

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

JAMES DANKWORTH

Defendant-Appellee.

SUPREME COURT CASE NO. 07-1211

**ON APPEAL FROM THE MIAMI
COUNTY COURT OF APPEALS,
SECOND APPELLATE DISTRICT**

**COURT OF APPEALS CASE NO.
06-CA-21**

**MERIT BRIEF OF APPELLEE,
JAMES DANKWORTH**

**L. PATRICK MULLIGAN
GEORGE A. KATCHMER (0005031)
Mulligan Building
28 N. Wilkinson Street
P.O. Box 248
Dayton, OH 45402
(937) 228-9790
Attorneys for Defendant-Appellee**

**Miami COUNTY PROSECUTOR
201 West Main Street
Troy, OH 45373
Attorney for Plaintiff-Appellant**

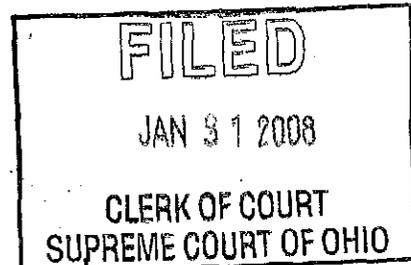


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS..... 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 3

Proposition of Law No. 1: The Calculation of Time for Speedy Trial Purposes Commences on the Date of Arrest.
..... 3

Proposition of Law No. 2: The Calculation of Time for Speedy Trial Purposes Commences on the Date of Arrest and This Computation May Not Be Thwarted by the Expedient of Subsequently Joining Charges With the Same Arrest Date in a Single Indictment
.....5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

APPENDIX A A1

APPENDIX B A8

APPENDIX C A22

APPENDIX D A32

APPENDIX E A36

R. C. 2945.71 A59

TABLE OF AUTHORITIES

Cases:

State v. Staton 2001 Ohio 7004 ,Miami App. No. 2001 CA3

State v. Dankworth (May 25, 2007), Miami App. No. 06-CA-21 3

State v. Knight 2005 Ohio 3179, Greene App. No. 03-CA 14 3

State v. Brock (May 22, 1991) Montgomery App. No. 12227 4

State v Stone (1975), 73 O. O. 2d 496 4

State v. DePue (1994) 96 Ohio App. 3d 513 4

State v. Broughton (1991) 63 Ohio St. 3d 253 4

State v. Johnson 2003 Ohio 3241, Cuyahoga App. Nos. 81692, 81693 5

State v. Parker 2007 Ohio 1534, 113 Ohio St. 3d 207 5

Statutes

R.C. 2945.71 4

STATEMENT OF THE CASE

Appellee was arrested on July 20, 2005. On the same date the following charges were filed against him in Miami County Municipal Court:

1. Case No. 05CRA 3244, theft,
2. Case No. 05CRA3245, violation of protection order,
3. Case No. 05CRA3246, aggravated arson,
4. Case No. 05CRA3247 burglary,
5. Case No. 05CRA3248, violation of protection order.

A preliminary hearing was scheduled for July 28, 2005. But waived by the Appellant and the case was bound over for the Miami County Grand Jury .On December 1,2005 the following charges were filed in Miami County Municipal Court :

1. Case No. 05CRA5511, forgery
2. Case No. 05CRA5512, theft
3. Case No. 05CRA5513, unauthorized use of a motor and vehicle
4. Case No. 05.CRA555514, aggravated arson
5. Case No. 05CRA5515, Violation of a protection order
6. Case No. 05Cra5516, Violation of a protection order
7. Case No. 05CRA5517, burglary

A charge of unauthorized used motor in vehicle had been previously charge against the Appellant on July 13, 2005.

On December 16, 2005 the Appellee was indicted for theft, two counts of violating a

protective order, burglary ,aggravated arson and forgery. The Appellee had been incarcerated from the date of his arrest.

A pre-trial conference was set for January 3,2006 .but vacated. A discovery demand was filed on December 28, 2006. Trial was set for February 28, 2006. The Appellee filed a Motion to Dismiss on speedy trial grounds on February 16, 2006 A hearing was held on February 22, 2006 and the Appellee's Motion was denied on February 28,2006 The Appellee entered a no contest plea to all counts on February 28,2006. Timely Notice Appeal was filed subsequently. The Second District Court of Appeals reversed this matter on May 25, 2007. Notice of Appeal was filed in this Court on July 6, 2007.

STATEMENT OF THE FACTS

Appellee allegedly took a handgun from his father without permission to do so, appeared at his wife's house twice, trespassed once on his wife's property , attempted to set the fire to her garage and forget a check.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW:

Proposition of Law No. 1: It is an Abuse of Discretion to Toll the Statutory Speedy Trial Limits Due to the Filing of a Request for Discovery Absent a Showing of a Reasonable Delay in Responding by the State

The standard for reviewing claims of speedy trial violations is whether the trial court's ruling is supported by the evidence or whether the court abuses its discretion by making a finding manifestly against the weight of the evidence. State v. Staton 2001 Ohio 7004 ,Miami App. No. 2001 CA (Appendix A). Speedy trial analysis must be strictly construed in favor of the defendant . Id.

In the present matter, a discovery demand was made on December 28, 2005. The State responded on that date . On February 16, 2006 the date that the Appellee's Motion to Dismiss was filed , the State "Updated the witness list " In its decision ,the Trial Court simply made a blanket assertion that the time elapsed from December 28,2005, until February 16, 2006 , the date the witness list was updated , was not unreasonable . The Second District Court of Appeals found that an amended witness list was not a response to a discovery request and that the State had no further discovery to provide. State v. Dankworth (May 25, 2007), Miami App. No. 06-CA-21 at 13 (Appendix B). Citing its Decision in State v. Knight 2005 Ohio 3179, Greene App. No. 03-CA 14 (Appendix C), the Second District held that a discovery request does not toll the speedy trial period when discovery has already been provided. Here, no further discovery was forthcoming from the State. A witness list for trial was simply updated.

Further, it is not the length of the time that is relevant as to whether the statute is tolled, but the reasonableness of the delay. Here where was no finding that the excuse of an updated

witness list was reasonable . In fact, the state did not elaborate or any evidence concerning the reason for this delay. It simply made this one isolated statement.

Accordingly , the Trial Court's decision is not supported by any evidence and its finding of reasonableness is, therefore, an abuse of discretion . The Court of Appeals Decision reversing this matter on this basis is, therefore, correct.

Proposition of Law No. 2: The Calculation of Time for Speedy Trial Purposes Commences on the Date of Arrest and This Computation May Not Be Thwarted by the Expedient of Subsequently Joining Charges With the Same Arrest Date in a Single Indictment

R.C. 2945.71(C)(2) states in part, “ A person against whom a felony charge is pending shall be brought to trial within 270 days.” R.C. 2945.71 (E) states “For purposes of computing time under divisions (A), (B),(C),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 a three days ...,” The statutory speedy trial time begins to run with the arrest or its functional equivalent. State v. Brock (May 22, 1991) Montgomery App. No. 12227 (Appendix D), see also State v Stone (1975), 73 O. O. 2d 496 (Date time commences is the date of the arrest not the date of the offense). Further even in a situation where there is a dismissal of original charges and the refiling of the new charges based upon the same underlying facts, the time is not tolled if the defendant is in jail or released on bail .State v. DePue (1994) 96 Ohio App. 3d 513, see also, State v. Broughton (1991) 63 Ohio St. 3d 253 (The period between the dismissal without prejudice of the original indictment and the filing subsequent indictment based upon the same facts is not counted unless the defendant is in jail or released on bond), Staton, supra.

In the present matter , the Appellee was arrested on July 20, 2005 for offenses that occurred between July 12, 2005 and July 20, 2005. It is of no consequence whether the charges are aggregated or separated , the arrest date on all of these charges is July 20,2005 . Time thus commences on each and every charge on July 20, 2005. Accordingly ,time for these charges would have run out on or about October 20, 2005 . New charges, based on absolutely the same facts, were filed on December 1, 2005. Again the Appellee remaining incarcerated throughout, this period was not tolled by the December 1,2005 filing.

The Trial Court and the Court of Appeals relied upon State v. Johnson 2003 Ohio 3241, Cuyahoga App. Nos. 81692, 81693 (Appendix E) in denying the Appellee's Motion to Dismiss. Johnson, however, stands for nothing new or novel , but only for the proposition that if a defendant is being held on a separate unrelated charge, the three for one provisions don't apply . Stating this , however, does not extended the time on individual charges. There are no separate arrest dates on the present offenses and no new charges based on different facts made against the Appellee after July 20, 2005. The simple fact that there are separate charges does not extend the time computation for the unquestioned arrest date in this matter.

The Second District, in its Opinion, relied on State v. Parker 2007 Ohio 1534, 113 Ohio St. 3d 207, for the proposition that when multiple *related* charges were brought separately, the State could not frustrate the triple count provisions by later combining them into a single indictment. Dankworth, *supra* at 11. The Second District then stated, that following the reasoning in Parker, where several *unrelated* charges are included in the same indictment, the triple count provisions also apply. *Id.*

Accepting the reasoning of the Second District, what is the justification for treating the

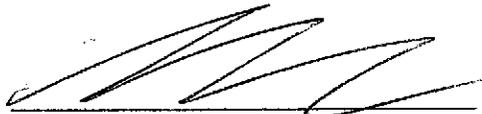
same offenses charged on the *same* arrest date, with no further charges being added or including no incidents not included in the original charges at the date of arrest, as somehow extending the speedy trial date? If, there were a subsequent incident. If there were even a subsequent charge not contemplated at the time of arrest wherein a differing and extended period of time for speedy trial purposes had commenced, then the denial of the triple count provisions would make sense. But when all charges existed simultaneously on the date of arrest and no new factual incidents were involved in the subsequent, single indictment, why would the period, running concurrently, on all charges be extended?

There is no justification for extending the period of time for speedy trial purposes under a single indictment in which all charges are to be tried in a single trial, nor, is there any justification for the denial of triple count provisions where the same incidents underlie the original charges on the same arrest date and no subsequent charges invoking a longer or differing period of limitations are presented. Accordingly, the period of time for speedy trial purposes had expired in this case.

CONCLUSION

For the reasons stated herein, the decision of the Second District Court of Appeals should be affirmed and, this Court should find that triple count provision of the Speedy trial statute apply in cases in which all charges flow from the incidents supporting the charges on the date of arrest when no new incidents or charges not included in the original date of arrest were part of the superceding indictment.

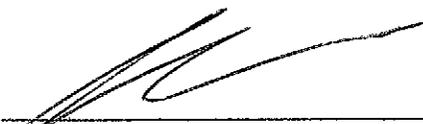
Respectfully submitted,



George A. Katchmer (0005031)
L. Patrick Mulligan (0016118)
L. Patrick Mulligan & Associates,
L.P.A., Co.
Mulligan Building
28 N. Wilkinson Street
P.O. Box 248
Dayton, OH 45402
(937) 228-9790
Attorneys for Appellee

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellee was served upon the Miami County Prosecutor, 201 West Main Street, Troy, OH. 45373 by ordinary U.S. Mail on this day of filing.



L. Patrick Mulligan (0016118)
George A. Katchmer (0005031)
Attorneys for Defendant-Appellee

LexisNexis™ Total Research System

My Lexis™ Search Research Tasks Get a Document Shepard's® Alerts Total Litigator Counsel Select

Source: Ohio > /.../ > OH State Cases, Combined

Terms: staton & miami & 2001 (Edit Search | Suggest Terms for My Search)

 Select for FOCUS™ or Delivery*2001 Ohio 7004; 2001 Ohio App. LEXIS 5610, **STATE OF OHIO, Plaintiff-Appellee v. M. PAUL **STATON**, Defendant-AppellantC.A. CASE NO. **2001** CA 10COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, **MIAMI** COUNTY**2001** Ohio 7004; **2001** Ohio App. LEXIS 5610December 14, **2001**, Rendered**PRIOR HISTORY:** [*1] T.C. CASE NO. 00 CR 189(A).**DISPOSITION:** Trial court judgment affirmed.**CASE SUMMARY**

PROCEDURAL POSTURE: Defendant appealed from the judgment of the **Miami** County Common Pleas Court (Ohio), which convicted him of engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity and sentenced him accordingly. Defendant asserted the State failed to provide him with a speedy trial as guaranteed by the United States Constitution, the Constitution of the State of Ohio, and the Ohio speedy trial statutes.

OVERVIEW: Defendant argued that the State failed to provide him with a speedy trial as guaranteed by the United States Constitution, the Constitution of the State of Ohio, and the Ohio speedy trial statutes. The total amount of time that passed under the speedy trial statute was 135 days. The trial court did abuse its discretion in tolling the trial time on two occasions concerning a motion to dismiss and the bill of particulars. However, these errors were harmless. The court properly tolled and calculated the trial time under Ohio Rev. Code Ann. §§ 2945.71(C)(2), .71(E), and .72(E).

OUTCOME: The judgment of the trial court was affirmed.

CORE TERMS: bill of particulars, co-defendant, speedy trial, tolled, indictment, continuance, discovery, suppress, corrupt, abuse of discretion, engaging, counted, tolling, conspiracy, time expended, defense counsels, specifications, necessitated, reindicted, expended, speedy, abused, felony, jail, bail, toll, trial date, order to provide, assignment of error, began to run

LEXISNEXIS® HEADNOTES

- Hide

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods ^{ALL}

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Statutory Right ^{ALL}

HN1 **The standard for reviewing claims of speedy trial violations is whether the trial court's ruling is supported by the evidence or whether the court abuses its discretion by making a finding manifestly against the weight of the evidence.** More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview ^{ALL}

HN2 **An abuse of discretion means more than an error of law or judgment, but instead it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.** More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview ^{ALL}

HN3 **An abuse of discretion occurs when the result must be so palpably and grossly violative of fact and logic that it evinces not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.** More Like This Headnote

Criminal Law & Procedure > Discovery & Inspection > Bills of Particulars ^{ALL}

Criminal Law & Procedure > Bail > General Overview ^{ALL}

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > General Overview ^{ALL}

HN4 **Under Ohio Rev. Code Ann. § 2945.71(C)(2), a defendant against whom a felony charge is pending shall be brought to trial within 270 days after the defendant's arrest. If the defendant is held in jail in lieu of bail on the pending charge, each day shall be counted as three days. Ohio Rev. Code Ann. § 2945.72(E) provides that this time may be extended by any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused. Generally, when a defendant files a demand for discovery or a bill of particulars, the time between the filing of the demand and the state's providing discovery must be counted against the defendant.** More Like This Headnote

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods ^{ALL}

HN5 **The time in which a defendant must receive a speedy trial pursuant to Ohio Rev. Code Ann. § 2945.71(C) is tolled under Ohio Rev. Code Ann. § 2945.72(E) until the State responds in a reasonably timely fashion. Moreover, the speedy trial analysis must be strictly construed in favor of the defendant.** More Like This Headnote

Criminal Law & Procedure > Bail > General Overview ^{ALL}

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods ^{ALL}

HN6 **The speedy trial statute is tolled during the time a defendant is not under indictment, if there is no evidence that the defendant was held in jail or released on bail.** More Like This Headnote

Criminal Law & Procedure > Discovery & Inspection > Bills of Particulars ^{ALL}

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods ^{ALL}

Legal Ethics > Prosecutorial Conduct ^{ALL}

HN7 **Where a prosecutor obtains a felony indictment, based upon the same conduct as previously nollied, lesser included misdemeanor charge, the time within which the accused shall be brought to trial pursuant to Ohio Rev. Code Ann. § 2945.71 et seq., consists of whatever residue remains from the 270-day period set forth in Ohio Rev. Code Ann. § 2945.71(C) after deducting the speedy trial time expended prior to the nolle prosequi time.** More Like This Headnote

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Excludable Time Periods ALL

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Continuances ALL

HN3 **+** In general, a defendant's request for a continuance tolls the speedy trial statute. More Like This Headnote

COUNSEL: JAMES D. BENNETT, First Assistant Prosecuting Attorney, Troy, Ohio, Attorney for Plaintiff-Appellee.

DANIEL J. O'BRIEN, Dayton, Ohio, Attorney for Defendant-Appellant.

JUDGES: FREDERICK N. YOUNG, J. BROGAN, J. and FAIN, J., concur.

OPINION BY: FREDERICK N. YOUNG

OPINION

FREDERICK N. YOUNG, J.

M. Paul **Staton** is appealing from the judgment of the **Miami** County Common Pleas Court, which convicted him of engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity and sentenced him accordingly.

Staton and his co-defendant Stanley R. Scott (hereinafter referred to as "the co-defendants") were indicted on August 2, 1999 on one count of engaging in a pattern of corrupt activity, Case No. 99CR205(A) and (B). After the State and the co-defendants filed numerous motions, a majority of them regarding the co-defendants' allegations that the State had filed an inadequate bill of particulars, the State voluntarily dismissed the co-defendants' indictments on February 29, 2000.

On July 9, 2000, the co-defendants were reindicted on the charge of engaging in a pattern of corrupt activity, and an additional charge of conspiracy to [*2] engage in a pattern of corrupt activity was added, Case No. 00CR189(A) and (B). The matter was set for trial on September 12, 2000. **Staton** filed a motion for a bill of particulars on July 17, 2000, which the trial court granted.

On September 8, 2000, the co-defendants filed a motion to dismiss, asserting that the State's bill of particulars, provided to them on September 7, 2000, was the same bill of particulars that the trial court had found to be insufficient under the first indictment. A hearing on the motion was held on September 11, 2000. At the hearing, it was determined that the State had failed to abide by the trial court's order to provide the co-defendants with a bill of particulars containing specific times and dates, and the trial court ordered the State to file an amended bill of particulars. At the conclusion of the hearing, the co-defendants made a motion to continue the trial because they were not "prepared" to go forward with the trial due to the inadequacy of the bill of particulars. The trial court noted that "voluminous" discovery had been provided to the co-defendants and that the time would be tolled because they had had plenty of materials from which to prepare [*3] their defense. The trial court continued the trial until January 9, 2001, the first date available to defense counsels.

On January 4, 2001, the co-defendants filed a motion to dismiss based upon speedy trial violations. The co-defendants argued that a minimum of three hundred ninety-four countable days had passed since the original indictment; thus the case should be dismissed as violating their speedy trial rights. The co-defendants asserted that time should not have been tolled

during the time that the trial court had to rule on the co-defendants' motions for a bill of particulars and motions to dismiss. On January 8, **2001**, the co-defendants filed an additional motion to dismiss the second indictment, based upon the State's filing of an inadequate amended bill of particulars. That same day, the trial court overruled the motions to dismiss and found that the amended bill of particulars, filed on October 10, 2000, had complied with the trial court's order.

The co-defendants entered no contest pleas to both charges on January 9, **2001**. They were found guilty by the trial court on January 25, **2001**, and each co-defendant was sentenced to three years on the engaging in a pattern of corrupt [*4] activity charge and two years on the conspiracy charge, with the sentences to be served concurrently.

Staton now appeals his conviction and sentences, asserting one assignment of error.

I.

The trial court prejudicially erred when it failed to grant this Appellant's sixth motion to dismiss for failure of the State over a period of time in excess of 598 days to provide this Appellant and his co-defendant with a bill of particulars to which they were entitled as a matter of right to this Appellant's actual prejudice on an indictment with allegations spanning a period of almost twenty-five (25) years, thereby preventing this Appellant from obtaining a speedy trial in conformity with his rights under the United States Constitution, the Constitution of the State of Ohio and the statutory structure of the State of Ohio and due process of law since all the delays that occurred in this case were caused by the intentional misfeasance of the State of Ohio.

Staton argues that the State failed to provide him with a speedy trial as guaranteed by the United States Constitution, the Constitution of the State of Ohio, and the Ohio speedy trial statutes.

^{HN1} ¶ The standard for reviewing claims [*5] of speedy trial violations is "whether the trial court's ruling is supported by the evidence or whether the court abused its discretion by making a finding manifestly against the weight of the evidence." *State v. Stickney*, 1994 Ohio App. LEXIS 5426 (Dec. 12, 1994) Montgomery App. No. 14232, unreported, citing *State v. Packard* (1988), 52 Ohio App. 3d 99, 557 N.E.2d 808, paragraph 3 of the syllabus. ^{HN2} ¶ "An abuse of discretion means more than an error of law or judgment, but instead it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Stickney*, 1994 Ohio App. LEXIS 5426, *supra*, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248. ^{HN3} ¶ An abuse of discretion occurs when "the result must be so palpably and grossly violative of fact and logic that it evinces not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Stickney*, 1994 Ohio App. LEXIS 5426, *supra* (citations omitted).

^{HN4} ¶ Under R.C. 2945.71(C)(2), a defendant against whom a felony charge is pending shall be brought to trial within two hundred seventy days after the defendant's arrest. [*6] If the defendant is held in jail in lieu of bail on the pending charge, each day shall be counted as three days. R.C. 2945.71(E). R.C. 2945.72(E) provides that this time may be extended by "any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" Generally, when a defendant files a demand for discovery or a bill of particulars, the time between the filing of the demand and the State's providing discovery must be counted against the defendant. *State v. Berge*, 2000 Ohio App. LEXIS 1782 (Apr. 24, 2000) Butler App. No. CA99-05-095, unreported, citing *State v. Keith* (1998), 130 Ohio App. 3d 456, 459, 720 N.E.2d 216, and *State v. Prather*, 1995 Ohio App. LEXIS 2905 (July 10, 1995) Brown App. No. CA94-08-010, unreported; see, also,

State v. Grinnell (1996), 112 Ohio App. 3d 124, 134, 678 N.E.2d 231; *State v. Heyward*, 1998 Ohio App. LEXIS 2270 (May 18, 1998) Pickaway App. No. 96CA42, unreported. ^{HMS}
¶The time in which a defendant must receive a speedy trial pursuant to R.C. 2945.71(C) is tolled under R.C. 2945.72(E) until the State responds [*7] in a reasonably timely fashion. *Benge*, 2000 Ohio App. LEXIS 1782, *supra*. Moreover, the speedy trial analysis must be strictly construed in favor of the defendant. *State v. Pachay* (1980), 64 Ohio St. 2d 218, 18 Ohio Op. 3d 427, 416 N.E.2d 589.

We note that **Staton's** argument ignores that the only portion of the record before us from prior Case No. 99CR205 is several transcripts from hearings before the trial court on various motions. The record before us does not contain any of **Staton's** motions filed under Case No. 99CR205 or any of the trial court's decisions. Therefore, we will rely on the information as contained in the transcripts from the first indictment and in the record before us from the second indictment.

In this case, **Staton** was indicted in Case No. 99CR205(B) on August 2, 1999 and arrested on August 4, 1999. He was released that day and was thus entitled to three days of the allowed time for the day he was incarcerated. Time began running at a rate of one-for-one, for twenty-nine days, until **Staton's** first motion to dismiss and motion for a bill of particulars was filed on September 2, 1999. The trial court denied the motion to dismiss on September 23, 1999. Based upon the previously-mentioned [*8] caselaw, we find no abuse of discretion in the trial court's decision finding that the filing of **Staton's** first motion to dismiss and first motion for a bill of particulars tolled the time between September 2 and September 23.

Time again began to run at a rate of one-for-one, for fourteen days, until October 7, 1999, when **Staton** filed a motion for production of discovery, a motion to suppress, and a motion to require the State to notify **Staton** of its intention to use evidence. Shortly thereafter, Scott filed several other motions. On October 12, 1999, **Staton** filed a motion to suppress, a motion to compel, and a motion to join Scott in all pending motions, including several motions to suppress and a motion to dismiss. A hearing was held on the motions to compel, dismiss, suppress and for a bill of particulars on November 12, 1999, during which extensive testimony was presented to the trial court on many issues. At the conclusion of the hearing, it was determined that more time was needed in which to present testimony on the motion to suppress and to give time to the State to file a bill of particulars. A second hearing was held on December 20, 1999.

According to the trial court's [*9] January 8, 2001 decision on the motion to dismiss for speedy trial issues, the last of the motions were decided on February 18, 2000. This included decisions on multiple motions to suppress and dismiss, motions to disqualify, and a motion for a change in venue. We cannot determine whether this time was "reasonable" or not under the statute, as we have no record before us. However, given the volume of decisions which the trial court had to make, we will presume regularity in the proceedings and defer to the trial court's decision that the time was reasonable and should have been tolled for speedy trial purposes pursuant to R.C. 2945.72(E). At this point, the State had expended forty-six days of the allotted time.

Time again began to run from February 18, 2000 to February 25, 2000, when **Staton** filed his fourth motion to dismiss. The State dismissed the case on February 29, 2000, prior to the trial court's ruling on the motion. **Staton** argues that time should not have been tolled upon the filing of this motion because had the State filed a bill of particulars per the trial court's order, the motion to dismiss would not have been filed. If we construe the statute [*10] in favor of **Staton**, we agree that the trial court did abuse its discretion in tolling the time, as it was due to the State's failure to abide by the trial court's order that **Staton** had to re-file his motion to dismiss and motion for a bill of particulars. Accordingly, the trial court should have charged the full eleven days between February 18 through the dismissal on February 29 to

the State. At this point, the total time expended was fifty-seven days.

The State reindicted **Staton** on July 11, 2000. ^{HNS} The speedy trial statute was tolled during the time **Staton** was not under indictment, as there was no evidence that **Staton** was held in jail or released on bail. *State v. Broughton* (1991), 62 Ohio St. 3d 253, 581 N.E.2d 541, paragraph one of the syllabus. We will, however, tack on any time that lapsed under the original indictment to the time period commencing with the second indictment. See *St. v. Bonarrigo* (1980), 62 Ohio St. 2d 7, 11, 402 N.E.2d 530. ^{HNT} ("Where a prosecutor obtains a felony indictment, based upon the same conduct as previously nollied, lesser included misdemeanor charge, the time within which the accused shall be brought to trial pursuant to [*11] Revised Code 2945.71 et seq., consists of whatever residue remains from the 270-day period set forth in Revised Code 2945.71(C) after deducting the speedy trial time expended prior to the Nolle Prosequi time").

Staton filed a motion for a bill of particulars on July 17, 2000. The trial court granted the motion on August 29, 2000, giving the State a deadline of September 5, 2000. **Staton** reiterates his argument that, as the motion for a bill of particulars was necessitated because the State's bill of particulars was inadequate, the time it took to decide that motion should not be counted against him. Again, construing the speedy trial statute strictly in favor of **Staton**, the motion was filed as a result of the State's inadequate bill of particulars, and we find that the time should not have been charged against **Staton**.

Staton filed his fifth motion to dismiss on September 8, 2000. A hearing was held on September 11, the day before the trial was set to commence. The trial court determined that the State had violated the trial court's order to provide **Staton** with a more specific bill of particulars. Upon this finding, **Staton** requested [*12] a continuance of the trial, which was set to begin the next day, on the grounds that the indictment and bill of particulars provided to him were not specific enough for him to defend his case. The trial court granted the continuance and rescheduled the trial for January 9, 2001, the next available trial date for the co-defendants' attorneys. The trial court found, however, that, because the State had provided "voluminous" discovery to **Staton**, **Staton** should have been prepared for trial. The trial court therefore decided that the time between the request for a continuance and the January 9, 2001 trial date would be tolled.

Staton asserts that the trial court abused its discretion in tolling the time resulting from the continuance. He argues that the inadequate bill of particulars prevented him from adequately preparing for trial. ^{HNS} In general, a defendant's request for a continuance tolls the speedy trial statute. *State v. Davis* (1976), 46 Ohio St. 2d 444, 448, 75 Ohio Op. 2d 498, 500-501, 349 N.E.2d 315; see, also, *State v. Parker*, 1990 Ohio App. LEXIS 2079 (May 24, 1990) Franklin App. No. 89AP-1217, unreported (concluding that defense counsel should be given the latitude to bind a defendant [*13] to his attorney's request for a continuance and rejecting the defendant's argument that the speedy trial statute was not tolled by his attorney's requested continuance because he had not consented to the continuance). We find no abuse of discretion in the trial court's decision to toll this time based upon the Ohio Supreme Court's decision in *State v. Lawrinson* (1990), 49 Ohio St. 3d 238, 551 N.E.2d 1261. The supreme court held that the purpose of a bill of particulars is not to provide the accused with "specifications of evidence or to serve as a substitute for discovery" but rather "to elucidate or particularize the conduct of the accused." *Id.* at 239, citing *State v. Sellards* (1985), 17 Ohio St. 3d 169, 478 N.E.2d 781. We agree with the trial court that **Staton** should have been prepared for trial on September 12, 2000, as full discovery had been provided to him. For these reasons, the time between September 11, 2000 and January 9, 2001 was properly tolled.

Consequently, for speedy trial purposes, we find that the time ran for an additional sixty-two days from July 11, 2000 until the request for a continuance on September 11, 2000; [*14]

however it was tolled from September 11, 2000 until the date of the trial on January 9, **2001**. At this point, the State had expended one hundred and nineteen days.

The State finally complied with the trial court's order and provided **Staton** with an amended bill of particulars containing the required specifications on October 10, 2000. On January 4, **2001**, **Staton** filed a motion to dismiss based upon the speedy trial violations, which the trial court overruled at the hearing on January 8, **2001**. **Staton** asserts that this time should not have been tolled, because he had to file the motions as a result of the State failing to follow the trial court's orders. However, since the time was already being properly tolled resulting from the continuance, this issue is moot. **Staton** pled no contest on January 9, **2001** and was found guilty of the charges on January 25, **2001**.

We find that the total amount of time that passed under the speedy trial statute was one hundred and thirty-five days. Based upon the above discussion, we find that the trial court did abuse its discretion in tolling the time between February 18, 2000 through February 29, 2000 and the time between August 15, 2000 through September 11, 2000. However, **[*15]** we find this error to be harmless. We affirm the trial court's decision to deny **Staton's** motion to dismiss based upon the speedy trial violations, though for slightly different reasons.

Staton's assignment of error is overruled.

Judgment of the trial court is affirmed.

BROGAN, J. and FAIN, J., concur.

Source: Ohio > / . . . / > OH State Cases, Combined :

Terms: **staton & miami & 2001** (Edit Search | Suggest Terms for My Search)

View: Full

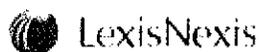
Date/Time: Wednesday, January 30, 2008 - 10:04 AM EST

* Signal Legend:

- - Warning: Negative treatment is indicated
- - Questioned: Validity questioned by citing refs
- ▲ - Caution: Possible negative treatment
- ◆ - Positive treatment is indicated
- Ⓐ - Citing Refs. With Analysis Available
- Ⓜ - Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

My Lexis™ | Search | Research Tasks | Get a Document | *Shepard's*® | Alerts | Total Litigator | Counsel Selector
History | Delivery Manager | Dossier | Switch Client | Preferences | Sign Off | Help



About LexisNexis | Terms & Conditions | Contact Us
Copyright © 2008 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

arson, and forgery. Dankworth contends that the trial court erred by denying his motion to dismiss on speedy trial grounds. Dankworth asserts that his speedy trial time began to run for each charge on July 20, 2005, and that the trial court erred in tolling the speedy trial time between December 28, 2005, when Dankworth filed a discovery request, and February 16, 2006, at which time the State provided an updated witness list.

Based on our review of the record, we conclude that the trial court correctly calculated which days were to be calculated on a one-for-one basis and which on a three-for-one basis. We further conclude, however, that the trial court erred in determining the period tolled by Dankworth's discovery request. Because Dankworth was incarcerated pending trial for a period greater than allowed by the speedy trial statute, the judgment of the trial court is Reversed, and Dankworth is Discharged with respect to these offenses.

According to the record, on July 13, 2005, Dankworth was arrested and charged in the Miami County Municipal Court with unauthorized use of a motor vehicle. Case No. 2005-CRA-3146. On the same day, he was released on a personal recognizance bond. On July 20, 2005, Dankworth was arrested and separately charged with theft (Case No. 2005-CRA-3244), aggravated arson (Case No. 2005-CRA-3246), burglary (Case No. 2005-CRA-3247), and two violations of a protective order (Case Nos. 2005-CRA-3245 & 3248). The court set a separate cash bond for each of the charges. Dankworth waived his preliminary hearing on the charges, and the cases were bound over to the common pleas court for consideration by the grand jury. Dankworth remained incarcerated.

On December 1, 2005, the State again filed charges against Dankworth in the Miami County Municipal Court for theft (Case No. 2005-CRA-5512), unauthorized use of a motor vehicle (Case No. 2005-CRA-5513), aggravated arson (Case No. 2005-CRA-5514), two violations of a protective order (Case Nos. 2005-CRA-5515 & 5516), burglary (Case No. 2005-CRA-5517), as well as one count of forgery (Case No. 2005-CRA-5511). A separate cash bond was set for each charge, which Dankworth did not pay, and he remained in jail. On December 9, 2005, the forgery, unauthorized use of a motor vehicle, theft, and burglary charges were dismissed. On December 14, 2005, Dankworth waived his right to a preliminary hearing on the aggravated arson and the protective order charges, and those three charges were bound over to the common pleas court to be presented to the grand jury.

On December 16, 2005, Dankworth was indicted for theft (count one), two violations of a protective order (counts two and three), burglary (count four), arson (count five), and forgery (count six). Miami Case No. 2005-CR-605. Count One alleged that Dankworth stole a firearm on July 12, 2005. Counts Two and Three alleged that Dankworth violated a protective order on July 18, 2005, and July 20, 2005. The burglary offense allegedly occurred on July 18, 2005, and the arson offense allegedly occurred on July 20, 2005; these actions were apparently connected to the violations of the protective order. Count Six alleged that Dankworth forged the writing of an elderly person on June 17, 2005. Dankworth was arraigned on December 22, 2005. Dankworth pled not guilty and requested a pre-trial conference, which was scheduled for January 3, 2006. The court set a cash bond of \$75,000.

On December 23, 2005, a joint demand for discovery, signed by both the prosecutor

and defense counsel, was filed. In a subsequent hearing, Dankworth indicated that the State had provided its discovery at the arraignment and that he had no discovery to provide to the State. On December 28, 2005, Dankworth obtained new counsel. On the same day, Dankworth requested a continuance of the pre-trial conference and filed a new request for discovery. The pre-trial conference was held on January 3, 2006, as scheduled, and trial was set for February 28, 2006. On February 16, 2006, the State provided an amended witness list to Dankworth. On the same day, Dankworth filed a motion to dismiss, pursuant to R.C. 2945.71, asserting a violation of his statutory right to a speedy trial.

On February 22 and 27, 2006, the trial court held a hearing on the motion to dismiss. At the conclusion of the hearing, the court ruled that Dankworth's speedy trial rights had not been violated. After the ruling, Dankworth entered a no-contest plea to all charges. The court found him guilty, and imposed an aggregate sentence of seven years in prison, restitution and costs. Dankworth appeals from his conviction and sentence.

II

Dankworth presents two assignments of error. His First Assignment of Error is as follows:

"THE CALCULATION OF TIME FOR SPEEDY TRIAL PURPOSES COMMENCES ON THE DATE OF ARREST."

Dankworth's Second Assignment of Error is as follows:

"IT IS AN ABUSE OF DISCRETION TO TOLL THE STATUTORY SPEEDY TRIAL LIMITS DUE TO THE FILING OF A REQUEST FOR DISCOVERY ABSENT A SHOWING

OF A REASONABLE DELAY IN RESPONDING BY THE STATE.”

Under his two assignments of error, Dankworth contends that the trial court erred in calculating the pre-indictment period of his speedy trial time on a one-for-one basis and in tolling the speedy trial time following the filing of his discovery motion. Because of the interrelatedness of the assignments of error, they will be addressed together.

In overruling Dankworth’s motion to dismiss, the trial court calculated the speedy trial time as follows:

“The Court initially computed the Defendant’s time in this case as follows (see Court’s Exhibit A):

“July 2005	12 days	
“August 2005	31 days	
“September 2005	30 days	
“October 2005	31 days	
“November 2005	30 days	
“December 2005	15 days	(It is unclear to the Court because neither side produced any evidence, if the initial charges were dismissed or ignored in Common Pleas Court which would have resulted in no charges pending between December 9-16)

“Corrected Total 149 days

“Since the Defendant was held on individual charges arising on different dates with

different bonds, the Court concludes he is not eligible for the 3-for-1 provision (R.C. 2945.71(E)) from July to December 15, 2005. *St. v. Johnson*, 2003 Ohio App. Lexis 2903.

"The Defendant was indicted on December 16, 2005. Pursuant to *St. v. Bowman* (1987), 41 Ohio App.3d 318, second syllabus, once the State joined the charges in a single indictment and intended to proceed to trial on a single trial date, the Defendant was entitled to the 3-for-1 provision of 2945.71.

"Therefore the court further computes the time as follows:

"December 16 to December 22 7 days x 3 = 21

"On December 22nd, the Defendant was arraigned and requested a pretrial conference. (See transcript of arraignment filed in this case.) This tolled the time until the pretrial date, January 3, 2006.

"However, on December 23, 2005 and on December 28, 2005, demands for discovery were filed; the first being a standard form used at Miami County arraignments and the latter being a written request for discovery filed by the Defendant's new counsel.

"Pursuant to *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, demands for discovery are tolling events. The question is, how long do they toll?

"This Court concludes that this answer must be determined on a case by case basis, and the State must respond to the discovery demand in a reasonably timely fashion. *St. v. Staton* (Dec. 14, 2001), Miami App. No. 2001CA10 at pg.4-5, citing *St. v. Benge* (Apr. 24, 2000), Butler App. No. CA99-05-095, etc., *St. v. McDonald*, 153 Ohio App.3d 679, 686, 2003-Ohio-4342.

"In the *McDonald* case, the state did not respond to the discovery requests until eleven months had lapsed. This, the court concluded, was not a reasonably timely

response. The *McDonald* court noted it would not set a bright line rule for every case, but after four months, the motion stopped acting as a tolling event. *McDonald*, 686, 687.

"In the present case, it appears there are three separate alleged victims and four separate incident dates, involving three separate locations.

"Accordingly, development of the case could possibly take some time. To the Court's questioning, the parties noted the last of the discovery was exchanged February 16, 2006, the same day the motion to dismiss was filed, about one and one-half months after it was demanded.

"The Court does not perceive any dilatory or bad faith action by the State in this regard. By the time of the arraignment (January 3, 2006), both sides were already resolute in their positions on the speedy trial; the State thought that the multiple counts tolled the time until April, the Defendant thought the time had expired 90 days after July 20, 2005.

"This Court, of course has taken a slightly different approach in the ultimate analysis.

"Nevertheless, the Court will find the request for discovery, Court's Exhibit B, tolled the time in which the Defendant was to be brought to trial and the State responded reasonably by February 16, 2006 at which time Defendant's motion to dismiss further tolled the time.

"Accordingly, 270 days has not elapsed and the Defendant's motion to dismiss must be overruled."

On appeal, Dankworth argues that the speedy trial clock began for each charge on July 20, 2005 – the date of his arrest – and that the speedy trial time for all of these charges expired on October 20, 2005. Dankworth's argument is premised on the idea that,

because he was arrested for all of the charges on the same date, they should be treated together for speedy trial purposes and the three-for-one provisions applied as of July 2005.

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. In Ohio, R.C. 2945.71 requires the State to bring a felony defendant to trial within two hundred and seventy days of arrest. R.C. 2945.71(C). Each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three pursuant to the triple-count provision of R.C. 2945.71(E)." *State v. Hart*, Montgomery App. No. 19556, 2003-Ohio-5327. This "triple-count" provision would reduce to ninety days the time for bringing to trial an accused who is incarcerated the entire time preceding trial.

However, an accused is only entitled to the triple-count provision when he is held in jail *solely* on the pending charge. *State v. Kaiser* (1978), 56 Ohio St.2d 29, 381 N.E.2d 633, paragraph two of the syllabus; *State v. DeLeon*, Montgomery App. No. 18114, 2002-Ohio-3286. The days will not be counted triply if he is also being held for additional charges. See *State v. MacDonald* (1976), 48 Ohio St.2d 66, 357 N.E.2d 40; *State v. Davenport*, Butler App. No. CA2005-01-05, 2005-Ohio-6686, ¶9.

The Supreme Court of Ohio has recently considered when multiple charges should be considered, collectively, as a "pending charge" for purposes of R.C. 2945.71(E). *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032. In *Parker*, the defendant was arrested in connection with the discovery of a methamphetamine lab. His arrest resulted in three separate complaints charging the illegal manufacture of drugs, possession of drugs, and carrying a concealed weapon. Separate bonds were set for the three charges, and the two felony charges were bound over to the court of common pleas.

Parker eventually posted a personal recognizance bond in the court of common pleas, but he remained jailed on the misdemeanor charge, which still required cash bail or a surety bond. The misdemeanor charge was subsequently dismissed.

Upon review, the *Parker* court concluded that the triple-count provision applied to the three charges, despite the fact that Parker was arraigned on three separate complaints. The court held that "when multiple charges arise from a criminal incident and share a common litigation history, pretrial incarceration on the multiple charges constitutes incarceration on the 'pending charge' for the purposes of the triple-count provision of the speedy-trial statute, R.C. 2945.71(E)." *Parker* at ¶21. The court noted: "[T]he charges at the time of the complaints could have proceeded together in one jurisdiction. Parker had no control over the decision to refer only the drug charges to the grand jury. The state cannot reasonably argue that it has a mechanism at its disposal whereby after bringing both misdemeanor and felony charges based on a single criminal incident, and retaining the misdemeanor as a pending action in municipal court, it can obviate any triple-count concerns." *Id.*

Unlike in *Parker*, Dankworth's July 20th arrest was not related to a single criminal incident which resulted in multiple charges. Rather, Dankworth had engaged in four unrelated acts of criminal conduct, involving at least three separate victims, on four separate dates: forgery on July 17, 2005; theft of a firearm on July 12, 2005; violation of a protective order and burglary on July 18, 2005; and violation of a protective order and arson on July 20, 2005. The State filed separate complaints, and the municipal court imposed separate cash bonds for each of the offenses. Because Dankworth was arrested for numerous unrelated charges, he was not held in jail in lieu of bail on a single "pending

charge." To the contrary, Dankworth was held in jail in lieu of bail on several unrelated charges. Accord *State v. Johnson*, Cuyahoga App. Nos. 81692 & 81693, 2003-Ohio-3241, ¶15-17. Under the circumstances presented, the fact that he was arrested on the same date for each of the unrelated criminal incidents is inconsequential. Moreover, although the State later combined these charges in a single indictment, nothing in the nature of the unrelated charges suggested that the State would or should do so. Contrast *Parker*, supra. Accordingly, the trial court properly calculated the period between July 20, 2005 and December 15, 2005 on a one-to-one basis. Not counting the date of Dankworth's arrest, *State v. Stewart*, Montgomery App. No. 21462, 2006-Ohio-4164, ¶16 (day of arrest is not counted in computing speedy trial time), that period amounted to 148 days.

Dankworth's First Assignment of Error is overruled.

We further agree with the trial court that, once an indictment including all of the charges was filed on December 16, 2005, Dankworth was entitled to the triple-count provision of R.C. 2945.71(E). Although this issue has not been directly addressed by the Ohio Supreme Court or by this court, several courts have held that, when an accused is charged with several unrelated offenses in a multiple-count indictment and all counts are to be tried in a single trial, the indictment is treated as a single charge, and the accused is entitled to the triple-count provision. *State v. Collins* (1993), 91 Ohio App.3d 10, 14-15, 631 N.E.2d 666; *State v. Armstrong* (May 25, 1989), Franklin App. No. 87AP-1166; *State v. Bowman* (1987), 41 Ohio App.3d 318, 535 N.E.2d 730. We agree with this proposition and note that the State likewise concedes that the triple-count provision applied once all charges were joined in a single indictment.

Moreover, we find no basis to conclude that *Parker* requires us to treat the multiple counts in the indictment on a one-to-one basis. *Parker* addressed the situation where multiple related charges were brought separately, and the Ohio Supreme Court concluded, in essence, that the State could not circumvent the triple-count provision by charging the related offenses in separate complaints and addressing them in multiple courts. *Parker* does not address the reverse situation where multiple unrelated charges are brought in a single multiple-count indictment, as is the case herein, nor does *Parker* suggest that the triple-count provision applies only when factual circumstances similar to *Parker's* exist. Accordingly, we conclude that, because Dankworth was in jail in lieu of bond on a single indictment, the time between December 16, 2005, and February 27, 2006, was properly counted triply. That time period amounted to an additional 222 days in jail.

Accordingly, between July 21, 2005, and February 27, 2006, Dankworth was incarcerated for a total of 370 days (148 days + 222 days).

A defendant must be brought to trial within the time limit set by statute unless the time is tolled by one of the exceptions listed in R.C. 2945.72. Under R.C. 2945.72, the speedy trial time may be tolled during any period of delay "necessitated by reason of a * * motion, proceeding, or action made or instituted by the accused." R.C. 2945.72(E).

Dankworth does not dispute that certain dates of his incarceration did not count against the State for speedy trial purposes. Dankworth was arraigned on December 22, 2005, and he requested a pre-trial conference at that time. The speedy trial time was thus tolled until January 3, 2006, when the pre-trial conference was held. This period was also tolled by Dankworth's request for a continuance of the pre-trial conference, filed on December 28, 2005. Because that motion was denied and the pre-trial conference was

held as scheduled, the tolling period resulting from the motion for a continuance likewise ended on January 3, 2006. Dankworth also does not challenge that the speedy trial time was tolled from February 16, 2006, when he filed his motion to dismiss, until his plea on February 27, 2006. Accordingly, Dankworth does not challenge that 75 days (25 days counted triply) were properly considered tolled by the trial court.

In his Second Assignment of Error, Dankworth contends that the trial court abused its discretion when it tolled the period between December 28, 2005, when Dankworth's new counsel filed a discovery request, and February 16, 2006, when the State filed its amended witness list.

The Ohio Supreme Court has held that a defendant's demand for discovery or a bill of particulars is a tolling event, pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159. The court reasoned that "[d]iscovery requests by a defendant divert the attention of prosecutors from preparing their case for trial, thus necessitating delay. If no tolling is permitted, a defendant could attempt to cause a speedy-trial violation by filing discovery requests just before trial." *Id.* at 124.

In *State v. Knight*, Greene App. No. 03-CA-14, 2005-Ohio-3179, we held that a defendant's filing of a discovery request did not toll the speedy trial time when the State had preemptively complied with the defendant's request (i.e., the State had provided the requested discovery before the request was made). We stated:

"On May 6, 2002, Defendant timely filed his request for discovery. Ordinarily, that demand would toll the speedy trial time for the reasonable period of time necessary for the State to respond. *Brown, supra.* However, the State had already filed its 'Rule 16 Compliance' on May 1, 2002. Consequently, Defendant's request for discovery could not

divert the prosecutor's attention from preparing the case for trial, *Brown, supra*, because the State had already provided discovery. Therefore, Defendant's May 6, 2002, request for discovery did not toll the speedy trial time." *Id.* at ¶18.

The present circumstances are similar to those in *Knight*. Here, it is undisputed that Dankworth and the State provided reciprocal discovery following the arraignment on December 22, 2005. As indicated by the trial court, on the following day, the parties filed a standard form in which Dankworth both demanded discovery and acknowledged receipt of presently available discovery from the prosecutor. The form further acknowledged Dankworth's receipt of the State's demand for discovery. When Dankworth obtained new counsel on December 28, 2005, his new counsel filed a second request for discovery. However, the record reflects that the State had no additional discovery to provide. In our view, the State's filing of an amended witness list on February 16, 2006, was not a response to the discovery request but merely satisfied the State's continuing obligation to notify the defense of its intended witnesses at trial. Thus, in accordance with *Knight*, Dankworth's December 28th request did not toll the speedy trial time, at least not beyond the reasonable time it should have taken the State to examine that request and determine that no additional discovery, beyond the discovery already provided, was being requested. In our view, the State had ample opportunity to come to this conclusion by the time of the pre-trial conference on January 3, 2006. Consequently, the trial court erred when it tolled the time between January 3, 2006, and February 16, 2006. As a result, Dankworth was held in jail in lieu of bail in excess of the time limit set forth in R.C. 2945.71, and the trial court should have granted his motion to dismiss.

Dankowrth's Second Assignment of Error is sustained.

III

Dankworth's Second Assignment of Error having been sustained, the judgment of the trial court is Reversed, and Dankworth is ordered Discharged with respect to the convictions with which this appeal is concerned.

.....

GRADY and DONOVAN, JJ., concur.

Copies mailed to:

James D. Bennett
George A. Katchmer
Hon. Robert J. Lindeman

LexisNexis® Total Research System

My Lexis™ Search Research Tasks Get a Document Shepard's® Alerts Total Litigator Counsel Select

Source: Ohio > /... / > OH State Cases, Combined

Terms: knight & greene & 2003 (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

2005 Ohio 3179, *; 2005 Ohio App. LEXIS 2962, **

STATE OF OHIO, Plaintiff-Appellee vs. MICHAEL G. KNIGHT, Defendant-Appellant

C.A. CASE NO. 03-CA-014

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE COUNTY

2005 Ohio 3179; 2005 Ohio App. LEXIS 2962

June 24, 2005, Rendered

PRIOR HISTORY: [1]** Criminal Appeal from Common Pleas Court. T.C. CASE NO. 02-CR-449.

State v. Knight, 2004 Ohio 1941, 2004 Ohio App. LEXIS 1674 (Ohio Ct. App., Greene County, Apr. 16, 2004)

DISPOSITION: Assignments of error sustained in part and overruled in part. Defendant-Appellant's conviction for the March 1, 2002 robbery offense reversed and vacated.**CASE SUMMARY****PROCEDURAL POSTURE:** Defendant filed an application pursuant to Ohio R. App. P. 26 (B), alleging that his appellate counsel rendered ineffective assistance in defendant's prior merit appeal of a judgment from the Greene County Common Pleas Court (Ohio). Defendant had been convicted of two counts of aggravated robbery. The court granted the application to reopen the appeal.**OVERVIEW:** Defendant was found guilty after a jury trial of the aggravated robbery counts. His convictions and sentences were affirmed on direct appeal, wherein the court held that defendant waived his speedy trial claim with respect to one of the robbery counts because his motion for dismissal was untimely. It was noted that the motion was not filed until the second day of trial, after the jury had been impaneled and sworn. Defendant sought to reopen his appeal pursuant to Rule 26(B), based on appellate counsel's failure to raise trial counsel's ineffective assistance on the speedy trial issue. The court noted that if there was a speedy trial violation, defendant would not have been convicted and accordingly, prejudice was shown. The issue was whether defendant's speedy trial rights under Ohio Rev. Code Ann. § 2945.71 were violated. The court conducted a careful analysis of the various time periods, noting that there was no tolling under Ohio Rev. Code Ann. § 2945.72(H) for the State's or defendant's discovery demands, nor for the continuance sought by the State. Only one of the convictions was violative of defendant's speedy trial rights, based on a reindictment containing later charges.**OUTCOME:** The court affirmed the judgment of the trial court with respect to one of the counts of aggravated robbery, and reversed the judgment with respect to the other aggravated robbery conviction.

has held that a defendant's demand for discovery or a bill of particulars is a tolling event per . The Court reasoned that discovery requests by a defendant divert the attention of prosecutors from preparing their case for trial, thus necessitating delay. Courts have also held, citing that when the defendant does not comply with the State's discovery request in a timely manner, the resulting period of delay is charged to the defendant.

> > > ALL
*The running of the speedy trial clock is tolled when a defendant has caused a delay. does not generally recognize motions filed by the State as triggering events that toll the speedy trial time.

> > > ALL
*Because a motion to compel discovery by a defendant is necessitated by the State's failure to fully comply with the defendant's earlier discovery request, any delay caused by the motion is not chargeable to the defendant and does not toll the speedy trial time.

> > > ALL ALL
*The time within which an accused must be brought to trial may be extended by 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.

> > > ALL
*In order to trigger the tolling provisions of there must be some form of application made by an accused.

> > > ALL ALL
*Continuances granted at the State's request must be reasonable for purposes of the speedy trial tolling period. Reasonableness is strictly construed against the State. The reasonableness of a continuance is determined by examining the purpose and length of the continuance. In granting continuances "other than upon an accused's own motion," in other words at the request of the State or sua sponte by a court, the reasons for the continuance must be included in the court's journal entry.

William F. Schenck, Pros. Attorney; Cheri L. Stout, Asst. Pros. Attorney, Xenia, Ohio, Attorney for Plaintiff-Appellee.

David H. Bodiker, State Public Defender; Charles B. Clovis, Asst. Pub. Defender, Columbus, Ohio, Attorney for Defendant-Appellant.

GRADY, J. WOLFF, J. And DONOVAN, J., concur.

OPINION BY: GRADY

GRADY, J.

[*P1] This matter is before the court on an application filed by Defendant-Appellant, Michael G. **Knight**, alleging ineffective assistance of appellate counsel. We find that **Knight's** appellate counsel in his prior merit appeal provided ineffective assistance because he failed to argue that **Knight's** trial counsel was ineffective for failing to move for **Knight's** discharge from one of two robbery offenses of which he was convicted due to a violation of **Knight's** statutory speedy trial rights. The conviction involved will be reversed and vacated. The conviction not likewise affected will be affirmed.

[2]** I.

[*P2] Defendant, Michael **Knight**, was found guilty following a jury trial of two counts of aggravated robbery. The first charge arose out of the robbery of a CD Connection store on February 28, 2002. The second charge stemmed from the robbery of a Kwik & Kold Drive Thru on March 1, 2002. A third aggravated robbery charge, based upon a February 24, 2002 robbery, had been dismissed. Defendant was sentenced to consecutive prison terms of nine years on each count, for a total of eighteen years.

[*P3] We affirmed Defendant's conviction and sentence on direct appeal.

In that appeal, we concluded that because Defendant did not file his motion to dismiss for want of a speedy trial until the second day of trial, after the jury had already been impaneled and sworn, his motion was untimely and his speedy trial claim was therefore waived.

[*P4] Defendant subsequently filed an application to reopen his appeal, alleging that his appellate counsel was ineffective for having failed to raise an issue of ineffective assistance of trial **[**3]** counsel, based on trial counsel's failure to timely file a motion to dismiss the charges for a speedy trial violation. We granted Defendant's application to reopen his appeal and directed that the reopened appeal be confined to the issue of "whether Defendant's trial counsel provided ineffective assistance by failing to raise a speedy trial violation in a timely manner."

[*P5] This matter is now ready for decision on the merits of that issue.

FIRST ASSIGNMENT OF ERROR

[*P6] "COUNSEL'S FAILURE TO MAKE A TIMELY OBJECTION TO THE VIOLATION OF MR. **KNIGHT'S** RIGHT TO A SPEEDY TRIAL DENIED MR. **KNIGHT** THE EFFECTIVE ASSISTANCE OF COUNSEL."

SECOND ASSIGNMENT OF ERROR

[*P7] "MR. **KNIGHT** WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON HIS PREVIOUS APPEAL."

[*P8] In order to demonstrate ineffective assistance of counsel, Defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance; that is, there is a reasonable probability that but for

CORE TERMS: speedy trial, continuance, discovery, robbery, tolled, discovery request, speedy trial, toll, ran, trial counsel, robbery charge, speedy, trial rights, arrest, ineffective assistance, failing to raise, timely manner, ineffective, tolling, trial began, fully complied, deficient, aggravated, application to reopen, trial counsel, timely file, compel discovery, witness list, necessitated, deficiently

LEXISNEXIS® HEADNOTES

- Hide

Criminal Law & Procedure > Counsel > Effective Assistance > Tests 

Criminal Law & Procedure > Trials > Burdens of Proof > Defense 

HN2  **In order to demonstrate ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance; that is, there is a reasonable probability that but for counsel's unprofessional errors the result of the trial or proceeding would have been different.** More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial 

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere 

Criminal Law & Procedure > Guilty Pleas > No Contest Pleas 

HN2  **The Sixth Amendment to the United States Constitution and Ohio Const. art. I, § 10 guarantee a criminal defendant the right to a speedy trial. In Ohio, that right is implemented by the statutory scheme imposing specific time limits in Ohio Rev. Code Ann. § 2945.71 et seq. The particular rights which that statutory scheme confers attach when a defendant is arrested on criminal charges. They continue so long as those charges remain pending, until his criminal liability is determined by trial or a plea of guilty or no contest.** More Like This Headnote |
Shepardize: Restrict By Headnote

Criminal Law & Procedure > Preliminary Proceedings > Detainer > General Overview 

Criminal Law & Procedure > Bail > General Overview 

Criminal Law & Procedure > Pretrial Motions > Speedy Trial > Statutory Right 

HN2  **Ohio Rev. Code Ann. § 2945.71(C)(2) requires the State to bring a person against whom a felony charge is pending to trial within 270 days after the person's arrest, unless the time for trial is extended pursuant to the provisions in Ohio Rev. Code Ann. § 2945.72. Each day the person is held in jail in lieu of bail on the pending charge is counted as three days. Ohio Rev. Code Ann. § 2945.71(E). For a violation of the rights these sections confer, a defendant may seek a discharge from criminal liability pursuant to Ohio Rev. Code Ann. § 2945.73.** More Like This Headnote

Criminal Law & Procedure > Discovery & Inspection > Discovery by Government 

HN4  **Pursuant to Ohio R. Crim. P. 16(C), the State's right to request and receive discovery from a defendant accrues only after the defendant has both requested and obtained discovery from the State.** More Like This Headnote

Criminal Law & Procedure > Discovery & Inspection > Speedy Trial 

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Discovery 

Criminal Law & Procedure > Discovery & Inspection > Speedy Trial > Continuance 

HN2  **Ohio Rev. Code Ann. § 2945.71 provides that the Ohio Supreme Court's § 2945.71 speedy trial time is tolled by any period necessitated by a plea, motion, or other application "made or instituted by a defendant." The Ohio Supreme Court**

counsel's unprofessional errors the result of the trial or proceeding would have been different. **[**4]**

In this case Defendant must prove that his appellate counsel performed deficiently by failing to raise the claim he now presents, and that there is a reasonable probability of success had counsel presented that claim on appeal.

[*P9] In granting Defendant's application to reopen this appeal, we observed that if the State violated Defendant's speedy trial rights, there is no justifiable reason for not having raised that issue in a timely manner. Furthermore, given that a timely and meritorious motion to dismiss on speedy trial grounds would have resulted in a dismissal of the charges, clearly, trial counsel's failure to file that motion and appellate counsel's failure to raise that issue on appeal would result in prejudice to Defendant. *Id.* at 8;

Thus, the critical issue in this case is whether Defendant's speedy trial rights were violated.

[*P10] The State responds that trial counsel did not perform deficiently by failing to timely raise a speedy trial claim, and therefore appellate **[**5]** counsel did not perform deficiently by failing to raise that issue on direct appeal, because a timely speedy trial claim would have lacked merit due to the many tolling events in this case.

[*P11] The and guarantee a criminal defendant the right to a speedy trial. In Ohio, that right is implemented by the statutory scheme imposing specific time limits in . The particular rights which that statutory scheme confers attach when a defendant is arrested on criminal charges. They continue so long as those charges remain pending, until his criminal liability is determined by trial or a plea of guilty or no contest.

[*P12] requires the State to bring a person against whom a felony charge is pending to trial within two hundred and seventy days after the person's arrest, unless the time for trial is extended pursuant to the provisions in . Each day the person is held in jail in lieu of bail on the **[**6]** pending charge is counted as three days. For a violation of the rights these sections confer, a defendant may seek a discharge from criminal liability pursuant to

[*P13] On April 25, 2002, Defendant was indicted for the robbery of the Kwik & Kold that occurred on March 1, 2002. Defendant was arrested for that robbery on April 30, 2002, and was also held on a detainer or holder from another court until May 2, 2002. The time for bringing Defendant to trial began running on May 1, 2002, the day after his arrest.

On May 1 and 2, time ran on a one-to-one basis due to the existence of the holder.

[*P14] On May 1, 2002, the State filed its " Compliance and Demand for Discovery." Citing , the State argues that its request for discovery tolled the speedy trial time pursuant to until Defendant fully complied with the State's discovery request on June 13, 2002. We disagree, for two reasons.

[*P15] Pursuant **[**7]** to , the State's right to request and receive discovery from the defendant accrues only after the Defendant has both requested and obtained discovery from the State. While the State's effort to meet its basic discovery obligations at an early date is laudable, the fact remains that Defendant did not file his discovery request until May 6, 2002. Accordingly, on May 1, 2002, the State had no right to demand discovery from Defendant when it did, and its request therefore did not toll the

speedy trial time.

[*P16] Further, provides that the speedy trial time is tolled by any period necessitated by a plea, motion, or other application "made or instituted by the defendant." In , the Supreme Court held that a defendant's demand for discovery or a bill of particulars is a tolling event per . The court reasoned that "discovery requests by a defendant divert the attention of prosecutors from preparing their case for trial, thus necessitating delay." Courts have also held, citing **[**8]** , that when the defendant does not comply with the State's discovery request in a timely manner, the resulting period of delay is charged to the defendant.

[*P17] The foregoing decisions are in accord with the proposition that the running of the speedy trial clock is tolled when the defendant has caused a delay. does not generally recognize motions filed by the state as triggering events that toll the speedy trial time. See:

. Therefore, the State's May 1, 2002 demand for discovery did not toll the speedy trial time.

[*P18] On May 6, 2002, Defendant timely filed his request for discovery. Ordinarily, that demand would toll the speedy trial time for the reasonable period of time necessary for the State to respond. However, the State had already filed its "Compliance" on May 1, 2002. Consequently, Defendant's request **[**9]** for discovery could not divert the prosecutor's attention from preparing the case for trial, , because the State had already provided discovery. Therefore, Defendant's May 6, 2002, request for discovery did not toll the speedy trial time.

[*P19] On May 30, 2002, Defendant filed a motion to compel discovery, arguing that the State failed to provide a videotape that depicted the events leading up to his arrest. Because this motion to compel discovery was necessitated by the State's failure to fully comply with Defendant's earlier discovery request, any delay caused by the motion is not chargeable to Defendant and does not toll the speedy trial time.

[*P20] On June 4, 2002, the trial court granted Defendant's motion to compel discovery and ordered the State to provide Defendant access to the videotape within seven days. The court's order demonstrates that the State had not previously fully complied with Defendant's request for discovery. Therefore, Defendant was not obligated to respond to the State's discovery request until after Defendant obtained full discovery from the State. **[**10]**

[*P21] The record does not indicate the date that the State complied with the trial court's order to give Defendant access to the videotape. We necessarily presume that occurred within seven days of June 4, 2002, as ordered by the court. Construing the evidence in a light most favorable to the State, if the State complied and provided full discovery to Defendant on June 4, 2002, then that is the date that the State's own discovery request could be deemed to have been properly filed and effective under . Defendant complied with the State's discovery request and filed his witness list on June 13, 2002.

[*P22] On June 18, 2002, the State filed a motion to continue the trial, which had been set for June 19, 2002. The motion was granted and the trial continued until July 1, 2002. The State argues that the continuance should be charged to Defendant and tolls the speedy trial time because Defendant did not object to the continuance, and in fact acquiesced to it, and the continuance was necessitated by Defendant's failure to provide discovery to the State in

a timely manner and by Defendant's prolonging plea negotiations **[**11]** until the eve of trial. The State's motion to continue stated:

[*P23] "This matter is currently scheduled for trial on June 19, 2002. Counsel for the State and the Defendant have engaged in negotiations for a period of time, which counsel reasonably believed would lead to a resolution of this matter without the necessity of trial. In recent days, it has become apparent that those negotiations will not lead to resolution.

[*P24] "The undersigned spoke with defense counsel on or about June 14, 2002, at which time it was agreed that the matter would not proceed to trial on June 19, 2002. In essence, the defense does not object to the requested continuance.

[*P25] "WHEREFORE, the State respectfully requests that an order issue vacating the trial date of June 19, 2002, and continuing this cause for a later date."

[*P26] "The time within which an accused must be brought to trial may be extended by 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."

These parties attempted unsuccessfully to negotiate a plea agreement **[**12]** until the eve of trial. However, that did not relieve either party of its obligation to prepare for trial.

[*P27] The record does not indicate that Defendant was unprepared for trial or desired a continuance for trial preparation. Furthermore, as previously discussed, Defendant fully complied with the State's discovery request and provided his witness list just nine days after the State's discovery request became effective. Thus, the State's argument that Defendant failed to provide discovery in a timely manner is not supported by this record. In any event, the State's motion seeking a continuance makes no mention of Defendant's alleged failure to timely provide discovery as a reason for the continuance.

[*P28] The State's contention on appeal that Defendant had acquiesced in the State's motion for a continuance confuses the tolling effect of [redacted] with the concept of waiver. In order to trigger the tolling provisions of [redacted], there must be some form of application made by the accused. The State's motion is not such an application, and its representation that defense counsel "had agreed that the matter **[**13]** would not proceed to trial on June 19, 2002" reflects nothing more than the probable consequence of the State's motion. Defendant's failure to object cannot rise to the level of a waiver of the speedy trial right, which is, in essence, what the State now contends.

[*P29] The facts before us, including Defendant's failure to object to the State's requested continuance, do not demonstrate either acquiescence to the State's request or a motion for a continuance made by the accused, much less a waiver of Defendant's speedy trial rights which must be made in writing or on the record in open court.

In other words, this continuance is not chargeable to Defendant and does not toll the speedy trial time.

[*P30] "Continuances granted at the State's request must be reasonable.

Reasonableness is strictly construed against the State.

The reasonableness of a continuance is determined by examining the purpose and length of the continuance.

In granting **[**14]** continuances "other than upon the accused's own motion," in other words at the request of the State or sua sponte by the court, the reasons for the continuance must be included in the court's journal entry.

[*P31] The court's journal does not contain an order by the court continuing the trial at the request of the State. Rather, the continuance is purportedly granted vis-a-vis a notice issued by the court's assignment commissioner, which does not reflect the reasons for the continuance. That is legally insufficient to continue the trial "other than upon the accused's own motion." Accordingly, we conclude that there was no valid continuance of the trial at the State's request that tolled the speedy trial time.

[*P32] Pursuant to the State's further motion, on July 1, 2002, the trial court dismissed without prejudice the pending aggravated robbery charge stemming from the Kwik & Kold robbery on March 1, 2002 (Case No. 2002-CR-270). Defendant remained in jail. On July 3, 2002, Defendant was reindicted (Case No. 2002-CR-449). The new indictment reasserted **[**15]** the dismissed charge and added two new aggravated robbery charges based upon robberies of the CD connection that occurred on February 24, 2002 and February 28, 2002. Defendant was arrested on the new indictment on July 10, 2002. That started the speedy trial clock running again.

[*P33] On July 12, 2002, Defendant filed a motion to continue the trial. The trial court granted the motion and trial was reset for September 4, 2002. Thus, the speedy trial time was tolled from July 12, 2002 to September 4, 2002. On August 30, 2002, Defendant filed a motion for separate trials on each of the charges. The trial court overruled that motion on October 4, 2002. Thus, the speedy trial time was further tolled from August 30, 2002 to October 4, 2002. There were no further events that tolled the speedy trial time. Defendant's trial began on December 4, 2002.

[*P34] The State claims that at the time of the original indictment it was not aware of Defendant's involvement in the February 24th and 28th robberies, and only became aware of those offenses during preparation for Defendant's trial on the March 1, 2002 robbery **[**16]** charge. Additionally, the State points out that the two February robberies are based upon facts different from the original March 1 robbery. Thus, the State asserts that any time chargeable to the State for speedy trial purposes that had accrued under the original March robbery charge does not apply to the new February robbery charges, and the speedy trial time on those new charges began running on July 11, 2002, the day after Defendant's arrest on those charges. See:

We agree. However, that does not relieve the State of its obligation to bring Defendant to trial on the original March robbery charges in a way that complies with

[*P35] With respect to Defendant's conviction for the March 1, 2002 robbery, the speedy trial time began running on May 1, 2002, the day after Defendant's arrest for that offense. Time ran on a one-to-one basis on May 1 and 2, 2002, due to the holder placed against Defendant. As we discussed, between May 1, 2002-June 4, 2002, neither the State's nor Defendant's actions regarding discovery **[**17]** resulted in a tolling of the speedy trial time. Therefore, time ran between May 3, 2002-June 4, 2002, on a three-to-one basis.

At best, the State's request for discovery tolled the speedy trial time from the day the State's discovery request became effective, June 4, 2002, until June 13, 2002, when Defendant fully complied with that request and filed his witness list. Time began running again on June 14, 2002, on a three-to-one basis.

[*P36] As we discussed, the State's request for a continuance did not result in a valid continuance of the trial that tolled the speedy trial time. Thus, time ran from June 14, 2002-July 1, 2002, on a three-to-one basis. The speedy trial time was tolled from July 1, 2002-July 3, 2002, because no felony charges were pending at that time. After Defendant's reindictment, time began running again and ran from July 4, 2002 to July 12, 2002, on a three-to-one basis. The speedy trial time was tolled from July 12, 2002 to October 4, 2002. Time began running again on October 5, 2002, and ran on a three-to-one basis until

December 4, 2002, when Defendant's trial began.

[*P37] On December 4, 2002, Defendant **[**18]** had been incarcerated prior to trial on the charge arising from the March 1, 2002 robbery for two days on a one-to-one basis and one hundred twenty-one days on a three-to-one basis, for a total of three hundred sixty-five days. That is well over the two hundred seventy day limit allowed for trial by Defendant's speedy trial rights with respect to charges arising from that offense were clearly violated, and his trial counsel performed in a constitutionally deficient manner by failing to timely file a motion to dismiss pursuant to . Furthermore, Defendant's counsel on appeal performed in a constitutionally deficient manner by failing to raise this issue concerning trial counsel's ineffective assistance. The prejudice to Defendant is obvious.

[*P38] With respect to Defendant's conviction for the February 28, 2002 robbery, the speedy trial time began running on July 11, 2002, the day after Defendant's arrest for that offense. Time ran until July 12, 2002, on a three-to-one basis. The speedy trial time was tolled from July 12, 2002 to October 4, 2002. Time began running again on October 5, 2002, and ran **[**19]** on a three-to-one basis until December 4, 2002, when Defendant's trial began.

[*P39] On December 4, 2002, Defendant had been incarcerated prior to trial on the February 28, 2002 offense for sixty-two days on a three-to-one basis, for a total of one hundred eighty-six days. That is well within the two hundred seventy days allowed for trial by . Thus, Defendant's speedy trial rights were not violated with respect to the February 28, 2002 robbery, and trial counsel was not ineffective for failing to timely file a motion to dismiss per . Neither was counsel on appeal ineffective for failing to raise an issue concerning trial counsel's ineffectiveness.

[*P40] The assignments of error are sustained in part and overruled in part. Defendant-Appellant's conviction for the March 1, 2002 robbery offense will be reversed and vacated. His conviction for the February 28, 2002 robbery offense and the sentence imposed for that offense stands undisturbed.

WOLFF, J. And DONOVAN, J., concur.

Source: >/.../> OH State Cases, Combined

Terms: knight & greene & 2003 ()

View: Full

Date/Time: Wednesday, January 30, 2008 - 10:11 AM EST

* Signal Legend:

- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any Shepard's signal to Shepardize® that case.

LexisNexis reserved.

2008 LexisNexis, a division of Reed Elsevier Inc. All rights

¶ The statutory speedy trial time begins to run in misdemeanors with the "arrest or service of summons." Ohio Rev. Code Ann. § 2945.71(A), (B). Section 2945.71(C) provides that a person against whom a charge of felony is pending shall be accorded a preliminary hearing within 15 days after his arrest and shall be brought to trial within 270 after his arrest. It is reasonably clear that the legislature has determined that the speedy trial clock begins to run with either an arrest or its functional equivalent. More Like This Headnote |

Shepardize: Restrict By Headnote

COUNSEL: STEVEN L. WAGENFELD, Assistant Prosecuting Attorney, Appellate Division, Dayton, Ohio, Attorney for Plaintiff-Appellant.

WILLIAM C. COX, Dayton, Ohio, Attorney for Defendant-Appellee.

JUDGES: Wilson, J. Fain, P.J., and Grady, J., concur.

OPINION BY: WILSON

OPINION

OPINION

Kenneth Wayne **Brock** was arrested on November 15, 1988 for selling a pound of marijuana. A complaint for trafficking in marijuana was filed the following day in the Vandalia Municipal Court. **Brock** was subsequently released on bond pending a preliminary hearing.

On December 1, 1988, the grand jury returned a two count felony indictment charging **Brock** with the sale and possession of marijuana on November 15, 1988. The defendant was not arrested under the indictment warrant until March 4, 1990.

On March 30, 1990 the defendant moved "to dismiss the charges against the Defendant as set forth in the Indictment herein for the reason that the Defendant has not been brought to trial within the time period set forth in R.C. 2945.71 et seq."

The state has appealed from the "Decision and Judgment [*2] Entry of Dismissal." The final order provides in part:

The Defendant was arrested on November 15, 1988, and on the same date was interviewed. At the time the Defendant indicated to the officers that he was visiting with some people who lived at 212 Helena Street in Dayton but that his permanent address was Hoskinston, Kentucky. He indicated there was no street address because of the size of the town and that he got his mail through general delivery at the Post Office. The Defendant's Kentucky driver's license showed the same address. The Defendant was charged, and bond was set. Approximately five days later the charges were dismissed and the case taken directly to the Grand Jury. The Grand Jury returned an indictment on December 1, 1988. Thereafter, a warrant was issued on the indictment and the warrant entered into the NCIC for adjacent states. No further action was taken to find nor arrest the Defendant on that warrant.

The Defendant continued to live at Hoskinston, Kentucky, until approximately six months ago when he moved to the Dayton area. The Defendant was arrested at a time when he was a passenger in a motor vehicle which was stopped for some traffic violation. It was at this [*3] point in time that the outstanding warrant was discovered and the Defendant placed under arrest.

It is clear from this evidence that the Defendant could easily have been located had the police authorities attempted to locate him in Hoskinston, Kentucky. The Defendant did not conceal nor secrete his whereabouts.

It is therefore ORDERED that the motion of the Defendant filed herein on March 30, 1990, be, and the same is hereby sustained. The facts before us are similar to the facts in our unreported case of State v. Looper (June 10, 1988), Mont. App. No. 10477, unreported. The material factual difference in the two cases is in the amount of delay between the dismissal of charges after the initial arrest and the arrest made as a result of the indictment.

The delay in the case before us was approximately sixteen months. The delay in the Looper Case was more than six years. Looper was decided on constitutional grounds. An implicit finding in Looper is that the speedy trial statute is tolled between the date the case is dismissed in the municipal court and the date of the rearrest pursuant to the indictment warrant.

The statutory speedy trial time begins to run in misdemeanors [*4] with the "arrest or service of summons." R.C. 2945.71(A) and (B).

R.C. 2945.71(C) provides in part:

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

- (1) * * * shall be accorded a preliminary hearing within fifteen days after his arrest * * *
- (2) shall be brought to trial within two hundred seventy days after his arrest. (Emphasis added.)

It is reasonably clear that the legislature has determined that the speedy trial clock begins to run with either an arrest or its functional equivalent.

We think that it is also reasonably clear that the statute is tolled during the period of time when no charge is pending. State v. Bonarrigo (1980), 62 Ohio St. 2d 7.

Source: Ohio > /... / > OH State Cases, Combined

Terms: **brock & Montgomery & 1991** (Edit Search | Suggest Terms for My Search)

View: Full

Date/Time: Wednesday, January 30, 2008 - 10:17 AM EST

* Signal Legend:

- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Statute information available

Click on any Shepard's signal to Shepardize® that case.

A34

LexisNexis

reserved.

