[Cite as *State v. Campbell*, 2009-Ohio-6726.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00064
THOMAS C. CAMPBELL	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Criminal appeal from the Licking County Court of Common Pleas, Case No. 08-CR-144

JUDGMENT: Affirmed in part; Reversed in part and Remanded

DATE OF JUDGMENT ENTRY: December 17, 2009

APPEARANCES:

For Plaintiff-Appellee
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Gwin, J.

{¶1} Defendant-appellant Thomas C. Campbell appeals the decision of the Licking County Court of Common Pleas denying his motion to dismiss based on a violation of his right to a speedy trial and finding him guilty of aggravated possession of drugs, a felony of the third degree, in violation of R.C. 2925.11(A)(C)(1)(b); possession of crack cocaine, a felony of the fifth degree in violation of R.C. 2925.11(A)(C)(4)(a); and possession of marijuana, a minor misdemeanor, in violation of R.C. 2925.11(A)(C)(3)(a). The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 2, 2007, appellant was arrested at the scene of an automobile accident after he failed a field sobriety test. During a search incident to the arrest, methamphetamine was found in appellant's pants pocket. Additional drugs-marijuana, crack cocaine, and methamphetamine-were found at the scene under the control of Rickie Bradshaw who had been called by the appellant to the scene of the accident. The charges were dismissed by the state on February 8, 2007.

{¶3} On May 18, 2007, appellant was indicted on one count of aggravated possession of drugs for the methamphetamine found on his person on February 2, 2007, and he was not charged with any crimes in relation to the accident. Appellant pleaded guilty to the drug charge on October 23, 2007, and was sentenced to nine months in prison.

{¶4} On November 2, 2007, appellant was indicted on two counts of vehicular assault for the February 2, 2007 accident. These charges were dismissed March 6, 2008.

{¶5} On March 14, 2008, appellant was again indicted this time on two counts of aggravated vehicular assault, two counts of vehicular assault, aggravated possession of drugs, possession of crack cocaine, possession of marijuana and operating a vehicle while impaired.

{¶6} On July 17, 2008, appellant filed a motion to dismiss contending that the charges all relate back to February 2, 2007 and therefore the charges set forth in the indictment issued March 14, 2008 should have been tried within 270 days from the date of his arrest on February 2, 2007 as required by R.C. 2945.71(C)(2). On July 17, 2008, an oral hearing was held on appellant's motion to dismiss. The trial court denied appellant's motion by judgment entry filed July 22, 2008.

{¶7} On September 15, 2008 appellant appeared for trial on the indictment issued March 14, 2008. The state moved to amend Counts 1 and 2 of that indictment to a charge of Negligent Assault, in violation of R.C. 2903.14, misdemeanors of the third degree, and to dismiss Counts 3, 4, and 8. Appellant entered guilty pleas on Counts 1, and 2. Appellant waived his rights to a jury trial on Counts 5, 6, and 7, and was found guilty on said counts after a bench trial.

{¶8} Appellant appealed his conviction in Licking App. No. 08-CA-145 which this Court dismissed pursuant to *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, 893 N.E. 2d 163.

{¶9} Appellant was resentenced in an Amended Judgment Entry on April 13, 2009. Appellant was advised of the imposition of community control, and sentenced on Counts 1, 2, 5 and 6 to Community Control for 5 years. He was fined $100 on Count 7.

{¶10} Appellant has timely appealed raising the following three assignments of error for our consideration:

{¶11} "I. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION."

{¶12} "II. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} "III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶14} In his first assignment of error, appellant contends the trial court erred and violated his constitutional rights by denying his speedy trial motion to dismiss filed November 29, 2005.

{¶15} At the outset, we note that a plea of guilty waives one's statutory right to a speedy trial. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph one of syllabus; *Village of Montpelier v. Greeno* (1986), 25 Ohio St.3d 170, 171-172, 495 N.E.2d 581; *State v. Mayle*, Morgan App. No. CA07-3, 2008-Ohio-286 at ¶ 30. Accordingly, we will consider appellant's argument concerning the denial of his statutory right to a speedy trial only on counts 5, 6 and 7 of the March 14, 2008 indictment[1].

{¶16} "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

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[1] As already noted, appellant plead guilty to Count one and Count Two of the Indictment.

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.].

{¶17} 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.

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

{¶19} "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.

{¶20} "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.

{¶21} "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.

{¶22} 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:

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

{¶24} "(1) * * *

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

{¶26} "(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."

{¶27} 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.

{¶28} 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."

{¶29} When dealing with multiple indictments, the Supreme Court of Ohio has held that, "[i]n issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." *State v. Baker* (1997), 78 Ohio St.3d 108, 111, 676 N.E.2d 883 at syllabus. "The Ninth District Court of Appeals has described the disjunctive nature of the

'or' in *Baker* as creating two distinct exceptions to the speedy trial timetable. *State v. Skorvanek,* 9th App. No. 05CA008743, 2006-Ohio-69; *State v. Armstrong,* 9th App. No. 03CA0064-M, 2004-Ohio-726; *State v. Haggard* (Oct. 6, 1999), 9th App. No. 98CA007154. The first exception is that there are different facts supporting a new charge. Id. The second exception, and the one relevant to our analysis in the present case, is that there were additional facts that the State was unaware of at the time of the original charge. Id.*" State v. Brown*, Stark App. No. 2007CA00129, 2008-Ohio-4087 at ¶ 23.

