[Cite as *State v. Balderson*, 2009-Ohio-6183.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 0043
BRIAN L. BALDERSON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case Nos. 2008-CR-611H & 2008-CR-692H
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 19, 2009

APPEARANCES:

For Plaintiff-Appellee:

JAMES J. MAYER, JR.
RICHLAND COUNTY PROSECUTOR

KIRSTEN PSCHOLKA-GARTNER
ASSISTANT COUNTY PROSECUTOR
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant appeals two judgment entries of the Richland County Court of Common Pleas: the January 26, 2009 judgment entry denying Appellant's motion to dismiss and the March 2, 2009 re-sentencing entry. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On June 27, 2008, the Loss Prevention Officer at the Meijer store in Ontario, Ohio contacted the Ontario Police Department. He informed Officer Hill that on June 26, 2008, an individual had attempted to cash a forged payroll check at the service desk. The store employee had attempted to cash the check in the amount of $698.76, which was made payable to Appellant. The business name of Shelly and Sands, Inc. was on the check and it was drawn from Chase Bank. Appellant swiped his ID card and printed his index finger on the bio-metrix finger print validator. However, the system indicated that the check was not valid. When the store employee informed Appellant that the check was not valid, Appellant fled the business and left the check behind.

{¶3} Officer Hill confirmed with Shelly and Sands, Inc. and Chase bank that the account did not exist. Appellant was captured on surveillance photos taken at the service desk of the Meijer store. The store employee provided a written statement. Officer Hill forwarded his report along with this information to the Richland County Prosecutor's Office to review for possible charges.

{¶4} On August 4, 2008, Appellant cashed a forged check at the Richland Bank. The check was counterfeit and contained the account information for the

Richland County Jail Inmate Commissary Account. Appellant was captured on video and his ID information was recorded on the check.

{¶5} Thereafter, the Richland County Sheriff's Department began investigating Appellant's involvement in yet another offense. On August 14, 2008, an employee with Fast Cash Advance in Mansfield, Ohio advised Deputy Rich Eichinger that Mark B. Leedy and Raymond E. Ball were at her business attempting to cash a check from the Richland County Jail Inmate Commissary Fund. The Deputy contacted the Lieutenant with the Richland County Jail to confirm authenticity. Leedy and Ball stated they could not wait and took the check back from the employee. The incident was recorded on videotape and a copy of the check was submitted to the Richland County Sheriff's Office crime lab.

{¶6} Leedy and Ball were interviewed by the Richland County Sheriff's Department and gave taped statements. Ball stated that Billy Lambert approached him to make "easy money." He met with Paul R. Limpach and Appellant. Checks were made out to Ball and Leedy, which they cashed at various locations. Ball kept half of the money and the other half went back to Appellant and Limpach.

{¶7} On August 21, 2008, Appellant was arrested in Mansfield and his vehicle was searched. During the search, numerous counterfeit checks made payable to Appellant were located in the vehicle. Appellant cooperated and a search warrant was obtained for Limpach's residence. Evidence was seized that included a computer with check software and additional counterfeit checks. Because of Appellant's and Limpach's actions, the Inmate Commissary Account was depleted of $13,000.00.

{¶8} After Appellant's arrest, Appellant was held in jail and his case based on the Richland County forgery investigation was bound over to the Richland County Grand Jury. The case was presented to the Grand Jury in September 2008 and the Grand Jury issued an indictment charging Appellant with two counts of possessing criminal tools, a felony of the fifth degree; one count of forgery, a felony of the fifth degree; and one count of theft, a felony of the fifth degree. The indictment was assigned Case No. 2008-CR-611H.

{¶9} The State also presented the case arising from Appellant's activities at the Meijer store in Ontario, Ohio to the Richland County Grand Jury sitting in September 2008. In that case, the Grand Jury issued an indictment charging Appellant with one county of forgery, a felony of the fifth degree; and one count of attempted theft, a misdemeanor of the first degree. This indictment was assigned Case No. 2008-CR-692H.

{¶10} Appellant was served with both indictments on September 20, 2008, and he pleaded not guilty to all charges at his arraignment. Appellant remained in jail pending trial.

{¶11} On December 12, 2008, Appellant filed a motion to dismiss all charges based on speedy trial grounds. Appellant argued that the two criminal cases should have been brought in a single indictment, so the triple count provision of R.C. 2945.71(E) would be applicable. The trial court held an oral hearing on the motion on January 7, 2009. The trial court overruled the motion on January 26, 2009.

{¶12} Following the denial of the motion to dismiss, on February 11, 2009 Appellant appeared before the trial court to enter a plea of no contest to the charges in

both 2008-CR-611H and 2008-CR-692H. The trial court accepted Appellant's plea, found him guilty of the charges, and proceeded to sentencing.

{¶13} In Case No. 2008-CR-611H, the trial court imposed a one-year sentence for each of the four fifth-degree felonies. The sentences were to run concurrent to one another, but consecutive to the sentence in Case No. 2008-CR-692H and to the sentence Appellant was already serving. In Case No. 2008-CR-692H, the trial court imposed a one-year sentence on the fifth degree felony charge and a six-month sentence on the first degree misdemeanor charge with credit for time served. In total, Appellant was subject to a prison sentence of two years. Appellant was ordered to report to the Richland County Jail by 10:00 a.m. on February 16, 2009 for transport to prison. The sentencing entry was filed on February 13, 2009.

{¶14} After the trial court sentenced Appellant, Appellant requested that the trial court release Appellant for several days to allow him to get his affairs in order before he reported to prison. The State objected to Appellant's release because Paula Banbury, a victim of Appellant's crime and Limpach's sister, reported being afraid of Appellant. The trial court granted Appellant's request over the State's objection; however, the trial court warned Appellant that he was to make no contact with Banbury during his release. If it was determined that Appellant made contact with Banbury, the trial court warned Appellant that he would be before the trial court for re-sentencing.

{¶15} The Sunday after Appellant was released, Banbury returned to her home to find that her garage had been broken into. Banbury saw a person moving around inside her garage and called the police. The person in the garage turned out to be

Appellant; he was arrested and charged with criminal trespass. Appellant pleaded guilty to the charge in the Mansfield Municipal Court and was released from jail a week later.

{¶16} After Appellant's release from jail, he was arrested a second time. A restaurant employee at Subway called the Richland County Sheriff's Department to report a suspicious person. When the deputy arrived and made contact with Appellant, Appellant provided a false name for an individual who happened to have four warrants for his arrest. Appellant was taken into custody and was transported to the Richland County Jail where corrections officers informed the deputy that he was actually Appellant. Appellant was charged with falsification.

{¶17} As a result of the incidents that occurred during Appellant's release, Appellant was brought back before the trial court for re-sentencing on February 25, 2009. The trial court reminded Appellant of its prior admonition and re-sentenced Appellant on both Case Nos. 2008-CR-611H and 2008-CR-692H to harsher sentences, over Appellant's objection.

{¶18} In Case No. 2008-CR-611H, the trial court sentenced Appellant to four one-year sentences to run consecutively to one another, but concurrent to the sentence in 2008-CR-692H. In Case No. 2008-CR-692H, the trial court sentence Appellant to one year to run concurrently to the sentence in 2008-CR-611H. Therefore, Appellant would serve a total of four years in prison, rather than two years as previously imposed. Appellant was remanded into the custody of the Sheriff for transportation to prison. The re-sentencing entry was filed on March 2, 2009.

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

ASSIGNMENTS OF ERROR

{¶20} Appellant raises two Assignments of Error:

{¶21} "I. THE TRIAL COURT ERRED IN RE-SENTENCING APPELLANT AFTER A PROPER, VALID AND LEGAL SENTENCE HAD BEEN IMPOSED.

{¶22} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE CASE ON VIOLATION OF THE APPELLANT'S SPEEDY TRIAL RIGHTS."

I.

{¶23} Appellant argues the trial court erred in re-sentencing Appellant on February 25, 2009 because it lacked authority to modify Appellant's sentence. We disagree.

{¶24} As a general rule, once a defendant has commenced serving his sentence, the trial court no longer has the authority to modify or amend that sentence, except as specifically provided by the General Assembly. *State v. Addison* (1987), 40 Ohio App.3d 7, 530 N.E.2d 1335; *State v. Garretson* (2000), 140 Ohio App.3d 554, 748 N.E.2d 560; *State v. Evans,* 161 Ohio App.3d 24, 829 N.E.2d 336, 2005-Ohio-2337. Execution of the sentence commences when the defendant is delivered to the institution where the sentence is to be served. *Garretson,* 140 Ohio App.3d 554; *State v. Addison* (1987), 40 Ohio App.3d 7. "Once a sentence has been executed, the trial court loses jurisdiction to amend or modify the sentence." *State v. Carr,* 167 Ohio App.3d 223, 2006-Ohio-3073, ¶ 3, citing *State v. Garretson* (2000), 140 Ohio App.3d 554.

{¶25} However, when execution of the sentence has not begun, the trial court possesses authority to modify or change the sentence. *Evans,* 161 Ohio App.3d 24, 2005-Ohio-2337, at ¶ 15-17; *State v. Lambert,* 5th Dist. No. 03CA65, 2003-Ohio-6791,

¶14. This is so because prior to execution, the sentence lacks the constitutional finality of a verdict of acquittal. *State v. Dawkins,* 8th Dist. No. 88022, 2007-Ohio-1006, ¶7, citing *State v. Meister* (1991), 76 Ohio App.3d 15, 17; *Evans,* 161 Ohio App.3d 24, 2005-Ohio-2337, at ¶ 11, citing *United States v. DiFrancesco* (1980), 449 U.S. 117; *State v. Vaughn* (1983), 10 Ohio App.3d 314.