2008 LexisNexis, a division of Reed Elsevier Inc. All rights

AZS

LexisNexis® Total Research System

My Lexis™ Search Research Tasks Get a Document Shepard's® Alerts Total Litigator Counsel Select

Source: >/.../> OH State Cases, Combined

Terms: johnson & cuyahoga & 2003 & 3241 (|)

Select for FOCUS™ or Delivery

*2003 Ohio 3241, *; 2003 Ohio App. LEXIS 2903, ***STATE OF OHIO, Plaintiff-Appellee vs. BERNARD **JOHNSON**, Defendant-Appellant

NO. 81692 & 81693

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, **CUYAHOGA** COUNTY**2003 Ohio 3241; 2003 Ohio App. LEXIS 2903**June 19, **2003**, Date of Announcement of Decision**SUBSEQUENT HISTORY:** Appeal denied by**PRIOR HISTORY: [**1]** CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case Nos. CR-402659 and CR-410155.**DISPOSITION:** Affirmed.**CASE SUMMARY****PROCEDURAL POSTURE:** Defendant was convicted in the Ohio common pleas court of two counts of burglary, two counts of kidnapping, one count of theft, one count of impersonating a police officer, and one count of disrupting public service. He appealed.**OVERVIEW:** Posing as police officers, defendant and another man ransacked an 82-year-old woman's home, stole money and property, and ripped her phone from the wall. Later, defendant and two others robbed a 90-year-old woman in a similar fashion. The appellate court held that as a witness's reference to defendant's prior arrests was fleeting and was promptly followed by a curative instruction, defendant had not been entitled to a mistrial. Though the victims could not identify defendant from photos, his fingerprints were found at the crime scenes; the evidence was sufficient to convict defendant of all offenses. Under , the State was not required to prove that defendant was the principal offender, or to prove the identity of the principal; it had only to prove that a principal committed the offenses. As burglary and kidnapping and burglary and theft were not "allied offenses of similar import" under , defendant was properly convicted of all of these offenses. Consecutive sentences were proper under , based on, inter alia, defendant's victimizing elderly women, his prior record, and his lack of remorse.**OUTCOME:** The judgment was affirmed.**CORE TERMS:** fingerprint, burglary, assignments of error, indictment, complicity, offender, kidnapping, door, theft, sentence, public service, disrupting, police officer,

while under the stress of excitement caused by the event; (3) the statement must have related to the startling event; and (4) the declarant must have personally observed the startling event. There is no per se amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought.

[Evidence > Testimony > Experts > Impeachment](#) ^{all}
HNS The admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties.

[Evidence > Testimony > Experts > Impeachment](#) ^{all}
[Evidence > Testimony > Experts > Qualifications](#) ^{all}
HNS A witness may testify as an expert if, among other things, the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony. Ohio R. Evid. 702(B). An expert need not be the best witness on a particular subject, but he or she must be capable of aiding the trier of fact in understanding the evidence or determining a fact in issue.

[Evidence > Procedural Considerations > Rulings on Evidence](#) ^{all}
[Evidence > Testimony > Experts > General Overview](#) ^{all}
HNS A trial court's determination to allow a witness to testify as an expert will not be reversed absent an abuse of discretion.

[Evidence > Procedural Considerations > Rulings on Evidence](#) ^{all}
[Evidence > Testimony > Experts > General Overview](#) ^{all}
HNS In determining the admissibility of scientific evidence, the Ohio Supreme Court has adopted the test set forth by the United States Supreme Court in Daubert. Under Daubert, a court must analyze the testimony and determine if the reasoning or methodology used is scientifically valid. In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology used has gained general acceptance.

[Evidence > Procedural Considerations > Rulings on Evidence](#) ^{all}
HNS The Ohio Supreme Court has recognized the use of fingerprints for identification purposes in criminal cases. Fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime.

[Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process](#) ^{all}
[Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent](#) ^{all}
HNS The Fifth Amendment privilege against self-incrimination protects an accused

128

only from being compelled to testify against himself, or otherwise provide the State with other evidence of a testimonial or communicative nature. It offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling communications or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it. Moreover, the presence of the jury does not enlarge the scope of the privilege against self- incrimination with respect to the taking of fingerprints. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Procedure](#) > [Admission of Evidence](#) > [Admissibility of Evidence](#) ^{ALL}
[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#) ^{ALL}

HN11 Many courts have held that joinder is appropriate where the separate offenses evidence a common scheme or plan and thus invite juries to draw conclusions. Joinder is permitted because the jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Particular Instructions](#) > [Use of Particular Evidence](#) ^{ALL}
[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#) ^{ALL}
[Evidence](#) > [Procedural Considerations](#) > [Preliminary Questions](#) > [Admissibility of Evidence](#) >

HN12 Evidence concerning a prior crime is admissible in a subsequent trial under Ohio R. Evid. R. 404(D) to show a course of criminal conduct involving a common scheme or plan, as well as the identity of the criminal. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Judicial Discretion](#) ^{ALL}
[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Jury Instructions](#) ^{ALL}
[Evidence](#) > [Procedural Considerations](#) > [Rules on Evidence](#) ^{ALL}

HN13 Where the defense failed to object to the court's jury charge at the time of trial, this issue is subject only to a plain error analysis. To constitute plain error, (1) the instruction must have been erroneous and (2) without the error, the result of the trial would have been different. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Procedure](#) > [Admission of Evidence](#) ^{ALL}

HN14 Pursuant to Ohio Rev. Code Ann. § 2923.03(F), a charge of complicity may be stated in terms of Ohio Rev. Code Ann. § 2923.02 or in terms of the principal offense. Where one is charged in terms of the principal offense, he is on notice, by operation of Ohio Rev. Code Ann. § 2923.02(F), that evidence could be presented that the defendant was either a principal or an aider and abettor for that offense. [More Like This Headnote](#) | [Supplemental Record 5, Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Judicial Discretion](#) ^{ALL}
[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Jury Instructions](#) ^{ALL}
[Criminal Law & Procedure](#) > [Criminal Procedure](#) > [Admission of Evidence](#) > [Admissibility of Evidence](#) ^{ALL}

HN15 Jury instructions are reviewed in their entirety to determine if they contain prejudicial error. The court commits error if it states its opinion regarding the facts while instructing the jury. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Judicial Discretion](#) ^{ALL}
[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Jury Instructions](#) ^{ALL}

A39

HN16 To find harmless error, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Thus, it is the job of the reviewing court to assess the impact of the error on the outcome of trial.

HN17 Juries are presumed to follow and obey the curative instructions given by a trial court.

HN18 See Ohio Rev. Code Ann. § 2921.51(E).

HN19 When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense. When a statute reads, "No person shall ", absent any reference to the requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability.

HN20 Complicity need not be stated in terms of the complicity statute but may be stated in terms of the principal offense. Ohio Rev. Code Ann. § 2923.03(F); Therefore, a defendant suffers no prejudice when the jury is instructed on complicity even though the indictment against him never mentioned the words "complicity," "solicitation," "conspiracy," or "aiding or abetting."

HN21 It is well established that the State may charge and try an aider and abettor as a principal, and if the evidence at trial reasonably indicates that the defendant was an aider and abettor rather than a principal offender, a jury instruction regarding complicity may be given.

HN22 Ohio Rev. Code Ann. § 2901.01(A) defines "force" as any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. "Force" may properly be defined as "effort" rather than "violence" in a charge to the jury. A defendant is not prejudiced if there is no substantial difference between the statutory definition of a term and the definition that the trial court provided to the jury. A trial court's definition of "force" as "the amount of force necessary to accomplish entry where the entry would not otherwise have occurred," comports with the statutory definition of "force," which simply requires effort be exerted against a person or thing.

210

More Like This Headnote

Criminal Law & Procedure > Trials > Motions for Acquittal ^{all}
Criminal Law & Procedure > Trials > Motions for Acquittal > Standards of Review > Substantial Evidence ^{all}
Evidence > Testimony > Credibility > General Overview ^{all}

HN23 **Ohio Rev. Code Ann. § 2911.21(A)(1) defines "trespass" as follows: No person, without privilege to do so, shall knowingly enter or remain on the land or premises of another. Where a court instructs the jury that one trespasses when he enters upon property of another without permission of a person authorized to give permission, there is no substantial difference between the statutory definition.** [More Like This Headnote](#)

Criminal Law & Procedure > Accusatory Instruments > Indictments ^{all}
Criminal Law & Procedure > Trials > Motions for Acquittal ^{all}
HN24 **See Ohio R. Crim. P. 29(A).**

Criminal Law & Procedure > Trials > Motions for Acquittal ^{all}
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence ^{all}
HN25 **A motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. Ohio R. Crim. P. 29(A). In reviewing the sufficiency of the evidence in a criminal case, an appellate court will not reverse a conviction where there is substantial evidence, viewed in a light most favorable to the prosecution, which would convince the average mind of the defendant's guilt beyond a reasonable doubt.** [More Like This Headnote](#)

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence ^{all}
Evidence > Procedural Considerations > Weight & Sufficiency ^{all}
Evidence > Testimony > Credibility > General Overview ^{all}
HN26 **When presented with a manifest weight argument, a court engages in a limited weighing of the evidence to determine whether the jury's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. Determinations of credibility and weight of the testimony remain within the province of the trier of fact.** [More Like This Headnote](#)

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview ^{all}
HN27 **See Ohio Rev. Code Ann. § 3009.04(A)(3).**

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview ^{all}
HN28 **Where one purposely disconnects the victim's telephone service, the crime of disrupting public service has been committed.** [More Like This Headnote](#)

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses ^{all}
HN29 **See Ohio Rev. Code Ann. § 2941.25.**

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses ^{all}
HN30 **In applying Ohio Rev. Code Ann. § 2941.25, a two-step analysis has been developed. First, the court must look to see if the elements of the two crimes correspond to such a degree that the commission of one offense will naturally result in the commission of the other. If the court finds the two crimes to be allied offenses of similar import, then it must determine, under § 2941.25(B), whether the offenses were committed separately or with a separate animus as to each.** [More Like This Headnote](#) | [Share this Headnote](#)

See Ohio Rev. Code Ann. § 2901.11.

See Ohio Rev. Code Ann. § 2901.02.

The offenses of aggravated burglary and theft have some common elements that aggravated burglary may involve the purpose to commit a theft offense. However, completion of the theft offense is not a necessary element because the purpose to commit any felony will suffice to supply the requisite intent. Therefore, burglary and theft are not "allied offenses" for purposes of Ohio Rev. Code Ann. § 2901.25.

Burglary is not an "allied offense" of kidnapping for purposes of

See

See

For Plaintiff-Appellee: WILLIAM D. MASON, Cuyahoga County Prosecutor, KRISTEN L. LUSNIA, Assistant, Cleveland, Ohio.

For Defendant-Appellant: PAUL MANCINO, JR., Cleveland, Ohio.

JUDGE COLLEEN CONWAY COONEY. MICHAEL J. CORRIGAN, P.J., and ANNE L. KILBANE, J., CONCUR

OPINION BY: COLLEEN CONWAY COONEY

OPINION

JOURNAL ENTRY and OPINION

COLLEEN CONWAY COONEY, J.:

[*P1] Defendant-appellant Bernard Johnson ("Johnson") appeals his convictions

A 42

following a jury trial on two counts of burglary, two counts of kidnapping, one count of theft, one count of impersonating a police officer, and one count of disrupting public service in two consolidated cases, Case Nos. 402659 and 410155. Finding no merit to the appeal, we affirm.

[*P2] The charges in this case arose out of two separate incidents implicating **Johnson** in burglaries of the homes of two elderly women. On August 4, 2000, Mildred Paul ("Paul"), who was eighty-two years old, received a phone call from a man who identified himself as "Detective Sergeant David." The caller told Paul that he had her granddaughter Katie with **[**2]** him. Paul, who did not have a granddaughter named Katie, told the caller she did not have time to talk to him. The caller responded, "There's a lot of robberies around, you better hide your money and your jewelry." Paul hung up the phone and then called the police to request that an officer come to her house.

[*P3] Later that evening, while waiting for the police to arrive, Paul heard someone pounding on her door. When she peered through the peephole, the man outside her door identified himself as "Sergeant David" and showed her a badge. Paul opened the door and discovered that the man had removed her storm door. She also observed a second man in her yard. The two men entered her house without her permission.

[*P4] One of the men guarded Paul while "Sergeant David" searched her bedroom, pulling open drawers, purses, and closets. After ransacking the bedroom, "Sergeant David" proceeded to the dining room and searched the buffet. Meanwhile, the man who was guarding Paul searched through the pockets of her clothes and took some change. He then searched her purse and took her credit card and money.

[*P5] After searching her home and taking various items, "Sergeant David" ripped the **[**3]** telephone from the kitchen wall and took it with him when he left the house. The second man followed shortly thereafter, telling Paul she should count to 100 before she leaves. Paul went to a neighbor's house to call the police.

[*P6] At trial, Officer Jeffrey Ryan testified that he responded to the call within five minutes. He saw that Paul's house had been ransacked, but she was unable to describe her intruders. Officer Ryan stayed with her until Det. Reynolds of the Scientific Investigation Unit arrived. Det. Reynolds "lifted" a latent fingerprint from a dresser in Paul's bedroom as evidence.

[*P7] On August 14, 2000, Margaret Daus, a ninety-year-old woman who lived alone, was visited by three men who came knocking on her door. Two of the men requested permission to look at the outside of her house. While the two men proceeded to the back of the house, the third man, who remained on the porch, entered her house without her permission. The man stood guard over Daus, who sat in a chair, while the other two men entered the house through the back door and proceeded to her bedroom where they searched every purse, box, and drawer. After collecting whatever valuables they could find, **[**4]** the two men came back downstairs and the three men left.

[*P8] Officer Brian Lockwood, who responded to the call to Daus' home, noticed immediately that the home had been burglarized. Daus was unable to give a detailed description of the intruders. Det. Donald Meel found a latent fingerprint on a cedar chest in Daus' bedroom and collected it as evidence.

[*P9] At trial, Felicia Wilson, a latent fingerprint expert with the Cleveland Police Department, testified that she examined the fingerprints lifted from Paul's dresser and Daus' cedar chest and found that they matched **Johnson's** fingerprints.

[*P10] The jury found **Johnson** guilty on all counts. The court sentenced him in Case No.

402659 to eight years for burglary, and eight years for kidnapping, to be served concurrently, but consecutive to his sentence in Case No. 410155. In Case No. 410155, the court sentenced **Johnson** to eight years each for burglary, disrupting public service, and kidnapping. The court also sentenced **Johnson** to eighteen months for theft, with an elderly specification, and five years for impersonating a police officer. All sentences in Case No. 410155 were to be served concurrently except for impersonating a police officer. Thus, **Johnson's** total combined sentences in Case Nos. 402659 and 410155 is twenty-one years.

[*P11] **Johnson** appeals his conviction and sentence, raising seventeen assignments of error.

Speedy Trial

[*P12] In his first assignment of error, **Johnson** argues he was denied due process of law when the trial court overruled his motion to dismiss, which was based on the alleged denial of his right to a speedy trial.

[*P13] ... provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing the time, ... states that each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three days. In other words, "a felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail."

[*P14] However, the triple-count provision in ... applies only to defendants held in jail in lieu of bail solely on the pending charge. ...; **[**6]** ..., paragraph one of the syllabus. If the defendant is in jail on a separate unrelated case, the three-for-one provision does not apply. ...;

[*P15] In the instant case, **Johnson** claims he was arrested on September 15, 2000 and was not brought to trial until October 22, 2001. However, when **Johnson** was arrested in September 2000, he was held in connection with five separate cases. Each of those cases involved different crimes and different victims.

[*P16] Although **Johnson** argues speedy trial limits cannot be extended by filing separate cases which the prosecutor claims should be tried as one case, only two of the five cases were consolidated and tried together in the instant matter. **Johnson** was not indicted on the two consolidated cases presented in the instant appeal, Case Nos. 402659 and 410155, until February 23, 2001 and July 19, 2001, respectively. Prior to those dates, **Johnson** was being held on three "older" cases. Therefore, because **Johnson** was being held in connection with multiple cases, the triple-count provision in **[**7]** did not apply.

[*P17] As previously stated, in Case No. 402659, **Johnson** was indicted on February 23, 2001. In case number 410155, **Johnson** was not indicted until July 19, 2001. These cases went to trial on October 22, 2001, 241 days after the February 23 indictment. Therefore, because these cases went to trial within 270 days from the date of the first indictment and **Johnson** was detained pending multiple cases, **Johnson's** right to speedy trial was not violated. Therefore, the first assignment of error is overruled.

Amended Indictment

[*P18] In his second assignment of error, **Johnson** argues the trial court violated his

constitutional right to due process when the court permitted an amendment of the indictment to substitute the name of a different victim.

[*P19] Pursuant to _____, the trial court has the discretion to amend the indictment at any time before, during, or after a trial "provided no change is made in the name or identity of the crime charged."

If an amendment is made to the substance of the indictment, the accused is entitled to a discharge of the jury on his motion **[**8]** and reasonable continuance if he was misled or prejudiced by the amendment.

[*P20] However, "an amendment to an indictment which changes the name of the victim changes neither the name nor the identity of the crime charged."

Because the name of the victim is not an essential element of the crime, the name of the victim is not required in the indictment. Moreover, **Johnson** was not prejudiced by the amendment because he previously received discovery from the State providing him the correct name of the victim. Therefore, the second assignment of error is overruled.

Prior Arrest Record

[*P21] In his third assignment of error, **Johnson** argues the trial court violated **Johnson's** right to due process and a fair trial when it allowed a witness to mention his previous arrest record in the presence of the jury.

[*P22] During the examination of Felicia Wilson, a fingerprint examiner for the City of Cleveland, the witness explained **[**9]** that she obtained a fingerprint card to make a comparison of **Johnson's** fingerprints from an earlier arrest of **Johnson**. As soon as Wilson made this statement, the court instructed the jury that the fact that **Johnson** was previously arrested is totally irrelevant. Notwithstanding the court's curative instruction, defense counsel moved for a mistrial, which the court denied. **Johnson** claims the court erred in denying his motion for mistrial.

[*P23] The grant or denial of a mistrial lies within the sound discretion of the trial court. We presume that the jury followed curative instructions given to it by the trial judge. The trial court need not declare a mistrial unless "the ends of justice so require and a fair trial is no longer possible." Citing,

[*P24] In *Garner*, the defendant objected and moved for a mistrial after an officer testified that he made arrests at the defendant's address **[**10]** in the past. The trial court immediately sustained the objection and admonished the jury not to consider the testimony. The Ohio Supreme Court affirmed the trial court's denial of a mistrial, finding that "the reference to the defendant's prior arrests was fleeting and was promptly followed by a curative instruction."

[*P25] In the instant case, as in _____, the reference to **Johnson's** arrest record was a brief and isolated remark followed by a curative instruction from the court. The mere mention of **Johnson's** arrest record, without more, did not unfairly prejudice **Johnson** so as to warrant a mistrial. Therefore, the third assignment of error is overruled.

Victims' Statements to Police

AKK

[*P26] In his fourth assignment of error, **Johnson** argues the trial court violated his right to due process when it allowed Officers Ryan and Lockwood to relate their interviews with each of the victims. **Johnson** also claims the court erroneously allowed Det. Karlin to testify about Paul's identification of suspects from photographs.

[*P27] **Johnson** argues the victims' statements to the officers constituted inadmissible hearsay. The State claims their statements were excited utterances **[**11]** and, therefore, admissible as exceptions to the hearsay rule.

[*P28] generally prohibits the admission of hearsay, which is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." However, under "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the hearsay rule if certain conditions are met.

[*P29] For a statement to be admissible as an excited utterance, (1) there must have been an event startling enough to produce a nervous excitement in the declarant; (2) the statement must have been made while under the stress of excitement caused by the event; (3) the statement must have related to the startling event; and (4) the declarant must have personally observed the startling event. paragraph one of the syllabus. "There is no **[**12]** per se amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought."

[*P30] Further, "the admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties."

[*P31] In the instant case, both victims' statements were excited utterances. The officers testified that Paul and Daus were visibly shaken and frightened when the police arrived shortly after the home invasions. When Officer Ryan first arrived at Daus' home, she was too afraid to open her door because the perpetrator of the burglary had impersonated a police officer. Because these women were still under the stress of having **[**13]** their homes invaded and burglarized, their statements to police, which were made within hours of these events, constitute excited utterance exceptions to the hearsay rule and were admissible.

[*P32] With regard to Det. Karlin's testimony regarding Paul's identification of suspects from photos, it is evident from the transcript that defense counsel opened the door to this testimony. Despite the fact that neither Paul nor the prosecutor mentioned the photos on direct examination, defense counsel asked:

"Q: How many picture - on June 30th, is that when you showed her the pictures?"

A: Yes.

Q: Okay. How many pictures did you show her?

A: Six.

Q: She couldn't identify anybody on there positively; is that right?

A: Correct.

Q: Was his picture in there, Bernard **Johnson's**?

A: Yes, it was."

[*P33] The defense, having brought up the photos in the first instance and then asking whether the defendant's photo was among them, opened the door for the prosecutor to question the witness further. Having opened the door, the defense waived any right to object to the admission of the witness' testimony regarding those photos on redirect. Accordingly, the fourth assignment of error is overruled.

[14]** Fingerprint Comparison

[*P34] In his fifth assignment of error, **Johnson** argues that Felicia Wilson, a fingerprint examiner for the City of Cleveland, should not have been permitted to testify as an expert because she lacked the training and experience necessary to qualify as an expert.

[*P35] A witness may testify as an expert if, among other things, the witness "is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." An expert need not be the best witness on a particular subject, but he or she must be capable of aiding the trier of fact in understanding the evidence or determining a fact in issue.

A trial court's determination to allow a witness to testify as an expert will not be reversed absent an abuse of discretion.

[*P36] In *State v. Lovings*, Franklin App. No. 97APA05-656, 1997 Ohio App. LEXIS 6023, the court held that the fingerprint examiner in that case was qualified to testify as an expert **[**15]** because she had been a fingerprint technician with the Columbus police for eight years and "a latent fingerprint examiner for the last three years." She also completed several courses on latent fingerprint comparisons, latent palm print comparisons, latent print photography, and latent print processing. *Id.* at * 14, 1997 Ohio App. LEXIS 6023. She also completed a six-month basic fingerprint course covering fingerprint pattern recognition and ink fingerprint comparisons in 1983 while she was an employee of the FBI. See also, *State v. Johnson*, 3rd Dist. No. 1-84-2, 1985 Ohio App. LEXIS 7272 (witness who worked as fingerprint examiner for police department for over 20 years and attended fingerprint training at FBI was qualified as an expert).

[*P37] In the instant case, Wilson testified that she had worked as a fingerprint examiner with the Cleveland Police Department for five and one-half years. She also testified that she was trained by the FBI to be a fingerprint examiner and had taken an advanced latent training class and received on-the-job training. She testified that she had identified over 1,000 people by comparing fingerprints. Therefore, she qualified as an expert to testify about the fingerprints **[**16]** found at the victims' homes.

[*P38] **Johnson** also argues that fingerprint identification is not reliable, scientific evidence. In determining the admissibility of scientific evidence, the Ohio Supreme Court in

, adopted the test set forth by the United States Supreme Court in

. The *Daubert* court stated that a court must analyze the testimony and determine if the reasoning or methodology used is scientifically valid. , citing

. The court further stated that "in evaluating the reliability of scientific evidence,

several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology used has gained general acceptance." , citing

[*P39] The Ohio Supreme Court has recognized the use of fingerprints for **[**17]** identification purposes in criminal cases, stating "fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime."

, syllabus. There is no dispute that the fingerprints in the instant case were found at the crime scenes and that the circumstances indicate that such prints could only have been impressed at the time of the commission of the crimes.

[*P40] Therefore, the fifth assignment of error is overruled.

Fingerprint examination

[*P41] In his sixth assignment of error, **Johnson** argues the trial court violated his constitutional rights when it required him, over objection, to submit to a fingerprint examination during the course of the trial. Although **Johnson** claims a substantial constitutional right was violated, he does not specify what right or rights he claims were violated.

[*P42] In support of his argument, **Johnson** relies on **[**18]** and **[**19]**, both of which held that fingerprint evidence should have been excluded as improperly obtained during illegal seizures in violation of the **Fourth** and **Fifth** Amendments. In contrast to these cases, **Johnson** does not claim he was illegally detained when his fingerprints were taken. Rather, he seems to be arguing that it was improper for the court to allow his fingerprints to be taken during the course of the trial as though it were compelled testimony in violation of the **Fifth** Amendment.

[*P43] The **Fifth** Amendment privilege against self-incrimination protects an accused "only from being compelled to testify against himself, or otherwise provide the State with other evidence of a testimonial or communicative nature ***."

"It offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, **[**19]** often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." See, also,

Moreover, the presence of the jury does not enlarge the scope of the privilege against self-incrimination with respect to the taking of fingerprints.

, affirmed
, certiorari denied . Therefore, we do not find that the court violated any constitutional right when it required **Johnson** to submit to a fingerprint examination during the trial. Accordingly, the sixth assignment of error is overruled.

Other Acts Evidence

[*P44] In his seventh assignment of error, **Johnson** claims he was deprived of a fair trial because the court gave the following jury instruction:

"Now as you consider the events of August 4th and August 14th, you must **[**20]** examine separately the evidence relating to each date.

That is to say you look at the evidence and you say what does it prove as to August 4th, and you look at the evidence against and you say what does it prove as to August 14th?

If the State establishes beyond a reasonable doubt that the defendant committed an offense on that date, it does not necessarily follow that he committed any of the alleged crimes on the other date.

You may consider, however, whether the conduct on one date was so similar to the conduct on the other date, that the conduct on each date was part of a unique common plan or scheme. That is, that the shared unique qualities indicate that the defendant participated in the offenses on each of these dates.

It's kind of like saying that there was a trademark that, you know, that may or may not be true but if you come to that kind of conclusion, then you can draw the appropriate conclusions from it."

[*P45] Pursuant to _____, the trial court allowed two of **Johnson's** pending criminal cases to be consolidated because they involved crimes of the same character. _____ Many courts have held that joinder is appropriate where the separate offenses evidence a common **[**21]** scheme or plan and thus invite juries to draw conclusions. See, e.g., *State v. White-Barnes*, Ross App. No. 93 CA 1994, 1995 Ohio App. LEXIS 2001; _____. Joinder is permitted because the jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated.

[*P46] Even if the trials were separated, _____ evidence concerning the first incident would have been admissible in a subsequent trial under _____ to show a course of criminal conduct involving a common scheme or plan, as well as the identity of the criminal. See _____. Moreover, the court instructed the jury to examine the evidence as it relates to each case separately. Indeed, the court informed the jury that simply because the State proves beyond a reasonable doubt that the defendant committed one of the offenses, does not mean the State necessarily proved the other. Therefore, we find nothing prejudicial about this instruction, and the seventh **[**22]** assignment of error is overruled.

Disrupting Public Service

[*P47] In his eighth assignment of error, **Johnson** claims the trial court violated his right to due process when it gave erroneous jury instructions on the elements of disrupting public service such that it improperly amended the indictment. Because _____ the defense failed to object to the court's charge at the time of trial, this issue is subject only to a plain error analysis. _____, discretionary appeal not allowed (1996), _____. To constitute plain error, (1) the instruction must have been erroneous and (2) without the error, the result of the trial would have been different.

[*P48] **Johnson** claims the court's use of a complicity theory in its charge of disrupting public service constructively amended the indictment. In instructing on the offense of disrupting public service, the court stated:

"Disrupting public service is committed when one knowingly by damaging or tampering with property substantially impairs the ability of law enforcement **[**23]** to respond to an emergency.

The State claims that this crime was committed when someone participated in the activities at Mildred Paul's home, the alleged burglary of Mildred Paul's home, pulled the telephone from the wall.

The State does not say which of the individuals pulled the phone from the wall. It asserts that the defendant is guilty under the concept of complicity."

[*P49] Pursuant to _____, a charge of complicity may be stated in terms of _____ or in terms of the principal offense. _____ . Where one is charged in terms of the principal offense, he is on notice, by operation of _____, that evidence could be presented that the defendant was either a principal or an aider and abettor for that offense. See _____ . Because a charge of complicity may be stated in terms of either the principal offense or in terms of _____, the complicity section; the indictment was not amended when the court instructed the **[**24]** jury that they could find **Johnson** guilty under the complicity theory. Therefore, the eighth assignment of error is overruled.

Identity of the Perpetrator

[*P50] In his ninth assignment of error, **Johnson** argues the court usurped the fact-finding role of the jury when the judge stated in his charge that the central issue in the case was not whether the crimes occurred but whether **Johnson** was the perpetrator of the crimes. During the charge, the court stated:

"What do you think about the credibility of the witnesses, because that, I think, is what this case is all about. I don't think - I didn't hear a serious dispute here that a burglary, for example, was not committed. I think the central issue here for the primary charges certainly is did the defendant do it, or did they have the wrong person?"

[*P51] Jury instructions are reviewed in their entirety to determine if they contain prejudicial error. _____ . The court commits error if it states its opinion regarding the facts while instructing the jury. _____ . Therefore, the court erred when **[**25]** it stated there was no dispute that a burglary had been committed, but we find this error harmless.

[*P52] To find harmless error, a reviewing court must be able to "declare a belief that the error was harmless beyond a reasonable doubt." _____ , at paragraph seven of the syllabus. Thus, it is the job of the reviewing court to assess the impact of the error on the outcome of trial.

[*P53] At the conclusion of the charge, defense counsel voiced his concern about the court's statement of its opinion that a burglary had been committed. In response, the court gave the following curative instruction:

"I've been asked to make clear that all of the elements of proof are disputed here so that when I said there's no dispute about burglary or something like that, the State has to prove a burglary, it has to prove a burglary was committed and that it was committed by the defendant. It has to prove each of these things, so in a legal sense, everything is disputed, okay?"

[*P54] Juries are presumed to follow and obey the curative instructions given by a trial court.

[*P55] Further, the court's statement **[**26]** about there being no dispute about a burglary being committed is not prejudicial when the charge and the evidence is viewed as a whole. Throughout the charge, the court repeatedly stated that the jury has the sole responsibility of evaluating the evidence and deliberating on each element of each offense. For example, the court instructed: "Your only concern is to decide what facts have been proved and whether or not those facts prove one or more of the offenses that are charged in this case beyond a reasonable doubt." The court also explained: "The defendant has entered a plea of not guilty and since he has entered a plea of not guilty, he denies the existence of all the elements of these offenses as they may relate to him," and "You, ladies and gentlemen, have the exclusive responsibility to decide what the facts are."

[*P56] Moreover, the evidence overwhelmingly proved that two burglaries occurred and there was no evidence or testimony to the contrary. Indeed, even defense counsel admitted in closing argument that "these events" occurred but argued the evidence was insufficient to prove that **Johnson** was the perpetrator. Therefore, because we find the court's error harmless, the **[**27]** ninth assignment of error is overruled.

Culpable Mental State

[*P57] In his tenth assignment of error, **Johnson** argues the trial court erred when it did not identify in its jury instructions a specific culpable mental state for the crime of impersonating a police officer. Because **Johnson** failed to object to the instruction at the time of trial, this issue is reviewed only for plain error.

[*P58] **Johnson** was charged with impersonating a police officer in violation of **R.C. 2901.04**, which provides: "No person shall commit a felony while impersonating a peace officer, a private police officer, or an officer, agent, or employee of the state." This section does not specifically identify a culpable mental state. **R.C. 2901.02** provides:

"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates **[**28]** a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

[*P59] In **State v. Johnson**, the court found that: "*** when a statute reads, 'No person shall ***,' absent any reference to the requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability." Because **R.C. 2901.04** provides that "no person shall commit a felony while impersonating a police officer," it is a strict liability crime which may be proven without regard to culpable mental state. Therefore, the trial court's instruction was proper and the tenth assignment of error is overruled.

Complicity

[*P60] In his eleventh assignment of error, **Johnson** claims he was denied due process of law and a fair trial because (1) the court's charge on complicity constructively amended the indictment, (2) the court lessened the burden of proof below the beyond-a-reasonable-doubt standard, and (3) the State was not required to prove that **Johnson** was the principal offender.

[*P61] As previously explained, the court's charge on complicity did not **[**29]** constructively amend the indictment because . . . complicity need not be stated in terms of the complicity statute but may be stated, as it was in this case, in terms of the principal offense. . . . Therefore, a defendant suffers no prejudice when the jury is instructed on complicity even though the indictment against him never mentioned the words "complicity," "solicitation," "conspiracy," or "aiding or abetting." See, also,

[*P62] Further, the court did not lessen the State's burden in this case. The court explained the proof-beyond-a-reasonable-doubt standard to the jury and properly instructed them that the State must prove **Johnson's** guilt beyond a reasonable doubt.

[*P63] Finally, the State was not required to prove that **Johnson** was the principal offender to obtain a conviction. . . . It is well established that the State may charge and try an aider and abettor as a principal, and if the evidence at trial reasonably indicates that the defendant was an aider and abettor rather than a principal offender, a jury **[**30]** instruction regarding complicity may be given. *State v. Kajoshaj*, **Cuyahoga** App. No. 76857, 2000 Ohio App. LEXIS 3642, citing . . . , cert. denied, . . . , and . . .

[*P64] Further, in order to convict an offender of complicity, the State need not establish the principal's identity; pursuant to . . . , the State need only prove that a principal committed the offense. . . . Therefore, **Johnson's** eleventh assignment of error is overruled.

Definitions of "Force" and "Trespass"

[*P65] In his twelfth assignment of error, **Johnson** claims the trial court failed to define the terms "force" and "trespass" as they relate to the burglary charge and that this failure violated his right to due process. Because the defendant did not object to these instructions at the time of trial, this issue is reviewed only for plain error. . . .

[*P66] At trial, the court instructed the jury as follows:

"But let us **[**31]** now look at each of the particular kinds of crimes that are alleged. What kind of crime is burglary? What do we mean by burglary . . .

A burglary occurs when a person by force or stealth - excuse me, by force or deception trespasses in an occupied structure when another person who is not the accomplice of the offender is present, and when he does so for the purpose of committing in the structure a criminal offense.

Theft, for example, is a criminal offense. The force that is used need not be of any particular amount.

It need only be sufficient to accomplish entry where entry would not have otherwise occurred, so when you say that the person trespassed by force, it's only the amount that's sufficient to accomplish the entry where the entry would not otherwise have occurred.

One trespasses when he enters upon property of another without permission of a person authorized to give permission. And I'm assuming you know what the word deception means. Now I'm going to try to define just that, just the same way, what it means to you in your everyday life. There's no tricky definition of that. Okay. So that's the crime of burglary."

[*P67] defines ****32** "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In , the court held that force may properly be defined as "effort" rather than "violence" in a charge to the jury. A defendant is not prejudiced if there is no substantial difference between the statutory definition of a term and the definition that the trial court provided to the jury.

[*P68] The court's definition of "force" as "the amount of force necessary to accomplish entry where the entry would not otherwise have occurred," comports with the statutory definition of "force" which simply requires effort be exerted against a person or thing. Accordingly, we find no substantial difference between the statutory definition of "force" and that given by the trial court.

[*P69] defines "trespass" as follows: "No person, without privilege to do so, shall . . . knowingly enter or remain on the land or premises of another." Here, the court instructed the jury, "One trespasses when he enters upon property of another without ****33** permission of a person authorized to give permission." Again, we find no substantial difference between the statutory definition and that given by the court. Therefore, the twelfth assignment of error is overruled.

Motion for Judgment of Acquittal as to Indictment Involving Mildred Paul

[*P70] In his thirteenth assignment of error, **Johnson** argues the trial court erred in denying his motion for judgment of acquittal. Specifically, **Johnson** argues the verdict was against the manifest weight of the evidence and there was insufficient evidence to support the convictions because Paul was unable to identify **Johnson** as the perpetrator.

[*P71] provides in part:

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

[*P72] A motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction.

****34** In reviewing the sufficiency of the evidence in a criminal case, an appellate court will not reverse a conviction where there is substantial evidence, viewed in a light most favorable to the prosecution, which would convince the average mind of the defendant's guilt beyond a reasonable doubt.

[*P73] When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether the jury's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt.

reconsideration denied ("When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting evidence"). Determinations of credibility and weight of the testimony remain within ****35** the province of the trier of fact. , paragraph one of the syllabus.

[*P74] After careful review of the record, we find that the State presented substantial credible evidence which would allow reasonable minds to conclude that all of the material

elements of the offenses at issue in this case were proven beyond a reasonable doubt. Paul testified that a man knocked on her door and claimed to be "Sergeant David." She testified that when she peered through the door, he showed her a badge and thus represented himself as a police officer. Further, Paul testified that when she opened the door, "Sergeant David" and another man entered her home without her permission.

[*P75] Paul also stated that the men forced her into her bedroom where one of them guarded her while the other searched her drawers, purses, and closets, taking any valuables he could find. They took change from her pockets, and money and a credit card from her purse. Finally, she stated that as they were leaving, "Sergeant David" ripped the telephone out of the wall.

[*P76] A fingerprint examiner testified that the fingerprint evidence collected from Paul's **[**36]** home from an item touched by "Sergeant David" was positively identified as matching **Johnson's** fingerprint. According to Paul's testimony, there was no reason for **Johnson's** fingerprint to be inside her home other than as a result of the burglary. Based on this evidence, reasonable jurors could conclude that **Johnson** committed the burglary, theft, impersonating a police officer, disrupting public service, and kidnapping of Paul. Therefore, the court's decision to deny the motion for acquittal was proper, and the thirteenth assignment of error is overruled.

Motion for Judgment of Acquittal as to Indictment Involving Margaret Daus

[*P77] In his fourteenth assignment of error, **Johnson** argues the trial court erred in denying his motion for judgment of acquittal as to the indictment involving Margaret Daus. Specifically, **Johnson** argues the verdict was against the manifest weight of the evidence and there was insufficient evidence to support the convictions because Daus could not remember seeing **Johnson** in her house.

[*P78] As previously stated, a motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. **[**37]** With regard to the manifest weight of the evidence, the conviction may only be reversed if it is not supported by sufficient competent, credible evidence keeping in mind that determinations of credibility remain within the province of the jury.

[*P79] Our review the record reveals that the State presented substantial credible evidence which would allow reasonable minds to conclude that all of the material elements of the offenses charged in the indictment involving Margaret Daus have been proven beyond a reasonable doubt. Daus testified that three men entered her house without her permission. While one of the men guarded her in the kitchen, the other two men proceeded to her bedroom, where they searched every purse, box, drawer, and closet, taking any valuable items they could find. After ransacking her bedroom, the three men left her house without saying a word to her.

[*P80] Although Daus testified that she could not identify the perpetrators, a fingerprint examiner testified that the fingerprint evidence collected from her home was positively identified as being **Johnson's** fingerprint. According to Daus, there was no reason **Johnson's** fingerprint would be found inside her house **[**38]** other than as a result of the burglary. Based on this evidence, reasonable jurors could conclude that **Johnson** committed the burglary and participated in the kidnapping of Daus. Therefore, the court did not err in overruling **Johnson's** motion for judgment of acquittal and the fourteenth assignment of error is overruled.

Motion to Dismiss

[*P81] In his fifteenth assignment of error, **Johnson** argues the trial court erred in

denying his motion to dismiss the count of disrupting public service when there was no evidence to support all the elements of that offense.

[*P82] provides:

"No person purposely by any means, or knowingly by damaging or tampering with any property, shall substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency, or to protect and preserve any person or property from serious physical harm."

[*P83] This court has held that where one purposely disconnects the victim's telephone service, the crime of disrupting public service has been committed. *State v. Coker*, **Cuyahoga** App. No. 74785, 1999 Ohio App. LEXIS 4291, **[**39]** citing

[*P84] In this case, Paul testified that the perpetrator ripped the telephone from the wall and took it with him when he left the house and that she had no means of calling the police. Thus, **Johnson** made it impossible for Paul to initiate or receive telephone calls at her home. Therefore, there was sufficient evidence to support a conviction of disrupting public service and the fifteenth assignment of error is overruled.

Allied Offenses

[*P85] In his sixteenth assignment of error, **Johnson** argues the trial court violated his right to due process when it failed to merge various offenses. Specifically, **Johnson** claims that pursuant to , burglary and kidnapping and burglary and theft are "allied offenses of similar import" and, therefore, the trial court should not have convicted and sentenced him for all of these offenses.

[*P86] provides:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such **[**40]** offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

[*P87] In applying this statute, a two-step analysis has been developed. See , and . First, we must look to see if the elements of the two crimes correspond to such a degree that the commission of one offense will naturally result in the commission of the other. If we find the two crimes to be allied offenses of similar import, then we must determine, under , whether the offenses were committed separately or with a separate animus as to each.

[*P88] When comparing the elements of kidnapping, burglary, and theft, it is obvious that any of these offenses **[**41]** could be committed without also committing the others. "Aggravated burglary" is defined in , which provides in relevant part:

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in , or in a separately secured or separately

occupied portion thereof, with purpose to commit therein any theft offense as defined in _____, or any felony, when any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance as defined in _____ on or about his person or under his control;
- (3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present."

[*P89] "Theft" is defined in _____ as follows:

"(A) _____ No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert **[**42]** control over either:

- (1) Without the consent of **[***7]** the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat."

[*P90] _____ These two offenses do have some common elements in that aggravated burglary may, as in this case, involve the purpose to commit a theft offense. However, completion of the theft offense is not a necessary element because the purpose to commit any felony will suffice to supply the requisite intent. Therefore, burglary and theft are not allied offenses. See _____

[*P91] Similarly, _____ burglary is not an allied offense of kidnapping. _____ Kidnapping is defined by _____, which states in pertinent part:

"(A) _____ No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

* * *

- (2) To facilitate the commission **[**43]** of any felony or flight thereafter."

[*P92] We find that the commission of kidnapping will not necessarily result in the commission of aggravated burglary and vice versa. Aggravated burglary requires the commission of a felony in connection with a trespass. These elements are not required to commit kidnapping. Therefore, kidnapping and burglary are not allied offenses of similar import and **Johnson** could be convicted and sentenced for burglary, kidnapping, and theft under both indictments in this case. Accordingly, the sixteenth assignment of error is overruled.

Consecutive Sentences

[*P93] In his seventeenth assignment of error, **Johnson** argues the trial court improperly sentenced him to consecutive prison terms. Specifically, **Johnson** argues the trial court

inappropriately imposed consecutive prison terms because **Johnson** refused to assist law enforcement in apprehending the other participants involved in these crimes. He also claims that the burglaries in these cases do not constitute the worst forms of the offense and that the court failed to state its reasons for imposing consecutive sentences.

[*P94] The court's decision to impose consecutive sentences was not based solely **[**44]** on the fact that **Johnson** refused to assist in apprehending the other participants involved in these crimes. The court sentenced **Johnson** according to the applicable terms of the sentencing statute.

[*P95] provides, in pertinent part:

"(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

* * *

(c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

[*P96] At sentencing, the court stated:

"These were both elderly persons. The most pathetic situations. Women living alone. One woman, as was pointed out, who lived at this location for 90 years. And I think the only reason that the trauma to the 90-year-old **[**45]** was manifest more severely is that she's just - she's not a mentally very able person. I mean, she obviously was suffering a lot of deficiencies, although incidentally she was articulate and she knows what's going on at the moment, but her, you know, her memory about what happened is not - was not good.

But the other woman's memory was very good, the 82-year-old, and she's clearly traumatized in a very serious way by this. She can't live the independent life that she was physically able to lead, taking care of herself and everything. And now she's so frightened she has to live with her families and are so concerned. And, of course, this was committed while he was on probation.

He's got four prior imprisonments. He shows no remorse. You've done this kind of thing in the past. I agree with Miss Tiburzio, this man will probably be a danger to older people for the rest of his life.

So I can't come to any conclusion except that this is a person who has the greatest likelihood of committing future crime and I think he's committed the worst form of these nonviolent burglaries, burglarizing elderly people when they're there, present in the home, selecting the most vulnerable people one **[**46]** can find and doing it in an organized fashion with other people, so he's getting other people to do it.

* * *

So I do not think that 21 years is disproportionate to the seriousness, Mr. **Johnson**, of your conduct or to the danger you pose to the public. And frankly, I think that this sentence is absolutely necessary to protect the public from you."

[*P97] These statements illustrate that the court not only gave its reasons for consecutive

sentences, but that the court's reasons were based on factors set forth in the sentencing statute. Accordingly, we overrule the seventeenth assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the **Cuyahoga** County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to [R.C. 2329.02\(B\)](#) by **MICHAEL J. **[**47]** CORRIGAN, P.J.** and

ANNE L. KILBANE, J. CONCUR

JUDGE

COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See [R.C. 2329.02\(B\)](#); [R.C. 2329.02\(C\)](#); [R.C. 2329.02\(D\)](#); [R.C. 2329.02\(E\)](#); [R.C. 2329.02\(F\)](#); [R.C. 2329.02\(G\)](#); [R.C. 2329.02\(H\)](#); [R.C. 2329.02\(I\)](#); [R.C. 2329.02\(J\)](#); [R.C. 2329.02\(K\)](#); [R.C. 2329.02\(L\)](#); [R.C. 2329.02\(M\)](#); [R.C. 2329.02\(N\)](#); [R.C. 2329.02\(O\)](#); [R.C. 2329.02\(P\)](#); [R.C. 2329.02\(Q\)](#); [R.C. 2329.02\(R\)](#); [R.C. 2329.02\(S\)](#); [R.C. 2329.02\(T\)](#); [R.C. 2329.02\(U\)](#); [R.C. 2329.02\(V\)](#); [R.C. 2329.02\(W\)](#); [R.C. 2329.02\(X\)](#); [R.C. 2329.02\(Y\)](#); [R.C. 2329.02\(Z\)](#). This decision will be journalized and will become the judgment and order of the court pursuant to [R.C. 2329.02\(B\)](#) unless a motion for reconsideration with supporting brief, per [R.C. 2329.02\(B\)](#), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per [R.C. 2329.02\(B\)](#). See, also, [R.C. 2329.02\(B\)](#).

Source: [OH State Cases, Combined](#)

Terms: **johnson & cuyahoga & 2003 & 3241**

View: Full

Date/Time: Wednesday, January 30, 2008 - 10:20 AM EST

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize* that case.

ACV

R.C. § 2945.71

Baldwin's Ohio Revised Code Annotated CurrentnessAppendix to Title XXIX Crimes--Procedure (Law Effective Prior to July 1, 1996) (Refs & Annos)*Chapter 2945. Trial*Schedule of Trial and Hearings***2945.71 Time within which hearing or trial must be held**

(A) 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 his arrest or the service of summons.

(B) 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:

(1) Within forty-five days after his 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 his 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 his arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after his 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 his arrest.

(D) A person against whom one or more charges of minor misdemeanor and one or more charges of misdemeanor other than minor misdemeanor, all of which arose out of the same act or transaction, are pending, or against whom charges of misdemeanors of different degrees, other than minor misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial within the time period required for the highest degree of misdemeanor charged, as determined under division (B) 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.

Current through 1995 File 49 of the 121st GA (1995-1996) apv. 8/10/95
Copr. © 2007 Thomson/West.
END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. US Gov. Works.

A60