

[Cite as *State v. Seitz*, 2015-Ohio-3100.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANDREW SEITZ

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 14 CAA 10 00072

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 14 CR I 02 0067

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 30, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Andrew Seitz appeals his conviction entered by the Delaware County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE¹

{¶2} On February 21, 2014, Appellant was indicted on one count of theft, in violation of R.C. 2913.02(A)(1), a fifth degree felony; one count of theft, in violation of R.C. 2913.02(A)(1), a fifth degree felony; one count of theft, a violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree; criminal damaging, a violation of R.C. 2909.06(A)(1), a misdemeanor of the second degree; and theft, a violation of R.C. 2913.02(A)(1) and a felony of the fifth degree.

{¶3} On March 11, 2014, Appellant filed a Notice of Placement of Imprisonment and Request for Disposition of Indictment, Information or Complaint. The notice was timely delivered to the Warden of the North Central Correctional Facility in Marion, Ohio. The Warden informed the trial court and the Delaware County Prosecutor's Office of Appellant's place of confinement, the originating county, the originating charges and the necessary dates.

{¶4} On March 31, 2014, Appellant appeared at an initial appearance in the trial court. A jury trial was scheduled to commence on August 19, 2014.

{¶5} On August 15, 2014, the state moved the trial court to continue trial due to a witness being unavailable, stating the witness had been involved in a car accident and was unavailable for trial.

¹ A rendition of the underlying facts is unnecessary for our resolution of this appeal.

{¶6} On August 29, 2014, the State filed supplemental discovery consisting of expert witness statements and a curriculum vitae.

{¶7} Following a jury trial on September 2, 2014, Appellant was found guilty of four of the five indicted charges. The fifth count of theft being the sole count on which the jury found Appellant not guilty.

{¶8} On October 3, 2014, Appellant was sentenced to twenty months of incarceration to be served consecutive to the sentence Appellant was already serving at the time of indictment.

{¶9} Appellant appeals, assigning as error:

{¶10} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE THE CASE WITHIN 180 DAYS.

{¶11} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE'S EXPERT WITNESS TO TESTIFY WHEN IT HAD FAILED TO COMPLY WITH CRIMINAL RULE 16(K)."

I.

{¶12} In the first assignment of error, Appellant argues the trial court erred in denying his motion to dismiss for failure to prosecute.

{¶13} Ohio Revised Code Section 2941.401 provides,

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.

If the action is not brought to trial within the time provided, subject to continuance allowed pursuant to this section, no court any longer has jurisdiction thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice.

{¶14} The Ohio Supreme Court has held, pursuant to R.C. 2941.401, the initial duty is placed on the defendant to notify the prosecutor and the court of his place of incarceration and to request final disposition of outstanding charges. *State v. Hairston*, 101 Ohio St.3d 308, 804 N.E.2d 471, 2004-Ohio-969. “In its plainest language, R.C. 2941.401 grants an incarcerated defendant a chance to have all pending charges resolved in a timely manner, thereby preventing the state from delaying prosecution until after the defendant has been released from his prison term.” *Id.* at 311, 804 N.E.2d 471.

{¶15} In *State v. Colon*, Stark App. 09CA232, 2010-Ohio-2326, this Court held,

The purpose of R.C. 2941.401 is to prevent the State of Ohio from delaying prosecution until after a defendant has been released from his or her prison term. See *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471 at paragraph 25. If the State were permitted to delay prosecution until after release, a defendant who, if he or she was prosecuted while still in prison on another offense might have received a concurrent sentence, would not have such an opportunity.”

Appellant next contends that time is to be tolled under R.C. 2941.401 only in specific instances where a continuance is granted in

open court and not for appellant's motions to dismiss or failure to respond to the state's request for discovery. However, the factors set forth in R.C. 2945.72 for tolling time are applicable to R.C. 2941.401.

Although R.C. 2945.72 does not specifically state that the tolling provisions therein are applicable to R.C. 2941.401, the Fourth District Court of Appeals has reasoned, and we agree, that "R.C. 2941.401 states, in pertinent part, '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 General Assembly, in enacting R.C. 2945.72, has legislated what are reasonable continuances. We therefore conclude that the factors set forth in R.C. 2945.72 are applicable to R.C. 2941.401." *State v. Nero* (Apr. 4, 1990), Athens App. No. 1392, at fn. 1; *State v. Smith*, 140 Ohio App.3d 81, 746 N.E.2d 678, 2000-Ohio-1777 at fn. 1.

{¶16} Here, the trial court rescheduled the jury trial for September 2, 2014, due to the unavailability of a state's witness. The State moved the trial court to continue the trial due to the unavailability of a necessary witness who had been involved in a car accident, and was unavailable to appear due to injuries. We find the continuance was reasonable, necessary and granted for good cause. Therefore, the continuance tolled the statutory speedy trial provisions.

{¶17} Accordingly, we find the trial court did not commit error in overruling Appellant's motion to dismiss. Appellant's right to a speedy trial was not violated.

{¶18} The first assignment of error is overruled.

II.

{¶19} Appellant's second assignment of error maintains the trial court abused its discretion in allowing the State's expert witness to testify despite the State's failure to comply with Criminal Rule 16(K).

{¶20} Ohio Criminal Rule 16(K) reads,

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶21} On August 27, 2014 the State filed a Supplemental Discovery noticing a CV filed of Robert M. Lawson, who was previously named as a witness. The State also filed a motion to enlarge time for disclosure of expert qualifications. The State's motion set forth:

In this case, the State of Ohio failed to provide a summary of the expert's qualifications pursuant to Criminal Rule 16(K), though the expert's report, name, and position were included in discovery materials. The omission did not prejudice the defendant because he had notice of the fingerprint reports themselves, as well as the name and position of the

expert. Exclusion of the expert testimony will substantially harm the State's case. The violation was not made in bad faith, but was a result of a simple paperwork error in conjunction with the defendant's insistence on bringing the matter to trial on September 2, 2014.

{¶22} Appellant filed a memorandum in opposition to the motion to enlarge discovery.

{¶23} Prior to the commencement of trial, the court addressed the State's motion and Appellant's objection thereto.

The State would ask that the Court deny Defendant's motion to exclude - - basically he's asking to exclude Mr. Lawson's testimony here. Pursuant to 16(K) and 16(L), the Court still has broad discretion in discovery matters that has been codified by *State v. Viera* which is actually about as on point as you can get to the facts before the Court on this case. It was a case that I actually tried upstairs in front of Judge Kreuger. 16(K) does not officiate the Court's ability to enlarge the time in order to provide CV's. Mr. Uhrich had the name of the expert, he had where he worked, he had the report. He did not take any actions to get another independent expert to rebut Mr. Lawson's qualifications. In short, Mr. Seitz has not been prejudiced by this and in fact the State did provide this six days prior, so he has had this for six days. Would suggest that the *Lakewood v. Poptelas* (phonetic) standard still provides to discovery matters. The defendant would be entitled to the least restrictive sanction

which would be a continuance, which time and again he has not wanted a continuance whatsoever.

Exclusion of the expert report is extreme and not warranted by both the case law and the criminal rules of procedure and pursuant to 16, so we would ask that the court deny defendant's motion. Thank you.

THE COURT: Why wasn't 16 complied with?

MR. PENKAL: I'm sorry?

THE COURT: Why wasn't the rule complied with?

MR. PENKAL: Your Honor, the CV was mistakenly not placed with the discovery packet. It was placed and given to defense counsel six days prior. There is no excuse, it just was not. However, defendant is entitled to the least restrictive sanction in this matter and the Fifth District has spoke on this, as other districts has as well, Your Honor.

THE COURT: Mr. Uhrich, do you wish to have a continuance?

MR. UHRICH: May I have a moment, Your Honor?

(Thereupon, there was a pause in the proceedings.)

MR. UHRICH: Your Honor, he does not wish to have a continuance.

THE COURT: Pardon me?

MR. UHRICH: He is not requesting a continuance today, Your Honor.

THE COURT: Court is going to overrule your Rule 16 Motion, Motion in Limine.

Tr. at 9-11

{¶24} Upon review, we find the trial court did not abuse its discretion in granting the State's motion for enlargement of discovery. Furthermore, Appellant has not demonstrated prejudice as a result thereof.

{¶25} The second assignment of error is overruled.

{¶26} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur