[Cite as *State v. Morgan*, 2009-Ohio-5662.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 0061
RODNEY J. MORGAN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2006 CR 0625 D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 15, 2009

APPEARANCES:

For Plaintiff-Appellee:

JAMES J. MAYER, JR.
Prosecuting Attorney

KIRSTEN L. PSCHOLKA-GARTNER
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For Defendant-Appellant:

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Delaney, J.

{¶1} Rodney J. Morgan appeals his conviction and sentence on two counts of receiving stolen property in violation of R.C. 2913.51(A).

STATEMENT OF THE FACTS AND THE CASE

{¶2} In April 2006, the City of Mansfield Police was advised that someone had broken into Carpenter School and Stadium School and stolen a desktop computer and laptop computer, respectively. Thereafter, an inmate of the Richland County Jail named Robert Morgan provided information to Mansfield Detective Eric Bosko regarding various crimes in Mansfield including the whereabouts of the two stolen computers. Robert Morgan related that the computers were at Appellant's residence at 73 North Weldon Avenue in Mansfield, Ohio. Appellant is Robert Morgan's brother.

{¶3} Based upon the information provided by Robert Morgan, Detective Bosko obtained a search warrant for the residence at 73 North Weldon Avenue. When the warrant was served on June 21, 2006, Appellant's children, a seventeen year-old son and a twelve year-old daughter, were present at the home. Neither Appellant nor his wife, Tanya Morgan, was at home when Detective Bosko first arrived; however, the children called Tanya Morgan and she returned home shortly thereafter. Tanya Morgan showed Detective Bosko the computers that were being used by her family.

{¶4} While the police conducted the search, Appellant called his wife on her cell phone. Detective Bosko could hear Appellant telling his wife that he was not coming home and they could not prove he possessed the property.

{¶5} On June 26, 2006, Appellant and his wife came to the Mansfield Police department. Appellant was Mirandized and agreed to give a voluntary statement

regarding the computers seized from his home during the search warrant. In the statement, Appellant reported that he got the property from Robert Morgan and Mike Marshall. Appellant told Detective Bosko that he traded beer for the computers.

{¶6} The computers recovered from Appellant's home in the search warrant bore stickers indicating they were property of Mansfield City Schools with a bar code and a serial number for inventory purposes.

{¶7} Because the stolen computers were recovered from his home, a criminal complaint was filed against Appellant on June 27, 2006, charging him with receiving stolen property, a felony of the fifth degree. Appellant was arrested on the warrant on July 5, 2006. Appellant posted bond and was released from jail on July 6, 2006. Appellant waived his right to a preliminary hearing, and his case was bound over to the Richland County Grand Jury.

{¶8} The Richland County Grand Jury indicted Appellant on two counts of receiving stolen property, with the property being valued greater than $500.00 but less than $5,000.00, both felonies of the fifth degree. Appellant was arraigned on the indictment on September 26, 2006, and remained free on bond pending his jury trial.

{¶9} The trial court originally set Appellant's jury trial for January 11, 2007. Due to conflicts with other trials, however, the trial court *sua sponte* continued Appellant's jury trial five times. After continuing the trial, the trial court finally set Appellant's jury trial for September 20, 2007. Appellant failed to appear at trial and the trial court issued a bench warrant for his arrest. The trial court continued Appellant's trial to January 10, 2008. On September 24, 2007, Appellant filed a motion to continue

his September 20, 2007, jury trial due to Appellant being admitted to the hospital on September 20, 2007. The trial court did not withdraw the bench warrant.

{¶10} On the afternoon of January 9, 2008, Detective Bosko and Assistant Prosecutor John Boyd went to Appellant's residence to arrest Appellant on the bench warrant and subpoena Appellant's wife. Tanya Morgan told them that her husband was not there. Detective Bosko advised Tanya Morgan that she could be arrested if she was found harboring Appellant at the residence. When she was served with the subpoena, Tanya Morgan informed them that she did not plan to testify against her husband.

{¶11} Later that evening, third shift police officers David Minard and Kenneth Carroll went to the residence a second time looking for Appellant. Upon walking around the house and looking in the windows, they saw Tanya Morgan in the kitchen and heard her talking to someone else inside the residence. The police officers knocked on the door and Tanya Morgan answered. They asked if Appellant was at the home. Tanya Morgan responded that he was not there and asked if they had a search warrant. The police officers told Tanya Morgan that they could get a warrant quickly and then Tanya Morgan yelled for Appellant to come out. Appellant was taken into custody. The police officers called Detective Bosko and he advised that Tanya Morgan should be arrested for obstructing official business.

{¶12} Tanya Morgan was taken to the Mansfield Police Station and she asked to speak with Detective Bosko. When Detective Bosko and Assistant Prosecutor Boyd arrived at the jail, they took Tanya Morgan to a classroom area to be interviewed. After some discussion, Detective Bosko left the room to get a tape recorder and a voluntary

statement form. When he returned, Detective Bosko informed Tanya Morgan of her *Miranda* rights and she signed a statement stating that she read, signed and agreed to give a voluntary statement. Tanya Morgan stated that she was tired of Appellant getting her involved in his troubles. In her statement, Tanya Morgan discussed her knowledge of how Appellant came to possess the computers. She also discussed Appellant's other criminal activities. During her discussion of Appellant's criminal activities with Detective Bosko and Assistant Prosecutor Boyd, the topic of Children Services came up and how Tanya Morgan risked getting Children Services involved due to her relationship with Appellant and his criminal dealings.

{¶13} On January 10, 2008, Appellant's jury trial commenced. The State called five witnesses, including Tanya Morgan. After speaking with the trial court, Tanya Morgan agreed to waive her spousal privilege and testify against Appellant.

{¶14} The jury found Appellant guilty of both counts charged in the indictment. On January 11, 2008, the trial court sentenced Appellant to nine months on each count, to run consecutive for a total sentence of eighteen months in prison.

{¶15} On January 15, 2008, counsel for Appellant filed a motion for mistrial and new trial. Appellant's counsel stated that he was not aware until after the January 10, 2008 jury trial that Detective Bosko had coerced Tonya Morgan to testify against her husband. A hearing on the motion was requested and was held on February 19, 2008, and February 26, 2008. During the hearing, Detective Bosko, Assistant Prosecutor Boyd, Officers Minard and Carroll were called as State's witnesses. Tanya Morgan testified in support of the motion.

{¶16} At the conclusion of the hearing, the trial court overruled the motion for new trial. On March 4, 2008, the trial court memorialized its ruling in a judgment entry.

{¶17} It is from these decisions Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶18} Appellant raises two Assignments of Error:

{¶19} "I. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS THE CASE BASED UPON THE TIME LIMITATIONS SET FORTH IN OHIO REVISED CODE SECTION 2945.71.

{¶20} "II. THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION IN NOT GRANTING THE DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL."

I.

{¶21} In Appellant's first Assignment of Error, Appellant contends the trial court erred in denying Appellant's motion to dismiss pursuant to R.C. 2945.71, Ohio's speedy trial provision.

{¶22} "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. Richardson*, Richland App. No. 2009-CA-00027, 2009-Ohio-4867, ¶ 31 citing *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.].

{¶23} 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:

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

{¶25} "(1) * * *

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

{¶27} "(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."

{¶28} 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.

{¶29} 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."

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

{¶31} "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:

{¶32} "(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;

{¶33} "(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;

{¶34} "(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;

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

{¶36} "(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;

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

{¶38} "(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;

{¶39} "(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;

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

{¶41} "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.

{¶42} In the present case, the trial court *sua sponte* continued Appellant's trial five times. Appellant's speedy trial period began on July 5, 2006 when Appellant was arrested pursuant to a warrant on the June 27, 2006 criminal complaint filed against him for receiving stolen property. Appellant's case was initially set for trial on January 11, 2007, a date within the 270-day period set by R.C. 2945.71(C)(2).

{¶43} On January 24, 2007, the trial court filed a judgment entry continuing Appellant's case to March 22, 2007, because it had continued a pending criminal trial of *State v. Snelling*, Case No. 06-CR-407D, to the same date as Appellant's.

{¶44} On March 26, 2007, the trial court continued Appellant's March 22, 2007 trial date to May 24, 2007 due to a pending criminal trial in the case of *State v. Grant*, Case No. 06-CR-834D.

{¶45} The trial court issued a third continuance on June 5, 2007 continuing Appellant's trial to July 19, 2007 due to a conflicting trial with a civil case, *Gardilcic v. Schroeder*, Case No. 04-CV-1167D. In addressing Appellant's motion to dismiss at Appellant's jury trial, the trial court stated that it granted a continuance of Appellant's trial because the civil case was mid-trial at the time Appellant's criminal case was scheduled to commence. (Trial T., p. 130).

{¶46} On July 27, 2007, the trial court issued its fourth continuance of Appellant's trial date to August 23, 2007 due to the criminal trial of *State v. Gray*, Case No. 07-CR-560. The trial of *State v. Gray*, a murder trial, commenced on July 12, 2007 and ended on July 20, 2007.

{¶47} The trial court issued its final *sua sponte* continuance on August 23, 2007 due to the conflicting case of *State v. Duncan*, Case No. 06-CR-491. Appellant's case was continued to September 20, 2007.

{¶48} Appellant's trial was ready to proceed on September 20, 2007, but Appellant did not appear at trial. Appellant filed a motion to continue due to Appellant's hospitalization. The trial court continued the trial to January 10, 2008 and the trial proceeded on that day.

{¶49} 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.

{¶50} In *State v. Richardson*, Richland App. No. 2009-CA-00027, 2009-Ohio-4867, this Court recently analyzed a similar speedy trial argument in which the trial court *sua sponte* continued the appellant's trial date due to conflicts with other trials. In that case, 238 days of the delay were due to the trial court's *sua sponte* continuances due to conflicts with other trials. Id. at ¶59. We found in that case that each of the trial court's *sua sponte* continuances 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. Id. at ¶60.

{¶51} We find the same to be applicable in the present case. The trial court's *sua sponte* continuances were for good cause and were necessary and reasonable. The trial court noted it is judgment entries that it was engaged in other trials. The trial court also stated upon the record that, "[i]n each case, when we went and looked at

those entries this morning, the trial was continued because another trial which was scheduled that day either went to trial or there was a trial currently in session at the time we got there. * * * In each case there is a continuance entry which talks about the conflicting criminal trial, or in one case it was a civil case that was already going which prevented us from trying the case." (Trial T., p. 130).

{¶52} As to the trial court's continuance of Appellant's criminal trial for a civil case, we found in *State v. Foster*, Richland App. No. 07CA31, 2007-Ohio-6626, that a *sua sponte* continuance of a civil case was reasonable and tolled the speedy trial time. We find the same factual circumstances of the *Foster* continuance to be present here: the civil case was mid-trial on the date Appellant's criminal case was to commence.

{¶53} It further appears that the trial court continued Appellant's criminal case (Case No. 06-CR-625) due to conflicting dates with more recent criminal cases, *State v. Grant*, Case No. 06-CR-834, and *State v. Gray*, Case No. 07-CR-560D. In the *Gray* case, the criminal trial was already in progress on July 19, 2007, the date Appellant's trial was to commence. In the *Grant* case, however, the record is silent on the details as to why this more relatively recent case proceeded before Appellant's trial. Because the recording in this case does not affirmatively demonstrate this continuance was otherwise unreasonable, we presume that the continuance of Appellant's trial due to the conflict with the *Grant* case was reasonable on its face, as set forth in the judgment entry, and supports the tolling of Appellant's speedy trial time.

{¶54} The final continuance in this case was due to Appellant's hospitalization on the day of trial, September 20, 2007.

{¶55} Based on the record before us, we find the *sua sponte* continuances of Appellant's criminal trial were reasonable and therefore tolled the running of speedy trial time in this case.

{¶56} Accordingly, we overrule Appellant's first Assignment of Error.

II.

{¶57} Appellant's argues in his second Assignment of Error that the trial court abused its discretion in denying Appellant's motion for new trial. We disagree.

{¶58} Crim.R. 33 governs new trials. A motion for a new trial made pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and may not be reversed unless we find an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. An abuse of discretion implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343.

{¶59} Appellant moved for a new trial pursuant to Crim.R. 33(A)(6). Under Crim.R. 33(A)(6), a new trial may be granted when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Appellant argues the newly discovered evidence is that Detective Bosko coerced the trial testimony of Appellant's wife, Tanya Morgan. Tanya Morgan stated at the hearing for new trial that Detective Bosko bullied her into giving false testimony and testifying against her will.

{¶60} During Appellant's trial, Tanya Morgan waived her spousal privilege and testified against her husband. Before she testified, the trial court and counsel for the State and Appellant discussed Tanya Morgan's testimony. Counsel for Appellant stated

that she was not going to testify. Counsel for the State disagreed, stating that she gave a voluntary statement the night before and that she was going to testify. (Trial T., p. 153-154). The trial court then explained to Tanya Morgan the spousal privilege and that she could not be forced to testify against her husband. (Trial T., p. 154). Tanya Morgan acknowledged that she understood this. The trial court asked Tanya Morgan whether she wanted to testify and she responded, "Yes, I will testify. I will tell the truth." Id. at 155.

{¶61} At the hearing for new trial, the trial court heard the testimony of Detective Bosko, Assistant Prosecutor Boyd, Officers Minard and Carroll, and Tanya Morgan. The witnesses testified as to their observations of the circumstances of the night of January 9, 2008 where Tanya Morgan was arrested for obstruction of official business and then gave her voluntary statement about her knowledge of Appellant's criminal activities. Tanya Morgan testified that Detective Bosko threatened her and told her he would charge her with a felony and involve Children Services if she did not testify against her husband. (Hrg. T., p. 64). She also said that during the trial, Detective Bosko was signaling her during her testimony. (Hrg. T., p. 52).

{¶62} Detective Bosko and Assistant Prosecutor Boyd disagreed with Tanya Morgan's version of how she came to make the voluntary statement. They both testified that Tanya Morgan told them she was tired of Appellant's involvement and she voluntarily told them of Appellant's criminal dealings. Children Services was discussed, but as to what could happen if Appellant should involve his wife and children in his activities. (Hrg. T., p. 72-73).

{¶63} The trial court determined that Tanya Morgan's charge that Detective Bosko and Assistant Prosecutor would threaten illegal conduct and produce perjured testimony was not credible. (Hrg. T., p. 84). He referred to the trial in which he discussed with Tanya Morgan's waiver of her spousal privilege and found her to be sincere at that time. Id. The trial court did not observe any untoward activity from Detective Bosko during Tanya Morgan's testimony. (Hrg. T., p. 85).

{¶64} Upon a review of the record, we cannot find the trial court abused its discretion in denying Appellant's motion for new trial.

{¶65} Appellant's second Assignment of Error is overruled.

{¶66} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

[Cite as *State v. Morgan*, 2009-Ohio-5662.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RODNEY J. MORGAN	:	
	:	Case No. 2009 CA 0061
Defendant-Appellant	:	

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

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN