

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2014-A-0058
TERRANCE L. CLARK,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2013 CR 110.

Judgment: Reversed and remanded.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

Rebecca Hall, P.O. Box 242, 34 South Chestnut Street, Suite 300, Jefferson, OH 44047 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from the Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing the charges pending against defendant-appellee, Terrance L. Clark, based on the violation of his right to a speedy trial. The issue to be determined by this court is whether a delay of several months in criminal proceedings due to the defendant’s failure to appear at a hearing and a lack of counsel constitutes a tolling of time for the purposes of evaluating the speedy trial issue.

For the following reasons, we reverse the judgment of the lower court and remand for further proceedings.

{¶2} On February 4, 2013, Complaints were filed in the Ashtabula Municipal Court, charging Clark with Having Weapons While Under Disability, and Improperly Handling Firearms in a Motor Vehicle. At arraignment, Clark was appointed counsel. However, on February 11, 2013, attorney Michelle French filed a Notice of Appearance as counsel. On February 12, 2013, the court found that probable cause was shown only as to Having Weapons While Under Disability, bound the charge over to the grand jury, and dismissed the other charge.

{¶3} On April 18, 2013, a Bill of Information was filed, charging Clark with Having Weapons While Under Disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3). A summons for his appearance on May 10, 2013, was issued.

{¶4} On May 8, 2013, a Discovery Demand was filed by Clark.

{¶5} Clark filed a Motion to Continue the Hearing on Information on May 10, 2013, due to counsel's illness. This was granted by the court and the matter was rescheduled for May 16, 2013.

{¶6} The State filed a notice that it submitted its discovery response on May 14, 2013.

{¶7} On May 31, 2013, defense counsel filed a Motion to Withdraw, asserting that Clark failed to pay attorney's fees in accordance with their agreement. She also stated that he "persistently failed to return her communications or attend his scheduled court hearings." On June 10, 2013, the court granted this request.

{¶8} The State filed a Motion to Dismiss the Information on January 15, 2014, to allow the State to proceed to the grand jury for an indictment, noting that Clark failed to appear for the plea hearing and failed to reschedule the matter. This Motion was granted on January 16, 2014.

{¶9} On March 20, 2014, Clark was indicted by the Ashtabula County Grand Jury on two counts of Having Weapons While Under Disability, felonies of the third degree, in violation of R.C. 2923.13(A)(1) and (3). Clark was served with the Indictment on April 21, 2014.

{¶10} On May 30, 2014, Clark filed a Request for Discovery and a Request for Bill of Particulars. The State filed a Notice that these were provided on June 5, 2014.

{¶11} Clark filed a Motion to Dismiss on August 28, 2014, for a violation of his right to a speedy trial. In it, the various periods when time was tolled were outlined. Most importantly, Clark argued that no activity occurred from June 11, 2013, through January 16, 2014. He asserted that the time was well over the 270 days allowed, and totaled 417 days. He argued that the State failed to exercise reasonable diligence to secure his availability.

{¶12} A hearing was held on the Motion to Dismiss on September 3, 2014. At that hearing, Clark argued that time had not tolled during the period after counsel withdrew, since he was not provided with notice that he was without counsel. Clark noted that although he had initially been appointed counsel, his attorney, French, who withdrew, had been hired by him.

{¶13} The State argued that Clark tolled time during the period following his failure to appear at the plea by information hearing and for failing to request counsel.

{¶14} In a September 12, 2014 Judgment Entry, the trial court granted the Motion to Dismiss and dismissed the case against Clark. It held that, even subtracting the tolling periods, 400 “speedy trial days” elapsed since Clark’s arrest. The court described the various periods during which time was tolled. Most significantly, the court found that the period of time during the 220 days from June 11, 2013 (the day after defense counsel was allowed to withdraw) through January 16, 2014 (the day on which the information was dismissed), nothing transpired in the case and that, when Clark failed to appear, the State was still required to “ensure that the proceedings moved forward in a timely fashion.”

{¶15} The State timely appeals and raises the following assignment of error:

{¶16} “The trial court erred in granting appellee’s motion to dismiss on the grounds that the state failed to bring the case to trial within the statutory time requirements of R.C. 2945.71.”

{¶17} “The standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71.” *State v. Blumensaadt*, 11th Dist. Lake No. 2000-L-107, 2001 Ohio App. LEXIS 4283, 17 (Sept. 21, 2001).

{¶18} Speedy trial issues present mixed questions of law and fact for the reviewing court. *State v. Lewis*, 11th Dist. Portage No. 2010-P-0070, 2011-Ohio-3748, ¶ 18. “The reviewing court accepts the facts as determined by the trial court, if supported by competent and credible evidence, while ‘freely,’ i.e., de novo, reviewing the application of the law to the facts.” (Citation omitted.) *State v. Barnard*, 11th Dist. Ashtabula No. 2011-A-0036, 2012-Ohio-399, ¶ 14.

{¶19} “It is well-established that the Ohio speedy trial statute is mandatory, constitutional, and must be construed strictly against the state. * * * Once a criminal defendant shows that he was not brought to trial within the permissible period, the accused presents a prima facie case for dismissal. * * * At that point, the burden shifts to the state to demonstrate that sufficient time was tolled or extended under the statute.” (Citations omitted.) *State v. Braden*, 197 Ohio App.3d 534, 2011-Ohio-6691, 968 N.E.2d 49, ¶ 37 (11th Dist.).

{¶20} A person charged with a felony “[s]hall be brought to trial within two hundred seventy days after the person’s arrest.” R.C. 2945.71(C)(2). If the accused is not brought to trial within the time specified by R.C. 2945.71, “[u]pon motion made at or prior to the commencement of trial,” the accused “shall be discharged.” R.C. 2945.73(B). “[S]uch discharge is a bar to any further criminal proceedings against him based on the same conduct.” R.C. 2945.73(D). Various exceptions allow for the tolling of the time period, including the accused’s request for a continuance and the accused’s lack of counsel. R.C. 2945.72.

{¶21} A review of the record reveals that 72 speedy trial days commenced after the date following the arrest, through the date when Clark filed a motion for bond. *State v. Barr*, 11th Dist. Portage No. 2008-P-0031, 2009-Ohio-1146, ¶ 46 (“[w]hen computing speedy trial time, the date of arrest itself is not counted”) (citation omitted). One day tolled until the motion was granted. *State v. Lawson*, 7th Dist. Mahoning No. 12 MA 194, 2014-Ohio-879, ¶ 38 (a motion to amend bond tolls speedy trial time). The State argued, and Clark conceded at the hearing, that he was not entitled to the application of

the triple-count provision during the time he was jailed, since he was held on a separate warrant.

{¶22} Twenty-one days were then counted for speedy trial purposes, through the date on which a Discovery Demand was filed, May 8, 2013. This again tolled the count of speedy trial time. R.C. 2945.72(E). See *State v. Rivera*, 11th Dist. Ashtabula No. 2011-A-0023, 2011-Ohio-6854, ¶ 45 (not counting the date the request for discovery was filed as tolling time, but counting subsequent dates, including the date discovery was provided). Time continued to toll during this period since a motion to continue the plea hearing was filed on May 10, 2013. R.C. 2945.72(H).

{¶23} Clark did not appear at the hearing on May 16, which began the period of time in dispute in this appeal, and that issue will be subsequently addressed.

{¶24} Following the dismissal of the charges on January 16, 2014, no time is counted for speedy trial purposes. Time began to run again on April 21, 2014, when Clark was served with the March 20, 2014 Indictment. *Rivera* at ¶ 19.

{¶25} Forty speedy trial days elapsed until time tolled for 6 days on the discovery request filed May 30, and an additional 84 speedy trial days passed before the filing of the Motion to Dismiss on August 28 began to toll time.

