[Cite as *State v. Troutman*, 2010-Ohio-39.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. RANDELL C. TROUTMAN Appellant	C. A. No. 09CA009590 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05CR069393

DECISION AND JOURNAL ENTRY

Dated: January 11, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} The Grand Jury indicted Randell Troutman on two counts of receiving stolen property and one count of possession of criminal tools, allegedly for use in stealing tires from motor vehicles. Mr. Troutman moved to suppress evidence obtained from a global positioning system that the police had attached to his co-defendant's van, but the trial court denied his motion. After the court refused to dismiss the charges on speedy trial grounds, Mr. Troutman pleaded no contest. The court found him guilty and sentenced him to two years of community control. Mr. Troutman has appealed, arguing that the counts of the two indictments against him did not allege a culpable mental state, that the trial court did not properly advise him before accepting his plea, that the court incorrectly denied his motion to suppress, and that the State violated his speedy trial rights. This Court affirms in part because the indictment counts did include culpable mental states and the State did not violate Mr. Troutman's speedy trial rights.

But it reverses in part because there were not enough facts in the record for the trial court to determine Mr. Troutman's motion to suppress without a hearing and the court did not advise him of all the rights he was waiving before accepting his no-contest plea.

FACTS

{¶2} On March 2, 2006, the Grand Jury indicted Mr. Troutman, alleging that he received stolen property on or about October 22, 2005. That same day, it issued a separate indictment, alleging that he received stolen property and possessed criminal tools on or about October 30, 2005. Mr. Troutman signed a waiver of his statutory right to a speedy trial in both cases, which were later consolidated.

{¶3} On March 28, 2007, Mr. Troutman moved to suppress the evidence against him, relying on arguments made by his co-defendant, John Dalton. The motion was set for hearing, but the hearing was postponed six times at Mr. Troutman's request. On November 19, 2007, the trial court denied Mr. Troutman's motion without a hearing, explaining that, because the motion raised only questions of law, a hearing was unnecessary.

{¶4} Mr. Troutman's cases were set for trial, but the date was postponed several times. On November 14, 2008, he moved to dismiss on speedy trial grounds. On November 20, 2008, he formally withdrew his speedy trial waiver. On November 26, 2008, the trial court denied his motion to dismiss. On January 6, 2009, Mr. Troutman again moved to dismiss on speedy trial grounds. On February 2, 2009, the court held a hearing on the motion and denied it, and Mr. Troutman changed his plea to no contest. On March 26, 2009, the court sentenced him to two years of community control. Mr. Troutman has assigned five errors on appeal.

CULPABLE MENTAL STATE

{¶5} Mr. Troutman's first assignment of error is that the indictments were deficient because the counts did not allege a culpable mental state. Under Ohio law, a person is not guilty of an offense unless "[t]he person [has] the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." *State v. Lester*, 123 Ohio St. 3d 396, 2009-Ohio-4225, at ¶13 (quoting R.C. 2901.21(A)(2)).

{¶6} The Grand Jury indicted Mr. Troutman for receiving stolen property under Section 2913.51(A) of the Ohio Revised Code and possession of criminal tools under Section 2923.24(A). Section 2913.51(A) provides that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." Section 2923.24(A) provides that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶7} It appears that Mr. Troutman has misread the indictments. The receiving stolen property counts alleged that he "did receive, retain or dispose of certain . . . property of another . . . knowing or having reasonable cause to believe it had been obtained through commission of a theft offense . . . ." The possession of criminal tools count alleged that he "did possess or have under [his] control any substance, device, instrument, or article . . . with purpose to use it criminally in the commission of a felony . . . ." The counts track the language of the statutes and specify the requisite culpable mental state. Accordingly, they were not deficient. Mr. Troutman's first assignment of error is overruled.

NO-CONTEST PLEA

{¶8} Mr. Troutman's second assignment of error is that the trial court incorrectly accepted his no-contest plea without informing him of all the rights he was waiving. His third assignment of error is that the court failed to tell him the effect of a no-contest plea and to accept the plea from him personally.

{¶9} Regarding Mr. Troutman's second assignment of error, the Ohio Supreme Court has held that, before accepting a no-contest plea, "[a] trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant . . . that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, at syllabus. If the "court fails to strictly comply with this duty, the defendant's plea is invalid." *Id*.

{¶10} The State has conceded that the trial court failed to advise Mr. Troutman that he had the right to confront witnesses and the right against self-incrimination before accepting his no-contest plea. Mr. Troutman, therefore, is correct that his plea was invalid. His second assignment of error is sustained. Reversal on that ground renders Mr. Troutman's third assignment of error moot, and it is overruled on that basis. See App. R. 12(A)(1)(c).

MOTION TO SUPPRESS

{¶11} Mr. Troutman's fourth assignment of error is that the trial court incorrectly denied his motion to suppress. A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. A reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence."

Id. But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

{¶12} The State has argued that the trial court properly denied Mr. Troutman's motion to suppress because he did not have a reasonable expectation of privacy in Mr. Dalton's van. It is correct that, before a defendant can challenge the search of a vehicle as unconstitutional, he must establish that he had a reasonable expectation of privacy in the areas searched. *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978). In *Rakas*, for example, the United States Supreme Court held that the passenger of an automobile, who does not assert a property or possessory interest in the vehicle, does not have a reasonable expectation of privacy in its glove box or the area under his seat. *Id*. at 148.

{¶13} In his motion to suppress, Mr. Troutman argued that all of the evidence the prosecution intended to use "was the fruit of an unconstitutional search and seizure . . . ." In his memorandum in support, Mr. Troutman "adopt[ed] and incorporate[d] by reference" the arguments made by Mr. Dalton in his motion to suppress. According to Mr. Dalton's motion in Lorain County Common Pleas Court case numbers 05CR069429 and 06CR070123, "[o]n or about July 10, 2005, police installed a GPS tracking device on Mr. Dalton's 1983 Ford E150 van by wiring it into the vehicle's electrical system in order to gain information on the travels and locations of the vehicle." Because the court did not hold a hearing on Mr. Troutman's motion to suppress, there are few other details in the record about the search and seizure or the evidence that he sought to suppress.

{¶14} In *Combs v. United States*, 408 U.S. 224 (1972), the FBI seized cases of whiskey that were on Mr. Combs's father's farm because it believed Mr. Combs had stolen them from an interstate shipment. Mr. Combs appealed the trial court's denial of his motion to suppress, but the court of appeals did not reach the merits, holding that Mr. Combs could not challenge the legality of the seizure because he had not asserted a "possessory or proprietary claim to the searched premises." *Id*. at 226-27 (quoting *U.S. v. Combs*, 446 F.2d 515, 516 (6th Cir. 1971), vacated, 408 U.S. 224 (1972)). The Supreme Court vacated the court of appeals' judgment, noting that Mr. Combs's "failure to make any such assertion, either at the trial or at the pretrial suppression hearing, may well be explained by the related failure of the Government to make any challenge in the District Court to petitioner's standing to raise his Fourth Amendment claim." *Id*. at 227. It also wrote that, "[i]n any event, the record now before us is virtually barren of the facts necessary to determine whether petitioner had an interest in connection with the searched premises . . . ." *Id*.

{¶15} The State did not argue to the trial court that Mr. Troutman did not have a reasonable expectation of privacy in the van with the global positioning system. Mr. Troutman, therefore, did not have an opportunity to respond to that argument or present any evidence demonstrating that he had a property or possessory interest in the van. Furthermore, because the court did not hold a hearing on the motion to suppress and the cases did not go to trial, there is insufficient information in the record from which to determine that question.

{¶16} It would be unnecessary to remand this matter for development of the expectation of privacy issue if Mr. Troutman's claim failed as a matter of law. As this Court determined in Mr. Dalton's case, however, because the trial court did not hold a hearing on the motion to suppress, there is insufficient evidence in the record from which to determine whether the

attachment of the global positioning system to the van was an illegal seizure. *State v. Dalton*, 9th Dist. No. 09CA009589, 2009-Ohio-6910, at ¶18. Because the merits of Mr. Troutman's argument cannot be determined from the record, his assignment of error is sustained and this matter is remanded so that the trial court can hold a hearing on the motion to suppress.

SPEEDY TRIAL

{¶17} Mr. Troutman's fifth assignment of error is that the trial court incorrectly denied his motion to dismiss for lack of a speedy trial. He has argued that the State violated his statutory and constitutional rights to a speedy trial by waiting almost three years after the Grand Jury indicted him to bring him to trial.

{¶18} "The right of an accused to a speedy trial is recognized by the Constitutions of both the United States and the State of Ohio." *State v. Pachay*, 64 Ohio St. 2d 218, 219 (1980). "The statutory speedy trial provisions, R.C. 2945.71 et seq., constitute a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor . . . ." *Id*. at syllabus. Accordingly, "for purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 *et seq.* and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." *State v. O'Brien*, 34 Ohio St. 3d 7, 9 (1987). "[T]he constitutional guarantees may be found to be broader than [the] speedy trial statutes in some circumstances." *Id*.

{¶19} Section 2945.71(C)(2) of the Ohio Revised Code provides that "[a] person against whom a charge of felony is pending . . . [s]hall be brought to trial within two hundred seventy days after the person's arrest." "[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). "Upon motion made at

or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by [R.C. 2945.71]." R.C. 2945.73(B).

{¶20} The State has argued that it did not violate Section 2945.71 because Mr. Troutman signed a number of unlimited waivers of his speedy trial rights. "It is well-settled law that an accused may waive his constitutional right to a speedy trial provided that such a waiver is knowingly and voluntarily made." *State v. King*, 70 Ohio St. 3d 158, 160 (1994) (citing *Barker v. Wingo*, 407 U.S. 514, 529 (1972)). "To be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record." *Id*. at syllabus.

{¶21} Mr. Troutman has argued that the waivers he signed only waived his statutory rights. The waivers indicated that "defendant waives statutory time for speedy trial pursuant to RC 2945.71 et. seq." The Ohio Supreme Court has held, however, that "a knowing, voluntary, express written waiver of an accused's statutory speedy trial rights may equate with a waiver of the coextensive constitutional rights, at least for the time period provided in the statute." *State v. O'Brien*, 34 Ohio St. 3d 7, 9 (1987). In *O'Brien*, for example, the Supreme Court concluded that Mr. O'Brien had knowingly and voluntarily waived his constitutional right to a speedy trial even though the written waiver he signed only specifically mentioned his statutory right under Section 2945.71. *Id*. at 8.

{¶22} During the hearing on his motion to dismiss, Mr. Troutman told the court that he thought he had to sign the forms with the waiver language to prove that he had appeared for the pretrial conferences. He also said he had been under duress on some of the occasions. The court rejected his arguments, concluding that he had "waived his right to a speedy trial" and that his "waiver was not defective."

{¶23} A review of the record shows that Mr. Troutman originally faced charges in Avon Lake Municipal Court. Mr. Troutman signed a waiver in that court indicating that he had been "advised . . . of [his] constitutional right to a speedy trial and to have this case tried within the time prescribed in [R.C.] 2945.71." He indicated that he "voluntarily and expressly waive[d] those rights, as evidenced . . . by [his] signature." After the charges were bound over to the Grand Jury, Mr. Troutman signed speedy trial waivers on at least seventeen separate occasions. Each time he signed his name immediately below waiver language that was in all capital letters. The waiver forms do not contain any language suggesting that they were for attendance purposes. Furthermore, in November 2008, Mr. Troutman filed a notice withdrawing his speedy trial waiver, suggesting that he believed he had an effective waiver in place at that time. See *State v. Dobbins*, 9th Dist. No. 08CA009498, 2009-Ohio-2079, at ¶17. This Court, therefore, concludes that the trial court correctly determined that Mr. Troutman knowingly and voluntarily waived his constitutional and statutory speedy trial rights.

{¶24} If a speedy trial waiver does not mention a specific time period, it is unlimited in duration. *State v. Skorvanek*, 9th Dist. No. 08CA009399, 2009-Ohio-3924, at ¶13 (citing *State v. Kovacek*, 9th Dist. No. 00CA007713, 2001 WL 577664 at *4 (May 30, 2001)). In addition, if it "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." *Id*. (quoting *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8). "Following an express, written waiver of unlimited duration by an accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused 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. O'Brien*, 34 Ohio St. 3d 7, paragraph two of the syllabus (1987). "[O]nce an accused revokes his

unlimited waiver, the strict requirements of Sections 2945.71 et seq. of the Ohio Revised Code no longer apply." *Skorvanek*, 2009-Ohio-3924, at ¶14.

{¶25} The speedy trial waivers that Mr. Troutman signed did not mention a start date or any other time limitation. On November 20, 2008, he formally withdrew his speedy trial waiver and requested that a trial be scheduled as soon as possible. The question for this Court, therefore, is whether the State brought Mr. Troutman to trial within a reasonable time after his written demand for trial.

{¶26} To determine whether Mr. Troutman was brought to trial within a reasonable time, this Court applies the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. O'Brien*, 34 Ohio St. 3d 7, 10 (1987). It must 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). It must weigh those factors together with any other relevant circumstances. *State v. Gaines*, 9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶16.

{¶27} "The initial consideration is that of the specific delay occasioned by the state. 'Until 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)). In *O'Brien*, the Ohio Supreme Court determined that a 138-day delay that was attributable to the State, during which time Mr. O'Brien was free on his own recognizance, was not "presumptively prejudicial." *Id*. (quoting *Barker*, 407 U.S. at 530).

{¶28} Mr. Troutman pleaded no contest 74 days after he revoked his speedy trial waiver. Because of his motions to dismiss, only 41 of those days are attributable to the State. This Court

concludes that the delay was not presumptively prejudicial. See *In re Fuller*, 9th Dist. No. 16824, 1994 WL 700086 at *3 (Dec. 14, 1994) ("we do not regard a seventy-two day period of delay following reassertion of the right to a speedy trial to be 'presumptively prejudicial.'"); see also *State v. Howard*, 7th Dist. No. 06-MA-31, 2007-Ohio-3170, at ¶26 (concluding that 63-day delay after revocation of speedy trial waiver was not presumptively prejudicial); *State v. Boles*, 2d Dist. No. 18762, 2003-Ohio-2693, at ¶2-3, 27 (concluding that 179-day delay between withdrawal of speedy trial waiver and defendant's no-contest plea was not presumptively prejudicial). Because the delay was not presumptively prejudicial, it is unnecessary to examine the other *Barker* factors. *State v. O'Brien*, 34 Ohio St. 3d 7, 10 (1987). The trial court properly concluded that the State did not violate Mr. Troutman's speedy trial rights. Mr. Troutman's fifth assignment of error is overruled.

CONCLUSION

{¶29} The trial court correctly concluded that the indictments were not deficient and that Mr. Troutman was not deprived of his speedy trial rights. It incorrectly failed to hold a hearing on Mr. Troutman's motion to suppress or advise him of all the rights he was waiving before accepting his no-contest plea. The judgment of the Lorain County Common Pleas Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

PAUL MANCINO, JR., attorney at law, for appellant.

DENNIS WILL, prosecuting attorney, and BILLIE JO BELCHER, assistant prosecuting attorney, for appellee.