

[Cite as *State v. Ellis*, 2009-Ohio-4956.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TOMMA M. ELLIS

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 9

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 07 CR 55

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

September 22, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, P. J.

{¶1} Defendant-appellant Tomma M. Ellis appeals the decision of the Perry County Court of Common Pleas denying her motion to dismiss based on a violation of her right to a speedy trial.

{¶2} Appellee is the State of Ohio.

{¶3} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶4} “(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be in sufficient compliance with App.R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form.”

{¶5} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE FACTS AND CASE

{¶6} The undisputed facts are as follows:

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{¶7} On February 23, 2007, Appellant Tomma M. Ellis was initially indicted by the Perry County Grand Jury on two counts of forgery, in violation of R.C. §2913.31 (A)(1), felonies of the fifth degree. The indictment was based on allegations that Appellant used a credit card owned by Regina Coffman and then forged Regina Coffman's signature on the authorizations on two separate occasions: February 25, 2006, and March 7, 2006.

{¶8} On August 29, 2007, Appellant filed a Motion to Dismiss both counts in the indictment on the basis that Appellant could not be charged and convicted of a general criminal statute, such as forgery, when the General Assembly has enacted a specific criminal statute for the same alleged conduct, such as misuse of a credit card.

{¶9} On August 30, 2007, the trial court granted Appellant's Motion to Dismiss.

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{¶10} On September 20, 2007, Appellant was again indicted by the Perry County Grand Jury with two counts of misuse of a credit card, in violation of R.C. §2913.21, and because it involved an elderly person, the charges were felonies of the fifth degree.

{¶11} This second indictment was based on alleged facts that were identical to the charges in the prior indictment in Perry County Common Pleas Court Case Number 07-CR-14, namely, that Appellant misused a credit card of Regina Coffman on two separate occasions: February 25, 2006, and March 7, 2006.

{¶12} On March 13, 2008, Appellant filed a Motion to Dismiss the second indictment on the basis that the State failed to bring Appellant to trial within the statutory time limits as set forth in R.C. §2945.71.

{¶13} On March 14, 2008, the trial court overruled Appellant's Motion to Dismiss.

{¶14} On March 21, 2008, Appellant changed her plea to "no contest".

{¶15} On May 6, 2008, Appellant was sentenced to, among other things, eight months in a state penal institution on each count, to run concurrent with each other.

{¶16} On May 19, 2009, a final Judgment Entry was filed with the court.

{¶17} On June 18, 2009, Appellant timely filed her Notice of Appeal and filed a Motion to Supplement the Record with the pleadings from the prior indictment in Perry County Common Pleas Court Case Number 07-CR-14.

{¶18} Appellant now pursues an appeal of the trial court's decision on her Motion to Dismiss herein raising the following assignment of error on appeal:

ASSIGNMENT OF ERROR

{¶19} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS BASED ON A SPEEDY TRIAL VIOLATION."

I.

{¶20} Appellant, in her sole assignment of error, argues that the trial court erred in denying her motion to dismiss. We agree.

{¶21} The right to a speedy trial is encompassed within the Sixth Amendment to the United States Constitution. The availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. *State v. Ladd* (1978), 56 Ohio St.2d 197; *State v. Pachay* (1980), 64 Ohio St.2d 218. Ohio's Speedy Trial statute codifies the constitutional guarantee of a speedy trial. *Pachay*, supra. Our review of a trial court's decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. McDonald* (June 30, 1999), Mahoning App. Nos. 97CA146 and 97CA148. Due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *Id.* However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, an appellate court must

strictly construe the relevant statutes against the state. *Id.*, citing *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57.

{¶22} Our chief task in reviewing a statutory 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. *Oregon v. Kohne* (1997), 117 Ohio App.3d 179, 180; *State v. DePue* (1994), 96 Ohio App.3d 513, 516. R.C. §2945.71(C)(2) provides that a criminal defendant who is charged with a felony must be brought to trial within 270 days of his or her arrest.

{¶23} An accused presents a prima facie case for discharge by demonstrating that his case was pending for a time exceeding the statutory limits provided in R.C. §2945.71. *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31. The burden then shifts to the state to show that the time limit was extended under R.C. §2945.72. *Id.* at 31. We construe extensions of time under R.C. §2945.72 strictly against the state. *State v. Singer* (1977), 50 Ohio St.2d 103, 105-06.

{¶24} Appellant relies on *State v. Broughton* (1991), 62 Ohio St.3d 253, to argue that her speedy-trial rights were violated. In *Broughton*, the Supreme Court held that when a felony charge is filed and then voluntarily dismissed, the speedy-trial time that elapsed with respect to the dismissed charge must be added to the speedy-trial time that elapsed with respect to a felony charge filed thereafter when the indictments in the two cases “are premised on the same facts.” *Id.* at 260.

{¶25} Appellant submits that the time periods counted against the State for speedy trial purposes ran from February 23, 2007, to August 29, 2007, and then again from September 20, 2007, to March 13, 2008, for a total of 362 days.

{¶26} The State argues that the *Broughton* court did not address the above issue but instead addressed the time period between the dismissal of the first indictment and filing of the second indictment.

{¶27} Upon review, we find that *Broughton* does apply to the case at bar. We further find that the charges in the instant case arise from the same facts as the original charges. We therefore find that the time that had elapsed under the first indictment should be tacked on to the time period commencing with the second indictment. The State therefore had whatever residue remained from the 270-day period set forth in R.C. §2945.71[C] after deducting the speedy trial time expended prior to the dismissal time within which to bring Appellant to trial.

{¶28} As 187 days elapsed during the pendency of the first charges, we find that the State had 83 days left within which to bring Appellant to trial. Instead, 175 days elapsed, far in excess of the 270-period mandated in R.C. §2945.71.

{¶29} We therefore find Appellant's sole assignment of error well-taken and hereby sustain same.

{¶30} Accordingly, the judgment of the Court of Common Pleas, Perry County, Ohio, is reversed and this matter is remanded for proceedings consistent with the law and this opinion.

By: Wise, P. J.
Edwards, J., and
Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

