

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

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| STATE OF OHIO, |) | Case No. 07-0519 |
| |) | |
| Plaintiff-Appellant, |) | On Appeal from the Ashtabula |
| -vs- |) | County Court of Appeals, |
| |) | Eleventh Appellate District |
| KENNETH BLACKBURN, |) | |
| |) | Ashtabula County Court of Appeals |
| Defendant-Appellee. |) | Case No. 2006-A-00029 |

MERIT BRIEF OF APPELLANT, STATE OF OHIO

THOMAS L. SARTINI (0001937)
ASHTABULA COUNTY PROSECUTOR
Shelley M. Pratt (0069721) (Counsel of Record)
Assistant Prosecutor
Office of the Ashtabula County Prosecutor
25 W. Jefferson Street
Jefferson, Ohio 44047
(440) 576-3664 Fax (440) 576-3600

COUNSEL FOR APPELLANT

William P. Bobulsky (0007357)
1612 East Prospect Road
Ashtabula, Ohio 44004
(440)998-4214

COUNSEL FOR APPELLEE

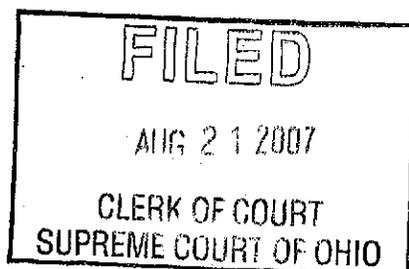


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STATEMENT OF THE CASE AND FACTS

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On December 17, 2004, Kenneth Blackburn, appellee herein, was arrested and charged in Western County Court with a violation of R.C. 2921.36, Illegal Conveyance of Weapons or Prohibited Items Onto the Grounds of a Detention Facility or Institution. Appellee posted bond on December 18, 2004, and was released from jail. On December 22, 2004, this case was dismissed without prejudice.

An indictment was filed on February 22, 2005, charging appellee with Conspiracy to Illegal Conveyance of Drugs Into a Detention Facility, in violation of R.C. 2923.01, a felony of the fourth degree, and Illegal Conveyance of Drugs Into a Detention Facility, in violation of R.C. 2921.36, a felony of the third degree. On February 25, 2005, appellee was served with a warrant and arraigned. Appellee entered a plea of not guilty to the charges contained in the indictment and was released on bond.

Appellee requested discovery on March 7, 2005. The State filed its response on March 25, 2005. On June 7, 2005, appellee filed a motion to continue his trial scheduled for June 21, 2005. The trial court granted appellee's motion to continue and appellee's trial date was continued until October 4, 2005.

On September 29, 2005, the State filed a motion to continue the trial date of October 4, 2005. This continuance was granted by the trial court and appellee's trial was continued until December 6, 2005. On December 5, 2005, the State filed a motion to dismiss the indictment without prejudice, which was granted on that date.

On February 6, 2006, an indictment was filed charging appellee with Trafficking in Drugs, in violation of R.C. 2925.03(A)(1) and (C)(3)(c), a felony of the fourth degree;

Trafficking in Drugs, in violation of R.C. 2925.03(A)(1) and (C)(6)(a), a felony of the fifth degree; and Complicity, in violation of R.C. 2923.01(A)(1), a felony of the third degree. (T.d. 1.)



Appellee was arraigned on February 16, 2006 and entered a plea of not guilty. Appellee was released on bond. (T.d. 4)

On February 16, 2006, appellee filed a request for discovery and a request for a bill of particulars. (T.d. 7,8.) The State responded on March 2, 2006. (T.d. 10.) Appellee filed a motion to dismiss on March 14, 2006. (T.d. 12.) The trial court granted appellee's motion to dismiss on May 11, 2006. (T.d. 24.) The State of Ohio appealed this decision. The Eleventh District Court of Appeals affirmed the decision of the trial court. *State v. Blackburn*, 11th Dist. No. 2006-A-0029 at ¶22, 2007-Ohio-1071.

On March 23, the State of Ohio filed its notice of appeal and memorandum in support of jurisdiction with this Honorable Court. On July 25, 2007, this Honorable Court accepted jurisdiction to hear this case and allowed this appeal.

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ARGUMENT

PROPOSITION OF LAW

SPEEDY TRIAL WAIVERS ARE DISTINCT FROM THE PROVISIONS IN R.C. 2945.72 THAT EXTEND THE STATUTORY SPEEDY TRIAL TIME BY TOLLING IT.

Both the United States Constitution, and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. *State v. Pachay* (1980), 64 Ohio St.2d 218, 219, 416 N.E.2d 589. Ohio's statutory provision for a defendant's right to a speedy trial is codified at R.C. 2945.71, *et seq.* Pursuant to R.C. 2945.71(C)(2), a person charged with a felony "[s]hall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(E) further provides that for purposes of computing time under R.C. 2945.71(C)(2), "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days."

The time *within* which a criminal defendant must be brought to trial can be tolled, however, by certain events delineated in R.C. 2945.72. Specifically, R.C. 2945.72(E) provides that speedy trial time may be tolled for "[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(H) further provides that speedy trial time may toll during "[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[.]"

"When reviewing a defendant's claim that he was denied his right to a speedy trial, an appellate court applies the *de novo* standard to questions of law and the clearly erroneous

standard to questions of fact.” *State v. Berner*, 9th Dist. No. 3275-M, 2002-Ohio-3024, at ¶6.

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The State submits

appeal not allowed, 97 Ohio St.3d 1422, 2002-Ohio-5820, 777 N.E.2d 276. The State submits that appellee’s speedy-trial rights were not violated in the case at bar.

In sustaining appellee’s motion to dismiss the trial court relied on the reasoning set forth in *State v. Adams*, 43 Ohio St.3d 67, 538 N.E.2d 1025. In *Adams*, the defendant was originally charged with a violation of R.C. 4511.19(A)(3). While this case was pending, the defendant executed three waivers of speedy trial limitations. *Id.* at 67. The State submitted a *nolle prosequi* on this charge and subsequently charged the defendant with a violation of R.C. 4511.19(A)(1). *Id.* The defendant filed a motion to dismiss for failure to comply with speedy trial limitations pursuant to R.C. 2945.71. *Id.* The trial court overruled defendant’s motion and this decision was affirmed by the court of appeals. *Id.* This Honorable Court reversed this decision, holding that “when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver.” *Id.* at 70. The court reasoned that, due to tactical reasons, a defendant who initially waived his right to a speedy trial may choose not to do so if a *nolle prosequi* is entered on the initial charge and he is subsequently indicted on another charge. *Id.* The court stated that “a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the exact nature of the crime he is charged with. *Id.*”

The case at bar is distinguishable from *Adams*. In *Adams*, the defendant executed a waiver of speedy trial time. In the case at bar, speedy trial time was tolled pursuant to the provisions contained in R.C. 2945.72. The *Adams* decision concerns waivers of speedy trial time

not tolling of speedy trial time pursuant to R.C. 2945.72.

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A distinction can be made between speedy trial waivers and the provisions of R.C. 2945.72 that extend speedy trial time by tolling it. *State v. Kerby*, 162 Ohio App.3d 353, 364, 833 N.E.2d 757. “A waiver relinquishes the right, at least until the waiver is withdrawn. Tolling doesn’t waive the speedy trial right, however. And, in most circumstances where R.C. 2945.72 applies, it allows sufficient time to avoid any prejudice the underlying request or order might create.” *Id.* It appears that other Ohio courts have followed the same reasoning in *Kerby*, making time tolled pursuant to R.C. 2945.72 on an initial indictment applicable to speedy trial calculations when that indictment is dismissed and a subsequent indictment arising from the same set of circumstances is filed. See *State v. Leonardson*, 11th Dist. App. No. 97-A-0076, 1998 WL 682397, *State v. Reynolds*, 8th Dist. App. No. 65342, 1994 WL 449743, *State v. Blackshaw*, 8th Dist. App. No. 85432, 2005-Ohio-5203, *State v. Atkinson*, 8th Dist. App. No. 58605, 1995 WL 79798, *State v. Ely*, 9th Dist. App. No. 2661-M, 1998 WL 34617.

In affirming the decision of the trial court, the Eleventh District Court of Appeals applied *Adams* and held that “R.C. 2945.72(B) [did] not apply to toll speedy trial in prior indictments for purposes of subsequent indictments filed by the state when each indictment contains different charges arising under the same set of facts.” *State v. Blackburn*, 11th Dist. No. 2006-A-0029 at ¶¶20-21, 2007-Ohio-1071. The Eleventh District Court of Appeals failed to recognize the distinction between a waiver of the right to speedy trial and the tolling provisions contained in R.C. 2945.72.

The Eleventh District Court of Appeals failed to acknowledge the difference between appellee’s situation and that of the defendant in *Adams*. In appellee’s situation, knowing the

exact nature of the crimes charged had nothing to do with the decision to seek a continuance.

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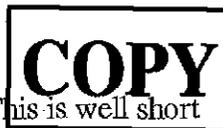
Balckburn at ¶26. This was not a tactical decision based on the pending charges and the delay did not result in prejudice. *Id.*

When taking into consideration the distinction between a waiver of speedy trial and tolling of speedy trial time pursuant to R.C. 2945.72, it is clear that the State did not fail to bring appellee to trial within the statutory time limits. Appellee was arrested in case number 04CRA01049W on December 17, 2004 and posted bond on December 18, 2004 for a total of three speedy trial days. From appellee's release until December 21, 2004, a total of six speedy trial days accumulated. On December 22, 2004, this case was dismissed. Appellee was released and bond was discharged.

On February 25, 2005, appellee was arrested for case number 05CR58 and posted bond. Between this date and March 6, 2005, appellee accumulated nine speedy trial days, for a total of 15 days. Speedy trial time was tolled between March 7, 2005 and March 25, 2005, due to appellee's requests for discovery and bill of particulars. Speedy trial time began to run again with the State's response on March 25, 2005 and a total of 88 speedy trial days had accumulated by June 7, 2005. On this date speedy trial time was tolled, due to appellee's motion to continue, until October 4, 2005. On October 4, 2005, the State requested a continuance and speedy trial time ran until December 5, 2005 for a total of 149 speedy trial days. On December 5, 2005, the dismissed the indictment without prejudice.

On February 16, 2006, appellee was arrested on the reindictment in case number 06CR45. A request for discovery and bill of particulars made on this date tolled speedy trial time until March 2, 2006. Speedy trial time began to run again and appellee accumulated a total of 159

speedy trial days before filing a motion to dismiss on March 13, 2006.



Only 159 speedy trial days have elapsed since appellee's initial arrest. This is well short of the time allotted to the State to bring a defendant to trial pursuant to R.C. 2945.71. Accordingly, appellee's speedy trial rights have not been violated and the decision of the Eleventh District Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to reverse the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

**THOMAS L. SARTINI (0001937)
PROSECUTING ATTORNEY**

Shelley M. Pratt (0069721)

Assistant Prosecutor

Ashtabula County Prosecutor's Office

25 West Jefferson Street

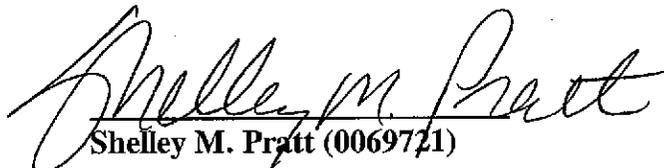
Jefferson, Ohio 44047

(440) 576-3664 FAX (440) 576-3600

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant, State of Ohio has been served via ordinary U.S. Mail, postage prepaid, this 20th day of August, 2007 upon William P. Bobulsky, Counsel for Appellee, at 1612 East Prospect Road, Ashtabula, Ohio 44004.


Shelley M. Pratt (0069721)
Assistant Prosecutor

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO



07 - 0519

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

KENNETH BLACKBURN,

Defendant-Appellee.

)
)
) On Appeal from the Ashtabula
) County Court of Appeals,
) Eleventh Appellate District
)
) Ashtabula County Court of Appeals
) Case No. 2006-A-0029
)

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

THOMAS L. SARTINI (0001937)
ASHTABULA COUNTY PROSECUTING ATTORNEY

Shelley M. Pratt (0069721) (Counsel of Record)
Assistant Prosecutor

Office of the Ashtabula County Prosecuting Attorney
25 W. Jefferson Street
Jefferson, Ohio 44047-1092
(440) 576-3664 Fax (440) 576-3600

COUNSEL FOR APPELLANT
THE STATE OF OHIO

William P. Bobulsky (0007357)
1612 East Prospect Road
Ashtabula, Ohio 44004
(440)998-4214

COUNSEL FOR APPELLEE

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MAR 23 2007
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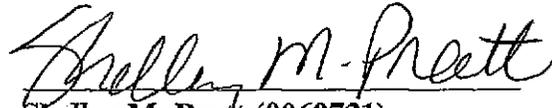
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Appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ashtabula County Court of Appeals, Eleventh Appellate District, entered in *State v. Blackburn*, Court of Appeals Case No. 200-A-0029, on March 12, 2007.

This case raises a substantial constitutional question, involves a felony, and is a case of public or great general interest.

Respectfully submitted,

THOMAS L. SARTINI (0001937)
PROSECUTING ATTORNEY



Shelley M. Pratt (0069721)

Assistant Prosecutor

Office of the Ashtabula County Prosecutor

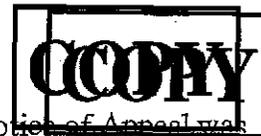
25 West Jefferson Street

Jefferson, Ohio 44047

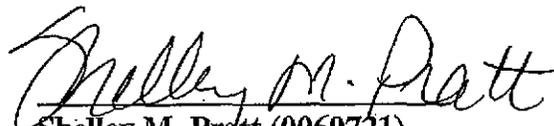
(440) 576-3664

COUNSEL FOR APPELLANT

PROOF OF SERVICE



The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal was served via ordinary U.S. Mail, postage prepaid, this 20th day of March, 2007, upon William P. Bobulsky, Counsel for Appellee, at 1612 East Prospect Road, Ashtabula, Ohio 440004.


Shelley M. Pratt (0069721)
Assistant Prosecutor

COURT OF APPEALS

STATE OF OHIO
COUNTY OF ASHTABULA

) FILED IN THE COURT OF APPEALS
) SS. ELEVENTH DISTRICT
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CAROL A. HEAD
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ASHTABULA CO., OH

Plaintiff-Appellant,

JUDGMENT ENTRY

- vs -

CASE NO. 2006-A-0029

KENNETH BLACKBURN,

Defendant-Appellee.

For the reasons stated in the opinion of this court, the sole assignment of error is without merit. It is the order and judgment of this court that the judgment of the trial court is affirmed.

Colleen Mary O'Toole
JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

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ASHTABULA COUNTY, OHIO

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CLERK OF COURTS
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CARDL A. MEAD
CLERK OF COURTS
ASHTABULA CO. OH
STATE OF OHIO
Plaintiff-Appellant,

OPINION

- vs -

CASE NO. 2006-A-0029

KENNETH BLACKBURN,
Defendant-Appellee.

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2006 CR 41.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

William P. Bobulsky, William P. Bobulsky Co., L.P.A., 1612 East Prospect Road, Ashtabula, OH 44004 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, the state of Ohio, appeals the decision of the Ashtabula County Court of Common Pleas, granting appellee's, Kenneth Blackburn's, motion to dismiss the charges pending against him for the state's failure to bring him to trial within the period of time specified by law. For the following reasons, we affirm the decision of the trial court.



{¶2} On December 17, 2004, Blackburn was arrested and brought to the Western County Court for illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution, a felony of the third degree in violation of R.C. 2921.36, Case No. 04CA1049. On December 18, 2004, Blackburn posted bail and was released from custody. On December 22, 2004, the state dismissed the charge against Blackburn.

{¶3} On February 22, 2005, a two-count indictment was filed against Blackburn, in Case No. 05CR58, charging him with conspiracy to commit illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution, a felony of the fourth degree in violation of R.C. 2923.01 and 2921.36, and illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution, in violation of R.C. 2921.36. Blackburn was served with this indictment on February 24, 2005. On December 5, 2005, the trial court dismissed the indictment without prejudice on the state's motion.

{¶4} On February 6, 2006, a three-count indictment was filed against Blackburn, Case No. 06CR41, charging him with two counts of trafficking in drugs, felonies of the fourth and fifth degrees in violation of R.C. 2925.03, and one count of conspiracy to trafficking in drugs, a felony of the third degree, in violation of R.C. 2923.01 and 2925.03. On February 16, 2006, Blackburn was arrested on this indictment and released under bond.

{¶5} On March 14, 2006, Blackburn filed a motion to dismiss the charges against him for the state's failure to bring him to trial within the period of time specified by law. On May 11, 2006, the trial court granted Blackburn's motion.



{¶16} The state timely appeals and raises the following assigned issues:

{¶17} "The trial court erred in granting appellee's motion to dismiss on the grounds that the State failed to bring the case to trial within the statutory time requirements of R.C. 2945.71."

{¶18} A person charged with a felony "[s]hall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B). "**** [S]uch discharge is a bar to any further criminal proceedings against him based on the same conduct." R.C. 2945.73(D).

{¶19} The state acknowledges that the charges in all three indictments arise from essentially the same underlying facts and circumstances. Accordingly, the two hundred seventy day period for bringing Blackburn to trial began to run on December 17, 2004, the day of his initial arrest. *State v. Adams* (1989), 43 Ohio St.3d 67, 68, quoting *State v. Clay* (1983), 9 Ohio App.3d 216, 218 "(* * * when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.") See, also, *State v. Baker* (1997), 78 Ohio St.3d 108, 110.

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{¶10} From Blackburn's initial arrest (December 17, 2004) to the filing of the first indictment (December 22, 2004), six days elapsed for purposes of the speedy trial count.¹

{¶11} From the service of the second indictment against Blackburn (February 24, 2005) to its subsequent dismissal (December 5, 2005), two hundred eighty four days elapsed.

{¶12} From the date of Blackburn's arrest under the third indictment (February 16, 2006) until Blackburn's motion to dismiss was filed (March 14, 2006), twenty five days elapsed, fourteen of which were tolled due to Blackburn's request for discovery and a bill of particulars. R.C. 2945.72(E). During the period of the third indictment, therefore, eleven days elapsed for the purposes of the speedy trial count.

{¶13} Thus, from Blackburn's initial arrest to the filing of the motion to dismiss, three hundred and one days elapsed for the purposes of the speedy trial count.

{¶14} The state argues the trial court miscalculated the speedy trial count. According to the state, the speedy trial count should have been tolled for an additional one hundred thirty-nine days during the pendency of the second indictment, due to Blackburn's requests for discovery, a bill of particulars, and continuation of the trial. R.C. 2945.72(E) and (H).² As stated by the trial court, the issue "squarely presented" is whether the delays resulting from Blackburn's motions filed in Case No. 05CR58 are applicable in calculating the statutory time period in Case No. 06CR41.

1. Although only four days elapsed, the triple-count provision in R.C. 2945.71(E) applied to the one day that Blackburn remained in custody.

2. Blackburn filed his discovery requests on March 7, 2005, and the state responded on March 25, 2005 (19 days). On June 7, 2005, Blackburn filed a motion to continue his trial, which was continued until October 4, 2005 (120 days).

{¶15} The trial court rejected the state's argument. The trial court noted that the charges in the second indictment (illegal conveyance) differed in their essential elements from the charges in the third indictment (trafficking), although both indictments were predicated on the same facts. Cf. *State v. Oliver* (1995), 101 Ohio App.3d 587, 596 (“[w]hen a person conveys a drug into a detention facility, drug trafficking as defined in R.C. 2925.03(A)(2) does not automatically occur ***.”)

{¶16} The trial court also relied on the Ohio Supreme Court's decision in *Adams*, supra, at syllabus, which held: “[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver.” The trial court found that the reasoning behind the *Adams* decision regarding waiver of the right to a speedy trial applied equally to decisions that merely tolled the speedy trial period.

{¶17} On appeal, the state argues that *Adams* is not applicable in the present case, because a distinction exists “between speedy trial waivers and the provisions of R.C. 2945.72.” We disagree that the distinction between the permanent relinquishment of one's speedy trial rights and merely tolling the time within which the accused must be brought to trial distinguishes the present case from the situation of *Adams*. In *State v. Homan* (2000), 89 Ohio St.3d 421, 428, the Supreme Court elaborated the rationale behind the *Adams* decision: “[w]e noted in *Adams* that knowing and intelligent tactical decisions cannot be made until all of the facts are known by the accused, and this, of course, includes knowing the exact nature of the crimes charged. *** When a defendant is unaware of the precise nature of the crimes

charged, he or she cannot make informed and intelligent tactical decisions about motion filings and other matters.”



{¶18} In the present case, the trial court calculated that three hundred and one days had elapsed for the purpose of bringing Blackburn to trial. The state argued that the delay of one hundred twenty days was occasioned, however, by Blackburn’s motion to continue his trial date, under the second indictment, from June 7, 2005, until October 4, 2005. The grounds for this continuance were that Blackburn had retained new counsel and, thus, required additional time to prepare for trial. In *Adams*, the Ohio Supreme Court considered whether a defendant’s waiver of speedy trial rights for an initial charge of driving while having a prohibited concentration of alcohol applied to a subsequently-filed charge of operating a vehicle while under the influence of alcohol. Both charges stemmed from the same set of facts, but involved different subsections of R.C. 4511.19(A). Ultimately, the Supreme Court decided that the initial waiver did not apply to the additional charge. In particular, the court stressed that: “[u]naware that his original waivers could affect the course of a subsequent charge, [defendant] did not have sufficient knowledge of the consequences of his actions at the time he executed the waivers ***.” *Adams*, supra, at 69.

{¶19} Both charges in *Adams* involved the same set of facts, and the Supreme Court focused on the fact that subsequent charges could involve different defenses at trial. The court concluded that because of these differences, a defendant might waive speedy trial rights for one charge, but might not be willing to waive a speedy trial for the other. *Id.* at 69-70. Accordingly, the court held that “a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes

knowing the exact nature of the crime he is charged with.” *Id.* at 72. The case is similarly situated to *Adams* in that a defense request for continuance for new counsel or to prepare for trial in a prior indictment cannot apply to speedy trial time when the state, which bears the burden of proof, files three different times with three differing sets of indictments on the same set of facts.



{¶20} The state’s position ignores the plain language of Ohio’s speedy trial statute and in not recognizing that the defendant cannot possibly knowingly waive his speedy trial right to trafficking in drugs eight months before the crime is indicted. Furthermore, its analysis is wholly at odds with the Supreme Court in *Adams*.

{¶21} For the foregoing reasons, we hold that R.C. 2945.72(E) does not apply to toll speedy trial in prior indictments for purposes of subsequent indictments filed by the state when each indictment contains different charges arising under the same set of facts.

{¶22} For the foregoing reasons, the state’s sole assignment of error is without merit. The judgment of the Ashtabula County Court of Common Pleas, granting Blackburn’s motion to dismiss the charges, is affirmed.

WILLIAM M. O’NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶23} I respectfully dissent.

{¶24} The majority, in its application of *State v. Adams* (1989), 43 Ohio St.3d 67, to the present case, fails to recognize the meaningful distinction that

exists between waiver of the right to a speedy trial and the tolling provisions contained in R.C. 2945.72. "Speedy-trial waivers are distinct from the provisions in R.C. 2945.72 that extend the statutory speedy-trial time by tolling it. A waiver relinquishes the right, at least until the waiver is withdrawn. Tolling doesn't waive the speedy-trial right. And, in most circumstances where R.C. 2945.72 applies, it allows sufficient time to avoid any prejudice the underlying request or order might create." *State v. Kerby*, 162 Ohio App.3d 353, 2005-Ohio-3734, at ¶62.

{¶25} As the majority notes, the Ohio Supreme Court elaborated upon the rationale behind *Adams* in *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212, observing that "[w]hen a defendant is unaware of the precise nature of the crimes charged, he or she cannot make informed and intelligent tactical decisions about motion filings and other matters." *Id.* at 428.

{¶26} In the present case, a delay of 120 days was occasioned by Blackburn's motion to continue his trial date, under the second indictment, from June 7, 2005, until October 4, 2005. The grounds for this continuance were that Blackburn had retained new counsel and, thus, required additional time to prepare for trial. In contrast to the situation in *Adams*, "knowing the exact nature of the crimes charged" had nothing to do with Blackburn's decision to seek a continuance. Since Blackburn's reasons for seeking a continuance were not a tactical decision based on the particular charges pending against him, there is no prejudice in tolling the speedy trial count for the delay occasioned by his request for a continuance.

{¶27} Accordingly, the trial court erred by not tolling the speedy trial count for the period of delay necessitated by the continuance. When this period is taken into consideration, only 181 days have elapsed out of the 270 days for bringing Blackburn to trial. The State's assignment of error has merit and the decision of the trial court should be reversed.

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IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

THE STATE OF OHIO

Plaintiff

-vs-

KENNETH BLACKBURN

Defendant

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CASE NO. 2006 CR 41

JUDGE YOST

JUDGMENT ENTRY

FILED
2006 MAY 11 A 11:38
CAROL A. MEAD
CLERK OF COURT
COMMON PLEAS COURT
ASHTABULA CO. OH

Proceeding: Defendant's Motion to Dismiss, filed March 14, 2006

The defendant has moved to dismiss all charges against him on the grounds that the State has failed to bring the case to trial within the statutory time requirements of R.C.§2945.71. The State filed its Response in Opposition on March 30, 2006.

The pertinent facts are of record and are not disputed. The defendant was arrested on December 17, 2004 and, on that same date, charged in the Western County Court with a violation of R.C.§2921.36, Illegal Conveyance of Weapons or Prohibited Items onto Grounds of Detention Facility or Institution, Case No. 04CRA1049. On December 18, 2004, the defendant posted bail, and on December 22, 2004, the State of Ohio voluntarily dismissed the charge. On February 22, 2005, an indictment was filed charging the defendant with Conspiracy to Illegal Conveyance of Weapons or Prohibited Items onto Grounds of Detention Facility or Institution (Count One), in violation of R.C.§2923.01 and R.C.§2921.36; and Illegal Conveyance of Weapons or Prohibited Items onto Grounds of Detention Facility or Institution (Count Two), in violation of R.C.§2921.36, Case No. 05CR58, in the Court of Common Pleas. The defendant was served with this indictment

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on February 24, 2005. On December 5, 2005, the Court entered judgment on the State of Ohio's motion to dismiss the indictment without prejudice. On February 6, 2006, an indictment was filed charging the defendant with Trafficking in Drugs (Count One), in violation of R.C. §2925.03; Trafficking in Drugs (Count Two), in violation of R.C. §2925.03; and Conspiracy to Trafficking in Drugs (Count Three), in violation of R.C. §2923.01 and R.C. §2925.03, Case No. 06CR41. The defendant was arrested on this indictment on February 16, 2006, and posted bond that same date. The State acknowledges that the charges in all of these cases arise from essentially the same underlying facts and circumstances.

Counsel for the State of Ohio has prepared a very helpful chart, reflecting the chronology of this case and listing events that might bear upon the calculation of the statutory time for trial in this case. The defendant has not filed a blanket waiver of his statutory time for trial, but has filed various motions that would toll the time for trial, at least for the period of delay during which the motions were pending. The defendant does not contest delays attributable to him while Case No. 05CR58 was pending, but argues that any waivers of time based upon conduct in that case cannot be counted against him in Case No. 06CR41, because the current case involves new and additional charges, arising from facts known to the State at the time of the previous indictment.

First of all, when a criminal case is dismissed and later refiled, the calculation of the statutory time for trial relates back to the date from which the trial time began to run on the original charge. Of course, there is no question that a defendant can waive the statutory right to a speedy trial. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218. However, it is also clear that " * * * when new and additional charges arise from the same facts as

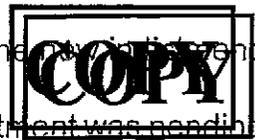
did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." *State v. Clay* (1983), 9 Ohio App.3d 216, 218, 9 OBR 366, 367, 459 N.E.2d 609, 610.



The State agrees that the calculation of the defendant's statutory time for trial in Case No. 06CR41 relates back to his original arrest on the charge in the Western County Court. However, as pointed out by counsel for the State of Ohio, while Case No. 05CR58 was pending, the defendant filed a request for discovery on March 7, 2005, that the State responded to on March 25, 2005, which tolled the trial time for 19 days. The defendant also filed a motion for continuance of trial on June 7, 2005, in which he expressed his waiver of the statutory time limits for trial for the period of time occasioned by the continuance, tolling the trial time for another 120 days. Thus, the issue squarely presented in this case is whether the delays resulting from motions filed by the defendant in Case No. 05CR58 are also applicable in calculating the statutory time for trial in Case No. 06CR41.

This Court has taken the view that when an indictment is dismissed and an identical indictment is later refiled, any waivers of time under the original indictment apply equally to the subsequent indictment. The defendant relies on *State v. Adams* (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025, for the proposition that any claimed waiver of the right to speedy trial, as to the initial charge, is not applicable to different or additional charges arising from the same set of circumstances, that are brought subsequent to the waiver. The State has cited *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541, in which the defendant was originally charged with corruption of a minor, then subsequently indicted for two counts of rape. The Court noted that on a reindictment, calculation of the

time for trial resumes when the defendant is arrested or served with the new indictment, and further ruled that the trial time that had elapsed while the prior indictment was pending must be tacked onto the time period commencing with arrest on the subsequent indictment. The Court held that the time between the dismissal of an indictment and the refiling of a subsequent indictment, based on the same facts, is not counted when computing time under the speedy trial statute. Significantly, in *Broughton*, nothing occurred while the prior indictment was pending to toll the time for trial, and on reindictment, the Court counted all of the time that the prior charge was pending, in calculating the statutory trial time. There were motions filed by the defendant after the second indictment was served that did toll the trial time and that vitiated his speedy trial argument.



In *State v. Adams, supra*, the defendant was originally charged with operating a vehicle with a breath concentration of .10 gram or more of alcohol [in violation of R.C.§4511.19(A)(3)]. While the case was pending, the defendant waived the time limitation for trial for various periods. The State submitted a *nolle prosequi* on the original charge, then filed a complaint charging operation of a vehicle while under the influence of alcohol [in violation of R.C.§4511.19(A)(1)]. The defendant filed a motion to dismiss for failure to comply with the speedy trial provisions of R.C.§2945.71. The trial court overruled the motion and the court of appeals affirmed. The Supreme Court reversed, holding "that when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." *State v. Adams, supra*, 70. The rationale discussed by the Court includes: that different charges could involve different defenses; a defendant may waive a speedy trial for tactical reasons on an initial charge,

but that other considerations may arise affecting that decision as to subsequent charges; and that a knowing and intelligent waiver cannot be made without knowledge of all the facts, including the exact nature of the crime charged.



Certainly this same rationale is applicable to this case. The factual recitation included in the indictment in Case No. 05CR58 alleges, essentially, that the defendant was employed as a corrections officer at the Lake Erie Correctional Facility, and that he accepted the sum of \$1,000.00 from an Ohio Highway Patrol Trooper, working under cover, in payment for his agreement to take drugs into the Lake Erie Correctional Facility. The essential elements to be proved under the indictment in that case were that the defendant (1) knowingly (2) attempted to convey (3) a drug of abuse (4) onto the grounds of a detention facility. [Under Count One, the defendant was charged with conspiring to do this.] The indictment in Case No. 06CR41 does not include the recitation of facts, but the essential elements to be proved under each of the three counts are that the defendant (1) knowingly (2) sold or offered to sell (3) a controlled substance. [Under Count Three, the defendant is charged with conspiring to do this.] It is certainly reasonable that the charges in Case No. 06CR41 could involve different defenses, or that the defendant may have different tactical considerations affecting what motions might be filed or whether the time for trial should be waived in the current case. In its Response in Opposition, the State has not addressed the applicability of the holding of *State v. Adams* to the facts of this case.

In summary, R.C. §2945.71 requires that the defendant, being under indictment for a felony in this case, must be brought to trial with 270 days after his arrest. Since the various charges filed against the defendant all arise from essentially the same underlying facts and circumstances, the statutory time for trial began to run from the date of his initial

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arrest, December 17, 2004, and the computation of time for subsequent charges must relate back to that date. The statutory time for trial does not run during any period that no charges were pending against the defendant, that is, between the date of dismissal of a prior charge and the filing of a subsequent charge. Since the charges brought in Case No. 06CR41 are different from the charges brought in Case No. 05CR58, even though they arise from essentially the same underlying facts and circumstances, any time waiver occasioned by the defendant in the prior Case No. 05CR58 is not applicable to the additional charges, arising from the same set of circumstances, that have been brought in the subsequent Case No. 06CR41. The calculation of trial time that has elapsed in this case is as follows:

12/17/04, the date of original arrest, to 12/18/04, the date the defendant posted bond, (the day in jail counts as three days) = **3 days**;

12/19/04 (the defendant remained on bail) to 12/22/04, the date the charge was dismissed = **3 days**;

2/24/05, the date the defendant was served with the indictment in Case No. 05CR58, to 12/5/05, the date the indictment was dismissed = **284 days**;

(On February 16, 2006, the date the defendant was arrested on the indictment in Case No. 06CR41, he immediately posted bond, and he filed a discovery request, tolling the time until the State responded to discovery on March 2, 2006.)

3/3/06, the date the time for trial resumed, to 3/14/06, the date the defendant filed the instant Motion to Dismiss = **11 days**.

The total trial time that has elapsed in this case is therefore 301 days, well in excess of the 270 day limit allowable under R.C. §2945.71.

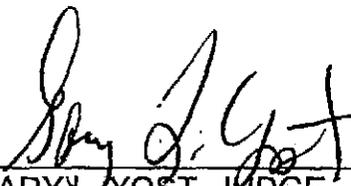


The court finds that the Motion to Dismiss is well taken.

Order: The Defendant's Motion to Dismiss, filed March 14, 2006, is sustained and, pursuant to R.C. §2945.73 (B), the defendant is discharged.

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

The Clerk is directed to serve notice of this judgment and its date of entry upon the journal upon the following: The Ashtabula County Prosecuting Attorney and William P. Bobulsky, Esq.


GARY L. YOST, JUDGE
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R.C. § 2945.72

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Title XXIX. Crimes--Procedure

Chapter 2945. Trial (Refs & Annos)

Schedule of Trial and Hearings

➔**2945.72 Extension of time for hearing or trial**

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

(D) Any period of delay occasioned by the neglect or improper act of the accused;

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

(H) The 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;

(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.

(1978 H 1168, eff. 11-1-78; 1976 S 368; 1975 H 164; 1972 H 511)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former **2945.72** repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 13447-2; see now

R.C. § 2945.71

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

▣ Chapter 2945. Trial (Refs & Annos)

▣ Schedule of Trial and Hearings

→2945.71 Time within which hearing or trial must be held

(A) Subject to division (D) of this section, a person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after the person's arrest or the service of summons.

(B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

(1) Within forty-five days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after the person's arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after the person's arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401 or sections 2963.30 to 2963.35 of the Revised Code.

(1999 S 49, eff. 10-29-99; 1981 S 119, eff. 3-17-82; 1980 S 288; 1975 S 83; 1973 H 716; 1972 H 511)

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