[Cite as *State v. McIntire*, 2011-Ohio-1544.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-10-004
Appellee	Trial Court No. CRI-2009-0529
v.	
Norvell T. McIntire	**DECISION AND JUDGMENT**
Appellant	Decided: March 31, 2011

* * * * *

Russell Leffler, Huron County Prosecuting Attorney, and
Dina Shenker, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

HANDWORK, J.

{¶1} This appeal is from the January 26, 2010 judgment of the Huron County Court of Common Pleas, which sentenced appellant, Norvell T. McIntire, after he was convicted by a jury of violating R.C. 2925.03(A)(1) and (C)(4)(b), trafficking in cocaine

in the presence of a minor. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS APPELLANT [SIC] INDICTMENT PURSUANT TO O.R.C. SEC. 2941.401.

{¶3} "II. APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} "III. APPELLANT'S CONVICTIONS WERE [SIC] AGAINST THE SUFFICIENCY OF THE EVIDENCE."

{¶5} Appellant was indicted in a single count indictment on January 4, 2008, and a warrant was issued for his arrest. On April 17, 2009, appellant, acting pro se, filed with the court a Notice of Availability pursuant to R.C. 2941.401 indicating that he was currently imprisoned and was asserting his speedy trial rights under the statute. He also mailed a copy of the notice to the prosecuting attorney at a former address. On June 1, 2009, appellant was transferred from the Mansfield Correctional Institution to the court for arraignment. On that date, counsel was appointed to represent appellant and appellant entered a not guilty plea. Trial was scheduled for September 1, 2009.

{¶6} On August 24, 2009, appellee moved to continue the trial because one of its material witnesses was unavailable to testify on that date. Trial was rescheduled for October 13, 2009. On October 13, 2009, the trial was continued sua sponte by the court

to October 22, 2009, and again on October 19, 2009, the trial was continued sua sponte by the court to November 12, 2009. Appellant was tried on that date and convicted by a jury on November 13, 2009, of the charged offense.

{¶7} Appellant had filed a motion to dismiss the charges against him on October 20, 2009, on the ground that his speedy trial right had been violated. He contended that he should have been brought to trial within 180 days of April 15, 2009 (the day he presumptively mailed the Notice of Availability), i.e., by October 12, 2009. On October 26, 2009, appellant executed a wavier of time limitation from that date until the consented trial date of November 12, 2009. The trial court denied appellant's motion following a hearing on November 9, 2009. In his first assignment of error, appellant argues that that he should have been tried within 180 days of April 17, 2009.

{¶8} A criminal defendant is guaranteed the right to a speedy trial by the Sixth Amendment to the United States Constitution, which was made applicable to the states as a fundamental right by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Kloper v. North Carolina* (1967), 386 U.S. 213, 222-223. The right is also guaranteed by Section 10, Article I of the Ohio Constitution. Furthermore, state legislatures are authorized by *Barker v. Wingo* (1972), 407 U.S. 514, 523, to enact procedural rules or laws consistent with the Constitutional guarantee. Courts strictly enforce statutory speedy trial rights because the speedy trial statutes

protect the constitutional guarantee of a public speedy trial." *State v. Pachay* (1980), 64 Ohio St.2d 218, syllabus.

{¶9} In Ohio, R.C. 2945.71 sets forth the time period in which a defendant must be brought to trial. Generally, if a defendant is incarcerated on an unrelated matter, the speedy trial provisions in R.C. 2945.71 are tolled pursuant to R.C. 2945.72(A). However, if a defendant is incarcerated in a state correctional institution, he may assert his right to be brought to trial within 180 days by complying with the requirements of R.C. 2941.401.

{¶10} R.C. 2941.401 provides that:

{¶11} "When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial *within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition* to be made of the matter, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance. The request of the prisoner *shall be accompanied by a certificate of the warden* or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time served and remaining to be served on the

sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner.

{¶12} "The *written notice and request for final disposition shall be given or sent by the prisoner to the warden* or superintendent having custody of him, *who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.*

{¶13} "The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof.

{¶14} "Escape from custody by the prisoner, subsequent to his execution of the request for final disposition, voids the request.

{¶15} "If the action is not brought to trial within the time provided, subject to continuance allowed pursuant to this section, no court any longer has jurisdiction thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice.

{¶16} "This section does not apply to any person adjudged to be mentally ill or who is under sentence of life imprisonment or death, or to any prisoner under sentence of death." (Emphasis added.)

{¶17} Appellant admits that he did not fully comply with the statute. He mailed the notice himself directly to the court and did not send it by registered or certified mail, return receipt requested. Furthermore, appellant sent the notice by ordinary mail to the prosecutor at a prior address. At arraignment, however, appellant inquired about his speedy trial rights. The prosecutor indicated that they had received a request from the prison on April 30, 2009, and that the state had "108" days from that date to try appellant.

{¶18} At the hearing on the motion to dismiss, the deputy clerk of the Huron County Clerk of Court's office testified that from the file stamp and notation on the "Notice of Availability" document filed by appellant, she could tell that she had filed-stamped the document as received on April 17, 2009, at 2:40 p.m. and would have placed a copy in a special box designated for her personal delivery to the prosecutor's office. She did not, however, recall actually receiving the document or delivering the document to the prosecutor's office. She did recall that she had a note from the court to put the document in a 2005 case file. The prosecution proffered into evidence: 1) a document entitled "Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Information or Complaints" executed on April 30, 2009, by appellant and the prison case manager, which was not file stamped upon receipt, 2) an envelope bearing a return address of Mansfield Correctional Institution with a certified mail sticker that indicated a certified mailing date of May 6, 2009, and 3) a certified mail return receipt indicating the delivery of mail to the Huron County Clerk on May 13, 2009. The court

accepted these documents into evidence despite the fact that none of the documents were authenticated.

{¶19} The trial court found that there was no evidence presented to prove that the prosecutor had received notice of the information that was supplied to the court through appellant's notice. We disagree. There was evidence presented from the clerk that she processed the notice in her customary manner and that the prosecutor would have received a copy of the notice sometime on or after April 17, 2009. Such evidence must be weighed against the statement of the prosecutor at arraignment that he did not receive notice of appellant's incarceration until April 30, 2009, and his documentary evidence that suggests that the warden's notice was received by the prosecution on May 13, 2009.

{¶20} The trial court also found that appellant did not substantially comply with the statutory requirements because he did not send the notice by certified mail and he sent a general notice applicable to all pending cases rather the specific case pending before the court. The court further found that there was no reason to justify appellant's noncompliance with the statute.

{¶21} Pursuant to R.C. 2941.401, the incarcerated defendant is required to give written notice of his desire to invoke his speedy trial rights to the prison warden, who must then forward the notice to the prosecutor and court along with a certificate of inmate status. However, substantial compliance with the statue is satisfactory to give rise to the right of a speedy trial. *State v. Antos*, 8th Dist. No. 88091, 2007-Ohio-415, ¶ 11, and

State v. Gill, 8th Dist. No. 82742, 2004-Ohio-1245, ¶ 23-25. See, also, *Daugherty v. Solicitor for Highland County* (1971), 25 Ohio St.2d 192, and *State v. Ferguson* (1987), 41 Ohio App.3d 306, 311 (involving R.C. 2963.30, a parallel statute for out-of-state or federal prison inmates). The key in such cases is whether the proper parties were provided with the proper information so the prosecution knows the defendant's location and that he intends to invoke his right to a speedy trial. *Daugherty*, supra.

{¶22} In the case before us, the file stamp on appellant notice and the clerk's standard processing of the document, as well as the prosecutor's acknowledged receipt of a notice from the warden, reflect substantial compliance with the statute either as early as April 17, 2009, the date the court notice was filed, or at least by May 13, 2009, the date the prosecutor received notice from the Warden. The fact that appellant failed to send the notice by certified mail, return receipt requested, does not make his notice ineffective. His failure to do so only makes the determination of when the prosecutor received the notice, and thus date the speedy-trial rights were triggered, difficult to prove.

{¶23} Appellant, in his motion to dismiss, and the trial court, at the motion to dismiss hearing, determined that at the earliest the 180 day time-limit would expire on October 12, 2009. The court and appellant both determined this date by beginning their count from the date appellant mailed the notice to the court, April 15, 2009. We find, however, that the speedy-trial time period begins to run from the date the notice was received by the proper court and prosecutor and not the date of mailing. *State v. Cartier*,

5th Dist. No. 10CAA010001, 2010-Ohio-2332, ¶ 29; *State v. Centafanti*, 5th Dist. No. 2007-CA-00044, 2007-Ohio-4036, ¶ 44; *State v. Siniard*, 6th Dist. No. H-03-008, 2004-Ohio-1043, ¶ 11; *State v. Dickerson* (Aug. 31, 2001), 6th Dist. No. E-00-060, at 2; *State v. McGowan* (June 21, 2000), 9th Dist. No. 19989, at 4; *State v. McDonald* (June 30, 1999), 7th Dist. Nos. 97 C.A. 146, 97 C.A. 148, at 3. An exception to this rule has only been made in cases where the incarcerated defendant delivered notice to the warden and the warden never mailed the notice to the court and prosecuting attorney. In that situation, courts have held that the speedy-trial time period began to run from the moment the defendant did everything required of him under the statute to claim his right to a speedy trial. *State v. Colon*, 5th Dist. No. 09-CA-232, 2010-Ohio-2326, ¶ 19, and *State v. Gill*, supra.

{¶24} Assuming arguendo, that appellant's speedy trial rights began to run on April 17, 2009, he should have been brought to trial by October 14, 2009. Appellant asserts that the court's continuances from October 13, 2009 until October 27, 2009, when he waived any further speedy trial rights, were not at appellant's request and, therefore, did not toll the running of the speedy trial time period. We disagree. The continuances of the trial tolled appellant's speedy trial right until November 12, 2009, because they were for good cause and were pronounced in open court pursuant to R.C. 2941.401.

{¶25} Prior to trial on the morning of October 13, 2009, appellant inadvertently walked through the halls of the courthouse in front of prospective jurors, which the trial

court determined would prevent him from receiving a fair trial. The matter was discussed with counsel and the trial was continued without objection. Since the continuance of the trial from October 13, 2009, to the next available date was to prevent unfair prejudice to appellant, we find that it was for good cause. The final continuance, from October 22, 2009, to November 12, 2009, was due to a conflict of the court with another trial which had proceeded to a jury trial. This continuance was for good cause and ordered by the court with all parties present and without their objection. Therefore, we find that the second continuance also tolled the running of the speedy trial time period.

{¶26} Therefore, we conclude that even if the earliest date of receipt of appellant's notice by the prosecution is accepted, appellant was brought to trial within the speedy-trial time period authorized by the statute. Appellant's first assignment of error is not well-taken.

{¶27} In his second assignment of error, appellant argues that his conviction was contrary to the manifest weight of the evidence. In his third assignment of error, appellant argues that there was insufficient evidence presented to support his conviction. We address these two assignments of error in reverse order.

{¶28} A challenge to the sufficiency of the evidence is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, reconsideration denied (1997), 79 Ohio St.3d 1451. The standard for determining whether there is sufficient evidence to support a conviction is whether the evidence admitted at trial, "if believed, would convince the

average mind of defendant's guilt beyond a reasonable doubt. The 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, citing *Jackson v. Virginia* (1979), 443 U.S. 307. See, also, *State v. Thompkins*, supra. Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, certiorari denied (1998), 522 U.S. 1128, citing *State v. Jenks*, supra. In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker* (1978), 55 Ohio St.2d 208, 212, certiorari denied (1979), 441 U.S. 924. Further, the court must view the evidence in the light most favorable to the prosecution. *State v. Jenks*, supra.

{¶29} Appellant was charged with a violation of R.C. 2925.03(A)(1) and (C)(4)(b), trafficking in cocaine in the presence of a minor. That statute provides that:

{¶30} "(A) No person shall knowingly do any of the following:

{¶31} "(1) Sell or offer to sell a controlled substance;

{¶32} "* * *.

{¶33} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶34} "* * *.

{¶35} " (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

{¶36} "* * *.

{¶37} "(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender."

{¶38} The following evidence was presented at trial. Officers Fulton and Fry, police officers for the Norwalk Police Department, both testified that in November, 2006 the department was using Vernon Jones as a paid confidential informant. Jones contacted Officer Fry about working as an informant for the police and began to do so in September 2006. Jones worked with the department until early in 2007 on approximately 20 cases and was paid $50 for each case. In 19 of those 20 cases, the defendants entered a guilty plea as part of a plea bargain.

{¶39} On November 16, 2006, Officer Fry contacted Officer Fulton and informed him that an arrangement had been made for Jones to make a controlled purchase of drugs

from someone he knew as "Nukie," later identified as appellant. The buy was to take place at an apartment at Bouscay Avenue, Norwalk, Ohio, which was rented by Holly Wetzel.

{¶40} The officers and Jones met at a parking lot where the officers search Jones' vehicle and person, planted a recording device on him, and provided him with $70 in bills that had been photocopied. Even though the officers did not strip search the informant or have a drug-sniffing dog search his car as questioned by the defense, the officers felt that they had sufficiently searched Jones and his vehicle to assure them that he did not have any cocaine on him prior to the controlled buy. While Officer Fulton did not include in his report that he had searched Jones after the buy, both officers testified that they conducted the controlled buy in their customary manner. Officer Fulton believed that he had merely overlooked including the follow-up search in his report. Officer Fry believed that Officer Fulton's report was thorough and accurate.

{¶41} The officers followed Jones to the apartment and watched him enter the premises. After 20 minutes, Jones exited the premises and they all returned to the original meeting location. On the return trip, the officers lost sight of Jones for approximately two miles. Jones turned over the recording device and what appeared to be cocaine. Officer Fry testified that when he asked Jones how much cocaine he was sold for $75, Jones said he thought it was a gram and then said that Nukie had said it was a "teener." However, Jeffrey Houser, a forensic scientist at the Bureau of Criminal

Investigations, testified that he examined the powdered substance obtained in this case and determined that it was .2 grams of cocaine.

{¶42} Officer Fulton believed that Jones had been given the smaller amount of drug in the sale and that Jones did not keep any cocaine since he had been searched after the buy, he had been wearing a recording device which did not record any unusual activity, and he was not observed doing anything suspicious. When he listened to the recording, Officer Fulton recognized the voices of Jones, Wetzel, and appellant. Officer Fulton could also hear the sound of what he believed were the voices of children.

{¶43} Jones testified that he became a confidential informant after talking to Officer Fry, who suggested that it was a good thing to do. Jones knew that there was some money involved, but he also knew that it was very little. After a few weeks, Jones decided to do it just to help out. He testified that he had called Holly Wetzel prior to the buy to tell her that he wanted to buy a gram of cocaine. Jones recalled that when he arrived at the apartment, Holly Wetzel led him into her bedroom. Her child was in the room, so Jones asked her to have the child leave. Appellant took some time to find a tray and a razor to cut the cocaine. He gave half to Holly, who immediately smashed it and began to use it. Appellant placed Jones' portion in a plastic baggie and tied it closed. Appellant called it a "teener" when he said that was all that he had right then. Jones did not know what that meant, but he assumed it meant something a little more than a gram. Jones indicated that he might go home and get some more money from his father and

appellant told Jones to call first and find out if he was still there. Jones had to sit in the room while Wetzel used her drugs so that her kids would not see her.

{¶44} Jones identified the baggie of cocaine at trial as the purchase he received from appellant. Jones denied having taken any of the cocaine himself. He further testified that the cocaine was not weighed during the buy and Jones was not familiar with cocaine and what a gram would look like. The recording of the buy was played for the jury and Jones identified the speakers as Wetzel and appellant. On cross-examination, Jones admitted to having a felony conviction for sexual battery and being involved with misdemeanor charges for underage consumption and disorderly conduct during the time period he was acting as an informant for the police.

{¶45} Appellant argues that there was insufficient evidence presented by the prosecution in this case because: 1) Jones was not thoroughly searched prior to the controlled buy, 2) Officer Fulton testified to facts that were not contained in the police report regarding the search of Jones after the controlled buy, 3) the officers lost sight of Jones for approximately 2 miles, 4) the officers did not have visual contact with Jones while he was in the apartment, and 5) Jones brought back significantly less than one gram of cocaine. Appellant argues that these facts make the legitimacy of the buy questionable. Furthermore, appellant argues that Jones' testimony is not credible because of his inconsistent testimony and felony record.

{¶46} Appellant's argument is premised upon the issue of credibility and weighing of the evidence, which are not issues to be addressed when considering the sufficiency of the evidence. Upon a review of the evidence, we find that there was sufficient direct evidence presented to submit the case to the jury.

{¶47} Appellant's third assignment of error is not well-taken.

{¶48} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *State v. Thompkins*, supra, at paragraph two of the syllabus. When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if the jury clearly "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *State v. Smith* (1997), 80 Ohio St.3d 89, 114, certiorari denied (1998), 523 U.S. 1125.

{¶49} Appellant again argues that the credibility of Jones was suspect because: 1) Jones has a criminal background, 2) there was a significant difference between the amount of actual cocaine submitted into evidence versus what Jones said he purchased, 3) Jones testified the officers removed his shoes during the search while the officers testified that they did not, 4) Jones testified that Officer Fulton searched his car while the officers

testified that Officer Fry had done so, and 5) Jones testified that the officers took eight minutes to search his car while the officers testified that they had searched the car in a few minutes.

{¶50} Appellant's argument that Jones was not credible simply because his testimony conflicted with the testimony of the police officers is meritless. Jones had made the buy nearly three years prior as part of a series of buys for the police. Even he admitted that the memories of the officers may be more correct. The fact that the witnesses' testimonies conflicted does not automatically indicate that one of the witnesses was not credible.

{¶51} But, even if Jones' credibility is an issue for the reasons appellant presented, Jones' testimony was not the sole evidence in this case. The jury also heard the taped recording of the controlled buy. While the tape is very poor quality and the people difficult to understand, the jury could hear Jones greeting "Nuke Dog" whom he identified at trial as appellant and calling for Holly, who rented the apartment. They could hear children talking nearby. Appellant could be heard saying that he was going to cut one off for Jones and that when it was gone, it was gone. Appellant stated that he would have to get some more. He also asked for a tray and razor. Appellant and Holly and Jones then discussed whether Jones would be able to come back soon and that he should call them. Furthermore, the officers involved testified that they conducted the controlled buy as they had done approximately 20 times prior with Jones and that they

believed that Jones returned with the entire amount of cocaine that he had purchased as he had in the past.

{¶52} The credibility issues in this case were not the type that would cause a jury to lose its way in evaluating the evidence by making credibility determinations and weighing the evidence. Therefore, we find that appellant's conviction was not contrary to the manifest weight of the evidence.

{¶53} Appellant's second assignment of error is not well-taken.

{¶54} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE