

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93305

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

GEORGE PIRKEL

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508709

BEFORE: Blackmon, P.J., Dyke, J., and Celebrezze, J.

RELEASED: April 29, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

Carrie Heindrichs
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Robert P. Smith, III
75 Public Square, Suite #1111
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant state of Ohio appeals the trial court's decision granting appellee George Pirkel's motion to dismiss for speedy trial violation. The state assigns the following errors for our review:

"I. The trial court erred when it granted defendant's motion to dismiss for violation of his right to a speedy trial pursuant to § 2945.73(B). JE 5/5/09."

"II. The trial court erred when it granted defendant's motion to dismiss on a constitutional violation. JE 5/5/09."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On March 28, 2008, the Cuyahoga County Grand Jury indicted Pirkel on one count each of intimidation and retaliation. On April 11, 2008, Pirkel pleaded not guilty at his arraignment. On April 15, 2008, Pirkel filed a motion for discovery and inspection, motion for bill of particulars, motion for exculpatory and mitigatory material, and motion for notice of evidence. On May 5, 2008, the state responded to Pirkel's discovery request and demanded discovery from Pirkel.

{¶ 4} On May 13, 2008, the first pretrial was conducted and the trial court scheduled trial for June 10, 2008. On April 13, 2009, after numerous continuances, Pirkel filed a motion to dismiss for violation of his right to a speedy trial. The state did not respond to Pirkel's motion. On April 30,

2009, the trial court granted Pirkel's motion to dismiss. The state now appeals.

Speedy Trial

{¶ 5} We will address both assigned errors jointly because of their common basis in law and fact. The state argues the trial court erred when it granted Pirkel's motion to dismiss for a violation of his right to a speedy trial. We disagree.

{¶ 6} Our review of a trial court's decision on a motion to dismiss for a speedy trial violation involves a mixed question of law and fact. *State v. Easley*, 4th Dist. No. 03CA2910, 2005-Ohio-767, citing *State v. Brown* (1998), 131 Ohio App.3d 387, 391, 722 N.E.2d 594; *State v. Kuhn* (June 10, 1998), 4th Dist. No. 97CA2307. We accord due deference to a trial court's findings of fact if supported by competent, credible evidence, but determine independently if the trial court correctly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, we must strictly construe the relevant statutes against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 1996-Ohio-171, 661 N.E.2d 706; see, also, *State v. Mustard*, 4th Dist. No. 04CA724, 2004-Ohio-4917, at 10.

{¶ 7} The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee an accused the right

to a speedy and public trial. *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30. In *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court declared that, with regard to fixing a time frame for speedy trials, “the States * * * are free to prescribe a reasonable period consistent with constitutional standards * * *.” To that end, the Ohio General Assembly enacted R.C. 2945.71 in order to comply with the *Barker* decision. See, also, *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854.

{¶ 8} The standard of review that appellate courts apply to speedy trial issues is to count days as set forth in R.C. 2945.71. *State v. Stevens*, Cuyahoga App. No. 87693, 2006-Ohio-5914. Trial must be held within 270 days of arrest in order to effectuate a speedy trial. See R.C. 2945.71(C)(2). However, pursuant to R.C. 2945.71(E), each day spent in jail “on a pending charge” acts as three days toward speedy trial time, thus 90 days time in jail would equate to 270 days using the triple-count provision.

{¶ 9} It is well established that the Ohio speedy trial statute constitutes a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or misdemeanor and shall be strictly enforced by the courts of this state. *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *Cleveland v. Jeric*,

Cuyahoga App. No. 89687, 2008-Ohio-1825, citing *State v. Howard* (1992), 79 Ohio App.3d 705, 607 N.E.2d 1121. At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Id.*, citing *State v. Geraldo* (1983), 13 Ohio App.3d 27, 468 N.E.2d 328.

{¶ 10} A review of the record on appeal indicates the following procedural events for the matter before us:

1. 3-28-08, Pirkel indicted.
2. 4-4-08, Pirkel signed for indictment.
3. 4-11-08, Pirkel arraigned and pleads not guilty to the charges.
4. 4-15-08, Pirkel filed motions for discovery.
5. 4-30-08, first pretrial conducted, but continued to 5-13-08, at Pirkel's request.
6. 5-5-08, state responds to Pirkel's request for discovery, and requests discovery of Pirkel.
7. 5-13-08, pretrial conducted. Trial scheduled for 6-10-08.
8. 6-10-08, trial continued to 7-8-08, at trial court's request because trial court is presiding over another trial.
9. 6-11-08, Pirkel responds to the state's request for discovery.
10. 7-8-08, trial continued to 8-6-08, at trial court's request due to its unavailability.
11. 8-6-08, trial not held and no entry journalized.
12. 8-15-08, pretrial conducted and trial rescheduled to 10-1-08.
13. 10-1-08, trial continued to 10-20-08, at trial court's request due to its unavailability.

14. 10-20-08, trial continued to 12-2-08, at trial court's request because trial court is presiding over another trial.
15. 12-2-08, trial continued to 1-13-09, at trial court's request due to its unavailability.
16. 1-13-09, trial continued to 2-2-09, at trial court's request because trial court is presiding over another trial.
17. 2-2-09, trial continued to 2-25-09, at trial court's request because trial court is presiding over another trial.
18. 2-25-09, trial continued to 3-18-09, at trial court's request because trial court is presiding over another trial.
19. 3-18-09, pretrial continued to 4-6-09, at Pirkel's request in order to file a motion to dismiss and for the State to respond.
20. 4-6-09, Pirkel filed motion for continuance of previously scheduled pretrial. Trial court continues the pretrial to 4-13-09.
21. 4-13-09, Pirkel filed motion to dismiss.
22. 4-15-09, pretrial conducted, but continued at Pirkel's request to 4-30-09.
23. 4-30-09, trial court grants Pirkel's motion to dismiss.

{¶ 11} When computing the previously discussed two hundred and seventy-day period, each day during which that individual is held in jail without bail solely on the pending charge shall be counted as three days. R.C. 2945.71(E). Because Pirkel was never held in jail, the triple count provision of R.C. 2945.71(E) does not apply. See *State v. Thieshen* (1977), 55 Ohio App.2d 99, 379 N.E.2d 622. Instead, the speedy trial time is counted on a one-for-one basis. Id.

{¶ 12} Thus, Pirkel's two hundred and seventy-day speedy trial time commenced on April 4, 2008, the day he signed for the indictment. See *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, 834 N.E.2d 887, citing *State v. Collins* (1997), 118 Ohio App.3d 73, 691 N.E.2d 1109. Applying the speedy trial period from that date, Pirkel was required to be brought to trial no later than Tuesday, December 30, 2008, unless that period was tolled. The record indicates that the trial court granted Pirkel's motion to dismiss on April 30, 2009. Thus, 391 days elapsed from the date the indictment was returned to the date the trial court granted Pirkel's motion to dismiss.

{¶ 13} 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 by 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. See R.C. 2945.72(H).

{¶ 14} A review of the above-cited procedural events reveals that Pirkel filed his motion for discovery on April 15, 2008, and the state responded to the request on May 5, 2008. Pursuant to R.C. 2945.72(H), the speedy trial time was tolled for 20 days.

{¶ 15} Thereafter, the trial court sua sponte filed a judgment entry continuing the matter eight times. Five of the continuances were the result

of the trial court's engagement in other criminal trials. Three of the continuances were due to the unavailability of the trial court.

{¶ 16} A sua sponte continuance must be properly journalized before the expiration of the speedy trial period and must set forth the trial court's reasons for the continuance. *State v. Weatherspoon*, 5th Dist. No.2006CA0013, 2006-Ohio-4794. "The record of the trial court must * * * affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095.

{¶ 17} Further, 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. *State v. Saffell* (1988), 35 Ohio St.3d 90, 518 N.E.2d 934; *State v. Mosley* (Aug. 15, 1995), 10th Dist. No. 95APA02-232. However, a continuance due to the trial court's engagement in another trial is generally reasonable under R.C. 2941.401. *State v. Doane* (July 9, 1992), Cuyahoga App. No. 60097; see, also, *State v. Judd* (Sept. 19, 1996), 10th Dist. No. 96APA03-330. However, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted. See *State v. Nichols*, 5th Dist. No. 2009-CA-0032, 2009-Ohio-3160, citing *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

{¶ 18} A recapitulation of the trial court's continuances resulting from engagement in other trials reveals that on June 10, 2008, the trial court continued the matter for 28 days; on October 20, 2008, for 43 days; on January 13, 2009, for 22 days; on February 2, 2009, for 23 days; and on February 25, 2009, for 21 days.

{¶ 19} In addition, on July 8, 2008, the trial court continued the matter for 29 days due to its unavailability; on October 1, 2008, for 19 days due to its unavailability; and on December 2, 2008, for 42 days due to its unavailability.

{¶ 20} Here, the trial court's continuances resulting from being engaged in other trials or being unavailable resulted in Pirkel's speedy trial time being extended by a total of 247 days. Even though the trial court properly entered upon the record the causes for the sua sponte continuances, we conclude the number of days that the trial court continued the matter was unreasonable. As such, the trial court had no choice but to grant Pirkel's motion to dismiss for a violation of his right to a speedy trial. Accordingly, we overrule both assigned errors.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR