

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-611
v.	:	(C.P.C. No. 08CR-03-1658)
Alexander D. Scott,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Alexander D. Scott, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to no contest plea, of one count of possession of cocaine in violation of R.C. 2925.11, a felony of the fifth degree and sentencing him to three years of community control and a one-year driver's

rights suspension. Because defendant's statutory and constitutional speedy trial rights were not violated, we affirm.

I. Procedural History

{¶2} The facts underlying defendant's appeal are largely undisputed and reveal that on May 26, 2007 the State Highway Patrol stopped defendant for a traffic violation. When defendant was asked for his license and registration, he stated he did not have his license, but gave the trooper his social security number. The officer noted a strong odor of alcohol about defendant, defendant's bloodshot and glassy eyes, and his slurred speech. After asking defendant to perform field sobriety tests, the trooper placed defendant under arrest. As the trooper directed defendant toward the patrol vehicle, defendant "side-stepped and reached right." (Tr. 3.) The trooper grabbed defendant's hand, and behind defendant on the ground was a sandwich baggie containing white powder; defendant stated he did not drop it.

{¶3} Out of the traffic stop, defendant was charged with misdemeanor traffic offenses and a felony count of possession of cocaine. Defendant was released on bond on June 2, 2007, and on June 5, 2007, the cocaine complaint was dismissed for future indictment. Defendant ultimately pleaded guilty on June 18, 2007 to physical control and false information to a law enforcement officer.

{¶4} On March 7, 2008, defendant was indicted for one count of possession of cocaine, a fifth-degree felony. After the parties exchanged requests for discovery, defendant filed a motion to dismiss on September 24, 2008, contending the state violated his statutory and constitutional rights to a speedy trial. Following the state's response, the

trial court issued a decision filed on March 3, 2009 denying defendant's motion to dismiss. While the trial court readily acknowledged that R.C. 2945.71 required defendant be brought to trial on a felony charge within 270 days after his arrest, the trial court noted exceptions and extensions applied to defendant.

{¶5} The court began to calculate speedy trial on the date of defendant's arrest, May 26, 2007. Recognizing defendant was not released on bond until June 2, 2007, the trial court granted defendant three days for each day he was held in jail in lieu of bond. Accordingly, the trial court concluded that as of June 2, 2007, the state was charged with 24 days against the 270-day speedy trial time limit. The court added an additional three days until the felony charge was dismissed on June 5, 2007, calculating 27 days had elapsed to that point in time.

{¶6} The trial court, however, concluded the time period between the date defendant's felony complaint for possession of cocaine was dismissed and the date of his June 21, 2008 arrest on the subsequent indictment should not be included in the calculations because defendant had no charges pending against him during that time; the trial court thus started the speedy trial clock running again as of June 21, 2008. Noting other factors that tolled the time for bringing defendant to trial, the trial court concluded the state complied with the 270-day time limitation R.C. 2945.71 prescribes.

{¶7} The trial court similarly concluded the March 7, 2008 indictment did not violate defendant's constitutional right to a speedy trial. The court found defendant's argument that he suffered substantial prejudice from pre-indictment delay to be speculative.

{¶8} Defendant subsequently entered a no contest plea to the indicted charge; the trial court found him guilty and sentenced accordingly. On appeal, defendant contends the trial court wrongly denied his motion to dismiss.

II. Assignments of Error

{¶9} Defendant assigns two errors:

FIRST ASSIGNMENT OF ERROR

The trial court erred in overruling Appellant's motion for discharge for denial of his right to a speedy trial, as guaranteed by R.C. 2945.71.

SECOND ASSIGNMENT OF ERROR

The trial court erred in overruling Appellant's motion for discharge for denial of his right to a speedy trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

III. First Assignment of Error – Statutory Speedy Trial

{¶10} Pursuant to R.C. 2945.71(C)(2), a person "against whom a felony charge is pending" must be "brought to trial within [270] days after the person's arrest." A felony charge is not "pending" under the statute "until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance." *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus. A person charged with an offense shall be discharged, upon his or her motion made at or prior to the commencement of trial, if he or she is not brought to trial within the time required by R.C. 2945.71. R.C. 2945.73(B). The time to bring an accused to trial can be extended for reasons enumerated in R.C. 2945.72, including "[a]ny period of delay

necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused." R.C. 2945.72(E). See *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478; *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374. The speedy-trial time also can be extended for "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." R.C. 2945.72(H).

