

[Cite as *State v. Orack*, 2009-Ohio-4997.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JAMES A. ORACK

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 09 COA 019

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Ashland Municipal
Court, Case No. 08 TRC 4833ABC

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

September 22, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, P. J.

{¶1} Appellant James A. Orack appeals his conviction, in the Ashland Municipal Court, for operating a motor vehicle under the influence with a prohibited concentration of drugs or alcohol. The relevant facts leading to this appeal are as follows.

{¶2} On August 2, 2008, appellant was stopped on Interstate 71 by an officer of the Ohio State Highway Patrol. As a result of the stop, appellant was arrested on the charge of operating a motor vehicle while under the influence of alcohol, R.C. 4511.19(A)(1)(a). Appellant was also charged with a marked lane violation and possession of marihuana (both minor misdemeanors). Appellant was arraigned on August 5, 2008, at which time he pled not guilty.

{¶3} On October 30, 2008, the State filed a new charge against appellant for operating a motor vehicle under the influence with a prohibited marihuana concentration, R.C. 4511.19(A)(1)(j)(viii)(II). On the same date, appellant pled not guilty to this charge.

{¶4} On January 21, 2009, appellant filed a speedy trial motion to dismiss concerning all four charges. A hearing was conducted on February 10, 2009. The State filed a memorandum on the issue on February 18, 2009.

{¶5} On February 20, 2009, the trial court issued a judgment entry dismissing the first three charges, i.e., the charges filed in August 2008. The trial court, however, as further analyzed infra, denied a speedy trial dismissal of the October 30, 2008 charge of operating while under the influence with a prohibited concentration.

{¶6} On April 22, 2009, a jury found appellant guilty of the aforementioned charge of operating while under the influence with a prohibited concentration. Appellant was thereupon sentenced to ninety days in jail, with seventy days suspended, and one year of probation.

{¶7} On May 20, 2009, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶8} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS THE CHARGE OF VIOLATING R.C. 4511.19(A)(1)(J)(8)(11) (SIC), FOR LACK OF A SPEEDY TRIAL."

I.

{¶9} In his sole Assignment of Error, appellant maintains the trial court erred in overruling his speedy trial motion to dismiss. We agree.

{¶10} 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, 383 N.E.2d 579; *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. 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, 661 N.E.2d 706.

{¶11} R.C. 2945.71(B)(2) mandates that a person against whom a charge of a first- or second-degree misdemeanor is pending shall be brought to trial within ninety days after the person's arrest or the service of summons.

{¶12} In *State v. Adams* (1989), 43 Ohio St.3d 67, 68, 538 N.E.2d 1025, the Ohio Supreme Court held: “[W]hen new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charges is subject to the same statutory limitations period that is applied to the original charge.” (Internal citations omitted.)

{¶13} In the case sub judice, in light of *Adams*, we initially agree with appellant that the October 30, 2008 “prohibited concentration” charge must relate back to the date of the August 2008 charges for speedy trial purposes. In its response to the speedy trial motion to dismiss before the trial court, the State urged that the prosecutor did not receive the urine test lab report until December 4, 2008, and thus was not aware of the facts supporting the “prohibited concentration” allegation until well after August 2008.¹ However, the State chose to proceed with the prohibited concentration charge on October 30, 2008, even in the absence of the subsequently-obtained test results, and thus cannot avoid the rule of *Adams* in such a manner. Furthermore, the State could

¹ A review of the trial court file indicates the prosecutor may have had a copy of the lab report as early as November 14, 2008, based on the State’s Notice of “Intent to Rely” filed on that date. This would, nonetheless, also post-date October 30, 2008.

have sought a continuance in light of R.C. 2945.72(H) for purposes of awaiting the test results.

{¶14} The State filed a memorandum in the trial court on February 18, 2009 in response to appellant's speedy trial motion to dismiss. That memorandum essentially concedes that the August 2008 charges were past speedy trial time, but hangs its hat on the proposition that the speedy trial clock for the prohibited concentration charge should have started on October 30, 2008, a proposition we have herein rejected. In its present appellee's brief, however, the State now presents a lengthy calculation seeking to demonstrate that appellant's speedy trial rights have not been violated *even if* the time started running in August 2008. For example, the State maintains in its brief that one of the delays, attributable to the arresting trooper's time off for surgery, is not chargeable to the State, despite taking the opposite position in its trial court memorandum. We are not inclined in this appeal to allow the State to reverse course and make arguments contrary to its position before the trial court, particularly where no cross-assignment of error has been presented, or otherwise make new arguments not presented to the trial court.

{¶15} Appellant's sole Assignment of Error is therefore sustained.

{¶16} For the reasons stated in the foregoing opinion, the judgment of the Ashland Municipal Court, Ashland County, Ohio, is hereby reversed.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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