submitted on August 29, 2012.

Zachary Lovett Mazer, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.

SERCOMBE, J.

Affirmed.

1 SERCOMBE, J.

2 Defendant appeals from a judgment of conviction for driving under the
3 influence of intoxicants (DUII), ORS 813.010, reckless driving, ORS 811.140, and two
4 counts of second-degree criminal mischief, ORS 164.354. He contends that the trial
5 court erred in failing to dismiss the case for unreasonable delay under ORS 135.747,
6 which requires that a defendant who is "charged with a crime" be "brought to trial within
7 a reasonable period of time." In particular, defendant asserts that the trial court
8 erroneously applied ORS 135.747 by measuring the relevant "period of time" for the trial
9 delay from the date on which the information was filed rather than from a date nearly two
10 years before when citations on the charges were served on defendant. On review for
11 errors of law, [*State v. Dixon*](#), 224 Or App 66, 68, 197 P3d 1106 (2008), *rev den*, 346 Or
12 10 (2009), we affirm.

13 The relevant facts are procedural in nature. On September 28, 2007,
14 defendant was involved in a rather spectacular collision involving his pickup truck, an
15 electric utility substation, and a high-pressure natural gas pipeline that, in the words of
16 the prosecutor, produced "an enormous fireball which took out all natural gas supplies to
17 Sauvie Island and all electrical supply to the Sauvie Island area[.]" Following the
18 accident and a brief hospital stay by defendant, two citations were issued: one for DUII
19 and another for three counts of first-degree criminal mischief. Those citations were
20 served on October 3, 2007. The criminal mischief citation was reissued and served on
21 October 4, 2007.

1 The citations were of two types. The DUII citation was a criminal citation
2 with a complaint; the criminal mischief citation was a criminal citation without a
3 complaint.¹ The citations directed defendant to appear in court on November 30, 2007.
4 On that date, defendant was in the custody of Multnomah County serving a post-prison
5 supervision sanction arising from the September 28 accident. Defendant was not taken to
6 a hearing on the citations, as they had not been docketed with the court and no hearing

¹ ORS 133.069 regulates the content of a criminal citation with a complaint. ORS 133.069(1)(c)(C) requires that such a citation contain

"[a] form of certificate in which the peace officer must certify that the peace officer has sufficient grounds to believe, and does believe, that the person named in the complaint committed the offense specified in the complaint. A certificate conforming to this subparagraph shall be deemed equivalent to a sworn complaint."

ORS 133.069(2) then provides that

"[t]he district attorney for the county shall review any criminal citation issued with a form of complaint that is to be filed in a circuit or justice court. The review must be done before the complaint is filed."

By contrast, a criminal citation without a complaint must disclose "[w]hether a complaint or information had been filed with the court at the time the citation was issued[.]" ORS 133.068(5), and must contain the following disclaimer:

"READ CAREFULLY

"This citation is not a complaint or an information. A complaint or an information may be filed and you will be provided a copy thereof at the time of your first appearance. You MUST appear in court at the time set in the citation. IF YOU FAIL TO APPEAR AND A COMPLAINT OR INFORMATION HAS BEEN FILED, THE COURT WILL IMMEDIATELY ISSUE A WARRANT FOR YOUR ARREST."

ORS 133.068(7) (uppercase in original).

1 was held. The district attorney had not immediately filed an information based on the
2 citations. In the somewhat inelegant words of the parties, the state had "no-complained"
3 the citations. (We note later the meaning of that noun/verb.)

4 Nothing happened for nearly two years. On September 16, 2009, the
5 Multnomah County district attorney issued and filed an information that charged
6 defendant with the misdemeanor crimes of DUII, two counts of second-degree criminal
7 mischief, and reckless driving. The citations and their printed identification numbers
8 were not referenced in the information.

9 Immediately following the filing of the information, an arrest warrant
10 issued. Alerted to that process, defendant turned himself in on October 8, 2009, retained
11 an attorney, and prepared his defense to the charges.

12 On May 28, 2010, defendant moved to dismiss the information under ORS
13 135.747.² Defendant argued that he was "charged with a crime" for purposes of ORS
14 135.747 when the citations were served on October 3 and 4, 2007, and that the nearly
15 two-year delay between the service of the citations and the filing of the information was
16 unreasonable.

17 At the hearing on defendant's motion to dismiss, the parties discussed the
18 status of the citations:

² Defendant also made speedy trial arguments under the state and federal constitutions. On appeal, however, defendant relies only on the statutory ground for dismissal.

1 "THE COURT: * * * [W]hat record do we have of these tickets? I
2 mean--

3 "[PROSECUTOR]: That is--that's a separate question, which is
4 quite bizarre. Typically, the originals would be retained in a court file,
5 showing that they were dismissed. Although if a case is no complained, I
6 suppose that wouldn't be the case, now that I think about it--

7 "THE COURT: Well, that's what I'm wondering is--

8 "[PROSECUTOR]: --because there's no court number.

9 "THE COURT: --whether there's, you know, I suppose somewhere
10 then there's a docket from November 30th that lists--that says on it, 'No
11 complaint,' I mean, that's--

12 "[PROSECUTOR]: That's exactly what it would have--would have
13 happened.

14 "THE COURT: That's one theory of how that would have played
15 out. That might be the only, you know, there wouldn't be an order, and
16 there wouldn't have been a court file because the case didn't get issued in
17 the first--you know, beyond the citation. I mean, you're not contending
18 there was a warrant out for that two years, right?

19 "[DEFENSE COUNSEL]: Correct.

20 "THE COURT: I mean, that seems--well, it seems that that's the
21 case, there was no warrant, and if there had been a warrant, I would mark
22 this down as an easy winner for the defense."

23 Later, the court observed:

24 "THE COURT: * * * I [am] forced to interpret what happened with
25 the initial citation as a no complaint. No warrant was issued, no charges
26 were filed. And I don't think there's any other--I mean, I would be pleased
27 to hear what arguments there might be about that having happened
28 differently than that. But as far as I can tell that's what happened."

29 Ultimately, the court ruled that the case commenced with the filing of the
30 information, rather than the service of the citations:

1 "THE COURT: Well, the question of when a prosecution is started
2 is kind of interesting.

3 "When a citation is given for some purposes, obviously the--you
4 know, defendant's on notice--now, he's not charged when he's handed that
5 ticket in any technical legal sense. He's charged when the ticket is filed,
6 that's what actually creates the case is the filing of the ticket.

7 "So when a no complaint--when it's not filed then the question is, did
8 it start? And I'm not sure the answer to that matters here.

9 "I'm persuaded that this one started in September of '09 when it was
10 filed, that it in fact did not start when it was no complained."

11 The court then ruled that the delay between the September 2009 initiation
12 of criminal charges and the May 2010 motion to dismiss was reasonable, and denied the
13 motion to dismiss. Defendant conditionally pleaded guilty to the charges, reserving his
14 right to appeal the denial of his motion to dismiss. This appeal followed.

15 On appeal, defendant renews his contention that he was "charged with a
16 crime" for purposes of ORS 135.747 when the citations were served. Measured from that
17 point, defendant argues that the "period of time" of his prosecution exceeded two years
18 and that that timeframe was unreasonable under the circumstances, thus compelling
19 dismissal of his case as a matter of law. The state, for its part, does not dispute that the
20 prosecution delay would be unreasonable if measured from the date of service of the
21 citations. Instead, the state contends that defendant was not "charged with a crime" until
22 the information was filed and that the delay in bringing defendant to trial afterward was
23 therefore reasonable as a matter of law. Defendant does not argue that the post-

1 information delay was unreasonable.³ We agree with the parties' assessments of both
2 periods of delay. Thus, the issue is whether the "period of time" to bring defendant to
3 trial under ORS 135.747 began with the service of the citations or with the filing of the
4 information. We conclude, under the facts of this case, that it began with the filing of the
5 information.

6 We reach that conclusion based on the text of ORS 135.747, its statutory
7 context, and the case law defining the starting point for the "period of time" under the
8 statute. Beginning with the text, ORS 135.747 provides:

9 "If a defendant charged with a crime, whose trial has not been
10 postponed upon the application of the defendant or by the consent of the
11 defendant, is not brought to trial within a reasonable period of time, the
12 court shall order the accusatory instrument to be dismissed."

13 Under the plain language of the statute, the "period of time" is measured from the time
14 when a defendant is "charged with a crime" through the time when he or she is "brought
15 to trial." See [State v. Johnson](#), 339 Or 69, 92, 116 P3d 879 (2005) ("Presumably, [ORS
16 135.747] means that, once a defendant stands 'charged with a crime,' his or her trial must
17 take place within a reasonable period of time."); [State v. Schneider](#), 201 Or App 546,
18 551-52, 120 P3d 16 (2005), [adh'd to on recons](#), 204 Or App 710, 131 P3d 842, *rev den*,
19 341 Or 392 (2006) (date of indictment rather than original citation identified as starting
20 point for the "period of time" under ORS 135.747).

³ The state argues, and defendant does not dispute, that defendant consented to over five months of the nearly nine-month delay between the issuance of the information and the trial.

1 The history of ORS 135.747, in turn, suggests that "charged with a crime"
2 requires the filing of an accusatory instrument. ORS 135.747 is a recodification of
3 *former* ORS 134.120 (1959), *renumbered as* ORS 135.747 (1973). Prior to its
4 amendment in 1973, *former* ORS 134.120 provided:

5 "If a defendant indicted for a crime, whose trial has not been
6 postponed upon his application or by his consent, is not brought to trial
7 within a reasonable period of time, the court shall order the indictment to be
8 dismissed."

9 The statute was interpreted to apply only to criminal proceedings initiated by indictment
10 and not to proceedings initiated by information or complaint. *See State v. Dodson*, 226
11 Or 458, 360 P2d 782 (1961) (*former* ORS 134.120 inapplicable to district court
12 proceedings commenced by complaint). To broaden the scope of the statute, it was
13 amended in 1973 to change the references to "indicted for a crime" to "charged with a
14 crime" and "indictment" to "accusatory instrument." Or Laws 1973, ch 836, § 204.
15 Thus, the likely legislative intent was to cover any prosecution where a defendant is
16 "charged with a crime" by the filing of an "accusatory instrument" in the same manner as
17 a defendant is "indicted for a crime" by the filing and return of an "indictment."

18 Moreover, the context of ORS 135.747 indicates that the statute does not
19 regulate prosecutorial delay prior to the filing of an accusatory instrument. Delay prior to
20 the time when a defendant is "charged with a crime" by an accusatory instrument is
21 separately regulated by ORS 135.745, which provides that,

22 "[w]hen a person has been held to answer for a crime, if an
23 indictment is not found against the person within 30 days or the district
24 attorney does not file an information in circuit court within 30 days after

1 the person is held to answer, the court shall order the prosecution to be
2 dismissed, unless good cause to the contrary is shown."

3 As the Supreme Court explained in *State v. Emery*, 318 Or 460, 466-67, 869 P2d 859
4 (1994),

5 "ORS 135.745 is the statutory speedy trial provision that applies
6 before an accusatory instrument is returned or filed, and ORS 135.747 is
7 the provision that applies after the accusatory instrument is returned or
8 filed. * * * Read together, ORS 135.745 and 135.747 provide guidelines for
9 the trial court for dismissing cases that have been in the system too long
10 without prosecutorial action. * * * Taken as a whole, the statutory speedy
11 trial scheme provides a method for dismissing cases that are languishing in
12 the criminal justice system without affecting the state's ability to
13 re prosecute serious charges. ORS 135.745, 135.747, and 135.753(2)
14 provide a 'housecleaning' mechanism triggered by the length of time that a
15 particular case has been in the system, rather than by the effect of the delay
16 on a particular defendant."

17 Accordingly, we have measured the statutory speedy trial interval from the
18 time when an accusatory instrument is filed. We explained in [State v. Coulson](#), 243 Or
19 App 257, 268, 258 P3d 1253 (2011), that,

20 "[t]hus, * * * the 'clock' for purposes of ORS 135.747 starts when a
21 defendant is 'charged with a crime,' *e.g.*, when a defendant is indicted,
22 *Johnson*, 339 Or at 92, or when a defendant is charged in another form of
23 accusatory instrument, such as an information or complaint. *See, e.g.*,
24 [\[State v.\] Adams](#), [339 Or 104, 106-07, 110 n 5, 116 P3d 898 (2005)]
25 (beginning speedy trial calculation with issuance of complaint); [State v.](#)
26 [Davis](#), 236 Or App 99, 107-08, 237 P3d 835 (2010) (calculating delay for
27 speedy trial purposes starting with date of the initial information). A
28 citation, which may incorporate a complaint, *see, e.g.*, ORS 133.066(1),
29 may also start the clock for speedy trial purposes in certain circumstances.
30 *See* [State v. Peterson](#), 183 Or App 571, 574, 53 P3d 455 (2002).

31 "Our cases further establish that, where multiple accusatory
32 instruments are issued in the context of a criminal case, the clock for
33 purposes of calculating the relevant period of delay in bringing a defendant
34 to trial will 'start anew' whenever a new accusatory instrument is issued
35 following the dismissal of an earlier accusatory instrument."

1 (Footnotes omitted.)

2 When a criminal proceeding starts with a criminal citation, a defendant is
3 "charged with a crime" for purposes of ORS 135.747 when an accusatory instrument is
4 filed--either a complaint that is filed as part of the citation or a separately filed complaint
5 or information. The statutes regulating citations specify that the prosecution begins with
6 the filing of *both* the citation and a complaint or information. Under ORS 133.065, when
7 a criminal citation issues, "the peace officer shall serve one copy on the person arrested
8 and shall, as soon as practicable, file a duplicate copy with the magistrate specified in
9 ORS 133.055 along with proof of service." After a citation issues, if the person cited
10 does not appear at the time and place specified in the citation, "and a complaint or
11 information is filed," the magistrate must issue an arrest warrant. ORS 135.060(2).
12 When a citation without a complaint issues, a "complaint or information may be filed
13 with the court before or after the issuance." ORS 133.066(3). By virtue of ORS
14 133.068(5), a citation without a complaint must communicate "[w]hether a complaint or
15 information had been filed with the court at the time the citation was issued." The
16 citation must also disclose that, if the defendant fails to appear and a complaint or
17 information has been filed, the court will enter a warrant for the defendant's arrest. ORS
18 133.068(7); *see also* ORS 131.005(3) (definition of "complaint" noting that a "complaint
19 serves * * * to commence an action"); ORS 131.005(4) (definition of "complainant's
20 information" noting that it "serves to commence an action").⁴

⁴ Compare ORS 131.135 (for purposes of statutes of limitations, a "prosecution is

1 Defendant argues that we determined in [State v. Anglin](#), 227 Or App 325,
2 206 P3d 193, *rev den*, 346 Or 364 (2009), that the issuance of a citation alone
3 commenced a prosecution under ORS 135.747. There, the defendant was cited for DUII
4 and reckless driving on October 5, 1997. He was ordered to appear in court on October
5 22, 1997, and the district attorney issued and filed an information on that date. The
6 defendant failed to appear, an arrest warrant issued, and the defendant ultimately turned
7 himself in nine years later--moving to dismiss the charges on statute of limitations and
8 speedy trial grounds. *Id.* at 327-28. After reviewing ORS 133.060 and other statutes
9 contemplating a citation and later-filed information process, we concluded that the
10 issuance of the citation and the filing of a related information were part of a single
11 prosecution for speedy trial purposes. Thus, the defendant's failure to appear in
12 connection with the citation process excused most of the pretrial delay under ORS
13 135.747. *Id.* at 328-34. *Anglin* does not undercut a conclusion that a defendant is
14 "charged with a crime" under ORS 135.747 only when an accusatory instrument is filed
15 with a court. *See Coulson*, 243 Or App at 272-73 (commencement of the relevant "period
16 of time" under ORS 135.747 by filing of an indictment after a citation where no
17 information or complaint was filed).

18 Thus, once a complaint or information is filed, the time begins to run to

commenced when a warrant or other process is issued, provided that the warrant or other process is executed without unreasonable delay"). Despite the reference in some of our cases to ORS 131.135 as relevant to the commencement of the "period of time" under ORS 135.747, we eschewed any such relevance in [State v. Williams](#), 232 Or App 303, 318 n 4, 222 P3d 31 (2009).

1 bring a defendant to trial under ORS 135.747. The relevant period of time continues until
2 that defendant is brought to trial or until the accusatory instrument is dismissed.
3 Following dismissal of the accusatory instrument, a new accusatory instrument can be
4 filed, if permitted under ORS 135.753(2) and if timely under the applicable limitations
5 period, and the statutory speedy trial period will "start anew." *Coulson*, 243 Or App at
6 268; *see also State v. Bayer*, 229 Or App 267, 278, 211 P3d 327, *rev den*, 347 Or 446
7 (2009) ("[W]hen the state dismisses one charging instrument but subsequently files
8 another, the prosecution commences with the second charging instrument and, thus,
9 serves as the starting point for calculating the relevant delay for purposes of ORS
10 135.747."); *State v. Purdom*, 218 Or App 514, 522-23, 180 P3d 150 (2008) (same).

11 On the other hand, if the accusatory instrument is amended and not
12 dismissed, the "reasonable period of time" under ORS 135.747 is measured from the
13 filing of the earlier, unamended accusatory instrument. *See Davis*, 236 Or App at 108
14 (date of initial information used for calculation of speedy trial period because there was
15 "no dismissal of any information in this case; the same information was continued with
16 very slight changes, and the rule in *Purdom* does not apply").

17 In the case at bar, there was never an information or indictment to replace
18 an earlier-filed accusatory instrument. Instead, the citations--one with a criminal
19 complaint and the other without--were never filed with the court as required by ORS
20 133.065. In fact, the district attorney "no-complained" the DUII citation under ORS
21 133.069(2) by not filing the citation with the court. Thus, neither citation operated to

1 initiate the prosecution or to file a complaint and charge defendant with a crime.
2 Defendant remained uncharged until the information was filed with the court on
3 September 16, 2009. The filing of that accusatory instrument marked the beginning point
4 of the speedy trial calculation under ORS 135.747. Because the trial delay after that
5 point was reasonable under ORS 135.747, the trial court did not err in denying
6 defendant's motion to dismiss.

7 Affirmed.