{¶11} When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the accused was properly brought to trial within the time limits set forth in R.C. 2945.71. *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, ¶19, citing *State v. DePue* (1994), 96 Ohio App.3d 513, 516. For purposes of computing time under the statute, each day an accused is held in jail in lieu of bond counts as three days under R.C. 2945.71(E), but the date of arrest is not included. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶7; *State v. Steiner* (1991), 71 Ohio App.3d 249, 250-51. See Crim.R. 45(A) (stating that the date of the act or event from which the designated period of time begins to run shall not be included); R.C. 1.14 (stating that "[t]he time within which an act is required by law to be done shall be computed by excluding the first and including the last day").

{¶12} In calculating the elapsed time under R.C. 2945.71, defendant does not dispute he is entitled to three days for each day he was incarcerated from May 26 through June 2, the day defendant was released on bond. He also argues the state is charged an additional three days because the possession of cocaine complaint was not dismissed

until June 5, 2007. Accordingly, defendant generally concurs that 27 days elapsed by June 5, 2007.

{¶13} Defendant points out he was indicted on one count of possession of cocaine on March 7, 2008 and was re-arrested on that charge on June 21, 2008. He was held on the indictment until he was released on bond on June 25, 2008. Granting him three days for each he was held in jail, defendant asserts he was entitled to an additional 12 days for the time period from June 21 to June 25, so that a minimum of 39 days elapsed to that date.

{¶14} Defendant charges an additional six days against the state from the date of defendant's release until defendant filed his discovery motion on July 1, 2008. Allowing the state 21 days to respond to the motion, defendant assesses an additional 51 days against the state from July 22 to September 11, 2008 when defendant waived his speedy trial rights through a series of continuances up until the trial date of April 6, 2009. Adding the additional 57 days to the 39 that had elapsed under the municipal court proceedings, 96 days were charged against the state on the date defendant entered his no contest plea, not counting the time from resolution of the municipal court charges to defendant's arrest on the subsequent indictment.

{¶15} While the state's calculations regarding the above-noted time periods differ in some aspects from those of defendant, the parties agree defendant's motion to dismiss turns on whether the time period from June 5, 2007, the date the possession complaint in municipal court was dismissed, to June 21, 2008, the date defendant was arrested on the indictment ("the time period at issue"), is included in the 270 days within which the state

must bring defendant to trial under R.C. 2945.71. If the time is charged against the state, then the state did not comply with the statutory mandate that defendant be brought to trial within 270 days; if the time is not charged against the state, then the state was well within 270 days at the time defendant entered his no contest plea. Defendant urges the time period at issue properly is charged against the state because the felony indictment arose out of the same facts and circumstances that gave rise to the original possession complaint in the municipal court. The state, by contrast, contends that because it learned of additional facts after the municipal court complaint was dismissed, the time period at issue is not part of the speedy trial calculation.

{¶16} "[W]here new and additional charges arise from the same set of facts as those found in the original charge, *and the state knew of those facts at the time of the initial indictment*, the time frame within which the new charge is to be tried is subject to the same statutory limitations period as that which is applied to the original charge." (Emphasis sic.) *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658, ¶28, citing *State v. Adams* (1989), 43 Ohio St.3d 67; *State v. Baker*, 78 Ohio St.3d 108, 1997-Ohio-229 (concluding that if additional charges arise from the same facts as those supporting the original indictment, the subsequent charges are subject to the same speedy trial constraints as the original charges).

{¶17} Nonetheless, "in issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." *Mohamed* at ¶29, quoting *Baker* at 110. See also *State*

v. Parker, 113 Ohio St.3d 207, 2007-Ohio-1534 (noting "the holdings of *Baker* and *Adams* * * * combined, stand for the proposition that speedy-trial time is not tolled for the filing of later charges that arose from the facts of the criminal incident that led to the first charge," but acknowledging exceptions to the general proposition when additional criminal charges arise from new facts not present at the time the original charges were filed, or the state did not know of the facts at the time the defendant initially was indicted). "The key question * * * is whether all of the offenses at issue arose out of the same set of facts, or whether additional charges arose from new facts that were either not present at the time of the original arrest or not available to the state at the time of the original arrest and indictment." *Mohamed* at ¶32.

{¶18} Defendant contends the felony possession charge necessarily arose out of the same facts as the traffic charges, as they occurred on the same day. Defendant thus contends his arrest and incarceration as a result of the traffic charges and the felony possession complaint started the speedy trial clock running on the subsequent felony drug indictment.

{¶19} The state, by contrast, notes that subsequent to dismissing the felony possession complaint in municipal court for future indictment, the police submitted the confiscated substance for chemical testing on July 5, 2007. The lab reported on September 6, 2007 to the investigating officers that the tested substance was cocaine. With that lab result, the state indicted defendant for a single count of possession of cocaine. Pointing to the lab results, the state asserts the felony indictment was premised on facts not available to the state at the time of the original arrest and indictment.

{¶20} Defendant responds that the lab results cannot constitute new facts, because the state suspected the recovered substance was cocaine, as indicated in the municipal court complaint that charged defendant with possession. To support his argument, defendant cites to *State v. Rutkowski*, 8th Dist. No. 86289, 2006-Ohio-1087, where the new or additional facts between defendant's initial arrest related to misdemeanor offenses and his subsequent indictment were lab results confirming that the pills confiscated at the time of defendant's misdemeanor offenses tested positive for Ecstasy. Because Rutkowski admitted having Ecstasy, the appellate court determined the lab results provided the state with no new or additional facts, and the speedy trial clock should have begun to run at the time of Rutkowski's initial arrest.

{¶21} Unlike the prosecution in *Rutkowski*, the state here had neither an admission from defendant or lab results that at the time of defendant's initial arrest confirmed he possessed cocaine. Accordingly, the facts here fall within the parameters of *Parker* that release the state from the speedy trial time limits of R.C. 2945.71 when the charges arise from facts not known at the time of the initial indictment. See *State v. Lekan* (June 27, 1997), 2d Dist. No. 16108 (concluding the second offense of driving with a prohibited concentration of alcohol did not arise from the same set of facts as the original charges because the second offense depended on a lab analysis not available to the police at the date the defendant first was charged); *State v. Cantrell* (Sept. 7, 2001), 2d Dist. No. 00CA0095; *State v. Dalton*, 2d Dist. No. 2003 CA 96, 2004-Ohio-3575; *State v. Riley* (June 12, 2000), 12th Dist. No. CA99-09-087 (concluding defendant's speedy trial rights were not violated when, eight months after defendant's arrest for driving under the

influence, he was indicted for possession of cocaine, as the possession charge resulted from a necessary fact not present at the time of the driving charge, the results from lab tests confirming the white powder was cocaine); *State v. Armstrong*, 9th Dist. No. 03CA0064-M, 2004-Ohio-726 (concluding the state was not subject to the statutory speedy trial timeframe applicable to the original charges where the subsequent indictment depended on confirmation from a lab report that the white powder seized was cocaine); *State v. Skinner*, 4th Dist. No. 06CA2931, 2007-Ohio-6320; *State v. Clark*, 11th Dist. No. 2001-P-0031, 2004-Ohio-334 (noting that even though the state may have suspected the confiscated substance was cocaine prior to its analysis, the speedy trial time did not apply from the date of the first indictment because the lab analysis results were not received until after the first indictment).

{¶22} Because the lab results were facts not known to the state at the time of defendant's traffic stop, the time period at issue is not included in the speedy trial calculations under R.C. 2945.71. Instead, the speedy trial clock began to run again on the date defendant was re-arrested on the felony indictment. The trial court properly denied defendant's motion to dismiss for violation of his statutory speedy trial rights. Accordingly, defendant's first assignment of error is overruled.

IV. Second Assignment of Error—Constitutional Speedy Trial Rights

{¶23} Defendant's second assignment of error contends the delay involved violated his right to a speedy trial under the Sixth Amendment to the United States Constitution, and Section 10, Article I of the Ohio Constitution.

{¶24} "In all criminal prosecutions, the accused shall enjoy the right to a speedy and swift trial by an impartial jury of the State and district wherein the crime shall have been committed." Sixth Amendment, U.S. Constitution. The Ohio Constitution separately guarantees the right to a speedy trial in Section 10, Article I. The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Barker v. Wingo* (1972), 407 U.S. 514, 515. 92 S.Ct. 2182, 2185.

{¶25} A two-pronged inquiry is appropriate in analyzing a claim that the state violated a defendant's constitutional speedy trial rights. "First, the defendant must make the threshold showing of a 'presumptively prejudicial' delay to trigger application of the *Barker* analysis." *State v. Sellers*, 10th Dist. No. 08AP-810, 2009-Ohio-2231, ¶14, citing *Doggett v. United States* (1992), 505 U.S. 647, 651, 112 S.Ct. 2686, 2690. If a presumptively prejudicial delay is discerned, then the second inquiry requires the court to consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the resulting prejudice to the defendant. *Doggett* at 651. Here, we assume, without deciding, that defendant met the presumptively prejudicial aspect of *Doggett*.

{¶26} Under the second inquiry, we examine first the length of the delay, which exceeds one year. The reason for the delay, however, lies in part with defendant. Defendant was indicted on March 7, 2008. He apparently was served on March 11, 2008 with a summons to appear at the Franklin County Common Pleas Court on March 21. When he failed to appear on that date, the matter was continued to April 4, 2008.

Defendant again failed to appear and a *capias* for his arrest was issued on April 8, 2008. Defendant was not arrested until June 21, 2008; he bonded out on June 25 and entered a not guilty plea. Accordingly, approximately three and one-half months of the time lapse is attributable to defendant's own failure to appear in court. Moreover, from September 11, 2008 through the date of defendant's scheduled trial, defendant waived his speedy trial rights. In between his arrest and his no contest plea, discovery, and then defendant's motion to dismiss, charged additional delay to defendant. Accordingly, the reasons for the delay do not favor defendant's constitutional speedy trial argument.

{¶27} Similarly, defendant did not assert his speedy trial rights immediately. The indictment was filed on March 7, 2008, the *capias* was issued on April 8, 2008, and defendant was arrested on June 21, 2008, but defendant did not file his motion to dismiss based on violation of his speedy trial rights until September 24, 2008, over six months after the indictment and more than three months following his re-arrest. Cf. *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶31 (concluding a two-month delay in filing a motion to dismiss for violation of speedy trial rights weighed against defendant's constitutional argument).

{¶28} Lastly, we agree with the trial court that defendant's claimed prejudice amounts to speculation. Defendant was not incarcerated following resolution of the municipal court charges and prior to the subsequent felony indictment. Defendant did not claim to have an alibi; nor did he assert he had witnesses who were unavailable due to the lapse of time.

{¶29} In the final analysis, even if the delay were presumptively prejudicial here, the length of delay exceeded one year because defendant failed to appear in court on the specified date. Much of the subsequent delay was due to the usual progression of a criminal case and defendant's waiver of his right to a speedy trial for a period of approximately seven months. While defendant asserted his speedy trial rights through his motion to dismiss, he did so approximately six months after he was indicted and nearly three months after he was arrested on the indictment. Nothing in the record demonstrates prejudice from the delay. Accordingly, defendant's constitutional right to a speedy trial was not violated, and the trial court properly so concluded. Defendant's second assignment of error is overruled.

{¶30} Having overruled both of defendant's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
