

[Cite as *State v. Alcorn*, 2010-Ohio-731.]

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

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-04-016
- VS -	:	<u>O P I N I O N</u> 3/1/2010
CINDY JO ALCORN,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2007-2029

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

Robert E. Rickey, 735 East State Street, Georgetown, OH 45121, for defendant-appellee

POWELL, P.J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Brown County Court of Common Pleas, granting the motion of defendant-appellee, Cindy Jo Alcorn, to dismiss her felony theft indictment on speedy trial grounds.

{¶2} Alcorn was indicted on five counts of felony theft in January 2007. The record indicates that Alcorn filed for discovery, which the state provided along with a

request for reciprocal discovery from Alcorn in March. By entry filed July 2, 2007, Alcorn's motion to continue her November 2007 trial date was granted. According to the record, the state twice filed a "Certificate of Readiness" and request for hearing in 2008.

{¶3} A pretrial was held in February 2009, wherein Alcorn indicated her intent to file a motion to dismiss for speedy trial reasons. Alcorn filed her motion, averring that both her statutory and constitutional rights to a speedy trial were violated. The trial court granted her motion, finding that her rights, "as protected under the United States and Ohio Constitution [sic], have in fact been violated." The state instituted this appeal, setting forth a single assignment of error.

{¶4} Assignment of Error:

{¶5} "THE TRIAL COURT ERRED BY DISMISSING THE CASE FOR VIOLATIONS OF THE APPELLEE'S RIGHT TO A SPEEDY TRIAL."

{¶6} The state argues that the trial court erred because it did not determine the effect of a statutory tolling event in the speedy trial calculation and, in considering the length of delay, did not weigh all the applicable factors, including Alcorn's failure to assert her speedy trial rights after she continued her 2007 trial date.

{¶7} Ohio recognizes both a constitutional right to a speedy trial and a statutory right. *State v. Nelson*, Clinton App. No. CA2007-11-046, 2009-Ohio-555, ¶4.

{¶8} The statutory speedy trial provisions, R.C. 2945.71 et seq., constitute a rational effort to enforce the constitutional right to a speedy trial of an accused and shall be strictly enforced by the courts. *State v. Pachay* (1980), 64 Ohio St.2d 218, syllabus.

{¶9} As part of the statutory scheme, R.C. 2945.71(C)(2) states that a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest. See *State v. Palmer*, 112 Ohio St.3d 457, 459, 2007-Ohio-374, ¶11 (speedy trial provisions are mandatory, and a person not brought to trial within the relevant time constraints shall be discharged); see, also, R.C. 2945.73.

{¶10} A defendant's speedy trial time rights may be waived or the period tolled under certain circumstances. *State v. Blackburn*, 118 Ohio St. 3d 163, 2008-Ohio-1823, ¶11.

{¶11} A defendant may expressly waive his statutory rights to a speedy trial, and a defendant's express written waiver of his statutory rights, if knowingly and voluntarily made, may also constitute a waiver of the coextensive speedy trial rights guaranteed by the United States and Ohio Constitutions. *State v. O'Brien* (1987), 34 Ohio St.3d 7, paragraph one of the syllabus.

{¶12} Following an express, written waiver of unlimited duration by a defendant of his right to a speedy trial, the defendant is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the defendant to trial within a reasonable time. *O'Brien* at paragraph two of syllabus.

{¶13} R.C. 2945.72 lists a number of factors that may extend or toll the speedy trial time calculation. For example, the state argues that the trial court failed to consider the delay occasioned by neglect of the accused as provided in R.C. 2945.72(D). Specifically, the state argues that Alcorn never responded to the reciprocal discovery request, which constituted neglect chargeable to Alcorn in the speedy trial calculation. See, e.g., *Palmer* at paragraph one of the syllabus (failure of

defendant to respond within reasonable time to prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72[D]).

{¶14} The record indicates that when Alcorn filed for a continuance of her trial, she stated in her motion that she was waiving her speedy trial time. However, the entry tendered by Alcorn and filed as an order of the court, stated, "Speedy trial times are waived pursuant to ORC §2945.72(H)." R.C. 2945.72(H) does not involve the concept of waiver, but is a tolling provision that deals with delays occasioned by continuances on the accused's own motion or the period of any reasonable continuance granted other than upon the accused's own motion. See *Blackburn*, 2008-Ohio-1823, at ¶16-18 (there is a difference between waiver and tolling events; tolling does not waive speedy trial right; statute may be tolled whether or not waiver has been executed).

{¶15} In deciding Alcorn's motion to dismiss, the trial court determined that Alcorn's speedy trial time was waived, but considered the waiver to be of a limited duration. Citing *State v. Scolaro* (1992), 73 Ohio App.3d 555, the trial court stated that a waiver of limited duration was a waiver for a "reasonable time," and found it was "facially unreasonable for the Court to not set the matter for a Jury Trial at any time after [the date of the entry granting the continuance]." The trial court concluded that, due to the unreasonableness of the delay, Alcorn's *constitutional* speedy trial rights were violated. (Emphasis added.)

{¶16} A review of the record reveals that the trial court moved to a finding of a constitutional speedy trial violation with little or no inquiry into the statutory speedy trial provisions and no discussion of the balancing factors set forth for a constitutional

analysis under *Barker v. Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182.

{¶17} The United States Supreme Court in *Barker* identified four factors to be assessed in determining whether an accused had been constitutionally denied a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. *Barker* at 530; see, also, *State v. Hull*, 110 Ohio St.3d 183, 187-188, 2006-Ohio-4252, ¶22-23, citing *Barker* at 530-531 (until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance; the length of delay that will provoke such inquiry is dependent upon peculiar circumstances of a case).

{¶18} This court recently released *State v. O'Hara*, Brown App. No. CA2009-04-015, 2010-Ohio-107, in which we noted that the trial court entries in that Brown County case were using waiver and tolling provisions interchangeably, when a waiver or a tolling provision could have a very different impact on a speedy trial analysis. *O'Hara* at ¶11-17; see *State v. Blackburn*, 2008-Ohio-1823 at ¶16-18.

{¶19} This court's decision in *O'Hara* remanded the case to the trial court so that it could determine the nature and ramifications of the court entries that employ both the waiver and tolling language with regard to the defendant's speedy trial rights, and instructed the trial court to analyze the defendant's constitutional right to a speedy trial under the balancing test of *Barker v. Wingo*, if a constitutional analysis was necessary. *O'Hara* at ¶18.

{¶20} After reviewing the record, it appears this case should also be remanded so the trial court can determine the speedy trial issues raised by the peculiar circumstances of this case. See *O'Hara* at ¶18-19; see, also, *O'Brien*, 34

Ohio St.3d at 9 (although the statutory and constitutional speedy trial provisions are coextensive, the constitutional guarantees may be found to be broader than speedy trial statutes in some circumstances).

{¶21} We sustain the state's assignment of error only to the extent that we reverse the trial court's dismissal of Alcorn's indictment, and remand this case to the trial court so that it can consider Alcorn's motion to dismiss with regard to her statutory and constitutional rights to a speedy trial.

{¶22} Judgment reversed and remanded for further proceedings.

RINGLAND and HENDRICKSON, JJ., concur.