

IN THE SUPREME COURT OF OHIO
Case No. 2005-1788

STATE OF OHIO, :
 :
 Plaintiff :
 :
 -vs- :
 :
 SANDRA AZBELL :
 :
 Defendant :

MEMORANDUM OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER
IN SUPPORT OF MOTION FOR RECONSIDERATION OF APPELLEE AZBELL

COUNSEL FOR APPELLEE SANDRA
AZBELL:

DAVID H. BODIKER
State Public Defender

J. BANNING JASTUNAS
Assistant State Public Defender
(Counsel of Record)
8 East Long St., 11th Floor
Columbus, Ohio 43215
(614) 466-5394
FAX (614) 752-51667

COUNSEL FOR AMICUS CURIAE
CUYAHOGA COUNTY PUBLIC DEFENDER:

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender

JOHN T. MARTIN
CULLEN SWEENEY
Assistant Public Defenders

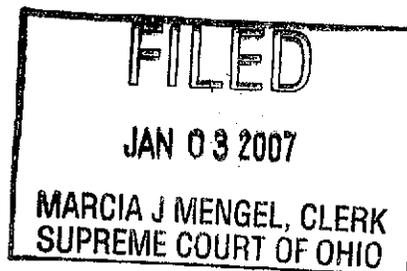
1200 West Third Street
Cleveland Ohio 44113
216-443-7583

COUNSEL FOR APPELLANT STATE OF
OHIO:

JAMES J. MAYER, JR.
Richland County Prosecutor

KIRSTEN L. PSCHOLKA-GARTNER
Assistant Richland County Prosecutor
(Counsel of Record)

38 South Park Street
Mansfield, OH 44902
(419)774-5676
FAX (419)774-5589



INTEREST OF AMICUS CURIAE

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County, and the primary legal counsel for indigent persons charged with misdemeanors in the City of Cleveland. As such the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The instant case is of great importance to your amicus. The practice of police arresting and then releasing defendants without formal charges being presented was widespread in Cuyahoga County.¹ As a result of public outcry in 2001,² the practice has been reduced in Cleveland, although not eliminated.

SUMMARY OF ARGUMENT

The plurality opinion of the Court (Lundberg Stratton, Resnick and O'Connor, JJ.) has combined with the concurring opinion (O'Donnell, J.) to create a majority view that Ms. Azbell's circumstances are not specifically covered by R.C. 2945.71 because a charge was not "pending" until she was indicted some eleven months after her arrest. Syllabus. Respectfully, the majority view has employed an incorrect interpretation of the plain meaning of R.C. 2945.71, which does not require that charges be pending after arrest in order for the speedy trial time to commence. Moreover, the majority view fails to consider the effect of Crim. R. 4's requirement that all arrestees be promptly charged, which evidences the General Assembly's intention to start

¹ See, McGinty, Hon. Timothy J., "'Straight Release': Justice Delayed, Justice Denied," 48 *Cleve. St. L. Rev.* 235 (2000) (Hereinafter, "Justice Delayed").

² The Plain Dealer expounded upon this practice in a series of articles and editorials, between March and June, 2001. See, e.g., *Justice, sometimes* (Editorial, March 19, 2001); Tobin, *Council troubled by suspects' release* (March 22, 2001); *Know when to hold 'em* (Editorial, March 26, 2001); McGinty, *Cleveland must end straight release* (Op-ed., March 26, 2001); Tobin,

the speedy trial time at the moment of arrest. The majority view actually creates a scenario whereby police and prosecutors will be rewarded for violating Crim. R. 4. Finally, the majority view fails to appreciate that the General Assembly must have intended that speedy trial time limits commence with arrests in all cases in order to vindicate the public's interest in a speedy trial.

ARGUMENT

A. Introduction: Standard for Reconsideration Has Been Met

Your amicus is mindful that this Court does not favor reconsideration of its opinions.

Nonetheless, reconsideration is appropriate when:

the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for [the Court's] consideration that was either not considered at all or was not fully considered by [the Court] when it should have been.

Matthews v. Matthews (1981), 5 Ohio App. 3d 140, 143.

In the instant case, both procons of *Matthews* apply.

B. Issues That Were Not Considered: The Public's Right to Speedy Trial, Crim. R. 4's Prohibition on Straight Release, and the Effect of Speedy Trial Time Computations on "Straight Release"

The briefs of the parties and, consequently, the decision of the Court, failed to consider a fundamental aspect of speedy trial protection:

The speedy trial right protects not just the defendant, but the public as well.

Federal courts, including the United States Supreme Court, have long recognized this vital aspect of speedy trial legislation. E.g., *Zedner v. United States* (2006), 126 S.Ct. 1976, 1985 (speedy

Councilman vows to end 'straight release' (May 19, 2001); *Letting go of straight release* (Editorial, June 14, 2001); *Tobin, Straight release ends next week* (June 15, 2001).

trial provisions were “designed with the public interest firmly in mind.”). The public has a vital interest in

[R]educing defendants’ opportunity to commit crimes while on pretrial release and preventing extended delay from impairing the deterrent effect of punishment.

Id. Accord, *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 11.

As a result of this Court’s decision in this case, police can arrest a person and release that person totally under the public radar. Presumably the original arrest was premised upon probable cause to believe a crime has been committed. Thus, when police release the person after arrest, the police are placing back in the community, without any supervision, a person who might still be incarcerated, or at least subject to pre-trial restrictions, had the person been brought before a judicial officer in a timely manner following arrest. Straight release is contrary to law See, Crim. R. 4(E)-(F) (arrested person “shall” be brought before judicial officer except when released on complaint and summons in misdemeanor cases). Simply put, the law neither countenances nor contemplates a person who has been arrested becoming “unarrested” by police mandate.

From the public’s perceptive, “straight release” is a substandard police tactic that allows the police to put off cases until a later date, advances police and prosecutorial inertia, and places the public at risk.³ From a defendant’s perspective, straight release places the defendant in police custody and then releases the defendant without ever providing the opportunity to appear before a judicial officer and without ever formally advising the defendant of the charge for which the arrest has been effected. Because the release takes place in relatively short order (in this case a matter of an hour; in some cases a matter of a couple of days), habeas relief is practically

³ Justice Denied, at 236-239.

unavailable. While it may seem strange for a public defender's office to decry the straight release of arrestees, your amicus is concerned that the process of straight release leaves our clients particularly vulnerable. There is no assurance that the same incident that gave rise to the arrest and release at the time of the alleged offense will not be used to later justify another arrest and release at a later time. When the State finally indicts the case, a final arrest can be made on the warrant issued in connection with the indictment, which is precisely what happened to Ms. Azbell in this case. Through it all, the police are having multiple encounters with a person who never is advised of the right to legal counsel and other constitutional rights that would have been explained had the person first been brought promptly to a judicial officer pursuant to Crim. R. 4 and afforded an initial appearance pursuant to Crim. R. 5. When one considers the larger picture, a process that allows police to arrest and release citizens without bringing them before judges, or even advising prosecutors, smacks of a level of jurisprudence far more primitive than that designed by the Framers.

Until now, the speedy trial statute has been the one criminal provision that ensured that such abuses would be limited – because arresting a defendant started the speedy trial clock and thus ensured that the police would have to present the case to prosecutors and bring charges in relatively short order. Similarly, the speedy trial statute was the chief protection that the public possessed against indefinite exposure to such “unarrested” persons. As long as speedy trial restrictions are triggered by “arrest,” the public could be assured that the alleged criminal not remain unsupervised beyond the statutory speedy trial time.⁴

⁴ For example, if the police arrest a person for driving under the influence of alcohol and then straight release that person without filing charges, that person can continue to drive indefinitely; the State has two years to bring the misdemeanor charge of DUI. On the other hand, if the speedy trial time begins with arrest, motorists throughout Ohio can be assured that the person will have to be charged with some alacrity because the speedy trial time period for

Because the speedy trial provisions require that trial commence within a set time, the public is also assured that guilty persons are sentenced quickly in cases where the original offense conduct was sufficiently egregious to require an arrest at the scene. This is particularly important to victims of violent crimes, those members of the public most affected by an offender's conduct. Moreover, by ensuring that trials take place more quickly in those cases where the offense conduct was serious enough to justify an arrest at the scene, the public has been assured that the most serious cases would be tried at a time when the evidence was fresh, and before victims had memory lapses or became unavailable. The public's legitimate interest in protecting the rights of those wrongfully accused has also been advanced by affording the defendant a prompt trial.

C. Interpreting R.C. 2945.71

Obviously, the policy grounds enunciated above cannot substitute for the words of the statute. However, when the policy underlying speedy trial is more fully understood, it becomes readily apparent that the General Assembly meant what it said – the speedy trial time limits begin with “arrest.”

