[**Cite as** ***State v. Stowe*****, 2010-Ohio-4646.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellant	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CAA 05 0046
	:	
	:	
RUSTY WAYNE STOWE	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING: Criminal Appeal from Delaware County Court of Common Pleas Case No. 05 CRI 06 0307

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 29, 2010

APPEARANCES:

For Plaintiff-Appellant

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Edwards, P.J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from the May 4, 2009, Judgment Entry of the Delaware County Court of Common Pleas granting the Motion to Dismiss filed by defendant-appellee, Rusty Wayne Stowe.

STATEMENT OF THE FACTS AND CASE

{¶2} An indictment was filed in the Delaware County Court of Common Pleas on June 17, 2005, charging appellee with one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a felony of the second degree, two counts of theft in violation of R.C. 2913.02(A)(1), felonies of the fifth degree, one count of theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree, and two counts of forgery in violation of R.C. 2913.31(A)(3), felonies of the fifth degree. Appellee also was indicted on one count of forgery in violation of R.C. 2913.31(A)(3), a felony of the fourth degree, two counts of passing bad checks in violation of R.C. 2913.11(A), felonies of the fifth degree, one count of passing bad checks in violation of R.C. 2913.11(A), a felony of the fourth degree, two counts of criminal simulation in violation of R.C. 2913.32(A)(1), felonies of the fifth degree, and one count of criminal simulation in violation of R.C. 2913.32(A)(1), a felony of the fourth degree.

{¶3} On or about June 17, 2005, the Delaware County Prosecuting Attorney requested that a warrant be issued for appellee who, at the time, was in a pre-trial detention center in Miami, Florida.

{¶4} On or about April 17, 2006, a federal detainer was placed on appellee. On May 26, 2006, the Delaware County Sheriff's Office faxed a document to the Florida Department of Corrections indicating that it had an active warrant for appellee and

requesting that it be contacted when appellee was to be released. The Sheriff's Office asked that the attached warrant be used as a detainer. On May 30, 2006, the Florida Department of Corrections issued an acknowledgement of detainer, indicating that it had received the detainer from Delaware County, Ohio. Appellee, on or about June 1, 2006, was released from the Florida Department of Corrections into the custody of the U.S. Marshall.

{¶5} Appellee sent a letter to the Delaware County Prosecutor's Office on or about December 11, 2006. Appellee, in his letter, indicated that he was currently in federal custody awaiting sentencing in Jacksonville, Florida on various crimes. Appellee requested that the charges against him in Delaware County be dismissed on double jeopardy grounds. Appellee specifically stated that the same crimes were involved in both the Ohio and Federal cases. On or about December 21, 2006, appellee's Florida counsel sent a letter to the Delaware County Prosecutor's Office indicting that appellee had entered a plea of guilty in federal court in Florida and was awaiting sentencing. Appellee's counsel sought information as to whether or not charges were pending against appellee in Delaware County and, if so, sought to resolve any pending charges. As memorialized in a letter dated January 26, 2007, to appellee's Florida counsel, the Delaware County Prosecutor's Office stated that it intended to prosecute appellee for the criminal charges pending in Delaware County.

{¶6} On or about December 14, 2007, appellee was sentenced in United States District Court in Florida and was committed to the custody of the United States Bureau of Prisons for a total term of 63 months. Appellee was ordered to pay restitution in the

amount of $194,900.00 to his victims. The court recommended that appellee be placed at FCI Coleman.

{¶7} As memorialized in a Detainer Action Letter to the Delaware County Sheriff's Office dated September 25, 2008, the Federal Bureau of Prisons requested the Sheriff's Office to advise it if the Sheriff's Office wanted a detainer to be placed on appellee and, if so, to forward a certified copy of the warrant. The letter was sent from a federal institution in Kentucky.

{¶8} Thereafter, on October 9, 2008, appellee, who was then incarcerated in Kentucky, filed a pro se Motion to Dismiss all of the pending charges against him in the case sub judice. Appellee, in his motion, argued that he could not be convicted of the Delaware County charges on double jeopardy grounds because of his federal conviction. Appellee was returned to Ohio on March 12, 2009, and was served with the indictment.

{¶9} On March 27, 2009, appellee's counsel filed a Motion to Dismiss arguing that appellee had been denied his rights to due process of law and a speedy trial. Appellee's counsel filed a supplement to such motion on March 27, 2009.

{¶10} Following a hearing on appellee's Motion to Dismiss, the trial court, pursuant to a Judgment Entry filed on May 4, 2009, ordered the charges against appellee dismissed, in accordance with *State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617, 870 N.E.2d 1149.

{¶11} Appellant now raises the following assignment of error on appeal:

{¶12} "I. THE TRIAL COURT ERRED AS MATTER OF LAW IN DISMISSING THE INDICTMENT."

I

{¶13} Appellant, in its sole assignment of error, argues that the trial court erred in dismissing the indictment against appellee. We disagree.

{¶14} At issue in the case sub judice is whether appellee's rights under the Interstate Act on Detainers ("IAD"), R.C. 2963.30, were violated. The purpose of the IAD is to encourage the orderly and expeditious disposition of charges outstanding against a prisoner and determination of the proper status of any detainers based on untried indictments, information or complaints. R.C. 2963.30 (Art. I). To achieve the purpose of the IAD, a procedure has been established which was summarized in *United States v. Mauro* (1978), 436 U.S. 340, 351, 98 S.Ct. 1834, 56 L.Ed.2d 329:" * * * Article III provides a procedure by which a prisoner against whom a detainer has been filed can demand a speedy disposition of the charges giving rise to the detainer. The warden of the institution in which the prisoner is incarcerated is required to inform him promptly of the source and contents of any detainer lodged against him and of his right to request final disposition of the charges. Art. III(c). If the prisoner does make such a request, the jurisdiction that filed the detainer must bring him to trial within 180 days. Art. III(a). The prisoner's request operates as a request for the final disposition of all untried charges underlying detainers filed against him by that State, Art. III(d), and is deemed to be a waiver of extradition. Art. III(e)." (Footnote omitted.)

{¶15} Pursuant to Article III(a) of R.C. 2963.30, Article III is only applicable where "a person has entered upon a term of imprisonment in a penal or correctional institution of a party state ." Pursuant to the express terms of Article III(a), the Interstate Agreement on Detainers only comes into effect when a detainer has been lodged.

{¶16} The United States Supreme Court has held that the one hundred eighty day time period in Article III(a) of the IAD does not begin until a prisoner's request for disposition is actually delivered to the court and the prosecuting officer that lodged the detainer against him. See *Fex v. Michigan* (1993), 507 U.S. 43, 52, 113 S.Ct. 1085, 1091, 122 L.Ed.2d 406. We concur with the trial court that the State has the burden of ensuring that institutions comply with R.C. 2963.30 and ensuring that defendants are tried within the time constraints imposed by law. The State cannot simply allow a defendant to remain in prison in another jurisdiction for months or years on end when there are pending charges against the defendant and the State knows, or should know, where the defendant is located. To allow this would circumvent the purpose of R.C. 2963.30 which is the orderly and expeditions disposition or charges outstanding against a prisoner. R.C. 2963.30 (Art.I).

{¶17} The trial court found, and we concur, that there is no evidence that appellee was ever given written notice by the Florida warden of the Delaware County indictment against him as required by Article III or that appellee was informed of his right to request disposition of the Delaware County charges. While, as noted by the trial court, it is apparent that appellee knew about the Delaware County indictment against him as early as January of 2006,[1] a defendant's knowledge of a pending indictment (or detainer) and of his right to request trial on the same does not satisfy the notification

[1] In January of 2006, and February of 2006, appellee had filed a request for final disposition of the Ohio charges under the Interstate Agreement on Detainers with the warden. The request was denied because, at such time, Ohio did not have any detainer lodged against appellee. In a letter to appellee dated February 17, 2006, the Correctional Services Administrator at the Florida Department of Corrections indicated that appellee would be notified when a detainer had been received and lodged against him.

requirements. See *State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617, 870 N.E.2d 1149.[2]

{¶18} In *Dillon*, the appellee was indicted in Delaware County on November 21, 2003, on charges of robbery, burglary and breaking and entering. A warrant upon the indictment was requested on the same day and was later issued. On December 4, 2003, two detectives interviewed the appellee at the Franklin County Jail, where he was incarcerated on unrelated charges. However, the appellee was not served with a copy of the indictment. Thereafter, on January 28, 2004, a detective and assistant prosecuting attorney met the appellee at the jail and advised him of the pending indictment and that he needed to file a request with the Prosecutor's Office to trigger the 180 day time period for trial. The appellee was not served with a copy of the indictment.

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[2] While the case sub judice involves R.C. 2963.03, *Dillon* involved R.C. 2941.401. R.C. 2941.401 states, in relevant part, as follows:" When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the warden or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time served and remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner.

The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.

The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof." The trial court stated that, "the Interstate Agreement on Detainers has the identical statutory provision in Article III (c)." We note that while R.C. 2941.401(C) requires a warden or superintendent to promptly inform a prisoner in writing of the source and contents of any untried indictment, information or complaint against him, R.C. 2963.30 requires the warden to promptly inform a prisoner of the source and contents of a detainer against him.

{¶19} In *Dillon*, the appellee, on January 28, 2004, was transferred from jail to the Ohio Corrections Reception Center in Orient, Ohio. A copy of the warrant on indictment was sent to the center on January 29, 2004, and also was faxed to the center. However, the appellee was not served with a copy of the indictment while at the center. Nor was the appellee served while he was at Pickaway Correctional Institution, where he had been transferred in February or March of 2004. On April 9, 2004, the appellee signed a wanted detainer form stating that he was wanted by the Delaware County Sheriff upon his release. The appellee, in *Dillon,* was not served with a copy of the warrant and indictment until August 13, 2004.

{¶20} After his motion to dismiss based on speedy trial grounds was denied, the appellee, in *Dillon* appealed. On appeal, this Court found that Dillon's speedy trial rights had been violated. The State then appealed. In affirming the decision of this Court, the Ohio Supreme Court, in *Dillon,* stated in relevant part, as follows : "An inmate's awareness of a pending indictment and of his right to request trial on the pending charges does not satisfy the notification requirements of R.C. 2941.401, which requires a warden or prison superintendent to notify a prisoner 'in writing of the source and contents of any untried indictment' and of his right 'to make a request for final disposition thereof.' Permitting a warden or superintendent to avoid complying with the duty imposed by R.C. 2941.401 would circumvent the purpose of the statute and relieve the state of its legal burden to try cases within the time constraints imposed by law. We conclude that the warden's failure to promptly inform Dillon in writing of the Delaware County indictment and his right to request trial violated R.C. 2941.401. We also conclude that the speedy-trial time calculation commenced when the warden was

requested to serve the indictment on Dillon, which occurred at the latest on February 4, 2004. Because of the R.C. 2941.401 speedy-trial violation, the trial court had no further jurisdiction over this matter." Id at paragraph 23.

{¶21} As is stated above, appellee was never given written notice by the Florida Warden of the Delaware County indictment against him or of his right to make a request for final disposition of the same. Absent notification to a prisoner of the prisoner's right to make a request for disposition, the State cannot rely upon the prisoner's failure to make demand for speedy disposition but must count the time as having commenced upon the first triggering of the State's duty to give notice of the right to make demand for speedy disposition. See *State v. Fitch* (1987), 37 Ohio App.3d 159, 524 N.E.2d 912.

{¶22} The trial court, in the case sub judice, applied the same standards as the Ohio Supreme Court applied in *Dillon*, supra in holding that the 180 days commenced upon appellee entering the Federal prison under a term of imprisonment. The trial court found that the Delaware County Prosecutor's Office knew that appellant was under federal jurisdiction as early as December 11, 2006, when appellee sent a letter to the Prosecutor's Office, and that the Delaware County Prosecutor's Office, with due diligence, would have known that appellee was in the Federal Bureau of Prisons serving a sentence as of December 14, 2007. Before such time, appellee was in pretrial detention. The speedy trial provisions of the Interstate Agreement on detainers do not apply to prisoners held in pretrial detention, but only to prisoners who have entered a term of confinement. See *Murray v. District of Columbia* (D.D.C. 1993) 826 F.Supp. 4. The trial court then determined that the 180 days in which to bring appellant to trial commenced when appellee entered the federal prison system in December of 2007

after he was sentenced. In other words, the 180 days commenced when the State knew or should have known where defendant was incarcerated.

{¶23} As noted by the court in *State v. Miller,* Butler App. No CA99-06-098, 2000 WL 1156843, "the state must use due diligence to secure the availability of a defendant who is in federal custody." Id at 2 citing to *State v. Howard* (1992), 79 Ohio App.3d 705, 707-708, 607 N.E.2d 1121. See also *State v. Jordan*, Muskingum App. No. CT2003-0029, 2005-Ohio-6064.

{¶24} Upon our review of the record, we concur with the trial court that appellant did not use due diligence in having the detainer served on appellee. Appellant knew that appellee was under federal jurisdiction as early as December 11, 2006, and, with due diligence, would have known that appellee was in the federal system serving a sentence as of December 14, 2007. Moreover, appellant knew that appellee had been represented by counsel. As is stated above, in a January 2007 letter to appellee's Florida counsel, the Delaware County Prosecutor's Office stated that it intended to prosecute appellee for the criminal charges pending in Delaware County. Appellant argues that it had no knowledge of appellee's whereabouts until September 25, 2008. However, as noted by appellee, "[i]t is inconceivable to think that the State of Ohio, through its prosecuting attorney, Attorney General's Office or other State officials, could not have located [appellee]…"

{¶25} Based on the foregoing, we find that the trial court did not err in granting appellee's Motion to Dismiss.

{¶26} Appellant's sole assignment of error is, therefore, overruled.

{¶27} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards_______________

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s/Patricia A. Delaney_____________

JUDGES

JAE/d0510

Farmer, J., dissents

{¶28} I respectfully dissent from the majority's view that appellee violated appellant's right to a speedy trial.

{¶29} I would find pursuant to R.C. 2963.03 [Article III(a)], the operable time frame is when appellant was actually imprisoned on the federal charges, December 14, 2007. Appellant was clearly aware of the pending charges in Delaware County as demonstrated by the numerous correspondence between his counsel and appellee. Appellant took no action until October 9, 2008, when he requested a dismissal of the charges. It is this date that triggers the 180-day rule (April 7, 2009). Because appellant was conveyed to Ohio on March 12, 2009, the conveyance was timely.

{¶30} I would sustain the assignment of error and reverse and remand for trial.

s/Sheila G. Farmer_____________
HON. SHEILA G. FARMER

[Cite as *State v. Stowe*, 2010-Ohio-4646.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RUSTY WAYNE STOWE	:	
Defendant-Appellee	:	CASE NO. 09 CAA 05 0046

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

s/Julie A. Edwards____________________

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s/Patricia A. Delaney__________________

JUDGES