

[Cite as *State v. Skorvanek*, 2009-Ohio-3924.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 08CA009399

Appellee

v.

JOHN SKORVANEK

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 04CR065344

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 10, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} John Skorvanek has been repeatedly prosecuted for various drug offenses. In this case, he pleaded no contest to a fourth-degree-felony count of trafficking in heroin four years after he was arrested on the charge. After he was indicted in this case, he was indicted in a separate case for additional drug-related charges arising from other transactions. The trial court dismissed the second case for a speedy trial violation, but this Court reversed and remanded it. *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69, at ¶27. Eventually, Mr. Skorvanek pleaded no contest to the charges in both cases. He has now appealed his conviction in the first case, arguing that his speedy trial rights were violated. This Court affirms because after Mr. Skorvanek revoked his unlimited waiver of his speedy trial rights, the State brought him to trial in a constitutionally reasonable time.

BACKGROUND

{¶2} Mr. Skorvanek was arrested on or about April 1, 2004, in connection with a controlled purchase of heroin on March 10, 2004, by a confidential informant for the Lorain Police Department. On June 2, 2004, the State indicted Mr. Skorvanek in case number 04CR065344 on one fourth-degree-felony count of trafficking in heroin.

{¶3} The following March, the State indicted him on two new counts of trafficking in heroin, possession of criminal tools, permitting drug abuse, and various other drug related charges. The new charges, in case number 05CR067480, stemmed from controlled buys of heroin on March 13 and March 23, 2004, and the execution of search warrants on April 1, 2004. The facts of Mr. Skorvanek's case number 05RC067480 are detailed in this Court's opinion in *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69. This appeal deals with case number 04CR065344.

CASE NUMBER 04CR065344

{¶4} The record reflects that Mr. Skorvanek posted bond in this case on April 19, 2005, and remained out on bond while the State appealed the trial court's dismissal of case number 05CR067480 for a speedy trial violation. The trial court tolled the speedy trial time for this case while that appeal was pending. This Court reversed the trial court's dismissal of case number 05CR067480 and remanded it in January 2006. *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69, at ¶27.

{¶5} Mr. Skorvanek was arrested again on October 4, 2006, after police alleged they had conducted two controlled buys of heroin from him using a confidential informant. The trial court revoked his bond on October 5, 2006. He remained in custody until he pleaded no contest to the charges in both this case and case number 05CR067480 on April 1, 2008.

{¶6} The record reflects that Mr. Skorvanek personally signed at least four unlimited time waivers in this case between June 2004 and February 2007, including one he signed in October 2006, after his bond had been revoked. On February 1, 2008, Mr. Skorvanek filed a formal written objection and demand for trial. Another 423 days passed before he entered his no-contest plea.

{¶7} Following Mr. Skorvanek's trial demand, he filed several motions. Despite being represented by a lawyer, on April 27, 2007, he filed a pro se motion to compel the staff of the Lorain County Correctional Facility to give him an oversized envelope. The trial court ruled against Mr. Skorvanek on that motion on May 7, 2007. On September 12, 2007, Mr. Skorvanek requested a competency evaluation and moved to dismiss his attorney. The trial court granted both motions. On February 14, 2008, it ruled Mr. Skorvanek competent to stand trial. Just before the scheduled trial, Mr. Skorvanek's new lawyer requested a continuance from February 20, 2008, to March 6, 2008. The record is not clear about the cause of the remaining delay.

MULTIPLE PENDING INDICTMENTS

{¶8} Mr. Skorvanek's sole assignment of error is that the trial court violated his statutory and constitutional rights by incorrectly denying his motion to dismiss because the State failed to bring him to trial within the time allotted by Section 2945.71 of the Ohio Revised Code. He has specifically argued that his speedy trial right was violated because 357 days elapsed between his arrest in this case and his indictment in case number 05CR067480.

{¶9} Mr. Skorvanek's argument in this regard focuses on his unhappiness with this Court's decision in *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69. In that case, this Court determined that, although they both stemmed from one ongoing investigation, Mr. Skorvanek's two indictments arose from different events that occurred on different days. *Id.* at

¶16. Therefore, the second indictment was not subject to the same speedy trial start date as the first indictment. *Id.* at ¶9 (citing *State v. Baker*, 78 Ohio St. 3d 108, 112 (1997)). This Court reversed the trial court’s dismissal of Mr. Skorvanek’s second indictment, and the Ohio Supreme Court refused to hear Mr. Skorvanek’s appeal. *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69, at ¶1, appeal denied, 109 Ohio St. 3d 1458, 2006-Ohio-2226.

{¶10} Mr. Skorvanek’s argument regarding the second indictment is an attempt to rehash the assignment of error this Court previously considered and overruled in *State v. Skorvanek*, 2006-Ohio-69. To the extent that Mr. Skorvanek’s assignment of error addresses the relationship between his arrest date in this case and his indictment in case number 05CR067480, it is overruled.

WAIVER OF SPEEDY TRIAL RIGHTS

{¶11} Mr. Skorvanek has argued that his various speedy trial waivers only tolled time “from the time [each was] given until the next scheduled [court] date [because] the Court’s practice is to obtain a wavier on every rescheduling or continuing of a pretrial.” Both the Ohio and the United States Constitutions recognize the right of an accused to a speedy trial. *State v. Pachay*, 64 Ohio St. 2d 218, 219 (1980). The General Assembly has enacted Section 2945.71 et seq. in order to enforce those constitutional rights. *Id.* at syllabus. Under Section 2945.71(C)(2) of the Ohio Revised Code, a person charged with a felony must be brought to trial within 270 days of his arrest. For the purpose of computing time, the day of the arrest is not included in the calculation. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶6. Under Section 2945.71(E) of the Ohio Revised Code, each day during which the accused is held in jail “in lieu of bail solely on the pending charge” shall be counted as three days. *State v. MacDonald*, 48 Ohio St. 2d 66, paragraph one of the syllabus (1976).

{¶12} If a trial court fails to bring an accused to trial within the time permitted by Section 2945.71, the accused “shall be discharged” and “such discharge is a bar to any further criminal proceedings against him based on the same conduct.” R.C. 2945.73(B),(D). According to the statute, various events, such as a delay necessitated by any motion filed by the accused, will toll the time and extend the period within which the accused may be brought to trial. R.C. 2945.72.

{¶13} An accused may also waive his speedy trial rights as long as the waiver is knowingly and voluntarily made. *State v. Kovacek*, 9th Dist. No. 00CA007713, 2001 WL 577664 at *4 (May 30, 2001) (citing *State v. King*, 70 Ohio St. 3d 158, 160 (1994)). Such a waiver may be limited in duration, but “a waiver that expressly waives the accused’s right to a speedy trial under the statute without mentioning a specific time period is unlimited in duration.” *Id.* (citing *State v. O’Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus (1987)). This Court has further held that, “when a waiver fails to include a specific date as the starting point for the tolling of time, the waiver is deemed to be effective from the date of arrest.” *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8 (citing *State v. Harris*, 9th Dist. No. 95CA006275, 1996 WL 625222 at *3 (Oct. 30, 1996) (citing *State v. Baugh*, 9th Dist. No. 95CA006124, 1996 WL 37726 at *2 (Jan. 31, 1996))).

{¶14} “Once an accused has executed an express, written waiver of unlimited duration, [he] is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.” *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8 (quoting *O’Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus). Thus, once an accused revokes his unlimited waiver, the strict requirements of Sections 2945.71 et seq. of the Ohio

Revised Code no longer apply. See *O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus; *State v. Carr*, 2d Dist. No. 22603, 2009-Ohio-1942, at ¶31; *In re Fuller*, 9th Dist. No. 16824, 1994 WL 700086 at *3 (Dec. 14, 1994).

{¶15} According to Mr. Skorvanek, he was arrested on March 29, 2004, was released after posting bond the next day, but was arrested again on May 19, 2004, and held until after he was indicted in the second case. The State has asserted that Mr. Skorvanek was arrested on April 1, 2004, and held until he posted bond the following April. The appellate record is unclear regarding a precise date of arrest, but does support the proposition that, once arrested, Mr. Skorvanek was subject to either incarceration or bond requirements until after his second indictment on June 2, 2004. See *State v. Azbell*, 112 Ohio St. 3d 300, 2006-Ohio-6552, at syllabus.

{¶16} Using Mr. Skorvanek's earlier arrest date, 1463 days passed between the time he was arrested and the time he pleaded no contest on March 31, 2008. As Mr. Skorvanek has demonstrated a prima facie violation of his speedy trial rights, it is the State's burden to prove that valid exceptions sufficiently extended the time so as to avoid a violation of Mr. Skorvanek's speedy trial rights. See *State v. Gaines*, 9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶12.

{¶17} Initially, the State has pointed to various waivers of speedy trial rights signed by Mr. Skorvanek or his counsel. Mr. Skorvanek has not challenged the validity or sufficiency of any of the waivers. Instead, he has argued that each waiver remained effective only from the date it was signed "until the next event occur[red]" because the trial court habitually asked for a new waiver at each court appearance. Mr. Skorvanek has acknowledged that this Court has held that an unlimited waiver remains in effect until it is revoked, but has argued that "common sense" demands a different result under the facts of this case.

{¶18} This Court has repeatedly held that “[a] waiver that expressly waives the accused's right to a speedy trial under the statute without mentioning a specific time period is unlimited in duration.” *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8 (quoting *State v. Kovacek*, 9th Dist. No. 00CA007713, 2001 WL 577664 at *4 (May 30, 2001) (citing *State v. O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus (1987))). The Ohio Supreme Court has held that, “[f]ollowing an express, written waiver of unlimited duration . . . the accused is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial” *O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus. This Court has also specifically rejected the argument that unlimited waivers are effective only until the next court date. *State v. Smith*, 9th Dist. No. 98CA007144, 1999 WL 1260872 at *3-4 (Dec. 22, 1999). There is nothing about the trial court’s procedure in this case that compels a contrary conclusion.

{¶19} At a hearing on June 11, 2004, Mr. Skorvanek signed a form journal entry. Directly above the signature line, the form included the words: “DEFENDANT WAIVES STATUTORY TIME FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 et[] seq.” The waiver language did not contain a beginning or an ending date so it was unlimited in duration and dated back to the time of Mr. Skorvanek’s arrest. See *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8-9. Thus, his charges could not be discharged under Section 2945.73(B) for delay in bringing him to trial until after he filed his formal, written objection and demand for trial on February 1, 2007. See *State v. O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus (1987).

{¶20} Mr. Skorvanek has also argued that his speedy trial time on this case should not have been tolled while the State appealed the dismissal of the subsequently indicted case. This

argument need not be addressed in light of the fact that Mr. Skorvanek's unlimited waiver of June 2004 remained in effect the entire time case number 05CR067480 was before this Court. See *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69 (decided January 11, 2006).

A REASONABLE TIME

{¶21} The Ohio Supreme Court has held that if an accused has signed an express, unlimited waiver, the state must bring him to trial "within a reasonable time" after he files a formal, written objection and demand for trial. *State v. O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus (1987). In this case, 423 days passed between Mr. Skorvanek's demand for trial and his change of plea hearing. The State has argued that this period of time was significantly reduced by tolling events chargeable to Mr. Skorvanek under Section 2945.72 of the Ohio Revised Code. According to the State, Mr. Skorvanek's speedy trial rights were not violated because it used less than the statutorily permissible 270 days to bring him to trial after his written objection and demand for trial.

{¶22} On this point, Mr. Skorvanek has simply quoted his lawyer's oral motion to dismiss made to the trial court on March 31, 2008. He has not offered any argument to bolster his trial lawyer's assertion that the triple-count provision applied, nor has he argued that an unreasonable period of time passed between his demand for trial and the date of his plea. This Court has repeatedly held that "[i]t is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." E.g., *State v. Ashby*, 9th Dist. No. 06CA0077-M, 2007-Ohio-3118, at ¶26 (quoting *State v. Taylor*, 9th Dist. No. 2783-M, 1999 WL 61619 at *3 (Feb. 9, 1999)). Mr. Skorvanek has relied on his trial lawyer's oral motion and that is the argument this Court will consider.

{¶23} Mr. Skorvanek based his oral motion on the mistaken assertion that he was entitled to three-for-one credit beginning on October 5, 2006, when his bond was revoked. According to Mr. Skorvanek, he was initially arrested and indicted for one count of trafficking in heroin in this case. Nine months later, he was indicted in case number 05CR067480 on two counts of trafficking in heroin, possession of criminal tools, permitting drug abuse, and various other charges. Mr. Skorvanek unsuccessfully argued to this Court that those two indictments arose from the same incident because they arose from one on-going investigation. This Court has previously ruled that the two indictments arose from separate facts and offenses committed on different dates. *State v. Skorvanek*, 9th Dist. No. 05CA008743, 2006-Ohio-69, at ¶14. There is nothing in the record indicating that the cases were consolidated prior to the day that Mr. Skorvanek pleaded no contest. The charges arose separately, were indicted separately, and were treated as separate cases throughout the course of litigation. Thus, Mr. Skorvanek was not being held in jail “solely” on the pending charge in this case from the time of his second indictment until the resolution of both cases on March 31, 2008. See *State v. MacDonald*, 48 Ohio St. 2d 66, paragraph one of the syllabus (1976). As his unlimited waiver dated back to the date of his arrest in this case, and he was held on at least two separate cases between the time of his second indictment and his plea, Mr. Skorvanek was never entitled to take advantage of the triple-count provision of Section 2945.71(E). *State v. Kaiser*, 56 Ohio St. 2d 29, paragraph two of the syllabus (1978).

{¶24} Mr. Skorvanek’s argument fails to acknowledge the effect of the unlimited waiver he signed in June 2004. Regardless of any subsequent waivers, time did not begin to run against the State until Mr. Skorvanek filed his written objection and demand for trial in February 2007. See *State v. O’Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus (1987).

{¶25} The question for this Court is whether the 423 days between the demand for trial and the plea was a constitutionally reasonable period of time under the circumstances. See *O'Brien*, 34 Ohio St. 3d 7, at paragraph two of the syllabus. The State has argued that the time was reduced to 255 days by tolling events chargeable to Mr. Skorvanek under Section 2945.72 of the Ohio Revised Code. According to the State, Mr. Skorvanek's speedy trial rights were not violated because, by its calculation, it used less than the statutory 270 days to bring him to trial. Although relevant as a guide to what may be considered reasonable, the strict requirements of the statutes are not applicable because Mr. Skorvanek signed, and later revoked, an unlimited waiver. See *id.*; see also *State v. Carr*, 2d Dist. No. 22603, 2009-Ohio-1942, at ¶31; *In re Fuller*, 9th Dist. No. 16824, 1994 WL 700086 at *3 (Dec. 14, 1994).

{¶26} The Ohio Supreme Court has applied a balancing test first set out by the United States Supreme Court to determine whether an accused has been brought to trial within a constitutionally reasonable time. *State v. O'Brien*, 34 Ohio St. 3d 7, 10 (1987) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The court should consider at least four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *Id.* (quoting *Barker*, 407 U.S. at 530). The court must weigh these factors together with any other relevant circumstances. *State v. Gaines*, 9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶16.

{¶27} In reference to the first factor, the Ohio Supreme Court has held that, “[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *State v. O'Brien*, 34 Ohio St. 3d 7, 10 (1987) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). “Generally, delays over one year are presumptively prejudicial.” *State v. Untied*, 5th Dist. No. 00CA32, 2001 WL 698024 at *5 (June 5, 2001)

(citing *State v. Kelly*, 101 Ohio App. 3d 700 (1995)); see *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)). In this case, Mr. Skorvanek pleaded no contest 423 days after he objected to the waiver and demanded a trial. As the total delay is sufficient to trigger the *Barker* inquiry, the Court must consider: “whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay’s result.” *Doggett*, 505 U.S. at 651. The delay of 423 days after the trial demand is uncommonly long as it is more than one and a half times the statutory maximum for a felony prosecution.

{¶28} As discussed above, however, Mr. Skorvanek was responsible for much of the delay. After he revoked his waiver, Mr. Skorvanek moved, pro se, to compel the staff of the Lorain County Correctional Facility to give him an oversized envelope. He also moved to dismiss his lawyer and have another appointed, and he requested an evaluation of his competency to stand trial. Later, at a final pre-trial five days before the scheduled trial, Mr. Skorvanek’s new lawyer moved for a two-week continuance. Thus, the State was responsible for just over half of the delay, for a total of 243 days. This factor weighs slightly in favor of Mr. Skorvanek.

{¶29} The third prong of the test requires consideration of when the accused asserted his right to a speedy trial. If Mr. Skorvanek had been entitled to the triple count benefit while incarcerated, as he has argued, then the State would have had only 90 days to bring him to trial. Yet, during the entire 423-day delay after his trial demand, Mr. Skorvanek never moved for dismissal based on a violation of his speedy trial rights until the day he pleaded no contest. “The accused’s failure to affirmatively assert constitutional speedy trial rights is to be accorded heavy evidentiary weight, and can prove fatal to a claim of constitutional violation.” *State v. Gaines*,

9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶18 (quoting *State v. Harris*, 9th Dist. No. 95CA006275, 1996 WL 625222 at *5 (Oct. 30, 1996)). This factor weighs heavily in favor of the State.

{¶30} Finally, the test requires consideration of prejudice to the defendant that may have resulted from the delay. “In evaluating the fourth factor . . . , prejudice to the defendant, three interests must be considered: prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the accused, and limitation of the possibility that the defense will be impaired.” *State v. Lagway*, 9th Dist. No. 16531, 1994 WL 463538 at *2 (Aug. 24, 1994); see also *Doggett v. United States*, 505 U.S. 647, 654 (1992). Mr. Skorvanek has not argued that, during the delay, he suffered excessive anxiety or concern over the single fourth-degree-felony charge at issue in this case. He also has not argued that he suffered oppressive pretrial incarceration. Indeed, such an argument would be difficult to support in light of the fact that he was not being held solely on this pending charge. Mr. Skorvanek was jailed on charges in at least two cases for the entire 423 days. Although the record is not clear, it appears that he also faced additional charges following his October 2006 arrest that caused his bond to be revoked in this case. There is some indication in the file that he began serving a sentence in a different case at least seven months before his plea in this case. Thus, pretrial incarceration was not oppressive and does not appear to have caused Mr. Skorvanek any undue anxiety or concern.

{¶31} Mr. Skorvanek has not argued that his incarceration during the delay prejudiced the quality of his defense, nor does the record reveal any evidence of prejudice. Mr. Skorvanek has not presented this Court with any argument regarding how the delay was unreasonable, except to say that it exceeded the statutory maximum. Considering the effect of the unlimited

waiver, however, the delay of 243 days attributable to the State was within the statutory 270 day limit. See R.C. 2945.71(C)(2).

{¶32} Although the government’s negligence in bringing a case to trial can weigh against the State even in the absence of demonstrable prejudice to the defendant, the facts of this case do not support that assessment. See *Doggett v. United States*, 505 U.S. 647, 657 (1992). The record does not contain evidence of an “egregious persistence [on the part of the State] in failing to prosecute” Mr. Skorvanek. *Id.* In fact, there is no evidence in the record tending to prove that the State was responsible for the continuances that were not directly attributable to Mr. Skorvanek. In the absence of any prejudice, alleged or actual, this factor weighs slightly in favor of the State.

{¶33} Balancing the relevant factors, the delay attributable to the State was constitutionally reasonable, under the circumstances of this case. The trial court correctly denied Mr. Skorvanek’s motion to dismiss. His sole assignment of error is overruled.

CONCLUSION

{¶34} The trial court correctly denied Mr. Skorvanek’s motion to dismiss because the State did not violate his speedy trial rights. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

PATRICK M. FARRELL, attorney at law, for appellant.

DENNIS WILL, prosecuting attorney and MARY R. SLANCZKA, assistant prosecuting attorney, for appellee.