

IN THE SUPREME COURT OF OHIO

COLUMBUS, OHIO

STATE OF OHIO)	CASE NO. 2007-0519
)	
Plaintiff-Appellant)	On Appeal from the Eleventh
)	District Court of Appeals;
vs.)	Ashtabula County Ohio
)	Case No. 2006-A-0029
KENNETH BLACKBURN)	
)	
Defendant-Appellee)	

**MERIT BRIEF OF APPELLEE,
KENNETH BLACKBURN**

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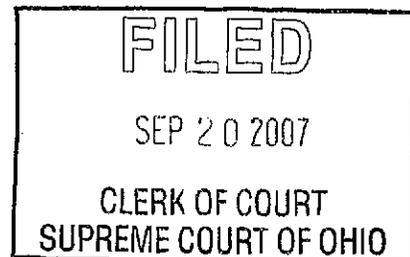


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II. STATEMENT OF FACTS

On February 6, 2006, Defendant was indicted in the Ashtabula County Court of Common Pleas on two counts of trafficking in drugs and one count of conspiracy to commit drug trafficking (T.D. 1). The case was assigned Case No. 2006-CR-00041. Pursuant to the Bill of Particulars filed herein by the State of Ohio on March 2, 2006 (T.D.11), all of the said charges relate to activities taking place in Geneva Township, Ashtabula County, Ohio, on December 17, 2004. All of the counts of the indictment are identical in date to a previous two-count indictment filed on February 22, 2005, in Ashtabula County Court of Common Pleas Case No. 2005-CR-00058, charging this Defendant with conspiracy to illegally convey drugs into a detention facility and illegal conveyance of drugs into a detention facility. A copy of the said indictment was attached to and incorporated in Defendant's trial court "Motion to Dismiss" (T.D. 12). The aforesaid indictment was dismissed, without prejudice, by the State of Ohio on December 5, 2005. A copy of the said dismissal was attached to and incorporated in Defendant's aforesaid "Motion to Dismiss".

The indictment of February 22, 2005, in Case No. 2005-CR-00058 alleged activities and conduct which are identical to those charged in the indictment in Case No. 2006-CR-00041. Pursuant to the language of the indictments, all of the charges in each indictment result from the identical conduct alleged to have been committed by Defendant which took place in Geneva Township, Ashtabula County, Ohio, on December 17, 2004. It should be carefully noted, however, that the initial indictment of February 22, 2005, in Case No. 2005-CR-00058 charged Defendant

with conspiracy to illegally convey drugs into a detention facility in violation of Revised Code §2923.01 and with illegal conveyance of drugs into a detention facility in violation of Revised Code §2921.36. Although arising from the identical conduct, the second indictment of February 6, 2006, in Case No. 2006-CR-00041, charged Defendant with two counts of trafficking in drugs in violation of Revised Code §2925.03 and conspiracy to facilitate the commission of a felony drug trafficking offense in violation of Revised Code §2923.01.

III. ARGUMENT

PROPOSITION OF LAW

THE STATE CANNOT EXTEND THE STATUTORY SPEEDY TRIAL TIME FOLLOWING A NEW INDICTMENT BY ASSERTING DEFENSE TIME WAIVERS IN AN EARLIER INDICTMENT WHICH WAS DISMISSED BY THE STATE.

Ohio Revised Code §2945.71(C)(2) provides that a person against whom a charge of felony is pending shall be brought to trial within 270 days after the person's arrest. Ohio Revised Code §2945.72 provides circumstances wherein the time for trial may be extended. None of those circumstances apply herein. Ohio Revised Code §2945.73(B) states that 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.

Charges in the predecessor case no. 2005-CR-00058 were filed on February 22, 2005, and dismissed on December 5, 2005. This constitutes a period of

285 days. The date of Defendant's indictment in Case No. 2006-CR-00041 was February 6, 2006. He was arraigned in Case No. 2006-CR-00041 on February 16, 2006, and had trial scheduled on May 8, 2006. All of the activity alleged to constitute the basis for the indictment took place on December 17, 2004. The time limits set forth in Revised Code §2945.71 had, therefore, expired upon the State's filing of its Motion to Dismiss on December 5, 2005.

The State has not proposed nor does the record support even a hint of a justification for the State's dismissal of the first indictment December 5, 2005. The dismissal was based entirely on the State's own fatal error in the indictment in Case No. 2005-CR-00058, wherein it charged Defendant with conspiracy to illegally convey drugs into a detention facility in violation of Revised Code §2923.01. The conspiracy statute, at Revised Code §2923.01(A), specifically sets forth a list of offenses which may constitute the basis for a conspiracy. Conspiracy to illegally convey drugs into a detention facility was not one of said predicate offenses. The State sought to rehabilitate its case by dismissal of the first indictment and the filing of a second indictment. It did so, however, after the expiration of the time limits set forth in Revised Code §2945.71(C)(2).

In State v. Broughton (1991), 62 Ohio St. 3d 253, the Supreme Court reiterated that the right to a speedy trial is a fundamental right made obligatory on the states through the Fourteenth Amendment, and that the right shall be strictly enforced. The court stated:

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The right to a speedy trial is encompassed within the Sixth Amendment to the United States Constitution, which provides that an "accused shall enjoy the right to a speedy and public trial * * *." See also Section 10, Article I of the Ohio Constitution. Moreover, the availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. See Klopper v. North Carolina (1967), 386 U.S. 213, 222-223, 87 S.Ct. 988, 993, 18 L.Ed. 2d 1, 8; State v. Singer (1977), 50 Ohio St. 2d 103, 106, 4 O.O. 3d 237, 238, 362 N.E. 2d 1216, 1218, at fn. 2.

In State vs. Pachay (1980), 64 Ohio St. 2d 218, 18 O.O. 3d 427, 416 N.E. 2d 589, syllabus, the Court observed that R.C. 2945.71 et seq. "* * * constitute a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state." Moreover, as was emphasized in State v. Pudlock (1975), 44 Ohio St. 2d 104, 106, 73 O.O. 2d 357, 358, 338 N.E. 2d 524, 525, the Court held that it would not permit the state to engage in "* * * practices which undercut the implementation of the 'speedy trial' provisions within R. C. 2945.71 and 2945.73 * * *." In reviewing whether a particular practice has undercut the implementation of the speedy-trial provisions, the Court approved of the language in United States v. Turner (C.A. 9, 1991), 926 F. 2d 883, 889, which stated:

To determine whether the government has violated a defendant's right to a speedy trial, we weigh the length of the delay, the reasons for it, the defendant's timeliness and manner of asserting this right, and whether the defendant has suffered cognizable prejudice. * * * Recognized prejudices are oppressive pretrial punishment, protracted anxiety and impairment of defense. * * * No single factor is either necessary or sufficient to establish a violation. (Citations omitted). See also, United States v. Taylor (1988), 487 U.S. 326, 340-341, 108 S. Ct. 2413, 2421, 101 L.Ed. 2d 297, 313; Barker v. Wingo (1972), 407 U.S. 514, 537, 92 S. Ct. 2182, 2195, 33 L.Ed. 2d 101, 121 (White, J., concurring).

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This Court squarely addressed the issues presented by this appeal in State v. Adams (1989) 43 Ohio St. 3d 67, 538 N.E. 2d 1025, wherein it held as follows:

West Headnote 1: When new and additional criminal charges arise from same facts as did original charge, and State knew of such facts at time of initial indictment, time within which trial is to begin on additional charge is subject to same statutory speedy trial limitations period that is applicable to original charge. R.C. §2945.71 et seq.

West Headnote 2: When defendant waives right to speedy trial as to an initial charge, waiver is not applicable to additional charges arising from same set of circumstances that are brought subsequent to execution of waiver. R.C. §2945.71.

All of the charges set forth in the later indictment of February 6, 2006, in Case No. 2006-CR-00041, are identical in place, persons and activities to those in the previous indictment of February 22, 2005, in Case No. 2005-CR-00058. All of the present charges are identical in the sense of their character as drug charges, the location where the offenses took place and the identity of the Defendant. All of the charges were known to the State of Ohio and employed by the State as the basis for the filing of the earlier indictment of February 22, 2005. Pursuant to the Adams holding, all of the charges are, accordingly, time barred pursuant to R.C. §2945.71, whether or not Defendant waived speedy trial rights in his defense of the initial indictment.

In State v. Baker (1997), 78 Ohio St. 3d 108, 676 N.E. 2d 883, the Ohio Supreme Court distinguished the Adams (id) decision to hold that:

In issuing subsequent indictment, state is not subject to speedy-trial timetable of initial indictment, where additional criminal charges arise from facts different from original charges, or state did not know of these facts at time of initial indictment.
U.S.C.A. Const. Amend 6; Const. Art. I §10; R.C. §2945.71(C)(2).

The Baker scenario involved original charges against the defendant which resulted from an investigation using informants to illegally purchase prescription drugs from the defendant which were based on controlled buys that occurred before the defendant's arrest. After executing search warrants at defendant's premises, the State discovered additional evidence upon which indictments were based. The Baker decision is factually distinct from the set of facts in the instant case in that the Baker scenario involved filing by the State of additional charges for activities subsequent to those constituting the initial act for which charges were brought rather than the identical activities as is the fact in the instant case. In the instant case, the State knew and was aware of all of the facts alleged to constitute the new charges contained in the indictment when the new indictment herein was filed on February 6, 2006.

Defendant's constitutional rights to due process of law and speedy trial are guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. The Ohio Supreme Court has consistently reiterated, in a long line of cases, the well-settled point of law "that the duty of the state to try an accused within the time limits

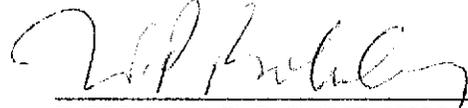
prescribed in R.C. 2945.71 is not affected by the accused's failure to demand a trial...." State v. Lee, 48 Ohio St. 2d 208, 210, 357 N.E. 2d 1095 (1976) State v. Davis, 46 Ohio St. 2d 444, 349 N.E. 2d 315 (1976); State v. Pudlock, 44 Ohio St. 2d 104, 338 N.E. 2d 524(1975); State v. Cross, 26 Ohio St. 2d 270, 271 N.E. 2d 264 (1971). Similarly, the Defendant is not required to show that he was prejudiced by the delay. State v. Coatam, 45 Ohio App. 2d 183, 341 N.E. 2d 635 (1975). Instead, a prima facie case for dismissal and discharge is made by the Defendant establishing that he was not brought to trial within the time period specified in Ohio Rev. Code Ann. Section 2945.71. The State then has the burden of proving that an extension is warranted under the O.R.C. Ann. Section 2945.72. State v. Coatam, supra. If the State fails to meet this burden then the discharge provisions in O.R.C. Ann. Section 2945.73 become operable.

IV. CONCLUSION

The State proposes to this Court that this defendant should remain in jeopardy beyond the statutory speedy trial time requirements based upon action entirely attributable to the State. Although the defense had waived time limits in the first indictment, the State had the benefit of all the time of that waiver to correct its flawed indictment. The State failed to do this, electing instead to dismiss the flawed indictment and re-indict the Defendant on charges based solely on all of the original facts supporting the original indictment. The State seeks to strip the Defendant of his constitutional and statutory speedy trial rights because of the State's own inaction. It

is, accordingly, respectfully respected that the decision by the Eleventh District Court of Appeals herein be affirmed.

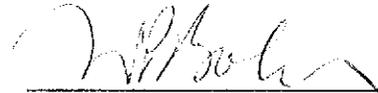
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Merit Brief of Appellee has been sent by regular U.S. mail, postage prepaid, this 19th day of September, 2007, to Shelley M. Pratt, Assistant Prosecutor, 25 W. Jefferson Street, Jefferson, Ohio 44047.



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