

[Cite as *State v. Moore*, 2014-Ohio-4436.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

)

)

PLAINTIFF-APPELLANT,

)

)

CASE NO. 14 MA 2

V.

)

)

OPINION

RANDOLPH MOORE,

)

)

DEFENDANT-APPELLEE.

)

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 2013CR1167

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellant

Paul Gains  
Prosecutor  
Ralph Rivera  
Assistant Prosecutor  
21 West Boardman St., 6<sup>th</sup> Floor  
Youngstown, Ohio 44503-1426

For Defendant-Appellee

Attorney Ronald Yarwood  
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JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite

Dated: September 25, 2014

[Cite as *State v. Moore*, 2014-Ohio-4436.]  
DONOFRIO, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from the Mahoning County Common Pleas Court judgment dismissing a charge of unlawful sexual conduct with a minor against defendant-appellee Randolph Moore on speedy-trial grounds.

{¶2} Moore was on parole and under the supervision of the Adult Parole Authority for convictions of unlawful sexual conduct with a minor. Moore's parole officer, James Corrin learned that Moore was having unlawful sexual conduct with the same minor in Boardman, Ohio. On August 28, 2013, Officer Corrin and Sgt. Glen Riddle of the Boardman Police Department took Moore into custody, interviewed him, and placed him in jail for a parole violation.

{¶3} On September 4, 2013, Sgt. Riddle charged Moore with unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(1), a fourth-degree felony. He and Officer Corrin then went to the jail and booked Moore on the new charge.

{¶4} Moore's initial appearance was held in Mahoning County Court Area No. 2 in Boardman, Ohio, on September 5, 2013. At his initial appearance, Moore indicated that he did not wish to waive the time within which to have his preliminary hearing and that he would hire his own counsel. Accordingly, the court scheduled Moore's preliminary hearing for September 10, 2013.

{¶5} On September 10, 2013, Moore again appeared in Mahoning County Court Area No. 2. Notably, Moore appeared without counsel. Perhaps due to his failure to retain counsel, it does not appear that the trial court conducted Moore's preliminary hearing at that time. Instead, Moore executed an affidavit of indigency, the court found him to be indigent and ordered the appointment of counsel. This time, Moore did agree to waive his right to have a preliminary hearing within the time limits required by Crim.R. 5 (ten days for a defendant in custody) and the court rescheduled the preliminary hearing for October 29, 2013.

{¶6} Moore appeared in Mahoning County Court Area No. 2 for his preliminary hearing on October 29, 2013, this time with counsel. Instead of having the hearing, Moore waived his right to a preliminary hearing and consented to being

bound over to the Mahoning County Common Pleas Court.

{¶17} On November 21, 2013, a Mahoning County grand jury indicted Moore on two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(1), fourth-degree felonies. On December 3, 2013, Moore was arraigned in Mahoning County Common Pleas Court. Moore pleaded not guilty, bond was continued, Moore was again appointed counsel, and the court set the case for trial on December 9, 2013.

{¶18} On December 9, 2013, Moore filed a motion for discharge pursuant to R.C. 2945.73 (discharge for delay in trial). The argument advanced by Moore's trial counsel was premised entirely on his incorrect assertion that Moore's speedy-trial clock began to run when he was placed in jail on August 28, 2013. Based on that premise, Moore's trial counsel argued that the first date set for the preliminary hearing, September 10, 2013, fell 13 days following his arrest and in violation of the 10-day rule prescribed for a preliminary hearing in Crim.R. 5, thereby rendering Moore's waiver of the time within which to have the preliminary hearing ineffectual. The state filed a memorandum contra the following day. Without any explanation or reasoning, the trial court sustained Moore's motion on December 13, 2013. This state's appeal followed.

{¶19} The state raises a single assignment of error that states:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED DEFENDANT'S INDICTMENT PURSUANT TO R.C. 2945.73(B), BECAUSE COMPETENT AND CREDIBLE EVIDENCE ESTABLISHED THAT DEFENDANT'S SPEEDY TRIAL CLOCK DID NOT REACH THE 90th DAY AFTER HE WAIVED THE TIME PERIOD TO HOLD A PRELIMINARY HEARING PURSUANT TO CRIMINAL RULE 5.

{¶10} The state argues that the trial court abused its discretion when it dismissed Moore's indictment after it found that his right to a speedy trial had been violated. The state contends that Moore's speedy trial clock tolled from September

10, 2013, until October 29, 2013. In response, Moore argues the time between the first and second preliminary hearing dates cannot serve as a tolling event pursuant to R.C. 2945.73(E) and R.C. 2945.73(H) because the delay cannot be attributed to him.

{¶11} Ohio recognizes both a constitutional and a statutory right to a speedy trial. *State v. King*, 70 Ohio St.3d 158, 161, 637 N.E.2d 903 (1994); see also Sixth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution. The Sixth Amendment of the U.S. Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy [trial].” This fundamental right has been codified by the General Assembly as R.C. 2945.71 to 2945.73. The Ohio Supreme Court has held the statutory speedy-trial provisions set forth in R.C. 2945.71 to be coextensive with constitutional speedy-trial provisions. *State v. O’Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987).

{¶12} The time-frame for trial is spelled out by statute based on the defendant’s level of offense. R.C.2945.71. Pursuant to R.C. 2945.71(C)(2), when a person is charged with a felony, such as Moore, they shall be brought to trial within 270 days of their arrest. R.C. 2945.71(C)(2). Additionally, each day an accused is held in jail in lieu of bail counts as 3 days towards the 270-day speedy-trial time limit. R.C. 2945.71(E) (triple-count provision). Moore remained in jail the entire time following his arrest and, thus, pursuant to the triple-count provision, was required to be brought to trial within 90 days.

{¶13} Here, the parties submitted in their written briefs before the trial court that the date of Moore’s arrest was August 28, 2013, for purposes of calculating whether his speedy-trial right was violated. However, as indicated, R.C. 2945.71(C)(2) provides that a person *against whom a charge of felony is pending* shall be brought to trial within 270 days after their arrest. When Moore was taken into custody on August 28, 2013, it was solely for the parole violation, no felony charges had yet been filed. He was not charged or served with any felony charge until September 4, 2013. Therefore, September 4, 2013, is the date that should be used to commence the running of Moore’s speedy trial clock. *State v. Rupp*, 7th Dist. No. 05

MA 166, 2007-Ohio-1561, ¶¶ 101-103 (count begins on the date on which the indictment was served upon the defendant and the fact that the parole violation was based upon the same allegations of the later indictment is irrelevant).

{¶14} Nonetheless, 95 days passed between Moore's being charged with a felony on September 4, 2013, and the trial set for December 9, 2013. Clearly, the 90-day time frame had elapsed.

{¶15} However, an accused may waive either the speedy trial or preliminary hearing time limits. *City of Westlake v. Cougill*, 56 Ohio St.2d 230, 233, 383 N.E.2d 599 (1978). R.C. 2945.72 provides numerous events that may extend a defendant's time in which he must be brought to trial. For example, pursuant to R.C. 2945.72, a defendant's speedy trial time limits may be extended by "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused" or for "[t]he period of any continuances granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." R.C. 2945.72(E), (H).

{¶16} Any continuances must be reasonable both in purpose and in length. *State v. Martin*, 56 Ohio St.2d 289, 293, 384 N.E.2d 239 (1978). R.C. 2945.72 does not toll the applicable time limit absolutely, but merely extends that time limit by the time necessary in light of the reason for the delay. *State v. Santini*, 144 Ohio App.3d 396, 403, 760 N.E.2d 442 (7th Dist.2001). The reasonableness of the delay is controlled by the particular facts and circumstances of the case. *State v. Saffell*, 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988).

{¶17} Of particular relevance to this appeal is Moore's September 10, 2013 waiver of his right to have his preliminary hearing within the time limits required by Crim.R. 5. The Ohio Supreme Court addressed this specific type of waiver in *State v. Martin*, 56 Ohio St.2d 289, 294, N.E.2d 239 (1978). There, the Court held that "[w]hen, at the request of defendant's counsel, a judge extends the time for a preliminary hearing pursuant to Crim.R. 5(B)(1), this continuance extends the time the defendant is required to be brought to both a preliminary hearing and trial

pursuant to R.C. 2945.72(H).” *Id.*, paragraph two of the syllabus.

{¶18} Like Moore here, *Martin* involved a defendant who waived the statutory time limits for his preliminary hearing. In addition though, the trial court supplemented the record, stating the preliminary hearing was delayed “[d]ue to [the] crowded docket in the Municipal Court and due to the expected length of the preliminary hearing.” *Id.* at 292. The Ohio Supreme Court found this to be a continuance other than on the defendant’s motion. However, as the Ohio Supreme Court explained:

If the defendant had waived the time limit solely on his own initiative, as opposed to accommodating the Municipal Court because of its crowded docket, the defendant’s action would be analogous to the “waiver of time” discussed in *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593, and therefore a “continuance granted on the accused’s own motion” pursuant to the first part of R.C. 2945.72(H).

*Id.* at 294, footnote 2.

{¶19} Here, on the first date set for Moore’s preliminary hearing, September 10, 2013, Moore executed a waiver of his right to have his preliminary hearing within the time limits required by Crim.R. 5. The preliminary hearing was rescheduled for October 29, 2013, at which time Moore ultimately waived his right to a preliminary hearing and consented to having the case bound over to the grand jury. Thus, pursuant to R.C. 2945.72(H) and *Martin*, his speedy trial time was tolled for the 49 days from September 10, 2013, to October 29, 2013.

