[Cite as *State v. Wheeler*, 2016-Ohio-4690.]

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

STATE OF OHIO	C.A. No. 15AP0025
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
QUON D. WHEELER	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 2014 CRC-I 000203

DECISION AND JOURNAL ENTRY

Dated: June 30, 2016

MOORE, Presiding Judge.

{¶1} Defendant, Quon D. Wheeler, appeals from his conviction in the Wayne County Court of Common Pleas. We affirm in part, vacate in part, and remand this matter for further proceedings consistent with this decision.

I.

{¶2} On May 17, 2014, an indictment was filed charging Mr. Wheeler with two counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1), felonies of the fifth degree. Mr. Wheeler initially pleaded not guilty to the charges. Thereafter, he filed a motion to dismiss the indictment on the basis that the State failed to bring him to trial within the time limits prescribed in R.C. 2945.71(C)(2). The trial court denied the motion. Mr. Wheeler changed his plea to no contest. In an entry dated June 9, 2015, the trial court found Mr. Wheeler guilty of both charges and sentenced him to ten months of incarceration on each count, to be served consecutively. Mr.

Wheeler timely appealed from the sentencing entry, and he now presents two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED BY DENYING MR. WHEELER'S MOTION TO DISMISS, AS THE TIME FOR TRYING MR. WHEELER HAD RUN OUT UNDER [R.C.] 2945.71(C)(2).

{¶3} In his first assignment of error, Mr. Wheeler argues that the trial court erred by denying Mr. Wheeler's motion to dismiss for violation of the statutory time within which to bring him to trial. We disagree.

{¶4} R.C. 2945.73(B) provides that "[u]pon 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 sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.71(C)(2) 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." The time within which an accused must be brought to trial may be extended as provided in R.C. 2945.72.

{¶5} In support of his argument that the State exceeded the speedy trial time here, Mr. Wheeler relies on the Ohio Supreme Court decision in *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, at syllabus, for the proposition that his speedy trial time began to run when his indictment was filed on May 17, 2014. As of the time that Mr. Wheeler filed his motion to dismiss in the trial court, three hundred eleven days had passed since the filing of his indictment. Mr. Wheeler maintains that only twenty-seven of those days were attributable to him. Accordingly, he maintains that he was not brought to trial within the time limits of R.C. 2945.71, and he established a prima facie case for discharge under R.C. 2945.73(B).

{¶6} However, the clear wording of the statute provides that a person against whom a charge of a felony "is *pending*" must be brought to trial "within two hundred seventy *days after the person's arrest*." (Emphasis added.) R.C. 2945.71(C)(2). In *Azbell*, the Ohio Supreme Court considered what constituted "pending" for purposes of R.C. 2945.71, and whether an arrest, where no charge was "pending[,]" would commence the speedy trial time. *Azbell* at ¶ 1, 9, and syllabus. The Court determined that the Sixth Amendment and the speedy trial statute required that charges be "pending" *for the arrest* to commence the speedy trial time. *See id.* at ¶ 19-21, and *id.* at ¶ 30 (O'Donnell, J. concurring). The *Azbell* syllabus does not, as Mr. Wheeler argues, define the date on which the statutory speedy trial time commences. *See id.* Instead, in the syllabus, the *Azbell* Court sets forth the circumstances that would meet the "pending" requirement of the speedy trial statute. The statute sets forth that, where felony charges are pending, the accused must be brought to trial within two hundred seventy days "after the person's arrest." R.C. 2945.71(C)(2); *State v. Browand*, 9th Dist. Lorain No. 06CA009053, 2007-Ohio-4342, ¶ 12 ("Time is calculated to run the day after the date of arrest."); Crim.R. 45(A). Here, there is no dispute that, as calculated from the day after Mr. Wheeler's arrest, there existed no speedy trial violation under R.C. 2945.71(C)(2).

{¶7} Mr. Wheeler further argues that the delay between the indictment and the arrest was unreasonable, and thus cannot serve to toll the speedy trial time. However, having concluded that Mr. Wheeler's case proceeded within the time limitation imposed under R.C. 2945.71(C)(2), we need not address arguments relative to the tolling of that time.

{¶8} Accordingly, Mr. Wheeler's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE PRISON TERMS WITHOUT MAKING THE FINDINGS REQUIRED BY [R.C.] 2929.14(C)(4).

{¶9} In his second assignment of error, Mr. Wheeler argues that the trial court erred in imposing consecutive prison terms on Mr. Wheeler without making the requisite findings under R.C. 2929.14(C)(4). We agree.

{¶10} R.C. 2929.14(C)(4) provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶11} R.C. 2953.08(A)(4) provides that a "defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant" where the sentence is contrary to law. R.C. 2953.08(G)(2) provides:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

See also State v. Marcum, Slip Opinion No. 2016-Ohio-1002, ¶ 7. Generally, if the trial court fails to make the statutorily required findings pursuant to R.C. 2929.14(C)(4) at the sentencing hearing, its imposition of a consecutive sentence is contrary to law. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 37; *see also State v. Sergent*, Slip Opinion No. 2016-Ohio-2696, ¶ 1, 42-43 (in the context of a *jointly-recommended* sentence a trial court is not required to make consecutive-sentence findings under R.C. 2929.14(C)(4)).

{¶12} Here, the trial court ordered that Mr. Wheeler's sentences on the two counts of trafficking be served consecutively. Although the trial court addressed some of the required findings in the sentencing entry in the context of imposing a prison term under R.C. 2929.11, at the sentencing hearing, the trial court only generally discussed Mr. Wheeler's prior criminal record when imposing the consecutive sentence and did not make the statutory findings required by R.C. 2929.14(C)(4). Accordingly, we sustain Mr. Wheeler's second assignment of error, vacate his sentence, and remand the matter to the trial court for resentencing. *See State v. Colburne*, 9th Dist. Summit No. 27553, 2015-Ohio-4348, ¶ 24-25.

III.

{¶13} Mr. Wheeler's first assignment of error is overruled. Mr. Wheeler's second assignment of error is sustained. The judgment of the trial court is affirmed in part, and vacated

in part, and this matter is remanded to the trial court for further proceedings consistent with this decision.

Judgment affirmed in part,
vacated 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 Wayne, 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(C). 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 equally to both parties.

CARLA MOORE
FOR THE COURT

HENSAL, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

PATRICK L. BROWN, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.