{¶30} In *Baker,* the second set of charges resulted from the complex and time-consuming process of checking the defendant's financial records. The state could not have known if additional charges were appropriate until that process was completed. The two sets of charges were based on separate sets of facts and did not arise from the "same sequence of events." The court reasoned that "to require the state to bring additional charges within the time period of the original indictment, when the state could not have had any knowledge of the additional charges until investigating later-seized evidence, would undermine the state's ability to prosecute elaborate or complex crimes." *Baker,* supra at 111, 676 N.E.2d 883, 676 N.E.2d at 886.

{¶31} In the case at bar, the following facts appear from the record. Appellant was arrested on February 2, 2007. That indictment was dismissed on February 8, 2007. Accordingly, because appellant was incarcerated during this time, eighteen days is chargeable to the state for purposes of the speedy trial calculation. No charges were pending against the appellant from February 8, 2007 until May 18, 2007. Accordingly, the time was tolled during this period for purposes of the speedy trial requirements.

State v. Broughton (1991), 62 Ohio St.3d 253, 258, 581 N.E.2d 541; *State v. Gee*, Licking App. No. 2008 CA 00132, 2009-Ohio-5139.

{¶32} The clock begins to run again for purposes of calculating the speedy trial provisions of R.C.2945.71 on May 18, 2007 when appellant was indicted for possession of the drugs found on his person at the scene of the accident on February 2, 2007. Mr. Bradshaw was also indicted for possession of drugs on that date in Licking County Court of Common Pleas, Case No. 2007CR00270.

{¶33} On October 23, 2007 appellant pled guilty to the aggravated possession of drugs charge for the methamphetamine found on his person. He was sentenced to nine months in prison.

{¶34} As can be fairly deduced from the record and the arguments advanced by the state during the pendency of this matter both here and in the trial court, sometime between May 18, 2007 and March 13, 2008 the state was able to obtain Mr. Bradshaw's cooperation in the prosecution of appellant for Counts 5, 6 and 7 in the case at bar[2].

{¶35} The question now is, was the state aware on May 18, 2007 of the facts necessary to charge appellant with the drugs that form the basis of Counts 5, 6 and 7; or, in the alternative, were there additional facts that the state was unaware of on May 18, 2007 which implicated appellant?

{¶36} Contained within the State's Discovery Record, Notice of Intent, Bill of Particulars, [and] State's Request for Discovery filed in the trial court on April 21, 2008 is the Ohio State Highway Patrol Report of Investigation of Trooper Dustin Neely. In that report, Trooper Neely indicates in some detail that Mr. Bradshaw claimed the drugs

[2] Mr. Bradshaw did not in fact plead guilty in Licking County Court of Common Pleas, Case No. 2007CR00270 until July 11, 2008.

found on Bradshaw and around the crime scene belonged to appellant. Further, Mr. Bradshaw informed the Trooper that appellant had asked Bradshaw to dispose of the items. These facts are not disputed by the state in this appeal. It is the state's position that the speedy trial clock was tolled because, since Mr. Bradshaw was under indictment, the state had no way of proving that the drugs belonged to appellant. However, it is not unheard of in the case of co-defendants that each would claim at trial that the other is the guilty party. The investigating officers could certainly testify as to what each officer observed Bradshaw doing at the scene. Certainly had the state wished to call Bradshaw at appellant's trial, they could have negotiated with him, as they in fact subsequently did, in order to obtain his testimony. The trier of fact would then be called upon to decide which party to believe, appellant or Bradshaw.

{¶37} The March 13, 2008 indictment charging appellant with possession of drugs in Counts 5, 6 and 7 was not based on facts **not** available to the state at the time. Bradshaw's story never changed nor did any independent witness come forth with new facts showing the drugs in question had come from appellant. See, e.g. *State v. Burrell,* First Dist. No. C-030803, 2005-Ohio-34 at ¶ 11. In the case at bar, all of the facts of this matter were known to the state and its agents on May 18, 2007 and those facts never changed. Taken literally, the state's position would permit it to initiate criminal charges long after the speedy trial statute had expired merely because a co-defendant, who waived his or her speedy trial time requirement, agreed to cooperate long after the time had expired.

{¶38} We therefore find appellant's first assignment of error well taken with respect to counts 5, 6 and 7 of the March 14, 2008 indictment, and hereby sustain it.

{¶39} Based upon our disposition of appellant's first assignment of error, we find appellant's second and third assignments of error to be moot.

{¶40} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed, in part and reversed, in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the convictions and sentences on Counts 5, 6 and 7 of the March 14, 2008 indictment are vacated, and this case is remanded for proceedings in accordance with our opinion and the law.

By Gwin, J., and

Farmer, P.J., concur

Hoffman, J., dissents

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN

WSG:clw 1124

Hoffman, J., dissenting

{¶41} I respectfully dissent from the majority opinion. While I agree with the majority's analysis the State is not exempt from the speedy-trial timetable as it relates to the second part of the *Baker* test, I find Appellant's convictions on Counts 5, 6, and 7 in the March 14, 2008 indictment arise from facts different than the original charges in the May 18, 2007 indictment. Accordingly, I find no violation of R.C. 2945.71 in this case and would affirm all of Appellant's convictions.[3] For a similar analysis and result see *State v. Skinner*, 2007-Ohio-2479, and *State v. Phillips,* (Jan. 28, 1992) Union App. No. 14-91-20, unreported.

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HON. WILLIAM B. HOFFMAN

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[3] Appellant does not argue a violation of constitutional speedy trial restraints based upon pre-indictment delay.

[Cite as *State v. Campbell*, 2009-Ohio-6726.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
THOMAS C. CAMPBELL	:	
Defendant-Appellant	:	CASE NO. 2009-CA-00064

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed, in part and reversed, in part. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN