

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : CASE NO. CA2009-04-015
 :
 - vs - : OPINION
 : 1/19/2010
 :
 DANIEL O'HARA, :
 :
 Defendant-Appellee. :

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2006-2162

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellant

Timothy Young, Ohio Public Defender, Kristopher A. Haines, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellee

BRESSLER, P.J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals from the Brown County Court of Common Pleas decision dismissing two felony aggravated drug trafficking charges against defendant-appellee, Daniel O'Hara, by finding his constitutional right to a speedy trial was violated. For the reasons outlined below, we reverse and remand for further proceedings.

{¶2} On June 29, 2006, O'Hara was indicted on two felony counts of aggravated drug trafficking while in the vicinity of a juvenile. On August 2, 2006, after

initially failing to appear, O'Hara was arraigned and released after posting bond. Approximately two weeks later, on August 18, 2006, O'Hara, whose case had since been assigned to the public defender's office, filed a discovery request and a request for a bill of particulars. After holding an initial pretrial hearing, the court, in its August 22, 2006 "Journal Entry on Pre-Trial," stated that O'Hara "waive[d] the time limitations for trial imposed by Ohio Revised Code 2945.71 *et seq.*" In addition, within the same August 22 entry, the court indicated that time was "[w]aived" pursuant to R.C. 2945.72(H). The state responded to O'Hara's discovery request on September 1, 2006, which included, among other things, a request for reciprocal discovery.¹

{¶3} After holding another pretrial hearing, the court, in its October 2, 2006 "Journal Entry on Pre-Trial," ordered the case assigned for a "Hearing on Defendant's Motion to Suppress," and stated that O'Hara "waive[d] the time limitations for trial imposed by Ohio Revised Code 2945.71 *et seq.* [f]rom today's date until said motion is decided." In addition, within the same October 2 entry, the court stated that O'Hara's speedy trial time was "[w]aived" pursuant to R.C. 2945.72(E). O'Hara's motion to suppress, filed on October 4, 2006, was scheduled for hearing on July 3, 2007.

{¶4} After O'Hara failed to appear at the July 3, 2007 suppression hearing, his counsel withdrew his motion to suppress. However, despite his withdrawal, the court rescheduled the suppression hearing and ultimately denied the motion in an entry dated September 9, 2007.² Following yet another pretrial hearing, and although O'Hara had yet to respond to the state's September 1, 2006 reciprocal discovery request, the court,

1. The state's entire reciprocal discovery request, which was located at the bottom of the second page of its September 1, 2006 discovery response, indicated that it "hereby requests discovery pursuant to Rule 16."

2. Although not part of the record, attached to the state's brief is a letter from O'Hara's counsel to the trial court judge. The letter, which is dated July 10, 2007, indicates that O'Hara did not attend the July 3, 2007

in its December 18, 2007 "Journal Entry on Pre-Trial," stated that the matter was "[c]ontinued" for a two-day jury trial with "[t]ime [w]aived," pursuant to R.C. 2945.72(H), "[u]ntil [t]rial."

{¶15} On February 12, 2009, approximately 14 months later, the court held another pretrial hearing. Following this hearing, the court, in its February 27, 2009 "Journal Entry on Pre-Trial," ordered the case assigned for a "Hearing on Defendant's Motion to Dismiss." A hearing on O'Hara's motion to dismiss, which he filed on March 12, 2009, was held on March 24, 2009. Thereafter, within its April 7, 2009 decision, the court stated, in pertinent part, the following:

{¶16} "The Court finds that the time prior to December 18, 2007 was attributable to Appellant's motions, waivers, and neglect with respect to reciprocal discovery. However, the 436 days that elapsed after the Court ordered time tolled under R.C. 2945.72(H) and for the matter to be scheduled for Jury Trial was facially unreasonable when the Trial Court understood as of December 18, 2007 that both sides were prepared for trial."³

{¶17} The court then granted O'Hara's motion to dismiss, albeit without any further discussion or factual findings, "as being in violation of [his] constitutional right to speedy trial."

{¶18} The state now appeals from the trial court's decision granting O'Hara's motion to dismiss, raising one assignment of error.

{¶19} "THE TRIAL COURT ERRED BY DISMISSING THE CASE FOR VIOLATIONS OF [O'HARA'S] RIGHT TO A SPEEDY TRIAL."

{¶10} In its sole assignment of error, the state argues that the trial court erred by

suppression hearing because he did not receive proper notice and that "it would be fruitful" if the matter was "set for a motion to suppress again[.]"

dismissing the two felony aggravated drug trafficking charges against O'Hara by finding his speedy trial rights were violated.

{¶11} Ohio recognizes both a *constitutional* right to a speedy trial and a *statutory* right to a speedy trial. *State v. Nelson*, Clinton App. No. CA2007-11-046, 2009-Ohio-555, ¶4; *State v. Sandera*, Brown App. No. CA2007-09-016, 2008-Ohio-6378, ¶3. "[T]he statutory speedy trial provisions * * * and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." *State v. O'Brien* (1987), 34 Ohio St.3d 7, 9; *State v. Gellenbeck*, Fayette App. No. CA2008-08-030, 2009-Ohio-1731, ¶8. However, "[a] person's speedy-trial time may be waived or the period may be tolled under certain circumstances." *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶11. "[T]hese are two separate distinct concepts that affect speedy-trial calculations in different ways." *Id.* at ¶16; *Sandera* at ¶12.

{¶12} "A waiver is an intentional relinquishment of a known right." *Blackburn* at ¶17, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶18; *State v. Underwood*, Slip Opinion No. 2010-Ohio-1. As with other fundamental rights, a defendant can waive the statutory right to a speedy trial, so long as the waiver is "expressed in writing or made in open court on the record." *State v. Cox*, Clermont App. No. CA2008-03-028, 2009-Ohio-928, ¶14, quoting *State v. King*, 70 Ohio St.3d 158, 1994-Ohio-412, syllabus; *Blackburn* at ¶17. Such a waiver, when "made knowingly and voluntarily, also constitutes a waiver of [the defendant's] speedy trial rights guaranteed by the United States and Ohio Constitutions." *State v. Melampy*, Brown App. No. CA2007-04-008, 2008-Ohio-5838, ¶11, quoting *King* at 160, 1994-Ohio-412; *State v. Blauvelt*, Butler App. No. CA2007-01-034, 2007-Ohio-5897, ¶13.

3. This court is unable to determine why O'Hara, the defendant, was referred to as "Appellant" within the trial court's April 7, 2009 decision.

{¶13} On the other hand, unlike waiver, "tolling doesn't waive the speedy-trial right" for the "statute may be tolled whether or not a waiver has been executed." *Blackburn*, 2008-Ohio-1823 at ¶18, quoting *State v. Kerby*, 162 Ohio App.3d 353, 2005-Ohio-3734, ¶62. Instead, because tolling automatically occurs by operation of the statute, it "does not necessarily require an informed, tactical decision." *Blackburn* at ¶18-19. In other words, and as this court recently stated, "R.C. 2945.72 provides circumstances that extend or toll the time within which a defendant must be brought to trial, but [does] not involve an intentional relinquishment of the fundamental right to a speedy trial." *Sandera*, 2008-Ohio-6378 at ¶12.

{¶14} To reiterate this point, we note, once again, that time waivers and tolling events are "two separate distinct concepts that affect speedy-trial calculations in different ways." *Blackburn* at ¶16. Therefore, due to their separate and distinct nature, such terms must not be used interchangeably.

{¶15} With these principles in mind, and after a thorough review of the record, we find ourselves once again faced with a number of unclear, ambiguous, and confusing journal entries originating from the Brown County Court of Common Pleas.⁴

{¶16} For example, and as noted above, in its August 22, 2006 "Journal Entry on Pre-Trial," the trial court indicated that O'Hara "waive[d] the time limitations for trial imposed by Ohio Revised Code 2945.71 *et seq.*" However, within that same entry, the court indicated that time was "*waived*" pursuant to R.C. 2945.72(H), which is a *tolling provision* dealing with a defendant's request for a continuance. (Emphasis added.) In addition, in its October 2, 2006 "Journal Entry on Pre-Trial," the trial court indicated that O'Hara "waive[d] the time limitations" until his motion to suppress was "decided." But,

4. "Since it [was] not clear," this court declined to interpret a journal entry from the Brown County Court of Common Pleas as an unlimited time waiver where the entry indicated time was "*waived*" pursuant to R.C.

within that same entry, the court indicated that time was "*waived*" pursuant to R.C. 2945.72(E), which is a *tolling provision* that extends speedy trial time due to "plea in bar or abatement, motion, proceeding, or action made or instituted by the accused." (Emphasis added.) Furthermore, in its December 18, 2007 "Journal Entry on Pre-Trial," the trial court indicated that the matter was "[c]ontinued" for a two-day jury trial with "[t]ime [*w*]aived," pursuant to R.C. 2945.72(H), a tolling provision, "[u]ntil [*t*]rial." (Emphasis added.)

{¶17} Due to the rampant ambiguity strewn throughout the record, and due to the trial court's lack of analysis regarding its August 22, 2006, October 2, 2006, and December 18, 2007 "Journal Entr[ies] on Pre-Trial," which indicate, among other things, that speedy trial time was *waived* pursuant to R.C. 2945.72(E) and R.C. 2945.72(H), both *tolling provisions*, we are unable to determine whether O'Hara waived his constitutional and statutory rights to a speedy trial, or, on the other hand, whether the speedy trial clock was merely tolled.⁵ Moreover, even if we were to assume that O'Hara waived his constitutional and statutory rights to a speedy trial, the duration of such a waiver is, at best, unclear.

{¶18} In light of the foregoing, and since the trial court is best able to characterize the nature of its own preprinted journal entries, we remand this matter to the trial court to analyze its August 22, 2006, October 2, 2006, and December 18, 2007 "Journal Entr[ies] on Pre-Trial," to determine the effect, if any, these documents have on O'Hara's constitutional and statutory speedy trial rights. After engaging in such an

2945.72(H), a *tolling provision* dealing with a defendant's request for a continuance. (Emphasis added.) See *State v. Slater*, Brown App. No. CA2007-10-017, 2008-Ohio-6379, ¶7, fn. 1.

5. This court's confusion stems from the Brown County Court of Common Pleas current practice of using a pre-printed document entitled "Journal Entry on Pre-Trial," which, among other obscurities, allows the trial court to check a box indicating "Time Waived." The issues presented here could be easily resolved if the trial court implemented a freestanding speedy trial time waiver form that includes an explanation of the rights being waived, as well as the consequences of such a waiver, as it relates to the defendant's

analysis, but only if the trial court finds O'Hara's *statutory right* to a speedy trial was not violated, we remind the trial court that it must then determine if O'Hara's *constitutional right* to a speedy trial was violated by applying the balancing test as set forth in *Barker v. Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182.⁶ *State v. Lasley*, Clinton App. No. CA2007-01-004, 2007-Ohio-5632, ¶12; *State v. Messer*, Clermont App. No. CA2006-10-084, 2007-Ohio-5899, ¶8.

{¶19} Accordingly, without rendering an opinion as to the merits of the state's claim, we reverse the trial court's decision granting O'Hara's motion to dismiss and remand for further proceedings consistent with this opinion.

{¶20} Judgment reversed and remanded.

YOUNG and RINGLAND, JJ., concur.

constitutional and statutory speedy trial rights.

6. Notwithstanding the trial court's unclear and ambiguous journal entries, we find ourselves equally troubled by its April 7, 2009 decision granting O'Hara's motion to dismiss "as being in violation of [his] *constitutional right* to a speedy trial" without any further discussion or factual findings. (Emphasis added).