

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-388 (C.P.C. No. 11CR06-3247)
Mamadou Diallo,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 29, 2013

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

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss filed by defendant-appellee, Mamadou Diallo, because of a violation of appellee's right to a speedy trial. For the following reasons, we reverse that judgment and remand the matter for further proceedings.

I. Factual and Procedural Background

{¶ 2} The parties have largely stipulated to the relevant facts of this case. On December 2, 2010, appellee was arrested and charged by a criminal complaint with one count of trademark counterfeiting in violation of R.C. 2913.34. On December 6, 2010, appellee was released from the Franklin County Corrections Center into the custody of the

Immigration and Customs Enforcement Agency ("ICE") on an immigration detainer. It appears that he was held in the Butler County jail on such detainer. On December 10, 2010, the trademark counterfeiting complaint was dismissed for future indictment. No charges remained pending against appellee, although he remained in ICE custody at the Butler County jail.

{¶ 3} On June 22, 2011, a Franklin County Grand Jury indicted appellee with seven counts of trademark counterfeiting. On July 1, 2011, appellee was brought back to the Franklin County Corrections Center from the Butler County jail. On July 8, 2011, the trial court arraigned appellee and imposed a recognizance bond. He was returned to the Butler County jail, but shortly thereafter came back to Franklin County, and on August 1, 2011, the trial court imposed a \$25,000 cash/surety bond. He was then released from his immigration detainer and from ICE custody. On August 19, 2011, appellee posted bond and was also released from the Franklin County Corrections Center. The trial court scheduled a September 29, 2011 trial date, which the trial court sua sponte continued until October 3, 2011 due to its unavailability.

{¶ 4} On October 31, 2011, appellee filed the instant motion to dismiss, claiming that his speedy trial rights had been violated. Specifically, appellee claimed that the time between the filing of the 2010 complaint on December 2, 2010 until his October 3, 2011 trial date far exceeded the allowable time for a speedy trial. R.C. 2945.71(C)(2). The state disagreed. The state argued that the time between the dismissal of the 2010 complaint on December 10, 2010, and the arraignment for the 2011 indictment on June 22, 2011, did not count against the state because appellee faced no pending charges. Absent those days, the state argued that no speedy trial violation had occurred.

{¶ 5} After a hearing, the trial court granted appellee's motion. The trial court noted that the 2011 indictment arose from the same facts as did the 2010 complaint and that the state had all the necessary information to proceed against appellee in 2010. The trial court also noted that the appellee was available for prosecution the entire time, despite being held by ICE during this time. The trial court concluded that the days between the dismissal of the 2010 complaint and the filing of the 2011 indictment counted against the state for purposes of a speedy trial analysis and, therefore, dismissed the indictment against appellee.

{¶ 6} The state appeals and assigns the following error:

The trial court erred when it granted the Defendant's Motion to Dismiss.

II. The Statutory Right to a Speedy Trial—R.C. 2945.71

{¶ 7} The state argues in its assignment of error that the trial court erred by granting appellee's motion because it included days in its speedy trial analysis during which no criminal charges were pending against appellee. We agree.

A. Standard of Review

{¶ 8} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55 (1996); *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 10. The speedy trial statutory provisions are mandatory and require strict compliance by prosecutors, as well as strict enforcement by the courts. *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶ 16. If the trial court and prosecution fail to bring a defendant to trial within the time required, the trial court shall discharge the defendant. *Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, ¶ 23.

{¶ 9} The proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶ 32, citing *State v. DePue*, 96 Ohio App.3d 513, 516 (4th Dist.1994). Appellee faced felony charges in this case. Pursuant to R.C. 2945.71(C)(2), the state must bring a defendant arrested on felony charges to trial within 270 days of his arrest. If the defendant is held in jail in lieu of bail on the pending charge, each day counts as three days. R.C. 2945.71(E).

{¶ 10} Upon demonstrating that more than 270 days elapsed before trial, a defendant establishes a prima facie case for dismissal based on a speedy trial violation. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9. Once a defendant

establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended. *Id.*

B. Counting Days Between Charges

{¶ 11} Appellee acknowledges that he cannot establish a prima facie violation of his speedy trial rights by counting only the days after his arraignment for the 2011 indictment. However, appellee argues that the 202 days between the dismissal of his 2010 complaint and his arraignment for the 2011 indictment should be counted as part of the speedy trial analysis because he remained in custody during that entire time. The basis for appellee's argument is the Supreme Court of Ohio's decision in *State v. Broughton*, 62 Ohio St.3d 253 (1991).

{¶ 12} In *Broughton*, the court considered whether the time period between the dismissal of a criminal complaint and the subsequent filing of an indictment premised on the same facts counted for speedy trial purposes. The court began its analysis "cognizant that the speedy trial statute shall run against the state only during the time in which an indictment or charge of felony is pending." *Id.* at 258. The court, however, reasoned that such proposition did not directly address a situation in which an indictment is dismissed and the same underlying facts provide the basis for a new indictment. *Id.* After reviewing different approaches other courts have taken to address this situation, the court concluded that the time period between indictments do not count for speedy trial purposes unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I). *Id.* at paragraph one of the syllabus.¹ See also *Bayless* at ¶ 20. Crim.R.(I), now (J), provides in pertinent part, that "[i]f the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint."

¹ We note that this procedure does not grant the state a new 270 days for which to put a defendant on trial for the second indictment. Any days that elapsed under the first indictment are counted toward the speedy trial time in the subsequent case. *Broughton*.

{¶ 13} Appellee argues that the 202 days between the dismissal of the 2010 complaint and his arraignment for the 2011 indictment should count in the speedy trial analysis because he was held in custody during that time. Because the record does not reflect that appellee was in custody pursuant to any Franklin County charges, nor was he in custody pursuant to Crim. R. 12(J), we disagree.

{¶ 14} There were no charges pending against appellee in Franklin County during the time he remained in custody after the dismissal of his 2010 complaint. As noted, the speedy trial statute, R.C. 2945.71(C), runs against the state only during the time when an indictment or charge is pending. *Broughton* at 258; *Bayless* at ¶ 30 (tolling time period between dismissal of complaint and subsequent indictment because no charges pending during that time period); *State v. Wright* (June 27, 1996), 8th Dist. No. 69386 (days between dismissal and re-indictment not counted towards speedy trial claim because no charges pending for that period). A charge is not pending for purposes of calculating speedy trial time 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, ¶ 21.

{¶ 15} Appellee argues that he was held in custody after the 2010 dismissal pending the filing of charges because he remained in custody pursuant to the ICE detainer. He also alleges that the ICE detainer was based solely on the Franklin County counterfeiting charges. This allegation is based on pure speculation. The detainer is not in the record. There is no evidence that the ICE detainer was based on the dismissed counterfeiting charges. *See State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658 (noting that time between indictments did not count for speedy trial purposes where defendant, although in custody, was in custody for "wholly unrelated charges"); *State v. Tatum*, 3d Dist. No. 13-10-18, 2011-Ohio-3005, ¶ 26-27 (not counting days between dismissal and re-indictment, even though defendant was held in custody for some of that time, because custody was for unrelated charges and a federal detainer); *State v. Moore*, 5th Dist. No. 93-CA-3 (Sept. 3, 1993) (not counting days between dismissal and re-indictment, even though defendant was held in custody for that time, because custody was due to a holder for an alleged probation violation, not any pending charges).

{¶ 16} In addition, the exception in *Broughton* that time spent in jail counts for speedy trial purposes only applies if a defendant is being held in jail or released on bail pursuant to Crim.R. 12(J). That rule allows a trial court to keep a defendant in custody or on bail, pending the filing of future charges, but only if the trial court dismissed a complaint, indictment, or information based on a defect in the institution of the proceedings or in the complaint, indictment or information themselves. Here, the trial court did not grant a motion to dismiss based on any of these circumstances. Nor does the record reflect that appellee was in custody pursuant to Crim.R. 12(J). Therefore, the *Broughton* exception does not apply. *State v. Crawford*, 8th Dist. No. 59430 (Nov. 7, 1991) (decision predating *Broughton*, but concluding that days between dismissal and re-indictment did not count toward speedy trial calculation because defendant remained in custody on another case and not pursuant to Crim.R.12).

{¶ 17} The time between the dismissal of the 2010 complaint and the arraignment for the 2011 indictment does not count for purposes of a speedy trial analysis. *Broughton*. Accordingly, appellee has failed to make a prima facie showing of a speedy trial violation, and the trial court erred by concluding otherwise.

III. Conclusion

{¶ 18} Because appellee's right to a speedy trial has not been violated, the trial court erred in granting appellee's motion to dismiss. Accordingly, we sustain the state's assignment of error, reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for further proceedings.

Judgment reversed; cause remanded.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District,
assigned to active duty under authority of Ohio Constitution,
Article IV, Section 3(B).
