**[Cite as *State v. Richardson*, 2009-Ohio-4867.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | | JUDGES: |
| STATE OF OHIO | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. William B. Hoffman, J. |
| Plaintiff-Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 2009-CA-00027 |
| JEROME RICHARDSON | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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|---|---|
| CHARACTER OF PROCEEDING: | Criminal appeal from the Richland County Court of Common Pleas, Case No. 2006-CR-658H |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | September 15, 2009 |
| APPEARANCES: | |
| For Plaintiff-Appellee | For Defendant-Appellant |
| JAMES J. MAYER, JR.<br>Richland County Prosecuting Attorney<br>By: Kirsten Pscholka-Gartner<br>38 South Park Street<br>Mansfield, OH 44902 | RYAN M. HOOVLER<br>13 Park Avenue West, Suite 300<br>Mansfield, OH 44902 |

*Gwin, P.J.*

**{¶1}** Defendant-appellant Jerome Richardson appeals from his conviction and sentence in the Richland County Court of Common Pleas on one count of possession of drugs in violation of R.C. 2925.11(C)(4)(a), a felony of the fifth degree. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶2}** At approximately 1:15 a.m. on July 8, 2006, auxiliary police officer Brad Fisher was patrolling West Fourth Street in Mansfield, Ohio. During this time, he noticed a black male standing between two houses wearing a jersey with the number 28 on it.

**{¶3}** Fisher recognized appellant as the suspect wearing the same number 28 jersey and pushing a dolly filled with household goods the previous week. At that time when officers attempted to make contact with the man to see if he was involved in a burglary, he fled, leaving the dolly and household items behind.

**{¶4}** When Fisher saw the man a second time in the early morning hours of July 8, 2006, he immediately turned his cruiser around to make contact with him. However, he could not locate the suspect. Sergeant Joy Stortz joined in the search and appellant was eventually located crouching behind overgrown bushes on the porch of a vacant house at 331 West Fourth Street. In the area where he was hiding, the officers located a small pair of scissors, a lighter, and a glass crack pipe.

**{¶5}** Appellant initially told Fisher that his name was Lamont Parker. When Fisher questioned him about the encounter the previous week, he admitted to being the same man that was pushing the dolly.

**{¶6}** During this time, Fisher spoke with appellant and learned that his name was actually Jerome Richardson. When this name was run through the system, Sergeant Stortz learned that appellant had an active warrant for his arrest. He was then transported to the Mansfield City Jail. While Fisher was searching appellant during book-in, he located rolling papers in his pants pocket. Concealed within those papers was a cellophane wrapper containing an off-white substance. It was tested by the Mansfield Police Crime lab and was found to be crack cocaine in the amount of .01 grams.

**{¶7}** At the conclusion of the trial, the jury found appellant guilty of possession of crack cocaine. The trial court sentenced appellant to twelve months in prison, to run consecutive to his prison sentence for an unrelated robbery imposed in Franklin County.

**{¶8}** Appellant timely appealed and raises the following three assignments of error for our consideration:

**{¶9}** "I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE.

**{¶10}** "II. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE A STATEMENT OF FACTS AND CONCLUSIONS OF LAW ON THE MOTION FOR A SPEEDY TRIAL FILED BY THE DEFENDANT AND FAILED TO DISMISS THE CASE.

**{¶11}** "III. DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

I.

**{¶12}** In his first assignment of error, appellant argues that the trial court erred in denying his motion to suppress and in finding that the officers had a reasonable suspicion to stop him. We disagree.

**{¶13}** There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627; *State v. Guysinger* (1993), 86 Ohio App.3d 592. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

**{¶14}** In the instant appeal, appellant's challenge of the trial court's ruling on his motion to suppress is based on the third method. Accordingly, this court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in this case.

**{¶15}** In the case sub judice, the parties concede that, at the time of the initial encounter, appellant had an outstanding warrant for his arrest, and the drugs in question were found as appellant was being booked into the jail on that warrant.

Accordingly, the only question in the case at bar is whether the initial contact of the police officers with appellant violated the appellant's Fourth Amendment rights.

**{¶16}** Contact between police officers and the public can be characterized in three different ways. *State v. Richardson,* 5th Dist. No.2004CA00205, 2005-Ohio-554 at ¶ 23-27. The first is contact initiated by a police officer for purposes of investigation. "[M]erely approaching an individual on the street or in another public place [,]" seeking to ask questions for voluntary, uncoerced responses, does not violate the Fourth Amendment. *United States v. Flowers* (6th Cir.1990), 909 F.2d 145, 147. The United State Supreme Court "[has] held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); see also *INS v. Delgado,* 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick,* supra, at 434-435, 111 S.Ct. 2382 (citations omitted). The person approached, however, need not answer any question put to him, and may continue on his way. *Florida v. Royer* (1983), 460 U .S. 491, 497-98. Moreover, he may not be detained even momentarily for his refusal to listen or answer. Id.

**{¶17}** The second type of contact is generally referred to as "a *Terry* stop" and is predicated upon reasonable suspicion. *Richardson,* supra*; Flowers,* 909 F.2d at 147; See *Terry v. Ohio* (1968), 392 U.S. 1. This temporary detention, although a seizure, does not violate the Fourth Amendment. Under the *Terry* doctrine, "certain seizures are justifiable ... if there is articulable suspicion that a person has committed or is about to

commit a crime" *Florida,* 460 U.S. at 498. In holding that the police officer's actions were reasonable under the Fourth Amendment, Justice Rehnquist provided the following discussion of the holding in *Terry:* "In *Terry* this Court recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Adams v. Williams* (1972), 407 U.S. 143, 145-47, 92 S.Ct. 1921, 1923-24, 32 L.Ed.2d 612.

**{¶18}** The third type of contact arises when an officer has "probable cause to believe a crime has been committed and the person stopped committed it." *Richardson,* supra*; Flowers,* 909 F. 2d at 147. A warrantless arrest is constitutionally valid if: "[a]t the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the * * * [individual] had committed or was committing an offense." *State v. Heston* (1972), 29 Ohio St.2d 152, 155-156, 280 N.E.2d 376, quoting *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142. "The principal components of a determination of reasonable suspicion or probable cause will be the events which

occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. United States* (1996), 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-1162. A police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, e.g., *United States v. Ortiz* (1975), 422 U.S. 891, 897, 95 S.Ct. 2585, 2589.

**{¶19}** In the case at bar, the initial contact with appellant is best placed into the second category. Upon review, under the totality of the circumstances, we conclude the events in the case sub judice constituted an investigative stop such that the officers were required to have a reasonable, articulable suspicion that the appellant was a person who has committed or is about to commit a crime.

**{¶20}** Reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Alabama v. White* (1990), 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301. However, it requires something more than an "inchoate and unparticularized suspicion or 'hunch.' "*Terry v. Ohio* (1968), 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889. "[T]he Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow* (2000), 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570.

**{¶21}** "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but

the second is a mixed question of law and fact." *Ornelas v. United States* (1996), 517 U.S. 690, 695-96, 116 S.Ct. 1657, 1661-62. In general, we review determinations of historical facts only for clear error. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." Id. at 698, 116 S.Ct. at 1663. On the other hand, determinations of reasonable suspicion and probable cause are reviewed de novo. Id.

**{¶22}** In the case at bar, Fisher recognized appellant as the suspect wearing the same number 28 jersey and pushing a dolly filled with household goods the previous week. At that time when officers attempted to make contact with the man to see if he was involved in a burglary, he fled, leaving the dolly and household items behind.

**{¶23}** When Fisher saw the man a second time in the early morning hours of July 8, 2006, he immediately turned his cruiser around to make contact with him. However, he could not locate the suspect. Sergeant Joy Stortz joined in the search and appellant was eventually located crouching behind overgrown bushes on the porch of a vacant house at 331 West Fourth Street. In the area where he was hiding, the officers located a small pair of scissors, and lighter, and a glass crack pipe.

**{¶24}** Appellant initially told Fisher that his name was Lamont Parker. When Fisher questioned him about the encounter the previous week, he admitted to being the same man that was pushing the dolly.

**{¶25}** During this time, Fisher spoke with appellant and learned that his name was actually Jerome Richardson. When this name was run through the system, Sergeant Stortz learned that appellant had an active warrant for his arrest. He was then

transported to the Mansfield City Jail. While Fisher was searching appellant during book-in, he located rolling papers in his pants pocket. Concealed within those papers was a cellophane wrapper containing an off-white substance. It was tested by the Mansfield Police Crime lab and was found to be crack cocaine in the amount of .01 grams.

**{¶26}** This Court finds that these facts and inferences satisfy the requirements of reasonable suspicion. The "Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (Internal quotations omitted.) *Bobo,* 37 Ohio St.3d at 180, quoting *Adams v. Williams* (1972), 47 U.S. 143, 145-46, 32 L.Ed.2d 612. The officers were justified in briefly stopping the appellant in order to determine his identity or to maintain the status quo momentarily by requiring that he remain on the porch while obtaining more information.

**{¶27}** In a motion to suppress, the trial court assumes the role of trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *Guysinger,* supra, at 594 (citations omitted). Accordingly, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Id., citing *State v. Fausnaugh* (Apr. 30, 1992), Ross App. No. 1778.

**{¶28}** We find Fisher’s and Sergeant Stortz’s contact with the appellant under the totality of the circumstances presented in this case does not amount to an unjustifiable intrusion by the government on the privacy of an individual such as to constitute a violation of the Fourth Amendment to the United States Constitution. The

conduct of the officers with the appellant was reasonable and prudent under the circumstances.

**{¶29}** Appellant's first assignment of error is overruled.

II.

**{¶30}** In his second assignment of error, appellant contends the trial court erred and violated his constitutional rights by failing to rule on his pro se speedy trial motion to dismiss filed January 8, 2008. We disagree.

**{¶31}** "We begin by noting our lengthy history of Sixth Amendment jurisprudence, including the application of R.C. 2945.71. 'The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. Section 10, Article I of the Ohio Constitution guarantees an accused this same right. *State v. MacDonald* (1976), 48 Ohio St.2d 66, 68, 2 O.O.3d 219, 220, 357 N.E.2d 40, 42. Although the United States Supreme Court declined to establish the exact number of days within which a trial must be held, it recognized that states may prescribe a reasonable period of time consistent with constitutional requirements. *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 113.'" *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534 at ¶11. [Quoting *State v. Hughes* (1999), 86 Ohio St.3d 424, 425, 715 N.E.2d 540.].

**{¶32}** In Ohio, the right to a speedy trial has been implemented by statutes that impose a duty on the state to bring a defendant who has not waived his rights to a speedy trial to trial within the time specified by the particular statute. R.C. 2945.71 *et seq.* applies to defendants generally. R.C. 2941.401 applies to defendants who are

imprisoned within the State of Ohio. *State v. Smith*, 140 Ohio App.3d 81, 85-86, 2000-Ohio-1777, 746 N.E.2d 678, 682.

**{¶33}** As Chief Justice Moyer wrote in *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 55-56, 661 N.E.2d 706:

**{¶34}** "Ohio's speedy trial statute was implemented to incorporate the constitutional protection of the right to a speedy trial provided for in the Sixth Amendment to the United States Constitution and in Section 10, Article I of the Ohio Constitution. *State v. Broughton* (1991), 62 Ohio St.3d 253, 256, 581 N.E.2d 541, 544; see *Columbus v. Bonner* (1981), 2 Ohio App.3d 34, 36, 2 OBR 37, 39, 440 N.E.2d 606, 608. The constitutional guarantee of a speedy trial was originally considered necessary to prevent oppressive pretrial incarceration, to minimize the anxiety of the accused, and to limit the possibility that the defense will be impaired. *State ex rel. Jones v. Cuyahoga Cty. Ct. of Common Pleas* (1978), 55 Ohio St.2d 130, 131, 9 O.O.3d 108, 109, 378 N.E.2d 471, 472.

**{¶35}** "Section 10, Article I of the Ohio Constitution guarantees to the party accused in any court 'a speedy public trial by an impartial jury.' 'Throughout the long history of litigation involving application of the speedy trial statutes, this court has repeatedly announced that the trial courts are to strictly enforce the legislative mandates evident in these statutes. This court's announced position of strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial.' (Citations omitted.) *State v. Pachay* (1980), 64 Ohio St.2d 218, 221, 18 O.O.3d 427, 429, 416 N.E.2d 589, 591.

**{¶36}** “We have long held that the statutory speedy-trial limitations are mandatory and that the State must strictly comply with them. *Hughes*, 86 Ohio St.3d at 427, 715 N.E.2d 540. Further, ‘the fundamental right to a speedy trial cannot be sacrificed for judicial economy or presumed legislative goals.’ Id.” *State v. Parker*, supra 2007-Ohio-1534 at ¶12-15.

**{¶37}** In Ohio, the right to a speedy trial has been implemented by statutes that impose a duty on the state to bring a defendant who has not waived his rights to a speedy trial to trial within the time specified by the particular statute. R.C. 2945.71 *et seq.* applies to defendants generally. R.C. 2945.71 provides:

**{¶38}** "(C) A person against whom a charge of felony is pending:

**{¶39}** "(1) * * *

**{¶40}** "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

**{¶41}** "(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section."

**{¶42}** A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin,* Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo

standard of review and thus freely review the trial court's application of the law to the facts. Id.

**{¶43}** When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

**{¶44}** The time to bring a defendant to trial can be extended for any of the reasons enumerated in R.C. 2945.72, which provides:

**{¶45}** "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:

**{¶46}** "(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

**{¶47}** "(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

**{¶48}** "(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 his request as required by law;

**{¶49}** "(D) Any period of delay occasioned by the neglect or improper act of the accused;

**{¶50}** "(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;

**{¶51}** "(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

**{¶52}** "(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

**{¶53}** "(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;

**{¶54}** "(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending."

**{¶55}** "When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71." *State v. Riley,* 162 Ohio App.3d 730, 2005-Ohio-4337, 834 N.E.2d 887, ¶ 19.

**{¶56}** As to all but one of the numerous continuances in this case, the trial court sua sponte filed a judgment entry continuing the matter.

**{¶57}** 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. "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. 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), Franklin App. No. 95APA02-232. However, a continuance due 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,* Franklin App. No. 96APA03-330, 1996 WL 532180. 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. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

**{¶58}** In *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 461 N.E.2d 892 the Ohio Supreme Court noted with respect to R.C.2945.72(E): "[i]t is evident from a reading of the statute that a motion to dismiss acts to toll the time in which a defendant must be brought to trial." Id. at 67, 461 N.E.2d 892. In *Bickerstaff,* supra, the Court found no prejudice from a five-month delay between the filing of the Motion to Dismiss and the trial court's ruling upon the motion. Id.

**{¶59}** Of the delays in the appellant's case, delays arising from or attributable to appellant account for 167 days; 77 days are attributable to the actions of the state, and 283 days of the delay were the trial court's sua sponte continuances due to conflicts with other trials.

**{¶60}** This court finds that each of the sua sponte continuances in the case sub judice were for good cause and were necessary and reasonable, given that the trial court entered upon the record that it was engaged in other trials, appellant filed a motion

to suppress, and discharged his original counsel. The number of days for which the trial was continued was not unreasonable.

**{¶61}** Appellant's second assignment of error is overruled.

III.

**{¶62}** In his third assignment of error, appellant argues that he was denied effective assistance of trial counsel.

**{¶63}** A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry in whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

**{¶64}** In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St. 3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

**{¶65}** In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; a trial whose result is reliable. *Strickland* 466 U.S. at 687; 694, 104 S.Ct. at 2064; 2068. The burden is upon the

defendant to demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.; *Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra; *Bradley*, supra.

**{¶66}** The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

**{¶67}** Appellant argues that his trial counsel was ineffective because they did not seek to have the controlled substance independently tested. Appellant contends that trial counsel filed a motion for independent testing, but failed to demand a hearing or ruling on the motion from the trial court, and further, failed to file a motion to dismiss for failure to conduct such a test.

**{¶68}** R.C. 2925.51(E) provides that any individual accused of a violation of R.C. Chapter 3719 is entitled, upon proper written request, to have a portion of the substance forming the basis of the alleged violation preserved for the benefit of independent analysis performed by a laboratory analyst employed by the accused. If a sample cannot be preserved, the accused is entitled to have his private analyst present at the state's analysis. Id.

**{¶69}** We note that this is not a case where the state failed to preserve the confiscated substance. Nor is it a case where the alleged contraband was totally consumed during the state's testing process. Additionally, at trial appellant testified and

vehemently denied possessing the substance. (T. July 29, 2008 at 174; 179-182; 190). Further, the analyst testified at trial and was cross-examined by appellant's counsel. (Id. at 143-165). Finally, appellant was represented by two attorneys at trial.

**{¶70}** Appellant's reliance on *State v. Zurbaugh* (Aug. 10, 1993), 5th Dist. No. 92-CA-122 is misplaced. In *Zurbaugh,* this Court entered a judgment of acquittal on two counts of drug abuse because the only evidence they presented was a "field test" using a scientific kit that indicated that the seized substances were marijuana and cocaine. This Court held that the "tests of the alleged contraband were not conducted by a laboratory nor by any quantitative scientific techniques. These preliminary field tests do not rise to a level of scientific reliability to permit their admission. Absent a qualified scientific test, the State was without evidence of the nature of the suspected drug. Therefore, there was no evidence available to establish the charges."

**{¶71}** As previously noted the analyst testified at appellant's trial and his report was admitted into evidence without objection.

**{¶72}** "Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner* (2004), 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45. Trial counsel's failure to request that the trial court rule on the motion for an independent analysis is a "debatable trial tactic," and does not amount to ineffective assistance of counsel. Appellant's trial counsel may have reasonably believed cross-examining the state's witnesses was a stronger strategic move to challenge the origin of the substance than pursuing a risky test. See *State v. Thompson* (1987), 33 Ohio St.3d 1, 9 (trial counsel's failure to obtain a forensic pathologist to "rebut" the issue of rape was not ineffective assistance of counsel); *State v. Foust,* 105 Ohio St.3d 137, 153-154, 2004-Ohio-7006, ¶

97-99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"); *State v. Yarger* (May 1, 1998), 6th Dist. No. H-97-014 (trial counsel's failure to hire an expert medical doctor to rebut state's expert witness was not ineffective assistance of trial counsel); *State v. Rutter,* 4th Dist. No. 02CA17, 2003-Ohio-373, ¶ 19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

**{¶73}** Having reviewed the record that appellant cites in support of his claim that he was denied effective assistance of counsel, we find appellant was not prejudiced by defense counsels' representation of him. The results of the proceedings were not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel.

**{¶74}** Appellant's third assignment of error is overruled.

**{¶75}** For the forgoing reasons, the judgment of the Richland County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J., and

Delaney, J., concur;

Hoffman, J., concurs

separately

_____

HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN

_____

HON. PATRICIA A. DELANEY

WSG:clw 0824

*Hoffman, J. concurring*

**{¶76}** I concur in the majority's analysis and disposition of Appellant's Assignment of Error I. I also concur in the majority's disposition of Appellant's Assignment of Error III, but would do so because Appellant has failed to demonstrate prejudice under the second prong of the *Strickland* test.[1]

**{¶77}** I further concur in the majority's analysis and disposition of Appellant's second assignment of error. However, I do so based upon the limited record before us. I do not believe our decision should be read as giving the trial court carte blanche discretion regarding sua sponte continuances of criminal cases based on court docket management.

**{¶78}** As noted in the majority opinion, the Ohio Supreme Court in *Martin* requires when the trial court grants a *sua sponte* continuance, the record must demonstrate the continuance was reasonable. Because criminal cases are to be given priority over civil cases, *sua sponte* continuances because of a civil case should be carefully scrutinized. While this Court has previously held in *State v. Foster*, 2007-Ohio-6626, such a *sua sponte* continuance was reasonable and tolled the speedy trial time, I believe our ruling in that case should be limited to the facts presented therein.

**{¶79}** In *Foster*, the civil case which prompted the continuance of the criminal case was mid-trial at the time the criminal case was scheduled to commence. Had the civil case not yet commenced in *Foster*, I would find the speedy trial time was not tolled.

[1] I do not believe receiving the results of a second test in any way precludes a challenge to the origin of the substance.

**{¶80}** The record in the case sub judice does not clearly demonstrate the civil case had not yet commenced. In fact, the record suggests the opposite in that the entry ordering the continuance states the civil case is "continued to trial this date."[2] Accordingly, I agree with the majority this *sua sponte* continuance tolled the running of speedy trial time in this case.

**{¶81}** I also have concerns over the reasonableness of *sua sponte* continuing the trial of an older criminal case in favor of a more recent one(s). Three of the *sua sponte* continuances in this case arose because of conflicts with the scheduled trial of criminal cases apparently commencing after Appellant's case: *State v. Caudle, State v. Tucker* and *State v. McCradic*. As a general rule it would seem reasonable to try older pending criminal cases before more recently filed criminal cases. Exceptions to the rule might depend upon whether the respective defendants are in custody or not, which case is closer to the expiration of speedy trial time, etc. Because the record in this case does not affirmatively demonstrate the *sua sponte* continuances for more recently filed criminal cases were otherwise unreasonable, I agree they were presumed reasonable on their face, and support tolling in this case.

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HON. WILLIAM B. HOFFMAN

[2] Order of Trial Continuance filed 1-26-09.

**[Cite as *State v. Richardson*, 2009-Ohio-4867.]**

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| JEROME RICHARDSON | : | |
| Defendant-Appellant | : | CASE NO. 2009-CA-00027 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY