

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-695
	:	(M.C. No. 2012 CRB 9553)
v.	:	
	:	(REGULAR CALENDAR)
Matthew L. Pritchard,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 29, 2013

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, and
Melanie R. Tobias, for appellant.

Donald W. Roberts, for appellee.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶ 1} State of Ohio, plaintiff-appellant, appeals from the judgment of the Franklin County Municipal Court, in which the court granted the motion to dismiss filed by Matthew L. Pritchard, defendant-appellee.

{¶ 2} The underlying facts relating to the offenses charged are not germane to the issues in this appeal; therefore, we need not discuss them. On April 17, 2012, appellee was charged with criminal damaging, which is a violation of R.C. 2909.06 and a second-degree misdemeanor, criminal mischief, which is a violation of R.C. 2909.07 and a third-degree misdemeanor, and disorderly conduct, which is a violation of Columbus City Code 2317.11(A)(1) and a fourth-degree misdemeanor. A summons was issued for appellee on

April 18, 2012. The certified mail service was eventually returned as unclaimed. Appellee apparently did receive the summons via regular mail on April 19, 2012.

{¶ 3} On May 16, 2012, appellee appeared for arraignment and entered a plea of not guilty. A pre-trial was held on June 11, 2012, and the matter was set for a jury trial on July 9, 2012. On July 9, 2012, the jury trial was continued to July 24, 2012, at the request of the state. On July 11, 2012, appellee filed a demand for discovery. On July 18, 2012, the state filed a response to the demand for discovery.

{¶ 4} On July 24, 2012, appellee filed a motion to dismiss based upon lack of a speedy trial. At the hearing on the motion the same date, appellee's counsel indicated that appellee had been served on April 19, 2012. The state argued that the speedy trial time was tolled by appellee's July 11, 2012 demand for discovery, as well as the trial court's unavailability for five days. On the same date, the trial court entered judgment granting appellee's motion to dismiss on speedy trial grounds. The state appeals the judgment of the trial court, asserting the following assignment of error:

THE TRIAL COURT ERRED WHEN IT DISMISSED APPELLEE'S CASE ON STATUTORY SPEEDY TRIAL GROUNDS BECAUSE AT THE TIME OF THE DISMISSAL, APPELLEE'S SPEEDY TRIAL TIME HAD NOT EXPIRED.

{¶ 5} The state argues in its assignment of error that the trial court erred when it granted appellee's motion to dismiss based upon speedy trial grounds. Under Ohio's speedy trial statutes, a trial court shall discharge a defendant if the trial court and prosecution fail to bring the defendant to trial within the time required by R.C. 2945.71 and 2945.72. *See* R.C. 2945.73(B). The Supreme Court of Ohio has "imposed upon the prosecution and the trial courts the mandatory duty of complying with" the speedy trial statutes. *State v. Singer*, 50 Ohio St.2d 103, 105 (1977). Thus, courts must strictly construe these statutes against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57 (1996). The standard of review in speedy trial cases is to simply count the number of days passed while determining to which party the time is chargeable as directed in R.C. 2945.71 and 2945.72. *State v. Gonzalez*, 10th Dist. No. 08AP-716, 2009-Ohio-3236, ¶ 9. Speedy trial issues present mixed questions of law and fact. *State v. Hiatt*, 120 Ohio App.3d 247, 261 (4th Dist.1997). Therefore, we "accept the facts as found by the trial court on some

competent, credible evidence, but freely review the application of the law to the facts." *Id.* at 261, citing *State v. Howard*, 4th Dist. No. 93CA2136 (Mar. 4, 1994).

{¶ 6} Furthermore, "when a defendant moves for discharge on the basis that he has not been brought to trial within the time limits set forth in [the speedy trial statutes], and he presents a prima facie case that he is entitled to discharge, the burden of production of evidence shifts to the state." *State v. Price*, 122 Ohio App.3d 65, 68 (10th Dist.1997), citing *State v. Butcher*, 27 Ohio St.3d 28, 30-31 (1986); *State v. Elliott*, 10th Dist. No. 03AP-605, 2004-Ohio-2134, ¶ 9. The state must then prove that the speedy trial statutes sufficiently extended the time for which a defendant could be brought to trial. *Price* at 68; *Elliott* at ¶ 9.

{¶ 7} Pursuant to R.C. 2945.71(D), "[a] person against whom one or more charges of different degrees, * * * all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged." Here, appellee's highest degree of offense was a second-degree misdemeanor. Pursuant to R.C. 2945.71(B)(2), a defendant who is charged with a second-degree misdemeanor must be brought to trial within 90 days after his arrest or the service of summons.

{¶ 8} In the present case, the state argues that, because appellee was never properly served with the summons by certified mail or personally and only received notice via regular mail, the speedy trial time did not commence to run until May 16, 2012, when appellee appeared at his arraignment. Thus, the state asserts, only 69 days had elapsed between the date of appellee's appearance on May 16, 2012, and the date appellee filed his motion to dismiss on July 24, 2012, thereby rendering his motion premature.

{¶ 9} We agree with the state on several points. We agree that, because Crim.R. 4(D)(3) requires service via certified mail or personal service and does not provide for service of summons by regular mail, receiving summons via regular mail cannot start the speedy trial clock. *See State v. Guy*, 2d Dist. No. 23680, 2010-Ohio-6341, ¶ 8-13. Also, we agree that, when a person charged with a misdemeanor does not receive service of summons, the first day chargeable to the state is the day of the person's initial appearance before the court. *See State v. Allen*, 8th Dist. No. 90552, 2008-Ohio-5251, ¶ 12. Furthermore, we agree that "[t]he merits of a motion for discharge for a violation of

speedy trial rights made pursuant to R.C. 2945.73 are determined as of the date * * * the motion is filed, not when it is decided." *State v. Williams*, 2d Dist. No. 20104, 2004-Ohio-5273, ¶ 11.

{¶ 10} However, appellee contends that the state never raised at the motion hearing the argument that the speedy trial time began to run May 16, 2012. Instead, at the hearing, the state agreed that appellee was served with the summons on April 19, 2012, and the 90-day period had expired. The state's only argument at the hearing was that there were events that tolled the speedy trial time. Because the state never raised the argument regarding the service of summons, appellee contends, the state may not raise it before this court on appeal or, alternatively, any error, in this respect, was error invited by the state.

{¶ 11} The state counters that whether the state implicitly agreed during the trial court proceedings that speedy trial time should be calculated from April 19, 2012 is inconsequential because an appellate court's duty is to independently review the record and calculate speedy trial time. We agree. In *State v. Toler*, 4th Dist. No. 09CA3103, 2009-Ohio-6669, the defendant argued, similar to appellee here, that because the state failed to specifically raise a particular argument in support of denying the defendant's motion to dismiss on speedy trial grounds, the state could not raise that argument on appeal. The court in *Toler* disagreed, finding "[o]ur duty when reviewing an alleged speedy trial violation is to independently review the record and to calculate the speedy trial time. Consequently, whether the [state] raised this particular argument during the trial court proceeding is inconsequential." *Id.* at ¶ 24.

{¶ 12} This court has found likewise. In *State v. Vrapic*, 10th Dist. No. 11AP-700, 2012-Ohio-1018, an interpreter was not available when the parties met for trial, and the court concluded that it was the last day to bring the defendant to trial under Ohio's speedy trial statutes. The court asked if the prosecutor agreed, and she initially agreed. She later stated that the trial could be rescheduled due to events that tolled speedy trial time. The court rejected that argument and dismissed the defendant's charge. On appeal, the defendant argued that the state forfeited its arguments against dismissal because the prosecutor initially agreed with the trial court that it was the last day to start the trial under the speedy trial statutes. We noted that the prosecutor did eventually argue that

tolling events extended the time to bring the defendant to trial; thus, it was not a case where there was no challenge in the trial court against the charge being dismissed, and the state did not forfeit its arguments against the dismissal. Importantly, we then found that "[i]n any event, we review a speedy trial case by independently calculating when the time to bring a defendant to trial expires." *Id.* at ¶ 9. After independently recalculating the speedy trial time, we concluded that the trial court erred by dismissing the defendant's charge. *Id.* At least one other court has determined the same. *See State v. Williams*, 7th Dist. No. 07 MA 162, 2008-Ohio-1532, ¶ 38 (appellate court's duty to conduct thorough file review and count the speedy trial days is not affected by whether the state raised certain tolling events in the trial court); *State v. Hart*, 7th Dist. No. 06 CO 62, 2007-Ohio-3404 (in state's appeal, the state did not waive the argument that a particular event tolled speedy trial time because a reviewing court must independently count the delays chargeable to either side and determine whether speedy trial time had run). Therefore, based upon our standard of review that requires us to review a speedy trial case by independently calculating when the time to bring a defendant to trial expires, we find the state did not waive its argument regarding the starting date for speedy trial purposes.

{¶ 13} After reviewing the record before us, it is clear that appellee was never served with his summons, as it was returned to the clerk of courts as undeliverable. Thus, the speedy trial time did not begin to run until May 16, 2012, when appellee appeared at his arraignment. Accordingly, as of appellee's motion on July 24, 2012, only 69 days had elapsed. Because the state had 90 days to bring appellee to trial, and only 69 days had elapsed, we find the trial court erred when it granted appellee's motion to dismiss based upon speedy trial grounds. Therefore, the state's assignment of error is sustained.

{¶ 14} Accordingly, the state's assignment of error is sustained, the judgment of the Franklin County Municipal Court is reversed, and the matter is remanded to that court for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

BRYANT and TYACK, JJ., concur.
