[Cite as *State v. Spencer*, 2017-Ohio-456.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
		Case No. 15CA3718
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
CALVIN D. SPENCER,	:	
Defendant-Appellant.	:	**RELEASED: 1/24/17**

APPEARANCES:

Mark K. Kuhn, Scioto County Prosecuting Attorney and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

John A. Gambill, Portsmouth, Ohio, for appellant.

Harsha, J.

{¶1} After a jury convicted Calvin D. Spencer of multiple drug offenses and tampering with evidence, the trial court sentenced him to a lengthy prison term. Spencer appealed, arguing that the state violated his statutory rights to a speedy trial. To resolve that issue we must decide whether the general speedy trial statute R.C.2945.71, or R.C.2941.401, a more limited speedy trial statute involving prisoners in a state correctional facility, controls. Spencer contends it is the former while the state relies upon the later.

{¶2} Spencer points out that he was arrested on felony drug charges on August 2, 2013 and placed in the Scioto County Jail. The state filed a complaint on the Scioto County charges on August 5, 2013, but then dismissed it without prejudice on the date scheduled for a preliminary hearing. On August 15, 2013 Spencer was transported from Scioto County to jail in Portage County to face unrelated charges. Ultimately,

Scioto County issued an indictment and warrant for the same charges on August 21, 2013, but did not bring Spencer to trial until October 2015. Spencer, who was imprisoned on the Portage County charges on the same day he was indicted in Scioto County, asserts that his speedy trial time commenced under R.C. 2945.71 in August 2013 and never tolled because the prosecutor did not exercise reasonable diligence to secure his availability. Therefore, he contends the state failed to bring him to trial within 270 days, violating his statutory right under R.C. 2945.71 to a speedy trial.

{¶3} However, R.C. 2945.71 was applicable only up until the time of Spencer's imprisonment on August 21, 2013; R.C. 2941.401 controlled after that date. Because the 270-day period had not expired on the date Spencer was imprisoned and the 180-day period under R.C. 2941.401 never commenced, Spencer's statutory speedy trial argument fails. We overrule the first assignment of error.

{¶4} Spencer also argues that the state violated his constitutional right to a speedy trial because the 26-month delay between his arrest and trial was substantial, was caused by the state's failure to exercise reasonable diligence, and prejudiced him. However, Spencer failed to show that the delay resulted in prejudice. His only claim of prejudice is that the delay prevented him from getting concurrent sentences for other crimes he committed. Due to its speculative nature, losing his opportunity to bargain for concurrent sentences is not sufficient to show prejudice. We overrule Spencer's second assignment of error.

{¶5} Spencer also contends that the state failed to present sufficient evidence to convict him of possessing and trafficking heroin weighing more than 10 grams. The state presented testimony that the heroin specimen, which weighed 10.5 grams,

included both heroin and segments of plastic stuck to the heroin. The state agrees that there was no evidence presented concerning the weight of the plastic or the relative proportionate weight of the plastic to heroin, but argues that this was Spencer's burden to show. However, the state has the burden to prove the heroin weighed 10 or more grams and failed to do so. Because the state presented no evidence of the weight of the heroin without the plastic, there was insufficient evidence that the heroin weighed 10 or more grams. We sustain Spencer's third assignment of error in part, but remand to the trial court to enter convictions for fifth degree felony possession and trafficking in heroin and sentence Spencer accordingly.

{¶6} Next Spencer contends that his conviction for tampering with evidence was against both the sufficiency and the manifest weight of the evidence. He argues that the state failed to present any evidence that Spencer tampered with evidence related to an ongoing or likely investigation. However, the state presented sufficient evidence of Spencer's complicity to tampering with evidence and the trial court instructed the jury that Spencer could be convicted of tampering as either the principal offender or as an accomplice. Because a charge of complicity can be stated in terms of the principal offense, an accomplice to the offense can be prosecuted and punished as if the accomplice was the principal offender. And, under the circumstances, we cannot find that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. We overrule Spencer's fourth assignment of error and affirm his conviction for tampering with evidence.

{¶7} Last, Spencer argues he received ineffective assistance of counsel because his attorney failed to object in a timely manner to testimony about his prior

heroin trafficking. However, when his trial attorney did belatedly object to the testimony, the trial court overruled the objection. It would require pure speculation to conclude that had the objection been made sooner, the court would have sustained it. Therefore, Spencer has failed to show prejudice. Moreover, the state's questioning about Spencer's prior drug-related activity was not used to prove the state's case, but to show the nature and existence of one of the witness's relationship to Spencer and to give the jury an understanding of the surrounding circumstances. Therefore it was admissible; trial counsel's performance was not deficient.

I. FACTS

{¶8} On August 2, 2013, a state trooper detained Spencer for a routine traffic stop, during which the trooper saw what he believed was marijuana residue on Spencer's pants and a white powder residue on the center console. The trooper field tested the residue, which gave a positive result for cocaine. The trooper questioned Spencer and his passenger, William Clevenger, who gave conflicting answers and false information concerning their identities. As the trooper placed the two in his cruiser, he noticed that Clevenger was walking oddly and his pants and underwear were down very low exposing his buttocks. The trooper searched the vehicle and found a roll of aluminum foil, which he stated was commonly used to sell black tar heroin.

{¶9} Because the trooper suspected that Spencer and Clevenger possessed black tar heroin, he listened to the audio/video recording of Spencer and Clevenger talking in the back of the cruiser. The trooper heard Clevenger state his concern that he would be taken to jail and have a cavity search; Spencer asked twice, "You can't shit it out right quick?" The trooper took them to the highway patrol post and told

Clevenger he knew he had something based on the cruiser's audio/video tape. Clevenger handed over a baggie containing black tar heroin.

{¶10} After putting Spencer in the Scioto County Jail, the state filed a complaint against him in the Portsmouth Municipal Court on August 5, 2013. However, on August 8, 2013, at the state's request the court dismissed the case without prejudice. Then on August 21, 2013, a grand jury indicted Spencer on one count of trafficking in drugs/heroin, a second degree felony; one count of possession of drugs/heroin, a second degree felony; and one count of tampering with evidence, a third degree felony.

{¶11} The state filed a request for issuance of a warrant on the indictment and indicated that Spencer was presently in the Scioto County Jail. The clerk issued a warrant for Spencer's arrest on August 22, 2013 and listed Spencer as currently in the Scioto County Jail. However, the return of an executed warrant did not occur until July 30, 2015; it stated that the arresting officer received the warrant on August 23, 2013 but did not serve a copy of the warrant and indictment until July 29, 2015.

{¶12} Spencer filed a motion to dismiss the charges on the ground that the state violated his statutory and constitutional right to a speedy trial. After a hearing on the motion, the trial court denied it.

{¶13} At trial the state presented the testimony of the trooper who testified about the traffic stop and arrest, the lab supervisor for the Ohio State Highway Patrol Crime Lab, Drug Chemistry Section, who testified about the tests she ran on the heroin specimen, and Clevenger, who testified about the traffic stop and Spencer's drug trafficking activities.

{¶14} The jury convicted Spencer on all three counts and the trial court sentenced him to prison.

II. ASSIGNMENTS OF ERROR

{¶15} On appeal Spencer raises five assignments of error:

1. THE TRIAL COURT COMMITTED REVERSABLE [sic] ERROR BY DENYING APPELLANT'S MOTION TO DISMISS, THEREBY VIOLATING HIS STATUTORY RIGHTS TO A SPEEDY TRIAL UNDER R.C 2945.71.

2. THE TRIAL COURT COMMITTED REVERSABLE [sic] ERROR BY DENYING APPELLANT'S MOTION TO DISMISS, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATE CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION.

3. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT APPELLANT OF POSSESSING AND TRAFFICKING HEROIN WEIGHING MORE THAN 10 GRAMS WHEN THE SAMPLE, WHEN WEIGHED, CONTAINED PIECES OF PLASTIC.

4. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT APPELLANT OF TAMPERING WITH EVIDENCE; OR IN THE ALTERNATIVE, THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

5. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO TESTIMONY THAT APPELLANT SOLD HEROIN ON PRIOR OCCASIONS.

III. MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS

A. Standard of Review

{¶16} Appellate review of a trial court's decision on a motion to dismiss for a violation of the speedy trial requirements presents a mixed question of law and fact. *State v. Jam*es, 4th Dist. Ross No. 13CA3393, 2014–Ohio–1702, ¶ 23; *State v. Brown*, 131 Ohio App.3d 387, 391, 722 N.E.2d 594 (4th Dist. 1998). Thus, appellate courts will defer to a trial court's findings of fact as long as competent, credible evidence supports

them. *Brown*, 131 Ohio App.3d at 391. Appellate courts then independently determine whether the trial court properly applied the law to the facts. *Id.* "Furthermore, when reviewing the legal issues presented in a speedy trial claim, we must strictly construe the relevant statutes against the state." *Id*., citing *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709 (1996).

{¶17} Here the trial court overruled the motion without making any findings of facts. But the record shows that the parties stipulated to the relevant facts set forth in Spencer's motion and the state supplemented those facts with the docket sheet in the case:

(1) Spencer was arrested on August 2, 2013;

(2) The state filed a complaint alleging second degree felony drug possession charges in violation of R.C. 2925.11(A);

(3) A preliminary hearing was set on August 8, 2013 and on that date the case was dismissed without prejudice;

(4) Spencer was held in the Scioto County Jail on a holder from Portage County;

(5) On August 15, 2013, the Portage County Sheriff transported Spencer to Portage County on other criminal proceedings;

(6) On August 21, 2103, the State filed an indictment on the felony drug charges and issued a warrant to the Scioto County Sheriff;

(7) The Sheriff received the warrant on August 23, 2013;

(8) Spencer was imprisoned in the Lorain Correctional Institute on August 21, 2013 on the charges arising out of the Portage County proceeding;

(9) The Scioto County Sheriff served the warrant and indictment on Spencer in the correctional institution on July 29, 2015;

(10) Spencer filed a motion to dismiss on speedy trial violations on October 13, 2015;

(11) The trial court overruled Spencer's motion and the trial commenced on October 14, 2015.

B. Statutory Speedy Trial Analysis

{¶18} In his motion Spencer argued that the trial court should dismiss the charges against him because the prosecution did not commence trial within the statutory time period provided by R.C. 2945.71(C)(2). Spencer alleged that he was arrested on August 2, 2013 on second degree felony drug charges and a complaint issued against him on August 5th but it was dismissed without prejudice on August 8, 2013. He alleged that he was held in the Scioto County Jail on a holder from Portage County until he was conveyed by the Portage County Sheriff's Department on August 15, 2013. On August 21, 2013, the Portage County Sheriff took Spencer to the Ohio Department of Corrections and he began serving a two-year sentence on charges unrelated to the Scioto County arrest.

{¶19} In this case Spencer was indicted on August 21, 2013 and a warrant for his arrest was issued on August 22, 2013. Two years later on July 29, 2015, the Scioto County Sheriff served the warrant on Spencer at the state correctional institution on his scheduled release date. Spencer alleges that he was unaware of the pending indictment until he received it from the Sheriff.

{¶20} R.C. 2945.71(C)(2), R.C. 2945.72(A) and R.C. 2941.401 govern the time within which the state must bring a defendant to trial. Under R.C. 2945.71(C)(2), a person charged with a felony offense must be brought to trial within 270 days after the person's arrest. Here, Spencer was arrested and held in the Scioto County Jail on felony drug charges on August 2, 2013. Therefore the 270-day speedy trial period

commenced on August 3, 2013. The complaint was filed on August 5 and dismissed without prejudice on August 8, 2013. Spencer continued to be held in the Scioto County Jail after dismissal of the complaint. Therefore, the dismissal of the complaint did not toll the 270-day time period under R.C. 2945.71(C). *State v. Broughton*, 62 Ohio St.3d 253, 259-60, 581 N.E.2d 541, 547 (1991) ("we hold that for purposes of computing how much time has run against the state under the speedy-trial statute, the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail"); *State v. Miller*, 4th Dist. Athens No. 11CA26, 2012-Ohio-1823, ¶ 14 ("*Broughton* makes clear that the speedy-trial clock under R.C. 2945.71 is not tolled between a dismissal without prejudice by the state and a later indictment when the defendant remains in jail").

{¶21} Because Spencer was being held on both his Scioto County felony drug charges and a holder from Portage County, he was not entitled to the triple-count provision of R.C. 2945.71(E) (if an accused remains in jail in lieu of bail solely on the pending charges, each day is counted as three days). *State v. Martin*, 56 Ohio St.2d 207, 211, 383 N.E.2d 585, 587 (1978). Thus the 270-day period in R.C. 2945.71(C)(2) applies to Spencer's case.

{¶22} The state filed a subsequent indictment on August 21, 2013 premised upon the same facts as the original complaint. The court issued a warrant to the Sheriff with instructions that Spencer was presently in the Scioto County Jail. However, when the Sheriff received the warrant on August 23, 2013, Spencer was no longer there because the Portage County Sheriff had removed him on August 15, 2013 for other

criminal proceedings in Portage County. Although Spencer was no longer in the Scioto County Jail, the record does not contain a return of unexecuted warrant. The record is silent as to why the Sheriff neither executed the warrant on Spencer in August 2013 nor returned it as unserved.

{¶23} R.C. 2945.72(A) allows for a tolling of the statutory speedy trial time if the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, but only if the prosecution exercises reasonable diligence to secure his availability. Spencer alleged in his motion that he was held in Scioto County Jail on a holder from Portage County and was transported from Scioto County to Portage County on August 15, 2013. We find nothing in the record to show that the prosecution exercised reasonable diligence to secure Spencer's availability under R.C. 2945.72(A).

{¶24} However, Spencer was imprisoned in the Lorain Correctional Institute on August 21, 2013. As a result, R.C. 2941.401 supplants the provisions of R.C. 2945.71 and controls the speedy trial rights of a defendant who is in prison. *See State v. Detamore*, 9th Dist. Wayne No. 15AP0026, 2016-Ohio-4682, ¶ 8; *State v. Charity*, 7th Dist. Mahoning No. 12 MA 214, 2013-Ohio-5385, ¶ 24, and cases cited therein ("The weight of authority on this subject * * * advises that once a defendant is admitted to prison, R.C. 2945.71, et seq., ceases to apply and R.C. 2941.401 takes over"). Therefore, once Spencer was imprisoned on the Portage County sentence, R.C. 2945.71 ceased to apply during the duration of his imprisonment on those charges. In fact, on appeal, Spencer does not claim otherwise. Instead, he concedes that R.C. 2941.401 "governs the time within which" he had to be brought to trial in Scioto County.

{¶25} But Spencer was not entitled to dismissal under R.C. 2941.401 because under that statute, the initial duty is placed on the defendant to notify the prosecutor and the court in writing of his place of incarceration and to request final disposition of the charges. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 26. Like the warden in *Hairston*, there is no evidence here that the prison warden had any knowledge of the pending Scioto County charges. And in *Hairston*, the Supreme Court rejected imposing a duty of reasonable diligence on the state under R.C. 2941.401. *Id.* at ¶ 21-22; *State v. Detamore,* 9th Dist. No. 15AP0026, 2016-Ohio-4682, ¶15-16 ("legislature could have included in the statute an obligation for the state to make reasonable efforts to locate an indicted individual within a specific time period in order to trigger speedy trial rights, but did not do so"). There is no equitable exception to either the plain language of the statute or to the Supreme Court's holding in *Hairston* for Spencer's claimed lack of knowledge of the pending charges, and we refuse to judicially create one. *See State v. McCain*, 9th Dist. Wayne No. 15AP0055, 2016-Ohio-4992, ¶ 25 ("we decline [the defendant's] invitation to carve out an equitable exception to an otherwise ambiguous statute. Regardless of her reason for not doing so, because [defendant] failed to comply with the statutory requirements, the 180-day time period for bringing a criminal defendant to trial under R.C. 2941.401 was not triggered"). We also decline to rewrite the statute so that knowledge of the Scioto County Sheriff is per se knowledge imputed to the warden. *See State v. Savage,* 12th Dist. Nos. CA2014-02-002, CA2014-02-003, CA2014-03-006, CA2014-03-007, 2015-Ohio-574, ¶16, 23-24 (deputy's knowledge of inmate's whereabouts and the indictment would not be imputed to either the prosecutor or the warden). Our decision in *State v. Williams*, 4th Dist.

Highland No. 12CA12, 2013-Ohio-950, is distinguishable because Williams complied with his initial duty to notify the prosecutor of his place of incarceration and requested a disposition of the untried charges.

{¶26} Furthermore, although Spencer's argument appears to be premised solely on R.C. 2941.401, his first assignment of error mentions only R.C. 2945.71. *See State v. Owens*, 2016-Ohio-176, 57 N.E.3d 345, ¶ 59 (4th Dist.), quoting *State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 41 (" 'we need not address this contention because we review assignments of error and not mere arguments' ").

{¶27} R.C. 2945.71(C)(2) controlled the statutory speedy-trial analysis during the period when Spencer was first arrested on August 2, 2013 until he was imprisoned on the Portage County charges on August 21, 2013. The 270-day period did not elapse during this period. Subsequently, R.C. 2941.401 controlled the statutory speedy-trial analysis from August 21, 2013 until his release from prison; that 180-day period did not commence because Spencer failed to comply with his initial duty to notify the prosecutor and the court in writing of his place of incarceration and to request final disposition of the charges. Thus the 180-day period never began to run before Spencer's Scioto County trial. Although we recognize that this statutory interpretation may result in a lengthy delay in the trial of a prisoner who fails to invoke R.C. 2941.401, the prisoner is not left without a remedy—an imprisoned defendant can either comply with the duty in that statute or claim a violation of the constitutional right to a speedy trial, the latter of which Spencer asserts in his second assignment of error.

{¶28} Accordingly, we reject Spencer's first assignment of error.

C. Constitutional Speedy Trial Analysis

{¶29} In his second assignment of error Spencer asserts a violation of the Sixth Amendment to the United States Constitution, which guarantees an accused in a criminal prosecution the right to a speedy trial. The Due Process Clause of the Fourteenth Amendment makes this provision applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

{¶30} In analyzing whether an accused has been denied the constitutional right to a speedy trial, a court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the accused's assertion of his right; and (4) prejudice to the accused. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). None of these four factors is per se determinative of whether an accused suffered a violation of his constitutional right to a speedy trial. I*d.* at 532. Instead, the court must consider the factors collectively. *Id*.

{¶31} The United States Supreme Court has recognized that the first factor, length of the delay, involves a double inquiry. *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). First, an accused must show that the length of the delay was “presumptively prejudicial” in order to trigger the *Barker* analysis. *Id*. at 651-52. Once the *Barker* analysis is triggered, length of delay, beyond the initial threshold showing, is again considered and balanced against the other relevant factors. *Id*. at 652.

{¶32} The Scioto County Grand Jury indicted Spencer in August 2013. However, Spencer was not served with the warrant until July 2015 and was not tried until October 2015. As the *Doggett* decision noted, courts generally find post-accusation delay to be “presumptively prejudicial” as it approaches one year. *Doggett,* 505 U.S. 647, fn. 1, 112

S.Ct. 2686, 120 L.Ed.2d 520. In accordance with this general guideline, we find that the 26-month delay between Spencer's indictment and trial was presumptively prejudicial, thus triggering the *Barker* analysis.

{¶33} We begin that analysis by revisiting the issue of the length of the delay. However, we will consider this factor together with the second factor, the reason for the delay. The record reveals no steps were taken to serve the warrant on Spencer. The state does not allege that it sent a copy of the warrant to the Portage County Jail, where Spencer had initially been transferred. Nor does the state allege that it attempted to locate Spencer's place of subsequent imprisonment. In its brief the state asserts that "the record demonstrates that there was some confusion as to his whereabouts" but does not cite to a place in the record for support. According to the record Spencer was being held in the Scioto County Jail on unrelated Portage County charges and transported to Portage County by the Portage County Sheriff. It would take little to no effort to determine if Spencer was still in the Portage County jail or if he had been imprisoned in a correctional institution. It is clear from the record that the state did nothing to locate Spencer, who at all times was in the custody of law enforcement.

{¶34} Although R.C. 2941.401 imposes no duty to act diligently, the constitution places a duty on the state to exercise reasonable diligence to serve the indictment. There can be no dispute that the state did not act as diligently as it could have in this case. The United States Supreme Court has recognized that different weights are to be assigned to different reasons for delay. *Doggett*, 505 U.S. at 657, citing *Barker*, 407 U.S. at 531. Concerning negligence, the Court stated: "Although negligence is

obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies with its protractedness * * * and its consequent threat to the fairness of the accused's trial. * * * To be sure, to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." *Id.* Although the state acted slowly in this case, we conclude the 26-month delay was not so protracted or intolerable as to warrant relief absent some particularized trial prejudice. *See State v. Manley*, 4th Dist. Adams No. 97CA637, 1997 WL 451360 (Aug. 6, 1997) (finding that the 29-month delay caused by the state's negligence was not so protracted or intolerable as to warrant relief absent some particularized trial prejudice).

{¶35} Looking to the third factor, Spencer did not assert his right to a speedy trial until two months after his arrest in July 2015. However, in light of this minimal delay, his assertion that he had no knowledge of the indictment against him and the lack of any evidence to the contrary, we assign no weight to Spencer's failure to assert his speedy trial rights.

{¶36} The final factor we must consider is the prejudice to the accused. In *Barke*r, the United States Supreme Court identified three interests that the speedy trial right is designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the

defense will be impaired." *Barker*, 407 U.S. at 532. The first two interests are not implicated here. Spencer was incarcerated on an unrelated criminal conviction during the delay. Because Spencer had no knowledge of the indictment against him, he could not have suffered anxiety and concern. As for the last interest, Spencer does not allege that the delay impaired his ability to defend himself. *See generally, State v. Boyd*, 4th Dist. Ross No. 04CA2790, 2005-Ohio-1228, ¶ 9-18.

{¶37} The only prejudice claimed by Spencer is that the lapse in time prevented him from getting concurrent sentences for other crimes he committed. Losing his opportunity to bargain for concurrent sentences is based upon speculation and is not sufficient to show prejudice; there is no constitutional or statutory right to be given concurrent sentences. *State v. Jones*, 4th Dist. Ross No. 95CA2128, 1996 WL 312469 (June 4, 1996); *see also State v. Rice,* 1st Dist. Hamilton No. C-150191, 2015-Ohio-5481, ¶32 ("courts have refused to hold that an unjustified delay in bringing a defendant to trial violates the defendant's right to a speedy trial where, as here, the only prejudice alleged is the theoretical and speculative loss of the opportunity for the defendant to serve the sentence on the pending charge concurrently with the sentence in another case").

{¶38} Although the first two factors, length of the delay and reason for the delay, weigh minimally in Spencer's favor, he has not established any prejudice. Looking at the totality of the circumstances, Spencer has failed to demonstrate a violation of a Sixth Amendment speedy trial right. Accordingly, we overrule Spencer's second assignment of error.

IV. Sufficiency & Manifest Weight of the Evidence for Drug Convictions

{¶39} Spencer claims that his conviction for possessing and trafficking heroin weighing more than 10 grams is not supported by sufficient evidence because the state did not prove beyond a reasonable doubt that the heroin weighed more than 10 grams. He contends that the lab supervisor who weighed the heroin testified that plastic packaging was stuck onto the heroin and could not be removed. As a result, the weight of 10.5 grams included both plastic and heroin. The lab supervisor did not quantify the weight of the heroin without the plastic.

A. Standard of Review

{¶40} "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶41} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119.

{¶42} "Although a court of appeals may determine that a judgment is sustained

by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541. But the weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 140 Ohio St.3d 73, 2013-Ohio-1966, 15 N.E.3d. 818, at ¶ 132. The trier of fact is free to believe all, part, or none of the testimony of any witness, and we defer to the trier of fact on evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *State v. Dillard,* 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, at ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, 2014 WL 1875931, ¶ 23.

B. Analysis of Drug Convictions

{¶43} Spencer was convicted of one count of trafficking in heroin in violation of R.C. 2925.03(A)(2) and (C)(6)(e), and one count of possession of heroin in violation of R.C. 2925.11(A) and (C)(6)(d). The trial court merged his possession count with his trafficking count and sentenced Spencer on the trafficking count to a prison term of eight years.

{¶44} Drug trafficking, R.C. 2925.03(A)(2) and (C)(6)(e) provide, "(A) No person shall knowingly do any of the following: * * * (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person. * * * (C) Whoever violates division (A) of this section is guilty of one of the following: * * * (6) If the drug involved in the violation is

heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows: * * * (e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree."

{¶45} Drug Possession, R.C. 2925.11(A) and (C)(6)(d), provide, "(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog. * * * (C) Whoever violates division (A) of this section is guilty of one of the following: * * * (6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows: * * * (d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree."

{¶46} Both the drug possession and drug trafficking penalty enhancement provisions require that the state prove the quantity of heroin "equals or exceeds ten grams but is less than fifty grams" for a second degree felony. To prove that the heroin weighed ten or more grams, the state presented the testimony and lab report of the lab

supervisor in the drug chemistry section of the state patrol crime lab. The lab supervisor testified that she analyzed the heroin and upon inspection found that it was partially contained in plastic material. The lab supervisor was unable to remove all of the plastic wrapping because the heroin substance "was very sticky and it was impossible for me to remove every last piece, but most of it - - most of the packaging had been removed prior to my weighing the sample." The weight of the heroin and plastic sample was 10.50 grams. On cross examination, the lab supervisor testified that there was "a small portion" of the plastic that she was unable to remove because of the stickiness of the heroin.

{¶47} The state argues that it was Spencer's duty to prove that the heroin weighed less than ten grams and he did not do so: "Again, there was no estimate elicited as to the weight of the plastic which could not be removed and there certainly was no other testimony offered. Appellant never requested an independent test, or other expert evaluation. As such, the evidence was sufficient to support the conviction * * * ." However, the state erroneously shifts the burden to prove the weight of the heroin – an element of the enhanced sentencing provision – upon the defendant. The state did not present any evidence from which a jury could determine the weight of the heroin without the plastic. The lab supervisor's testimony was vague and inconclusive: "Most of the packaging had been removed" but "a small portion" remained. Nonetheless, we cannot speculate that the adhering plastic weighed less than 0.50 grams.[1]

[1] Although our result is similar, our case is distinguishable from *State v. Gonzales,* __ Ohio St.3d. __, 2016-Ohio-8319, __ N.E.3d __ where, based upon statutory language specific to that substance, the court required a purity analysis of the drug involved, cocaine, in order to apply a penalty enhancement.

{¶48} After viewing this evidence in a light most favorable to the prosecution, we cannot say that a rational trier of fact could have concluded beyond a reasonable doubt that the weight of the heroin alone equaled or exceeded 10 grams. There was simply no evidence of the relative weight of heroin to plastic. Thus, there is insufficient evidence to support the jury's verdict for a felony of the second degree. We sustain his third assignment of error in part and vacate his convictions and sentences for drug trafficking and drug possession under R.C. 2925.03(A)(1)/(C)(6)(e) and R.C. 2925.11(A)/(C)(6)(d). We remand to the trial court to enter a judgment of conviction under R.C. 2925.03(A)(1)/(C)(6)(a) and R.C. 2925.11(A)/(C)(6)(a) as felonies of the fifth degree and to enter an appropriate sentence. *See State v. Siggers,* 9th Dist. Medina No. 09CA0028-M, 2010-Ohio-1353, ¶ 20-21; *see also* App.R.12(A)(1)(a) providing for modification of the trial court's judgment.

V. Sufficiency & Manifest Weight of Evidence for Tampering with Evidence[2]

{¶49} Spencer claims that his conviction for tampering with evidence is against the manifest weight of the evidence and is not supported by the sufficiency of the evidence because the state presented no evidence that he tampered with the packaged heroin.

{¶50} R.C. 2921.12(A)(1) prohibits tampering with evidence and provides that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." As the Supreme Court of Ohio recently stated,

[2] The standard of review for sufficiency and weight of the evidence set for in Section IV(A) applies here also.

"[t]here are three elements of this offense: (1) knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation." *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11.

{¶51} Spencer contends that the state failed to prove any particular instance of his alleged tampering with evidence. The state responds that Spencer "was complicit in attempting to hide the packaged black tar heroin while in the back of the cruiser" by encouraging Clevenger to "shit that stuff out real quick." The state contends that "Clevenger complied, removing the heroin from his rectal cavity and hiding it in his pocket." At trial Clevenger testified that he took the heroin out of his rectum and placed it in his pocket. The state argues that "this is a clear and specific complicit act, knowing an official investigation was in progress, to conceal evidence in such investigation."

{¶52} The state did not charge Spencer with complicity to tampering with evidence; it charged him with tampering with evidence. Complicity, R.C. 2923.03, provides: "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:(1) Solicit or procure another to commit the offense;(2) Aid or abet another in committing the offense;(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;(4) Cause an innocent or irresponsible person to commit the offense."

{¶53} R.C. 2923.03(F) of the complicity statute provides, "(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may

be stated in terms of this section, or in terms of the principal offense." Because a charge of complicity can be stated in terms of the principal offense, an accomplice to the offense can be prosecuted and punished as if the accomplice was the principal offender. *State v. Tumbleson,* 105 Ohio App.3d 693, 697, 664 N.E.2d 1318 (12th Dist. 1995). "It is well settled that 'the prosecution may charge and try an aider and abettor as a principal and if the evidence at trial reasonably indicates that the defendant was an aider and abettor rather than a principal offender, a jury instruction regarding complicity may be given.' " *Id*. quoting *State v. Wagers,* 12th Dist. Butler No. CA92-11-231, 1993 WL 369240 (Sept. 20, 1993); *see also State v. Frost,* 164 Ohio App.3d 61, 2005-Ohio-5510, 841 N.E.2d 336, ¶ 17-26 (2d Dist.).

{¶54} In *Frost, supra*, the state indicted Frost with aggravated robbery. At trial the state presented evidence that Frost was an accomplice in the aggravated robbery. The jury found Frost guilty of aggravated robbery. Frost appealed arguing that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. Frost conceded there was evidence that he aided and abetted in the robbery, but argued that there was no evidence that he had a deadly weapon.

{¶55} The appellate court held that the prosecutor was under no obligation to charge Frost under R.C 2923.03 as an aider and abettor. Rather, under R.C. 2923.03(F), Frost was subject to conviction as an aider and abettor in the aggravated robbery when he was indicted under R.C. 2911.01(A)(1), the aggravated robbery statute. *Id.* at ¶ 21.

{¶56} The appellate court also found that because "the indictment for aggravated robbery encompassed a charge of aiding and abetting in the aggravated

robbery, we have little difficulty in finding that the state presented sufficient evidence to support the charge as alleged in the indictment." *Id*. at ¶ 22.

> In sum, upon review of the record, we find that the state provided sufficient evidence that Frost was an accomplice in the robbery of Holloway at the Shell station at Free Pike and Gettysburg. The state further provided sufficient evidence that Walton, the principal, had committed the robbery while armed with a deadly weapon, i.e., a gun, and that he had displayed, brandished, possessed, or used it. Such evidence is sufficient to support a conviction of Frost as an aider and abetter for aggravated robbery under R.C. 2911.01(A)(1).

Id. at ¶ 24.

{¶57} However, even though the state presented sufficient evidence to support the indictment, the appellate court held that because the trial court failed to give a jury instruction on complicity, the verdict was unsupported and subject to reversal:

> [W]e cannot ignore the fact that the trial court instructed the jury as though Frost had been a principal in the offense and did not provide the jury with an instruction on aiding and abetting, as apparently requested by the state. * * * Consequently, the jury's verdict—based on the defective jury instructions—is unsupported and must be reversed.

Id. at ¶ 25-26.

{¶58} Here, the trial court gave a jury instruction on tampering with evidence that set forth the elements of the tampering with evidence and informed the jury that they could find Spencer guilty of tampering with evidence if they found beyond a reasonable doubt that he tampered with evidence or was an accomplice to tampering with evidence. However, it did not give a complete complicity instruction.

{¶59} Spencer did not object to the jury instruction at trial and did not raise any issue concerning it as an assignment of error in his brief as required by App.R. 16. The failure to object to a jury instruction waives any claim of error relative to that instruction unless, but for the error, the outcome of the trial clearly would have been

otherwise. *State v. Barrett*, 4th Dist. Scioto No. 03CA2889, 2004-Ohio-2064, ¶ 26. We may disregard an issue that is not raised as an assignment of error, specifically pointed out in the record, and separately argued by brief. App.R. 12(A)(1) and (2).

{¶60} Because the state presented sufficient evidence that Spencer was an accomplice to tampering with evidence and the trial court instructed the jury that they could find him guilty as an accomplice, the jury's verdict is supported by sufficient evidence.

{¶61} Spencer's tampering with evidence conviction is supported by the manifest weight of the evidence. The record contains evidence that Spencer and Clevenger anticipated a body cavity search and Spencer asked Clevenger to remove the heroin from his rectum in an attempt to prevent it from being discovered. Under the circumstances, we cannot find that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

{¶62} We overrule Spencer's fourth assignment of error and affirm his tampering with evidence conviction.

VI. Ineffective Assistance of Counsel

{¶63} In his fifth assignment of error Spencer contends that his trial counsel was ineffective for failing to object to "other acts evidence" during the state's presentation of the drug trafficking and possession evidence.

A. Standard of Review and Law

{¶64} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short,* 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, ¶ 23. Because this issue cannot be presented at trial, we conduct the initial review.

{¶65} The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). In reviewing the claim of ineffective assistance of counsel we must indulge in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland* at 689.

B. Trial Counsel's Objection to Other Acts Evidence

{¶66} As a general rule, evidence of prior crimes, wrongs, or bad acts is inadmissible if it is wholly independent of the charge for which an accused is on trial. *State v. Marshall*, 4th Dist. Lawrence No. 06CA23, 2007–Ohio–6298, ¶ 45. Evid. R. 404(B) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404(B). " 'When other acts evidence is relevant for one of those

limited purposes, the court may properly admit it, even though the evidence may show or tend to show the commission of another crime by the accused.' " *Id.* The admissibility of other acts evidence is "carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment." *In re Sturm*, 4th Dist. Washington No. 05CA35, 2006–Ohio–7101, ¶ 51, citing *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661, 668 (1992).

> "Evidence of other crimes and acts of wrongdoing must be strictly construed against admissibility. [Internal citations omitted.] Such evidence is only admissible if the other act tends to show by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *State v. Moore*, 7th Dist. No. 02CA152, 2004-Ohio-2320, ¶ 44. "It is never admissible when its sole purpose is to establish that the defendant committed the act alleged of him in the indictment." *Id*. However, "the decision to admit Evid. R. 404(B) prior acts evidence rests in the trial court's sound discretion and that decision should not be reversed absent an abuse of discretion." *State v. Hairston*, 4th Dist. Scioto No. 06CA3089, 2007–Ohio–3707, at ¶ 38.

Marshall, 2007–Ohio–6298 at ¶ 46.

{¶67} "Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). The Supreme Court of Ohio has suggested that the probative value of the other-acts evidence is related to the quality of the state's proof. *State v. Jamison*, 49 Ohio St.3d 182, 187, 552 N.E.2d 180 (1990) ("In this case, the state established the probative value of the other-acts evidence by the strong quality of its proof. * * * Other-acts

evidence need be proved only by substantial proof, not proof beyond a reasonable doubt. Yet, the relative high quality of this other-acts evidence in this case establishes that the prosecution did not attempt to prove one case simply by questionable evidence of other offenses." (Citation omitted.)). We have also recognized that, "[f]or other acts evidence to have probative value, substantial proof must exist that the defendant committed the act." *State v. Wright*, 4th Dist. Washington No. 00CA39, 2001–Ohio–2473, *7; *see also State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 33-34.

{¶68} Clevenger testified that he had been a drug addict for about 15 years and that he started out abusing Ritalin and then progressed to heroin. Clevenger testified that he started using heroin after he met Spencer. The state asked Clevenger about his past drug use and his relationship to Spencer:

> Q. Okay. How did you meet this Defendant?
>
> A. He stayed at a motel my sister ran.
>
> Q. Okay. And what motel was that?
>
> A. The Super 8.
>
> Q. Okay. How often did he stay there?
>
> A. I have no clue.
>
> Q. Okay. How often did you get heroin from him?
>
> A. Quite often.
>
> Q. You said daily, was it daily?
>
> A. Daily, yeah.
>
> Q. So you were getting - - daily you were getting heroin from this Defendant?
>
> A. Well, yeah, that's what an addict does.

Q. Okay.

A. No offense.

Q. You were an addict?

A. Yeah.

Q. Now what were you doing in return for that? He would give you heroin, what would you do?

MR. CAMPBELL: Your Honor, I'm going to object to this.

{¶69} The trial court overruled the objection and the state continued questioning Clevenger about his relationship with Spencer, establishing that Clevenger knew Spencer for about a year and that Clevenger worked for Spencer in exchange for drugs.

{¶70} Spencer argues that although trial counsel objected to the prior acts evidence, the objection was made too late and the jury was tainted.

{¶71} First, assuming that the testimony was inadmissible evidence of other acts, Spencer was not prejudiced by the timing of trial counsel's objection because the trial court overruled it after hearing the merits of counsel's motion. Thus, even if trial counsel had made an objection sooner, there is nothing in the record to suggest the trial court would have sustained it. As a result, Spencer cannot show any prejudice from the timing of the objection. *See State v. Nields*, 93 Ohio St.3d 6, 34, 752 N.E.2d 859 (2001) (to establish prejudice, appellant must demonstrate that objection would have had a reasonable probability of success).

{¶72} Moreover, while this testimony does establish that Clevenger previously bought drugs from Spencer, it was not being used to show that Spencer acted in conformity with those prior acts. Rather, the testimony was introduced to show the existence of a relationship between Clevenger and Spencer and to give the jury an

understanding of their involvement, i.e. a prior relationship existed. *See State v. Persohn*, 7th Dist. Columbiana No. 11 CO 37, 2012-Ohio-6091, ¶ 36 (evidence of prior drug purchases between witness and defendant allowed the jury to understand how the witness could be used as a confidential informant and was not being used to show that the prior drug dealings proved that the current drug deal occurred).

{¶73} Because the prior acts evidence here was admissible to establish the relationship between Clevenger and Spencer, trial counsel was not deficient in making what Spencer characterized as an untimely objection. *See State v. McGlone*, 83 Ohio App.3d 899, 615 N.E.2d 1139 (4th Dist.1992).

{¶74} We overrule Spencer's fifth assignment of error.

VII. CONCLUSION

{¶75} Spencer's statutory speedy trial rights were not violated because he was imprisoned and did not provide notice and a request for final disposition as required to commence the 180-day speedy trial time period for imprisoned defendants. His constitutional speedy trial rights were not violated because he failed to show prejudice by the delay. Thus we overrule Spencer's first and second assignments of error. However, the state failed to present sufficient evidence to prove Spencer possessed or trafficked heroin equal to or exceeding ten grams. Even after viewing the evidence in a light most favorable to the prosecution, we conclude no rational trier of fact could have found beyond a reasonable doubt that the heroin weighed 10 grams or more. Accordingly, we sustain Spencer's third assignment of error in part and remand for resentencing on fifth degree drug felonies. The state presented sufficient evidence to prove Spencer tampered with evidence, i.e. that Spencer was complicit in encouraging

Clevenger to tamper with evidence. Because the trial court instructed the jury that they could find Spencer guilty as an accomplice, there was sufficient evidence to support Spencer's conviction for tampering with evidence. Accordingly, we overrule Spencer's fourth assignment of error. Finally, Spencer failed to show that trial counsel's performance was deficient or that he was prejudiced in any way by the timing of counsel's objection. We overrule Spencer's fifth assignment of error.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED, AND CAUSE REMANDED FOR ENTRY OF THE APPROPRIATE JUDGMENT AND RESENTENCING.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED, and that the CAUSE IS REMANDED FOR ENTRY OF THE APPROPRIATE JUDGMENT & RESENTENCING. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.