[Cite as *State v. Willig*, 2010-Ohio-2560.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-925
v.	:	(C.P.C. No. 09CR-02-0856)
Scott M. Willig,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 8, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher,* for appellant.

Tyack, Blackmore & Liston Co., LPA, and *Jonathan T. Tyack,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting, in part, the motion to dismiss of defendant-appellee, Scott M. Willig, filed pursuant to R.C. 2945.73(D). The state assigns a single error:

> The trial court erred when it dismissed three counts of the indictment based on the defendant's claim that R.C. 2945.73(D) required dismissal.

Because the trial court did not err when it dismissed three counts of the indictment under R.C. 2945.73(D), we affirm.

I. Procedural History

{¶2} On July 8, 2008, defendant was involved in an accident in which the truck he was driving struck and injured a juvenile pedestrian. Police arrested defendant and charged him with three misdemeanor traffic offenses: operating a motor vehicle while under the influence of alcohol or a drug of abuse in violation of R.C. 4511.19(A)(1)(a), failure to control in violation of R.C. 4511.202, and reckless operation of a motor vehicle in violation of R.C. 4511.201. The three charges were filed in the Franklin County Municipal Court under case No. 08TRC-161229 ("first case").

{¶3} Based on the positive drug test of defendant's urine collected after the July 8, 2008 accident, the state on September 10, 2008 charged defendant in case No. 08TRC-185298 ("second case") in the Franklin County Municipal Court with operating a motor vehicle with a prohibited amount of marijuana metabolite in his urine, a "per se" violation of R.C. 4511.19(A)(1)(j)(viii)(II). Pursuant to a summons issued to him, defendant appeared for arraignment on the second case on September 15, 2008 and requested a speedy trial. Although the municipal court initially scheduled pretrial for the second case on October 22, 2008, the trial judge on October 2, 2008 recused himself based upon the judge's personal relationship with defendant's trial attorney. A different municipal court judge held a pretrial in the second case on October 21, 2008.

{¶4} On October 22, 2008, defendant filed a motion to suppress and/or a motion in limine in the first case, contending the officers lacked probable cause to arrest

defendant. On the same day, defendant filed a motion to dismiss the second case, alleging a statutory speedy trial violation under R.C. 2945.71. The municipal court held a hearing on December 8, 2008 and dismissed the "per se" charge filed in the second case, concluding defendant's statutory speedy trial rights were violated. The state did not appeal the municipal court's decision. At the state's request, the municipal court dismissed the first case on December 16, 2008 for a future indictment.

{¶5} The Franklin County grand jury issued a four-count indictment on February 12, 2009 arising out of the July 8, 2008 automobile accident. The indictment charged defendant with one count of aggravated vehicular assault in violation of R.C. 2903.08, one count of vehicular assault in violation of R.C. 2903.08, and two counts of operating a motor vehicle while under the influence of alcohol or a drug of abuse in violation of R.C. 4511.19.

{¶6} On April 8, 2009, defendant filed a request for discovery, a request for a bill of particulars, and a motion to suppress/motion in limine in the indicted case; on April 9, 2009, defendant filed a motion to dismiss the indictment, asserting the violation of his statutory speedy trial rights in the second case required the indictment be dismissed pursuant to R.C. 2945.73(D). According to defendant, the municipal court's decision dismissing the second case barred prosecuting defendant for any offenses arising out of the events of the July 8, 2008 automobile accident.

{¶7} After the state responded with a memorandum in opposition to defendant's motion to dismiss, the common pleas court conducted a hearing on the motion, admitting as exhibits a transcript of the hearing the municipal court conducted on defendant's motion to dismiss the second case and a certified copy of the court file from the second

case. At the conclusion of the hearing on defendant's motion to dismiss the indictment, the common pleas court granted defendant's motion to dismiss counts one, three, and four of the indictment; the court overruled defendant's motion to dismiss count two of the indictment, the vehicular assault charge. The common pleas court journalized its decision in a September 11, 2009 judgment entry.

{¶8} On October 1, 2009, the state filed a notice of appeal, and defendant filed a notice of cross-appeal on October 8, 2009. The state filed a motion to dismiss defendant's cross-appeal because the trial court's decision regarding count two of the indictment is not a final appealable order. On December 17, 2009, this court granted the state's motion to dismiss defendant's cross-appeal.

II. Assignment of Error – R.C. 2945.73(D)

{¶9} The state's sole assignment of error contends the trial court erroneously dismissed three of the indicted charges against defendant. The state's assigned error invokes examination of the statutory speedy trial provisions of R.C. 2945.71, et seq.

A. The Law at Issue

{¶10} Pursuant to R.C. 2945.71, a person against whom a felony charge is pending must be brought to trial within 270 days of arrest, while a person against whom a first-degree misdemeanor charge is pending must be brought to trial within 90 days of arrest. R.C. 2945.71(C)(2) and 2945.71(B)(2). In the event a defendant is not brought to trial within the statutory speedy trial time frame, R.C. 2945.73 provides the remedy: "Upon a 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. 2945.73(B). At the heart of the state's

appeal is R.C. 2945.73(D), which provides that "[w]hen an accused is discharged pursuant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him *based on the same conduct*." (Emphasis added.) Id. The common pleas court dismissed three counts of the felony indictment because it concluded the indicted charges were "based on the same conduct" as the misdemeanor charge the municipal court dismissed in the second case.

{¶11} The state and defendant frame differently the issue for our review. Focusing on the first case, the state asserts that because the municipal court dismissed the first case at the state's request, and not because of a statutory speedy trial violation, those charges were not "discharged" within the meaning of R.C. 2945.73(D), rendering R.C. 2945.73(D) inapplicable. Relying on *State v. Flowers*, 2d Dist. No. 22751, 2009-Ohio-1945, the state contends R.C. 2945.73(D) requires discharge from *all* criminal liability in order to bar further criminal proceedings based on the same conduct. Id. at ¶32 (explaining a criminal defendant may seek "a discharge from criminal liability pursuant to R.C. 2945.73" when the defendant's statutory speedy trial rights under R.C. 2945.71 were violated). Since no "discharge pursuant to" the speedy trial statute occurred with respect to those three charges filed in the first case against defendant, the state asserts R.C. 2945.73(D) does not apply.

{¶12} *Flowers* is unpersuasive on the facts here. Nowhere does *Flowers* define "discharge" in R.C. 2945.73(D) to mean discharge from all criminal liability rather than discharge of any single pending charge based on the same conduct. Indeed, while the appellate decision in *Flowers* addresses the proper calculation for the number of days

elapsed in a speedy trial claim, it does not elaborate on the meaning or application of R.C. 2945.73(D) other than the fleeting reference the state cited.

{¶13} Defendant, on the other hand, focuses on the meaning of "based on the same conduct" in R.C. 2945.73(D). Because the municipal court "discharged" the second case against defendant for a violation of R.C. 2945.71, defendant asserts R.C. 2945.73(D) bars prosecuting defendant based on the events and circumstances of the automobile accident on July 8, 2008, regardless of the state's voluntary dismissal of the charges in the first case.

{¶14} Defendant correctly contends that since the charges in the second case and in the subsequent felony indictment arose from the same automobile accident, the interpretation and meaning of "based on the same conduct" in R.C. 2945.73(D) determines whether, or to what extent, the state is able to pursue any future charges against defendant premised on the July 8, 2008 automobile accident. "When an appellate court is called upon to review a trial court's interpretation and application of a statute, the 'appellate court conducts a de novo review, without deference to the trial court's determination.' " *McGeehan v. State Bur. of Workers' Comp.* (Dec. 28, 2000), 10th Dist. No. 00AP-648, citing *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506.

B. Application of R.C. 2945.73(D)

{¶15} The state initially contends R.C. 2945.73(D) cannot bar subsequent prosectuion because the municipal court erred in concluding defendant's speedy trial rights were violated in the second case. The state argues that because a violation of defendant's right to a speedy trial is a necessary prerequisite to applying R.C. 2945.73(D), R.C. 2945.73 does not bar further criminal proceedings against defendant.

{¶16} The state, however, did not appeal the municipal court's ruling in the second case, thus waiving any error in the ruling; the municipal court's decision remains the final disposition of the second case for purposes of this appeal. See, e.g., *In re Mapley*, 7th Dist. No. 07 MA 36, 2008-Ohio-1180, ¶9 (stating "[f]ailure to appeal a final appealable order waives any error that could have been raised with respect to that order"), citing *In re Nice*, 141 Ohio App.3d 445, 452, 2001-Ohio-3214; *State v. Wooden*, 10th Dist. No. 02AP-473, 2002-Ohio-7363, ¶9 (stating that where an "appellant's claims could have been raised in a timely appeal from the original judgment of the trial court," appellant's failure to directly appeal that issue results in a waiver of the argument). Accordingly, we do not address whether the trial court erred in concluding defendant's speedy trial rights were violated in the second case.

{¶17} The state next asserts the conduct underlying the impaired driving offense under R.C. 4511.19 contained in the indictment in the common pleas court is not the "same conduct" that underlay the dismissed "per se" offense in the second case. Using the framework of a double jeopardy analysis, the state notes that testing over the legal limit is a violation under the per se offense, while the crux of an impaired driving violation is evidence of actual, impaired driving. *State v. Minix* (June 21, 1996), 4th Dist. No. 95CA2347 (explaining that because the per se violation and the impaired driving violation have separate and distinct elements, "they are not 'the same offense or conduct' for double jeopardy purposes").

{¶18} The state similarly distinguishes aggravated vehicular assault and vehicular assault, charged in the indictment, from the impaired and "per se" driving violations in the municipal court. See *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807. The state points

out that aggravated vehicular assault and vehicular assault both require proof of serious physical harm while driving under the influence, whether "per se" or impaired, does not. Id. at ¶33. Contending double jeopardy would not preclude the state's prosecuting defendant for these offenses at separate times, the state argues the offenses likewise do not constitute the "same conduct" for purposes of R.C. 2945.73(D).

{¶19} The difficulty in applying the state's double jeopardy analogy is the test a double jeopardy analysis employs. It "focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case." *Zima* at ¶20, citing *State v. Thomas* (1980), 61 Ohio St.2d 254, 259, overruled on other grounds in *State v. Crago* (1990), 53 Ohio St.3d 243, syllabus; *United States v. Dixon* (1993), 509 U.S. 688, 696, 113 S.Ct. 2849, 2856. By contrast, R.C. 2945.73(D) focuses on the conduct at issue. Indeed, precedent from this court addressing the meaning of "based on the same conduct" in R.C. 2945.73(D) supports the interpretation the common pleas court used.

{¶20} In *State v. Smith* (June 22, 1978), 10th Dist. No. 77AP-960 this court explained "[t]he word 'conduct' as used in R.C. 2945.73(D) is broader than merely that relating to the essential elements of the charge involved and includes the surrounding circumstances and evidence which would naturally be introduced in support of the charge." *Smith* involved a defendant arrested for attempting to cash a forged check at a grocery store. After the police arrived, they found a second forged check in defendant's possession. The state charged defendant with forgery relating to the first check but waited some time before charging defendant with forgery relating to the second check. Eventually, the charge pertaining to the first check was dismissed because the defendant was not brought to trial within the time R.C. 2945.71(A) and (D) prescribed. Citing R.C.

2945.73(D), the defendant then moved to dismiss the charge pertaining to the second check.

{¶21} Even though the charges dealt with two separate, forged checks, this court held R.C. 2945.73(D) required the charge stemming from the second check be dismissed. We noted that in light of the broader reading of the phrase "same conduct," "R.C. 2945.73(D) precludes prosecution of the [charge for the second check] since the conduct upon which prosecution must depend is the same conduct that was involved in connection with [the first check]." *Smith*.

{¶22} We again addressed the meaning of "based on the same conduct" under R.C. 2945.73(D) in *State v. Chauhan* (Aug. 12, 1997), 10th Dist. No. 97APA01-122, where the state initially indicted the defendant on misdemeanor charges of trespassing and disorderly conduct stemming from an incident in which defendant trespassed into a university dormitory, entered the beds of young women, and fondled them. The Franklin County Municipal Court ultimately dismissed the misdemeanor charges because of a speedy trial violation under R.C. 2945.71. After the misdemeanor charges were dismissed, the state indicted the defendant on felony charges of aggravated burglary, gross sexual imposition, and burglary stemming from the same incident at the university dormitory. This court held R.C. 2945.73(D) required the felony charges be dismissed because "R.C. 2945.73(D) is impeccably clear" that "[t]he failure to pursue timely the misdemeanor charges and to comply with the mandates of R.C. 2945.71 and 2945.72 is a bar to any further criminal proceedings, felony or misdemeanor 'based on the same conduct.' " *Chauhan.*

{¶23} The state, however, points to *State v. Spencer* (Nov. 4, 1998), 4th Dist. No. 97CA2536, in which the Fourth District found neither the double jeopardy clause nor R.C. 2945.73(D) prohibited the state from contemporaneously charging an accused with misdemeanor and felony charges arising out of the same conduct. *Spencer* concluded the misdemeanor and felony tax charges were sufficiently dissimilar that R.C. 2945.73(D) did not bar the defendant's felony prosecution even though related misdemeanor charges were dismissed for a speedy trial violation.

{¶24} *Spencer* differs from the present case in at least two respects. Initially, both the trial court and the defendant in *Spencer* engaged in a double jeopardy analysis; the appellate court simply addressed the arguments presented to it. Secondly, the appellate court concluded R.C. 2945.73(D) did not apply where the felony and misdemeanor charges were filed contemporaneously, as they were in that case. In so holding, the court distinguished the facts before it from a case involving charges not filed at the same time where R.C. 2945.73(D) applied. Indeed, the language of *Spencer* arguably supports the common pleas court's interpretation of R.C. 2945.73(D), as *Spencer* clarified "that the plain language of R.C. 2945.73 requires a broader interpretation of the accused's rights than traditional double jeopardy jurisprudence and that the phrase 'further criminal proceedings,' bars the state from bringing subsequent punitive charges against the accused." *Spencer*.

{¶25} The "broader interpretation of the accused's rights" *Spencer* contemplated supports the interpretation of R.C. 2945.73(D) the common pleas court applied. The court properly interpreted the phrase "based on the same conduct" from R.C. 2945.73(D) to refer to the conduct underlying the charged offenses rather than the specific elements of

the offenses. See *Chauhan,* supra (involving disorderly conduct and a subsequent indictment for gross sexual imposition whose prosecution would not be barred by double jeopardy considerations but was barred under R.C. 2945.73(D)). Because the parties do not dispute defendant was involved in only one automobile accident on July 8, 2008, the common pleas court properly concluded on the facts present here that all of the charges stem from the same conduct, a conclusion that caused it correctly to invoke the R.C. 2945.73(D) bar to further prosecution for offenses based on the same conduct.

{¶26} In the final analysis, we decline the state's invitation to depart from our holdings in *Smith* and *Chauhan*. As used in R.C. 2945.73(D), the phrase "based on the same conduct" means more than offenses sharing the same elements. The trial court did not err in interpreting R.C. 2945.73(D) to require three counts of the felony indictment be dismissed, as those offenses all are based on the same conduct, the July 8, 2008 car accident, as the misdemeanor offense dismissed in the second case for violation of defendant's speedy trial rights. We thus overrule the state's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

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