With R.C. 2945.71(C), the Ohio General Assembly has provided the public, the litigants, and the courts with a bright-line rule:

A person against who a charge of felony is pending:

* * *

(2) [s]hall be brought to trial within two hundred seventy days *after the person's arrest*.

bringing the person to trial is only 90 days; once charges are brought, driving privileges are administratively suspended and may also be restricted as part of pre-trial release.

(emphasis added). In short, the speedy trial clock begins with the defendant's arrest. *State v. Duncleman*, Montgomery App. No. 19233, 2002 Ohio 4463, at ¶ 19; *State v. Rutkowski*, Cuyahoga App. No. 86289, 2006 Ohio 1087, ¶ 20; *State v. Lloyd*, Cuyahoga App. No. 86501 & 86502, 2006 Ohio 1356, ¶ 20; *State v. Jones*, Defiance App. No. 4-05-21, 2006 Ohio 5147, ¶¶ 10-11.

In this case, the majority of the Court has opined that the words "is pending" require that:

[T]he 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.

Opinion, at syllabus and ¶¶ 1, 9, 21, and 30.

Respectfully, this is incorrect. The words "is pending" are used at the beginning of R.C. 2945.71(C), to describe the type of charge that is the subject of a particular case, just as the same term, "is pending," is used at the beginning of R.C. 2945.71(A) and 2945.71(B). As the dissent notes, the term "is pending" is simply part of the terminology used to differentiate the three types of cases that are the subject of subsections (A), (B), and (C), respectively. Opinion, at ¶ 34 (Moyer, C.J., dissenting). "Is pending" appears at the beginning of each subsection, when the charge then before the court is being discussed – not at the end of each subsection when arrest or service of summons is discussed.

When viewed in the context of the tripartite Speedy Trial Act, codified at R.C. 2945.71 through 2945.73, the need for the term "is pending" to describe the charge then before the trial court becomes apparent. R.C. 2945.73 sets forth that violations of R.C. 2945.71 will result in the dismissal not only of the pending charges but also all other charges relating to the same conduct. Thus, it is important for R.C. 2945.71 to be couched in terms of the charge that "is pending," because that charge determines (a) the time frame (e.g., has a misdemeanor been charged or a felony?) and (b) what other alleged offenses are also subject to the speedy trial computations in

any particular case (e.g., is the charge that “is pending” the May 1st bank robbery or the May 5th assault on a police officer?).

The majority view conflicts with the canon of statutory construction that a court avoid any construction of a statute that renders a part of that statute “superfluous,” “meaningless,” and/or “inoperative.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St. 3d 250, 257. (quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.* (1917), 95 Ohio St. 367, 372-73); see also *East Ohio Gas Co. v. Public Utilities Comm’n* (1988), 39 Ohio St. 3d. 295, 299; R.C. 1.47. Here, the majority view of R.C. 2945.71(C) renders the phrase “after the person’s arrest” meaningless. By using the pendency of a felony charge as the starting point for the speedy trial clock, the majority has effectively construed R.C. 2945.71(C) as providing that “[a] person against whom a charge of felony is pending . . . [s]hall be brought to trial within two hundred seventy days [.]” The General Assembly’s provision that the two hundred seventy day time period be tied to the date of “the person’s arrest” has been read right out of the statute.

Second, the majority view is inconsistent with the canon of construction that the General Assembly does not intend its legislation to result in absurd or illogical consequences. E.g., *Superior’s Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St.2d 133. Here, the majority view creates the situation where a defendant who is arrested and incarcerated, but then released without being charged, has accrued no speedy trial time because no charge was ever pending. Yet, the majority view recognizes that this same defendant, if instead of being released is then brought before a judicial officer as required by law, will receive the speedy-trial benefit of the time thus far spent in custody.⁵

⁵ A simple example illustrates the problem with the majority’s opinion. Two defendants are arrested at 12:01 a.m. on January 1st, and incarcerated. Defendant A is straight released in the

Thus, the majority opinion has created a disincentive to follow Crim. R. 4 – police and prosecutors are better off if they violate Crim. R. 4 and does not give the defendant a prompt hearing. Not only is this absurd, it is inconsistent with this Court’s established jurisprudence that the speedy trial statute must be strictly construed in favor of the defendant and against the State. See e.g. *City of Brecksville v. Cook* (1996), 75 Ohio St. 3d 53, 57. By restricting the start of the speedy trial clock to the pendency of charges rather than the date of arrest, this Court has run afoul that principle and removed the guarantee of a speedy trial from cases in which criminal defendants, like Ms. Abzell, are arrested but not charged until several months or even years later.

The majority view relies in part, both in the plurality opinion and the concurring opinion, on the observation that R.C. 2945.71 contemplates an accompanying charge, and that straight release thus falls outside the ambit of R.C. 2945.71. However, as discussed above, the General Assembly did not need to specifically address the scenario presented by arrest and straight release – because Crim. R. 4 required that persons arrested would be promptly charged.

In the end, while R.C. 2945.71(C) does not set out a specific time period for charging an individual arrested for a felony, it leaves the time period for charging to the dictates of Crim. R. 4, which requires charging to closely accompany arrest. R.C. 2945.71 then requires that a person be tried within 270 days of that arrest. Any lingering ambiguity or uncertainty is easily resolved in favor of that interpretation by resorting to principles of statutory construction and considerations of the public’s interest in a speedy trial.

evening of January 2nd. Defendant B is brought before a judge and released on bond earlier that same day. On January 3rd, both defendants are indicted. Under this Court’s ruling, Defendant B must be brought to trial six days earlier than Defendant A, because B, who was actually released earlier, spent two days in jail “pending the filing of charges,” while A did not.

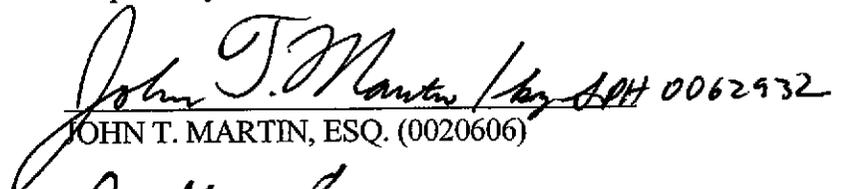
D. Constitutional Speedy Trial Cases Are Inapposite

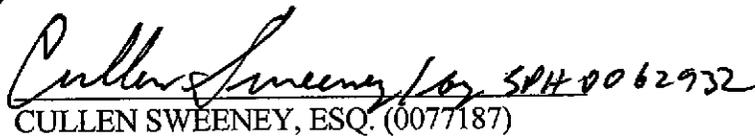
With all due respect, the plurality, as well as the dissent, relies on federal caselaw that is inapposite. These cases relate to the constitutional right to speedy trial, which only protects the defendant's rights without considering the public right to a speedy trial. As discussed supra, Ms. Azbell's case does not turn on the constitutional principles of speedy trial but on the statutory provisions. As this Court is well aware, the General Assembly can provide defendants and the public with greater speedy trial rights than those required by the Constitution of the United States or the Constitution of the State of Ohio. This is precisely what the General Assembly has done in R.C. 2945.71 et seq., by considering the public's interest in a speedy trial and providing a bright-line rule as opposed to a more amorphous constitutional standard.

CONCLUSION

Wherefore, your amicus prays that this Court reconsider its decision in the instant case.

Respectfully submitted,


JOHN T. MARTIN, ESQ. (0020606)


CULLEN SWEENEY, ESQ. (0077187)

Assistant Public Defenders,
Cuyahoga County Ohio
1200 West Third Street, Suite 100
Cleveland, Ohio 44113

Counsel for Amicus Curiae
The Cuyahoga County Public Defender

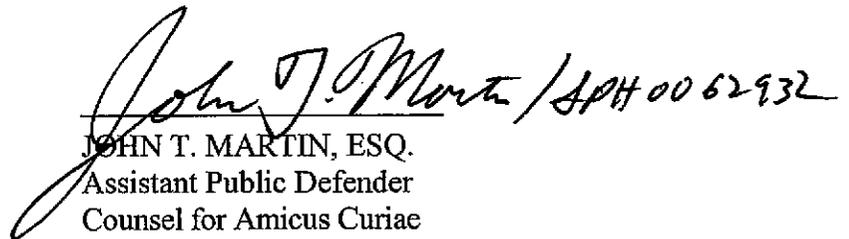
CERTIFICATE OF SERVICE

A copy of the foregoing Amicus Brief in Support of Appellant's Motion for

Reconsideration was mailed on this 3rd day of January, 2007 to the following:

J. BANNING JASIUNAS
Assistant State Public Defender
8 East Long St., 11th Floor
Columbus, Ohio 43215

KIRSTEN L. PSCHOLKA-GARTNER
Assistant Richland County Prosecutor
38 South Park Street
Mansfield, OH 44902


JOHN T. MARTIN, ESQ.
Assistant Public Defender
Counsel for Amicus Curiae
Cuyahoga County Public Defender