{¶26} This entire period of time is approximately 50 days under the 270 day limit required for a speedy trial. This case, then, turns on the issue of whether time tolled from May 2013, when Clark failed to appear at the hearing, and January 2014, when the charges were dismissed.

{¶27} During that time, no action was taken on this matter. Clark was without counsel after his counsel withdrew and had not appeared at the most recent hearing, a hearing arranged to enter a plea on the Information.

{¶28} The State argues that speedy trial remained tolled after Clark failed to appear for the May 16, 2013 hearing, since time tolls when a defendant causes the delay.

{¶29} In the present case, the trial court found that Clark failed to appear at the May 16, 2013 hearing, which is supported by the fact that no plea on the Information was entered on that date and by the Motion to Withdraw, in which counsel contended that Clark failed to appear at hearings. This court has held that “[a] defendant may not enjoy the benefits of the speedy trial statute for a delay resulting from his failure to appear for a hearing.” *State v. Parker*, 11th Dist. Trumbull No. 97-T-0116, 1998 Ohio App. LEXIS 4845, 8 (Oct. 9, 1998). A defendant “will not be permitted to enjoy the protection of [the speedy trial statutes], * * * when by his actions he has waived their benefits.” *State v. Bauer*, 61 Ohio St.2d 83, 84, 399 N.E.2d 555 (1980).

{¶30} Courts have applied this principle in determining that speedy trial time does not continue to run when a defendant misses various hearings in criminal proceedings. *Parker* at 8 (tolling time following the defendant’s failure to attend a pretrial hearing until he appeared before the court again); *State v. Evans*, 12th Dist. Butler No. CA98-11-237, 1999 Ohio App. LEXIS 6407, 9 (Dec. 30, 1999) (periods of time during which the appellant failed to appear at pretrial conferences “must be counted against appellant”).

{¶31} While it is the case here that the State did not take action, such as seeking a warrant, to require Clark to appear after he failed to do so, this does not mean that the speedy trial clock should have continued. *See State v. Hopkins*, 7th Dist. Mahoning No. 11 MA 107, 2012-Ohio-3003, ¶ 17 (rejecting the defendant's argument that, since a bench warrant was not issued after he failed to appear, the speedy trial clock should not have tolled). Although a general procedure is for a *capias* warrant to issue and the speedy trial period to restart following a defendant's arrest for not appearing at a hearing/trial, the failure for one to be issued here should not absolve Clark of his responsibility to attend hearings. Regardless of the existence of a warrant or a *capias*, the failure to appear is the fault of Clark. *See Parker*, 1998 Ohio App. LEXIS 4845, at 8 (the speedy trial days were tolled until the defendant reappeared, without mention of a *capias* warrant requirement).

{¶32} Even if we were to presume that the tolling of time was not appropriate due to Clark's failure to appear, it is noteworthy that he was also without counsel for the period of time at issue. Speedy trial time may be extended by "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 his request as required by law[.]" R.C. 2945.72(C).

{¶33} Subsequent to counsel's withdrawal in June of 2013, Clark did not request that the court appoint new counsel, did not retain private counsel, or take any other action to remedy this situation. While it appears from the record that, based on an initial finding of indigency, Clark was appointed counsel, it is clear from the hearing that Clark had chosen to retain private counsel rather than continue with appointed counsel.

Without a request to the court to appoint new counsel, it would appear that Clark may search for additional private representation. He again failed to take action on his own behalf that would resume the speedy trial clock.

{¶34} Since we find that time was tolled from the period starting in May 2013 until the charges were dismissed in January 2014, due to Clark's conduct, no speedy trial days should be counted for that period. As such, the trial court erred in dismissing the charges against Clark and this judgment is reversed.

{¶35} The sole assignment of error is with merit.

{¶36} For the foregoing reasons, the Judgment Entry of the Ashtabula County Court of Common Pleas, dismissing the charges against Clark, is reversed and remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.

concur.