

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2005-1788
Plaintiff-Appellant, :
vs. :
SANDRA AZBELL, :
Defendant-Appellee. :

PLAINTIFF-APPELLANT, STATE OF OHIO'S MEMORANDUM IN OPPOSITION
TO APPELLEE'S MOTION FOR RECONSIDERATION

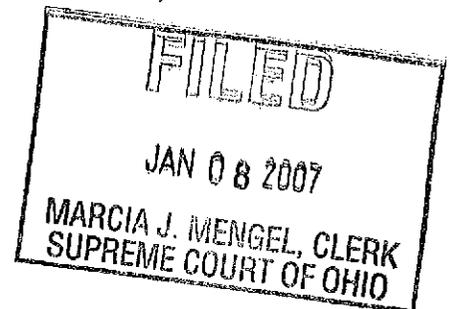
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Now comes the Plaintiff-Appellee, State of Ohio, and hereby opposes the Defendant-Appellee's motion for reconsideration and the memorandum in support filed by *amicus curiae*, Cuyahoga County Public Defender. In both the motion for reconsideration and the memorandum in support, the Appellee argues that the majority's decision is contrary to the provisions of Crim.R. 4 and the language of R.C. 2945.71. Once again, the Appellee's argument hinges on the statutory language "after the person's arrest," while ignoring the language indicating that the arrest must be on a pending felony charge. See, R.C. 2945.71(C). The Appellant submits that the Defendant-Appellee and the *amicus curiae* are merely attempting to reargue issues already decided by this Court.

The majority opinion in this case was clearly in line with the statutory language of R.C. 2945.71 and the prior decisions of this Court. Justice Lundberg-Stratton, writing for the majority, cited this Court's prior decisions in *Westlake v. Cougill* (1978), 56 Ohio St.2d 230, 244, 383 N.E.2d 599; *State v. Bonarrigio* (1980), 62 Ohio St.2d 7, 402 N.E.2d 530; and *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541. While those cases deal with the calculation of speedy trial time between the dismissal of an indictment and the re-indictment on the same charge, it is clear from the Court's reasoning that it did not intend speedy trial time to run when no charges are pending.

Furthermore, the language in the body of the *Broughton* opinion clearly supports the Court's holding that a defendant's statutory speedy trial time does not run during periods when there is no pending indictment. In the majority opinion, authored by Justice Holmes, the Court noted that "the speedy-trial statute required Broughton to be brought to trial within 270 days of his original *indictment*. . ." 62 Ohio St.3d at 257. The Court stated, "in reviewing the dictates of Revised Code 2945.71, we are 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. “Unless and until a formal charge is filed against him, neither he nor the public generally could have any legitimate interest in the prompt processing of a non-existent case against him. Although a person under investigation, but not subject to formal charges, may suffer some apprehension or anxiety, his guarantee against pre-prosecutorial delay lies solely in the applicable statute of limitations and in the guarantees of due process.” *Id.* at 259.

In his concurring opinion, Justice O’Donnell addressed the issue of statutory construction. He found that “reading [R.C. 2945.71] in its entirety in order to discern the legislative intent, it is apparent to me that this statute applies only to persons against whom charges are pending.” *State v. Azbell* (2006) ____ Ohio St.3d ____, 2006 Ohio 6552 at ¶ 27. Justice O’Donnell further noted that R.C. 2945.71(C), the only subsection applicable to this case, has as its predicate that it applies only to a person against whom a charge of felony is pending. *Id.* at ¶ 28. Moreover, “the language used by the General Assembly does not refer to the circumstance confronting Sandra Azbell in this case: that of being arrested but not charged. No subsection of R.C. 2945.71 pertains to the circumstance in which a person has been arrested but not charged; nor does the statute require that upon arrest, a charge must be presented against that person within any stated time period. Rather, this statute applies only to those who have charges pending against them.” *Id.*

The majority of Ohio’s appellate districts have reached the same conclusion as Justice O’Donnell in cases which are factually similar to Ms. Azbell’s case. See, *State v. Weiser*, 2003 Ohio 7034, 2003 Ohio App. LEXIS 6367; *State v. Fallat*, 2003 Ohio 169,

2003 Ohio App. LEXIS 137; *State v. Williamson*, 2000 Ohio App. LEXIS 2741, (June 14, 2000), Ross App. No. 97CA2345, unreported; *State v. Gonzales*, 1997 Ohio App. LEXIS 2991, (July 11, 1997), Huron App. No. H-96-061, unreported; *State v. Hunter*, 1996 Ohio App. LEXIS 3272, (Aug. 2, 1996), Montgomery App. No. 15436, unreported; *State v. Harris*, 1995 Ohio App. LEXIS 2938, (July 13, 1995), Cuyahoga App. No. 66648, unreported; *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854; and *State v. Shyers*, 1984 Ohio App. LEXIS 12159, (Dec. 31, 1984), Preble App. No. CA84-06-016, unreported.

Only the First, Fifth, and Eighth Appellate Districts reach the conclusion sought by the Appellee. See, *State v. Kisse* (2002), 2002 Ohio 7255, 2002 Ohio App. LEXIS 7087; *State v. Tolliver*, 1986 Ohio App. LEXIS 9595, (Dec. 30, 1986), Licking App. No. CA-3216, unreported; and *State v. Brown*, 1985 Ohio App. LEXIS 6433, (April 17, 1985), Hamilton App. No. C840445, unreported.

In the memorandum filed by *amicus curiae* Cuyahoga County Public Defender, counsel argues that the majority view of R.C. 2945.71(C) reads the phrase “after a person’s arrest” out of the statute. On the contrary, the State would argue that the majority is actually reading the plain language of the statute in its entirety. The majority’s interpretation requires the arrest to be tied to a pending felony charge in order for an individual to avail themselves of statutory speedy trial rights under R.C. 2945.71(C).

The Appellee’s arguments in support of her motion for reconsideration also misconstrue the consequences of the holding in this case. In her memorandum in support of her motion for reconsideration, the Appellee contends that the majority’s interpretation of the statute creates a situation where a defendant who is arrested and incarcerated, but

then released without being charged, accrues no speedy trial time because no charge was ever pending. However, that claim is contrary to the facts in this case. While Ms. Azbell was arrested, she was merely taken to the police station to be fingerprinted, photographed, and interviewed. She was never placed in a holding cell. Moreover, she was released approximately thirty minutes to one hour after her arrest without posting a bond.

Both the Appellee and the *amicus curiae* argue that the holding in this case would lead to individuals being arrested and held indefinitely without being charged with a crime, or individuals being arrested and released while the State waits years to file charges. However, remedies are available to prevent such abuses. Individuals such as the Appellee may invoke their right to due process or the protections of the applicable statute of limitations if charges are brought after an unreasonable pre-indictment delay. See, *Broughton*, 62 Ohio St.3d at 259; *State v. Luck* (1984), 15 Ohio St.3d 150, 472 N.E.2d 1097. Additionally, individuals who are arrested and held without charge can obtain relief through habeas corpus proceedings.

They also contend that this Court's interpretation of the statute violates the provisions of Crim.R. 4. On the contrary, the State would argue that the language of Crim.R. 4(E)(2), cited by the Appellee deals with a situation where a charge is pending. Crim.R. 4(E)(2) states in pertinent part:

“[w]here a person is arrested without a warrant the arresting officer shall . . . bring the arrested person without unnecessary delay before a court having *jurisdiction of the offense*, and shall file or cause to be filed a *complaint* describing the *offense* for which the person was arrested. Thereafter, the court shall proceed in accordance with Crim.R. 5.”

Ohio Rule of Criminal Procedure 4(E)(2), (emphasis added).

Under this Court's interpretation of R.C. 2945.71(C), the filing of a criminal complaint would trigger the running of the defendant's statutory speedy trial time. Furthermore, after a complaint is filed, Crim.R. 5 would trigger the defendant's right to a preliminary hearing, which does not come into play unless there is a pending charge.

However, the police may arrest an individual during an investigation without commencing prosecution. See, *State v. Evans* (2005), 2005 Ohio 1787, 2005 Ohio App. LEXIS 1710 at p. 35, citing *State v. Bradford*, 1978 Ohio App. LEXIS 9959, (July 13, 1978), Cuyahoga App. No. 37536, unreported at p. 5. In circumstances where a suspect is taken to the police station for questioning, that individual's liberty may be constrained to a sufficient degree to constitute an arrest, but the police may not obtain enough information to charge the person with a crime at that point in time.

The impracticality of the Appellee's argument is demonstrated most clearly in the context of cold case homicide investigations. If the Appellee's interpretation of R.C. 2945.71(C) were applied to the facts of *State v. Bruce*, 2003 Ohio 1714, 2003 Ohio App. LEXIS 1616, a cold case homicide from Richland County, the defendant would have gotten away with murder. In that case, a husband was brought to the police station for questioning after his wife's body was found in a rural area of Richland County. He was handcuffed, fingerprinted, and interrogated. The police did not have enough evidence to charge him with his wife's murder, and he was released. Twenty years later, new evidence was discovered which linked him to the murder. Under the Appellee's interpretation of R.C. 2945.71(C), the defendant's speedy trial time would have started running when he was initially arrested for questioning, and he could not have been tried on the new evidence.

For the foregoing reasons, the Defendant-Appellee's Motion for Reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Opposing Motion for Reconsideration was sent to Attorney J. Banning Jasiunas, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 by regular U.S. Mail this 8th day of January, 2007.



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