{¶26} In the present case, the original sentencing entry was journalized on February 13, 2009. Appellant was ordered to report to the Richland County Jail for transportation to prison on February 16, 2009. Due to Appellant's activities after his release on February 11, 2009, Appellant did not report to prison on February 16, 2009 pursuant to the sentencing entry. Therefore, execution of Appellant's sentence for Case Nos. 2008-CR-611H and 2008-CR-692H had not begun.

{¶27} Because execution of Appellant's sentence had not begun, the trial court possessed the authority to modify or change Appellant's sentence.

{¶28} Appellant's first Assignment of Error is overruled.

II.

{¶29} Appellant states in his second Assignment of Error that the trial court erred when it denied Appellant's motion to dismiss due to speedy trial violations. We disagree.

{¶30} Appellant argues the triple count provision of R.C. 2945.71(E) applied to his case because the charges in Case Nos. 2008-CR-611H and 2008-CR-692H could have been brought in a single indictment.

{¶31} On August 21, 2008, the Richland County Sheriff's Department arrested Appellant based upon its investigation into the use of forged checks to deplete the

Inmate Commissary Account. The charges were presented by complaint and Appellant was bound over to the Richland County Jury by the Mansfield Municipal Court. The case was presented to the Richland County Grand Jury in September 2008. Appellant was served with this indictment in Case No. 2008-CR-611H on September 20, 2008.

{¶32} The Ontario Police Department gave its case regarding the counterfeit check presented at the Meijer store to the Richland County Prosecutors Office for review. The case was presented to the same Richland County Grand Jury in September 2008. Appellant was also served with the indictment in Case No. 2008-CR-692H on September 20, 2008.

{¶33} Appellant states that the State had in its possession all of the pertinent facts that formed the basis for the original charge, as well as the additional charges brought by way of indictment in both cases. The State should have known that charges in the Ontario case and the Richland County forgery investigation arose from the same facts, therefore the charges could have been brought in a single indictment.

{¶34} 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:

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

{¶36} "(1) * * *

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

{¶38} "(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.

{¶39} "(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail *on the pending charge* shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section." (Emphasis added).

{¶40} 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.

{¶41} 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."

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

{¶43} "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.

{¶44} Appellant was arrested on August 21, 2008. He filed a motion to dismiss on December 12, 2008, which the trial court denied on January 26, 2009. Appellant remained in jail until he entered his change of plea on February 11, 2009. Appellant states that because the charges against him could have been brought in a single indictment, pursuant to the triple count provision of R.C. 2945.71(E), the number of days chargeable to the State is 339.

{¶45} The question before us is whether the term "pending charge" should encompass possible additional charges stemming from separate incidents or transactions under investigation by the state for which an arrest is not made, so a defendant may receive the benefit of the triple count provision of R.C. 2945.71(E)? We find that it does not.

{¶46} Upon the record before us, we find the indictments were the result of two separate investigations by the Ontario Police Department and the Richland County Sheriff's Department into two separate events, one occurring in June 2008 and the other in August 2008. While these charges were brought before the same grand jury, albeit in separate hearings, we find the evidence in the Case No. 2008-CR-611H was based on a separate investigation from that of Case No. 2008-CR-692H.

{¶47} Appellant was arrested and placed in jail on August 21, 2008 based on the Richland County forgery investigation. Appellant was served with his two separate indictments on September 20, 2008. The triple-count provision applied to Appellant's time in jail for the Richland County forgery investigation, so a total of 90 days elapsed

for speedy trial purposes. From September 20, 2008 to December 12, 2008, 84 days are chargeable to the State, calculated at one for one, because Appellant was now being held pursuant to other charges, and not solely on the pending forgery charge. See, *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶7. The speedy trial time was tolled pursuant to R.C. 2945.72 when Appellant filed his motion to dismiss on December 12, 2008 and the trial court ruled on the motion on January 26, 2009. 16 days elapsed, calculated one for one, before Appellant entered his plea on February 11, 2009. Accordingly, the State exhausted 190 days of the allowed 270 days.

{¶48} The trial court correctly determined that Appellant's right to a speedy trial was not violated. Appellant's second Assignment of Error is overruled.

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

By: Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRIAN L. BALDERSON	:	
	:	
	:	Case No. 2009 CA 0043
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. WILLIAM B. HOFFMAN

HON. JOHN W. WISE