{¶20} While Moore acknowledges this time period of September 10, 2013, to October 29, 2013, he argues that his speedy-trial time was not tolled during this time period for two reasons. First, he contends that his September 10, 2013 waiver of his right to have his preliminary hearing within the time limits required by Crim.R. 5 was made at the first date set for his preliminary hearing and, thus, *Martin* is inapplicable because *Martin* involved a defendant making the waiver at his initial appearance. Second, he argues that since the record does not reflect why the preliminary hearing

did not take place at the first date set for the hearing on September 10, 2013, the delay in not having the hearing on that date cannot be attributed to him under R.C. 2945.72(H).

{¶21} Moore's arguments in this regard are unpersuasive. First, the Ohio Supreme Court's holding in *Martin* was not confined to a defendant waiving the time within which to have a preliminary hearing at their initial appearance. The Court noted that if a defendant waives the time limit solely on their own initiative, as Moore did here, the defendant's action is a waiver of time and constitutes a continuance granted on the accused's own motion pursuant to the first part of R.C. 2945.72(H). Whether a defendant executes a waiver of the time within which to have his preliminary hearing at his initial appearance or at the first date set for the preliminary hearing is inconsequential to the effect that waiver has on the reasonable amount of time that elapses thereafter until the preliminary hearing actually takes place.

{¶22} Second, the record here is not devoid of any indication as to why the preliminary hearing did not take place as first scheduled on September 10, 2013. At his September 5, 2013 initial appearance, Moore indicated to the trial court that he would be hiring his own counsel. However, at the first date scheduled for his preliminary hearing on September 10, 2013, Moore appeared without counsel and then, for the first time, claimed to be an indigent. Therefore, the record here supports the conclusion that the delay in having the preliminary hearing as first scheduled on September 10, 2013, can be attributed to Moore and his failure to hire his own counsel as he indicated that he would do at his initial appearance.

{¶23} Having determined that the 49-day period of delay to have Moore's preliminary hearing was attributable to Moore and reasonable in purpose, we turn now to whether that period of delay was reasonable in length. As already indicated, reasonableness depends on the facts and circumstances of each particular case. *State v. Saffell*, 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988). It has often been held that reasonable trial delays due to scheduling conflicts, crowded dockets, or the lack of an available courtroom, toll the speedy trial clock. *State v. Nottingham*, 7th Dist.

No. 05 BE 39, 2007-Ohio-3040, ¶ 18, citing *State v. Lee*, 48 Ohio St.2d 208, 210, 357 N.E.2d 1095 (1976).

{¶24} As indicated, in *Martin, supra*, the defendant waived the time within which to have his preliminary hearing. Due to a crowded court docket, the trial court set the preliminary hearing for 34 days later. Although the hearing was twice delayed again for an additional period of 9 days due to a requested continuance by the defendant's counsel and the failure of certain witnesses to appear, the Ohio Supreme Court still found this to be a reasonable delay.

{¶25} In stark contrast to the reasonableness of the 34-day delay occasioned by the trial court in *Martin*, in *State v. Dunlap*, 7th Dist. 01 CA 124, 2002-Ohio-5214, ¶ 19, this court did not take issue with a trial court's determination that a preliminary hearing held 279 days after arrest was unreasonable in light of the fact that the record was devoid of any evidence or reasons as to why it took the municipal court nearly ten months to hold a preliminary hearing. Additionally, in *State v. Clow*, 7th Dist. No. 01 CA 70, 2002-Ohio-1564, ¶ 19, this court specifically held that a 175 day delay between the defendant's waiver of preliminary hearing and date set for preliminary hearing was unreasonable.

{¶26} Here, the 49-day delay is substantially closer to the 34-day delay that the Ohio Supreme Court found to be reasonable in *Martin*. Under the facts and circumstances of this case, there is nothing in the record and there was no explanation offered by the trial court that would support a finding that the time period of the delay was unreasonable.

{¶27} In sum, the 49-day period of delay from September 10, 2013, to October 29, 2013, was attributable to Moore due to his failure to obtain his own counsel as he indicated he would do and his having executed a waiver of time within which to have his preliminary hearing. Under the facts and circumstances of this case, the delay was reasonable in purpose and in length. Therefore, only 46 of the 90 days had elapsed on the speedy-trial clock and the trial court erred in sustaining Moore's motion for discharge based on that basis.



{¶28} Accordingly, the state's sole assignment of error has merit.

{¶29} The judgment of the trial court is reversed, the charge against Moore reinstated, this matter is remanded for further proceedings accordingly to law and consistent with this court's opinion.

Vukovich, J., concurs.

Waite, J., concurs.