[Cite as *State v. Savage*, 2015-Ohio-574.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2014-02-002
Plaintiff-Appellee,	:	CA2014-02-003
		CA2014-03-006
	:	CA2014-03-007
- vs -		
	:	O P I N I O N
		2/17/2015
JAMES J. SAVAGE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI 20120148

Stephen J. Pronai, Madison County Prosecuting Attorney, Rachel M. Price, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Shannon M. Treynor, 63 North Main Street, P.O. Box 735, London, Ohio 43140, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, James Savage, appeals his convictions in the Madison County Court of Common Pleas for forgery and failure to appear.

{¶ 2} Savage has an extensive criminal history involving passing bad checks, forgery, uttering, and bank fraud. In August 2012, and while Savage was being held in the Clark County Jail on forgery charges, he was interviewed by Detective Dean Harrison of the Madison County Sheriff's Office. Detective Harrison interviewed Savage specific to cashing

several fraudulent checks in Madison County. The investigation into the cashing of fraudulent checks in Madison County was not connected to the Clark County forgery charges for which Savage was held.

{¶ 3} In September 2012, a month after Detective Harrison's interview with Savage, Savage wrote a letter to the Madison County Clerk of Courts, asking whether there were any pending indictments or charges against him. Savage's letter was filed by the clerk with other correspondence from inmates, and contained a notation dated October 1, 2012 that no pending charges were found.

{¶ 4} On November 15, 2012, Savage was indicted on one count of forgery in regard to the forged checks in Madison County. The sheriff's office attempted to serve Savage with the indictment, but failed, noting on the return of service that Savage was incarcerated. The failed return of service was not filed with the Clerk of Courts nor sent to the prosecutor's office.

{¶ 5} In May 2013, Savage sent a letter to the Madison County Clerk of Courts, indicating his upcoming release date from the Clark County sentence. He notified the court that he was aware of a warrant for his arrest in Madison County. Within eight days of the receipt of Savage's letter by the court, Savage was arraigned on the forgery charge in the Madison County Court of Common Pleas.

{¶ 6} On July 3, 2013, Savage filed a motion to dismiss, alleging that pursuant to R.C. 2941.401, his speedy trial rights had been violated. Savage argued that the state had knowledge that he was incarcerated and was therefore obligated to serve him the indictment so that he could invoke his statutory speedy trial rights. Savage relied, not upon Ohio's general speedy trial statute, but only upon R.C. 2941.401. Savage did not argue any state or federal constitutional grounds to support a violation of his speedy trial rights.

{¶ 7} Before and during the pendency of the hearing on Savage's motion to dismiss, the state and Savage stipulated several facts, including that (1) Savage had sent the letter to the Clerk of Courts asking if any charges were pending, (2) the letter includes a notation that no charges were found, (3) Savage did not send a letter to the prosecutor's office, and that (4) service was attempted by the Madison County Sheriff's Office and that the return of service included a notation that Savage was in prison in Marion County and was not served.

{¶ 8} Following the hearing, the trial court denied Savage's motion to dismiss. Savage then pled no contest to the forgery charge, and the trial court found him guilty. The trial court scheduled a sentencing hearing, and Savage was released until sentencing could occur. However, Savage failed to appear at the sentencing hearing, and he was charged with failure to appear to which he subsequently pled guilty. When Savage ultimately appeared for sentencing on both charges, the trial court sentenced Savage to an agreed sentence of one year on the forgery charge and one year on the failure to appear charge, concurrent to each other, but consecutive to a sentence that Savage was already serving on other charges. Savage now appeals his convictions and sentence, raising the following assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE COURT ERRED IN ITS RELIANCE OF *STATE VS. HAIRSTON* IN DENYING THE DEFENDANT'S MOTION TO DISMISS.

{¶ 11} Savage argues in his first assignment of error that the trial court erred in determining that his speedy trial rights were not violated.

{¶ 12} Appellate review of speedy trial issues involves a mixed question of law and fact. *State v. Messer*, 12th Dist. Clermont No. CA2006-10-084, 2007-Ohio-5899, ¶ 7. An appellate court must give due deference to the trial court's findings of fact if they are

supported by competent, credible evidence, but will independently review whether the trial court correctly applied the law to the facts of the case. *Id.*

{¶ 13} According to R.C. 2941.401,

> 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.
>
> 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.
>
> 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.
>
> Escape from custody by the prisoner, subsequent to his execution of the request for final disposition, voids the request.
>
> 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.

{¶ 14} Therefore, in order to invoke the statutory speedy trial rights as afforded by R.C. 2941.401, the defendant must (1) provide written notice of the place of his imprisonment and a request for a final disposition to be made of the matter *to the trial court in which the charges are pending*, (2) provide written notice of the place of his imprisonment and a request for a final disposition to be made of the matter *to the prosecutor*, and (3) accompany both requests with a certificate from the warden stating the terms of the defendant's confinement.[1] The statute also places a duty on the warden to inform the incarcerated defendant of any pending charges or indictments, but only if the warden has such knowledge.

{¶ 15} There is no dispute in this case that Savage did not send the prosecutor or the court written notice of his incarceration and his desire to have any charges disposed of within 180 days. Nor is there any evidence in the record that the warden had knowledge of pending charges against Savage.

{¶ 16} In addition to the stipulated facts, the parties suggested to the trial court the following question was determinative of the issue: "whether the Madison County Sheriffs' Office's knowledge of the Defendant's whereabouts on November 18, 2012, operates as imputed knowledge to the State for purposes of affording the Defendant his right to a speedy trial." However, according to R.C. 2941.401, the knowledge would have to be imputed to the warden, not the state in general. In his brief, Savage argues that the deputy who tried to serve him had knowledge of his whereabouts, which should be imputed to the prosecutor, who should have notified the warden, who then would have had knowledge. In order to

1. We are aware of case law that permits a defendant's substantial compliance with the statutory requirements. *See, e.g., State v. Moore*, 3d Dist. Union No. 14-14-06, 2014-Ohio-4879. However, because Savage did not take *any* action to invoke his rights after he was indicted, we need not address whether there was substantial compliance.

connect these dots, Savage urges us to read into the statute a requirement of "reasonable diligence" upon all of law enforcement so that a warden can be imputed to have knowledge.

{¶ 17} The Ohio Supreme Court has analyzed R.C. 2941.401 on multiple occasions, with two decisions particularly important to our analysis. First, the court decided *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969. Within *Hairston*, the court was asked to decide "whether R.C. 2941.401 places a duty of reasonable diligence on the state to discover the whereabouts of an incarcerated defendant against whom charges are pending." *Id*. at ¶ 1. The court declined to impose any such duty.

{¶ 18} In addressing the posed question, the court determined that the statute is not ambiguous so that application, rather than interpretation, of the statutory requirements was all that was necessary in order to determine if the state had a duty to discover where the defendant was located. *Id*. at ¶ 20.

{¶ 19} Despite Hairston's request for the Ohio Supreme Court to impose a duty on the state to locate the incarcerated defendant for purposes of other pending charges, the court noted that it would not do so because "had the legislature wanted to impose such a duty on the state in similar cases, it could have done so. As our task is to apply unambiguous laws and not rewrite them, we decline to impose duties on prosecutors or courts not imposed by the legislation." *Id*. at ¶ 22.

{¶ 20} In addressing R.C. 2941.401, the court stated that the statute "places the initial duty on the defendant to cause written notice to be delivered to the prosecuting attorney and the appropriate court advising of the place of is imprisonment and requesting final disposition." *Id*. at ¶ 20. As such, the court determined that the statute "*imposes no duty on the state until such time as the incarcerated defendant provides the statutory notice*." *Id*. (Emphasis added.) The court also noted that the warden has a duty to inform the

incarcerated defendant of the charges "*only when* the warden or superintendent *has knowledge* of such charges." *Id*. (Emphasis added.) The court found that Hairston's warden did not have notice of the pending charges against Hairston so that the warden had no duty to inform of unknown charges.

{¶ 21} After deciding *Hairston*, the Ohio Supreme Court considered *State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617. In *Dillon*, the court revisited R.C. 2941.401 and was asked to determine whether an inmate's awareness of a pending indictment and of his right to request trial within 180 days negates a warden's duty to notify an inmate of his speedy trial rights pursuant to R.C. 2941.401. Again, the court indicated that the statute is unambiguous, and requires the warden inform a prisoner in writing of the indictment when the warden has knowledge of the indictment regardless if the defendant already knows about such indictment.

{¶ 22} Unlike *Hairston*, the warden in *Dillon* knew of the charges pending against Dillon but failed to deliver the indictment to him. As such, the *Dillon* court found Dillon's speedy trial rights had been violated pursuant to R.C. 2941.401 because the warden's violation of his duty to inform Dillon pursuant to the statute denied Dillon the opportunity to respond with a request that his charges be disposed of within 180 days.

{¶ 23} Savage now argues that his case is in line with *Dillon* rather than *Hairston* because the warden failed to give him written notice of the pending charges despite the deputy knowing that Savage was in prison and despite his writing a general letter requesting information from the Clerk of Courts. Savage urges us to rewrite the statute so that knowledge of any law enforcement officer is per se knowledge imputed to the warden. This, we decline to do, as the Ohio Supreme Court has held the statute is unambiguous on this point.

{¶ 24} We find the case sub judice in line with *Hairston* because the record establishes that the warden was unable, and had no duty, to inform Savage of charges of which the warden had no knowledge. Clearly and unambiguously, the statute only places a duty upon a warden who has knowledge of an existing indictment or specific charges.

{¶ 25} Savage argues in his brief that the deputy who tried to serve him was required by Crim.R. 9(C)(2) to make a return of the warrant to the court. Savage contends that *if* the officer would have returned the warrant as required, the prosecutor and court *would have been* on notice that service failed because Savage was incarcerated. However, what the deputy should have done does not change the fact that the record does not establish the warden had knowledge of an existing indictment against Savage.[2]

{¶ 26} Savage also asks this court to impute knowledge to the warden because he sent a letter to the Clerk of Courts asking if any charges were pending against him. However, the record establishes that Savage's letter was sent before the indictment was handed down against him so that there were no pending charges when the clerk received the letter. Moreover, Savage's letter asking if there were pending charges against him did nothing to indicate that Savage was attempting to invoke speedy trial rights, and would not have served to place the prosecutor and court on notice that Savage was invoking R.C. 2941.401.

{¶ 27} Savage cites a few cases relative to R.C. 2941.401 in support of his argument that the state had a duty of due diligence to find him to serve the indictment so that he could begin the process of invoking his statutory speedy trial rights. However, none of these cases were decided after the Ohio Supreme Court held in *Hairston* that R.C. 2941.401 imposes no

2. Savage also attempts to argue "reasonable diligence" as discussed in a host of post-indictment constitutional speedy trial cases discussing due process, such as *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182 (1972). However, we decline the opportunity to interpret constitutional concepts into R.C. 2941.401.

duty on the state until such time as the incarcerated defendant provides the statutory notice, and that the defendant has the initial burden to invoke his statutory speedy trial rights.[3]

{¶ 28} Savage cites *State v. Williams*, 10th Dist. Franklin No. 13AP-992, 2014-Ohio-2737. However, the *Williams* court was asked to determine if Williams' constitutional speedy trial rights had been violated where the police department knew that Williams was incarcerated in Georgia but the charges were not brought until four years after the police department was informed of Williams' location. The court discussed whether or not Williams had been prejudiced by the four-year delay before being indicted, and noted that the state was aware that Williams was incarcerated in Georgia because the police were notified that he was incarcerated there. However, such a constitutional analysis is different than an analysis pursuant to R.C. 2941.401 in cases where the process starts with the warden informing the incarcerated defendant of known pending charges and then the incarcerated defendant takes action to invoke his statutory rights.

{¶ 29} Despite Savage's argument that *Hairston* is inapplicable, we find it to be directly on point. *Hairston* clearly sets forth that the Ohio Legislature has imposed no duty on law enforcement officers through R.C. 2941.401 to find the defendant and inform him of pending charges so that the incarcerated defendant can invoke speedy trial rights. *Hairston* also establishes that the initial burden lies with the incarcerated defendant to invoke his rights, and that the warden only has a duty to inform the incarcerated defendant when the warden knows of the pending charges. The record does not establish the warden was aware of

3. Savage attaches to his brief Form III, which appears to have never been filed. This form may indicate that Savage could have been anticipating a detainer to be placed upon him. However, with no testimony regarding the form's origin or reasons for its creation, we cannot presume its significance. As the trial court found, there is no evidence that a detainer was ever forthcoming.

pending charges against Savage or that Savage did anything to invoke his speedy trial rights pursuant to R.C. 2941.401. As such, Savage's first assignment of error is overruled.

{¶ 30} Assignment of Error No. 2:

{¶ 31} THE COURT ERRED IN ITS IMPOSITION OF A CONSECUTIVE SENTENCE UPON THE DEFENDANT FOR HIS FAILURE TO APPEAR.

{¶ 32} Savage argues in his second assignment of error that the trial court failed to make the requisite statutory findings before imposing consecutive sentences.

{¶ 33} As recently stated by the Ohio Supreme Court, "in order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry* * *." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 37.

{¶ 34} While the trial court noted that it had considered the consecutive sentencing requirements, it did not make each of the requisite findings at sentencing or within its sentencing entry. Even so, the Ohio Supreme Court has held that an agreed sentence is not subject to review for failure of a trial court to make statutory findings before imposing consecutive sentences. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 25. Instead, the "General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence." *Id.* Therefore, a trial court's lack of findings is not reversible error and the agreed sentence is not subject to appellate review. *State v. Weese*, 2d Dist. Clark No. 2013-CA-61, 2014-Ohio-3267, ¶ 5.

{¶ 35} The record indicates that the parties agreed to a sentence before Savage agreed to plead guilty to the failure to appear charge and before he was sentenced. The trial

court's judgment entry of sentence indicates that the sentence was "an agreed sentence by the parties," and during the sentencing hearing, the trial court reiterated the agreement reached by all parties.

> I've indicated that I'd impose a year's sentence this morning, consecutive to his present term of confinement out of Clark County. If he pleads to the second offense of failure to appear, I would run that concurrent, one year concurrent to one year consecutive to Clark County. His out date is July the 30th of this year. That would move his out date to July 30, 2015.

{¶ 36} After the trial court reiterated the agreed sentence, Savage expressed his displeasure at not being able to pay court costs in a different manner and for not having his indictment for forgery dismissed, but then pled guilty to the failure to appear charge. The trial court then imposed the agreed sentence of one year on the forgery charge to run concurrently to one year on the failure to appear charge with the one-year-aggregate term consecutive to the sentence on the other charges Savage was serving. As the parties entered into a valid agreed sentence, Savage accepted the consecutive nature of his sentence and he cannot now challenge that aspect on appeal. As such, Savage's second assignment of error is overruled.

{¶ 37} Judgment affirmed.

HENDRICKSON and M. POWELL, JJ., concur.