

IN THE SUPREME COURT OF OHIO

10-2143

City of Columbus,	:	On Appeal from the Franklin
Appellee,	:	County Court of Appeals,
	:	Tenth Appellate District
v.	:	Court of Appeals
	:	Case No. 10AP-325
Timothy H. Cooper,	:	
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

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COUNSEL FOR APPELLEE CITY OF COLUMBUS

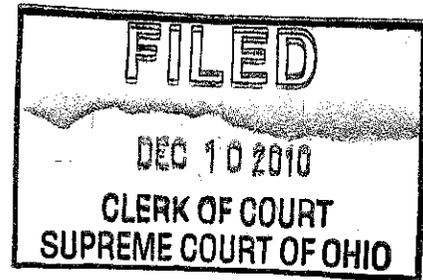


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Proposition of Law:

"To be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record. (*State v. O'Brien* [1987], 34 Ohio St.3d 7, 516 N.E.2d 218, applied and followed; *State v. Mincy* [1982], 2 Ohio St.3d 6, 2 OBR 282, 441 N.E.2d 571, followed.)" *State v. King* (1994), 70 Ohio St.3d 158, syllabus.

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Exhibit 1 - Trial Court Entry – January 5, 2010 with **unsigned** "Waiver of Right to Speedy Trial"

Exhibit 2 - Court of Appeals Judgment Entry – October 26, 2010

Exhibit 3 - Court of Appeals Decision – City of Columbus v. Cooper, 2010-Ohio-5210, Case No. 10AP-325

Exhibit 4 – State v. King, 70 Ohio St.3d 158 (1994)

Exhibit 5 – Ottawa Hills v. Afjeh, 2000-Ohio2707, Case No. L-99-1074 (Lucas, June 23, 2000)

Substantial Constitutional Question

The substantial constitutional question is whether an accused's Sixth Amendment right to a speedy trial is protected where the Trial Court, in light of Ohio Supreme Court authority, 1) uses its discretion and intentionally fails to record the hearing, 2) does not obtain a signed, written waiver of speedy trial rights from the accused, and 3) based thereon concludes that the accused has waived his constitutional and statutory rights to a speedy trial.

An accused individual's right to a speedy trial is guaranteed by the Sixth Amendment to the Constitution of the United States of America and Ohio statutory law. It is fundamental and a cornerstone of our legal system. The Ohio Supreme Court has ruled that "[t]o be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record. (*State v. O'Brien* [1987], 34 Ohio St.3d 7, 516 N.E.2d 218, applied and followed; *State v. Mincy* [1982], 2 Ohio St.3d 6, 2 OBR 282, 441 N.E.2d 571, followed.)" *State v. King* (1994), 70 Ohio St.3d 158, syllabus.

In this case, there is no written waiver of speedy trial and no record to show that speedy trial rights were waived in open court on the record. The Trial Court did not record the hearing. As a result, there is no transcript available of the alleged speedy trial waiver or non-waiver? Appellant had requested a transcript to support his argument on appeal that he did not waive his right to a speedy trial. He could not show it to the Court of Appeals because the Trial Court failed to record the proceedings. Further, the Trial Court used a pre-printed entry that included a section for waiver of speedy trial rights. The waiver of speedy trial section was blank and unsigned.

Statement of the Case and Facts

Appellant, Timothy H. Cooper, appeals from a judgment entry of the Franklin County Court of Appeals affirming a judgment entry of the Franklin County Municipal Court finding Appellant guilty of one count of speed, in violation of Columbus City Code 2133.03(D)(2), a minor misdemeanor. The Court of Appeals concluded that (1) the Trial Court did not err in denying Appellant's motion to dismiss on speedy trial grounds, and (2) the Trial Court was not required to record the proceedings.

On December 8, 2009, Appellant received a citation for one count of speeding, in violation of Columbus City Code 2133.03(D)(2). At his December 16, 2009 arraignment, Appellant entered a not guilty plea and requested a speedy trial. The Trial Court scheduled Appellant's trial for January 5, 2010. Appellant filed a request for discovery on December 24, 2009.

On January 5, 2010, Appellant appeared in court and moved to dismiss the charge filed against him. The Trial Court overruled Appellant's motion and continued the matter to February 12, 2010. The Trial Court made no recording or transcript of the January 5, 2010 hearing. Appellant denies requesting a continuance. And the parties dispute upon whose motion the Trial Court acted. The Court of Appeals concluded that an entry dated January 5, 2010 indicates the Trial Court continued the matter at Appellant's request. However, the Court of Appeals failed to address the fact that the Speedy Trial section of the entry was blank and unsigned.

On February 12, 2010, Appellant appeared for trial and again moved to dismiss the charge, this time on the grounds the state violated his right to a speedy trial. The Trial Court overruled Appellant's motion to dismiss. Appellant **then** requested the Trial Court to continue the case so Appellant could obtain counsel. The Trial Court granted Appellant's request for a continuance and scheduled the trial for March 10, 2010.

Before the March 10, 2010 trial, Appellant again moved to dismiss the charge on the basis of a speedy trial violation; the Trial Court again overruled Appellant's motion to dismiss. A bench trial followed, the Trial Court found Appellant guilty of one count of speeding, and the court fined Appellant \$50 plus court costs. The Trial Court journalized its decision in a March 10, 2010 entry.

Appellant, timely appealed the judgment entry of the Franklin County Municipal Court to the Franklin County Court of Appeals. On October 26, 2010, the Court of Appeals concluded that (1) the trial court did not err in denying Appellant's motion to dismiss on speedy trial grounds, and (2) the trial court was not required to record the proceedings.

Appellant hereby appeals to the Supreme Court of Ohio to review this case.

Argument

The issue is that the Trial Court denied Appellant's Sixth Amendment right to a speedy trial when, in light of clear Ohio Supreme Court authority, the Trial Court 1) used its discretion and intentionally failed to record the hearing on January 5, 2010, 2) did not obtain from Appellant a signed, written waiver of his speedy trial rights, and 3) based thereon concluded that Appellant had waived his constitutional and statutory rights to a speedy trial. The Court of Appeals compounded this denial of constitutional and statutory rights by affirming the Trial Court's decision and further stating that in the absence of a transcript, it had to assume the Trial Court's entry showed the regularity of the proceedings.

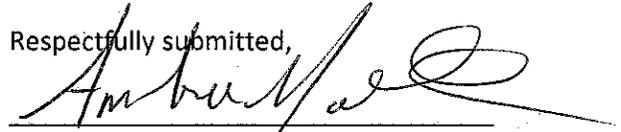
The lack of a transcript was due to the Trial Court not recording the proceedings. Appellant had requested a transcript and learned that one was not available because there was no recording of the proceedings. The Trial Court effectively gave no way for Appellant to show the Court of Appeals what happened that morning in court. The Court of Appeals simply took the Trial Court's word (through its January 5, 2010 entry) that everything was normal and regular, even though the January 5, 2010 entry was incomplete and unsigned when it comes to the issue at hand, to wit, waiver of speedy trial rights.

The rule in Ohio is that an accused individual's right to a speedy trial is guaranteed by the Sixth Amendment to the Constitution of the United States of America and Ohio statutory law. It is fundamental and a cornerstone of our legal system. The Ohio Supreme Court has ruled that "[t]o be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record. (*State v. O'Brien* [1987], 34 Ohio St.3d 7, 516 N.E.2d 218, applied and followed; *State v. Mincy* [1982], 2 Ohio St.3d 6, 2 OBR 282, 441 N.E.2d 571, followed.)" *State v. King* (1994), 70 Ohio St.3d 158, syllabus.

As applied in this case, there is no written waiver of speedy trial and no record to show that speedy trial rights were waived in open court on the record. The Trial Court did not record the hearing. As a result, there is no transcript available of the alleged speedy trial waiver or non-waiver? Appellant had requested a transcript to support his argument on appeal that he did not waive his right to a speedy trial. He could not show it to the Court of Appeals because the Trial Court failed to record the proceedings. Further, the Trial Court used a pre-printed entry that included a section for waiver of speedy trial rights. The waiver of speedy trial section was blank and unsigned.

Once can only conclude that the record in this case is devoid of any effective waiver of constitutional and statutory rights to a speedy trial by the Appellant.

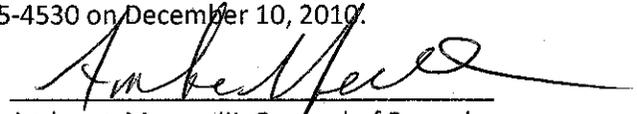
Respectfully submitted,



Ambrose Moses, III, Counsel of Record
COUNSEL FOR APPELLANT,
TIMOTHY H. COOPER

Certificate of Service

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Melanie R. Tobias, Assistant City Prosecutor, City of Columbus Prosecutor's Office, 375 South High Street, 17th Floor, Columbus, Ohio 43215-4530 on December 10, 2010.



Ambrose Moses, III, Counsel of Record
COUNSEL FOR APPELLANT,
TIMOTHY H. COOPER

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO

STATE OF OHIO/CITY OF COLUMBUS, :
Plaintiff, :

vs. Timothy Cooper :
Defendant. :

CASE NO. 09-215875

FILED
2010 JAN -5 A 10:17
FRANKLIN COUNTY
MUNICIPAL COURT
COLUMBUS, OHIO

ENTRY

Pretrial held. Reassign for _____ on _____ at _____ a.m./p.m.

Continue CT to 2-12-10 at 9⁰⁰ a.m./p.m. at request of A.

Defendant given oral and written instructions to contact the Public Defender's Office.

Enter to substitute _____ as counsel of record (_____).

Defendant instructed that no further continuances will be granted to obtain counsel.

Other Motion to dismiss O/A

WAIVER OF RIGHT TO SPEEDY TRIAL

I, _____, knowingly and voluntarily waive my right to a speedy trial with the time provided by law.

Date Defendant/Attorney for Defendant

ACKNOWLEDGEMENT OF RECEIPT OF NEXT COURT DATE

I acknowledge that this is the only notice of the next court date I or my client will receive. I also understand that no notice will be mailed to me or my client.

JAN 05 2010
Date

Timothy Cooper
Defendant/Attorney for Defendant

JAN 05 2010
Date

[Signature]
JUDGE H. WILLIAM POLLITT, JR.

FILED
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CLERK OF COURTS
COURT OF APPEALS
FRANKLIN CO. OHIO

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
2010 OCT 26 PM 3:20
CLERK OF COURTS

City of Columbus, :
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 Plaintiff-Appellee, :
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 v. :
 :
 Timothy H. Cooper, :
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 Defendant-Appellant. :

No. 10AP-325
(M.C. No. 2009 TR D 215875)
(REGULAR CALENDAR)

JUDGMENT ENTRY

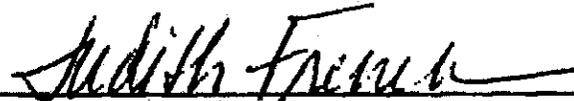
For the reasons stated in the decision of this court rendered herein on October 28, 2010, and having overruled defendant's two assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs assessed to defendant.



Judge G. Gary Tyack, P.J.



Judge William A. Klatt



Judge Judith L. French

2010-Ohio-5210

City of Columbus, Plaintiff-Appellee,

v.

Timothy H. Cooper, Defendant-Appellant.

No. 10AP-325

Court of Appeals of Ohio, Tenth District

October 26, 2010

APPEAL from the Franklin County Municipal Court. M.C. No. 2009 TR D 215875

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, City Prosecutor, and Melanie R. Tobias, for appellee.

Timothy H. Cooper, pro se.

DECISION

PER CURIAM.

{¶1} Defendant-appellant, Timothy H. Cooper, appeals from a judgment entry of the Franklin County Municipal Court finding defendant guilty of one count of speed, in violation of Columbus City Code 2133.03(D)(2), a minor misdemeanor. Because (1) the trial court did not err in denying defendant's motion to dismiss on speedy trial grounds, and (2) the trial court was not required to record the proceedings, we affirm.

{¶2} On December 8, 2009, defendant received a citation for one count of speeding, in violation of Columbus City Code 2133.03(D)(2). The citation alleged defendant was driving 83 miles per hour in an area with a speed limit of 65 miles per hour. At his December 16, 2009 arraignment, defendant entered a not guilty plea and requested a speedy trial. The trial court scheduled defendant's trial for January 5, 2010. Defendant filed a request for discovery on December 24, 2009.

{¶3} On January 5, 2010, defendant appeared in court and moved to dismiss the charge filed against him. The trial court overruled defendant's motion and continued the matter to February 12, 2010. In the absence of a transcript of the January 5 hearing, the parties dispute upon whose motion the trial court acted, but an entry dated January 5, 2010 indicates the trial court continued the matter at defendant's request.

{¶4} On February 12, 2010, defendant appeared for trial and again moved to dismiss the charge, this time on the grounds the state violated his right to a speedy trial.

The trial court overruled defendant's motion to dismiss. Defendant then requested the trial court to continue the case so defendant could obtain counsel. The trial court granted defendant's request for a continuance and scheduled the trial for March 10, 2010.

{¶5} Before the March 10, 2010 trial, defendant again moved to dismiss the charge on the basis of a speedy trial violation; the trial court again overruled defendant's motion to dismiss. A bench trial followed, the trial court found defendant guilty of one count of speeding, and the court fined defendant \$50 plus court costs. The trial court journalized its decision in a March 10, 2010 entry.

II. Assignments of Error

{¶6} Defendant appeals, assigning the following errors:

I. Where Appellant was charged with a minor misdemeanor offense on December 9, 2009 and, after not waiving his rights to a speedy trial within 30 days, the Trial Court, on February 12, 2010, erred in denying Appellant's motion to dismiss due to the State's failure to provide him with a speedy trial.

II. The Trial Court committed reversible error in failing to record the trial proceedings on January 5, 2010, wherein the Trial Court, *sua sponte* or at the State's request, continued the case so that the State could respond to discovery requests that were served upon the State on December 24, 2009.

{¶7} In his first assignment of error, defendant asserts the trial court erred in overruling his motion to dismiss based upon an alleged violation of his speedy trial rights.

{¶8} Pursuant to R.C. 2945.71(A), a person against whom a minor misdemeanor charge is pending in a court of record "shall be brought to trial within thirty days after the person's arrest or the service of summons." Because defendant was charged with a minor misdemeanor speeding offense, the state was required to bring his case to trial within 30 days after the service of summons. R.C. 2945.72, however, extends for specified reasons the time within which an accused must be brought to trial, including the "period of any continuance granted on the accused's own motion." R.C. 2945.72(H). A person charged with an offense shall be discharged if he or she is not brought to trial within the time required under R.C. 2945.71 and 2945.72. R.C. 2945.73(B).

{¶9} When reviewing a speedy trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the accused was properly brought to trial within the time

limits set forth in R.C. 2945.71. *State v. Riley*, 162 Ohio.App.3d 730, 2005-Ohio-4337, ¶19, citing *State v. DePue* (1994), 96 Ohio.App.3d 513, 516. In calculating the time elapsed under R.C. 2945.71, defendant does not dispute that his speedy trial time began to run on December 9, 2009, the day after defendant received service of his summons. Originally, the trial court scheduled defendant's trial for January 5, 2010, and both parties appeared on that date. Accordingly, 28 days elapsed by January 5, 2010.

{¶10} At the proceedings on January 5, 2010, the trial court continued the matter until February 12, 2010. According to the entry filed on January 5, 2010, the trial court granted the continuance at the request of defendant; the appellate record does not contain a transcript of the proceedings from January 5, 2010. Because a continuance granted at defendant's request is a tolling event under R.C. 2945.72(H), the time that elapsed between January 5, 2010 and February 12, 2010 does not count toward the 30-day total. *State v. Madden*, 10th Dist. No. 04AP-1228, 2005-Ohio-4281, ¶33, citing *State v. Martin* (1978), 56 Ohio St.2d 289, 297-98.

{¶11} At the proceedings on February 12, 2010, defendant moved to dismiss on the basis that there had been a violation of his speedy trial rights, but the trial court denied that motion. Defendant then requested another continuance so he could obtain counsel; the trial court granted that request and continued the matter for a trial on March 10, 2010. Again, this continuance occurred at defendant's request and, as a tolling event, did not affect the overall speedy trial total. See R.C. 2945.72(H); *Madden* at ¶33.

Defendant's trial then occurred on March 10, 2010. Up to that date, only 28 days of speedy trial time had elapsed.

{¶12} Despite those calculations, defendant argues there was, in fact, a violation of his right to a speedy trial because he did not request the continuance on January 5, 2010, so the elapsed time between January 5, 2010 and February 12, 2010 should not count as a tolling event under R.C. 2945.72. According to defendant, he informed the trial court on January 5 that the state had not complied with defendant's discovery request, and it was either the state or the trial court sua sponte who moved for a continuance. Defendant argues the entry dated January 5, 2010 indicating defendant requested the continuance reflects an error made by the trial court in journalizing the proceedings from that day.

{¶13} In *Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, this court addressed a similar argument. In *Streb*, the defendant argued that he did not request a continuance even though the journal entry indicated the continuance occurred at defendant's request. Streb thus argued the continuance should not count as a tolling event. The appellate record did not contain a transcript of

the hearing granting the continuance.

{¶14} In addressing Streb's argument, we explained that "[t]o the extent that appellant may argue that the journal entry does not accurately reflect what occurred when the trial court ordered [the continuance], we note the absence of a transcript of those proceedings. Thus, we must presume the regularity of proceedings surrounding the trial court's decision to issue the continuance." *Streb* at ¶36, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Ultimately, we stated "we must conclude that the trial court's * * * journal entry accurately depicts appellant's request for a continuance." *Id.* See also *State v. Willis* (Mar. 22, 2002), 6th Dist. No. WD-01-009 (concluding the court properly tolled speedy trial time during the period of continuance even though the defendant argued the trial court's journal entry inaccurately indicated that defendant requested the continuance but there was no record of the proceedings); *State v. Robinson*, 10th Dist. No. 01AP-1005, 2002-Ohio-2090, ¶16 (holding that because "no transcripts were provided for the hearings when continuances were granted, we presume the trial court was correct in its findings that appellant waived his right to a speedy trial for each of the continuances").

{¶15} As in *Streb*, *Willis*, and *Robinson*, here there is no record of the January 5, 2010 proceedings. Thus, we must presume the accuracy of the trial court's January 5, 2010 journal entry indicating defendant requested the continuance. Accordingly, that continuance was a tolling event that did not affect defendant's speedy trial time.

{¶16} Even if we were to entertain defendant's argument that the trial court's January 5, 2010 entry inaccurately indicated it was defendant who requested the continuance, the remainder of the record does not support defendant's position. At the March 10, 2010 trial, defendant renewed his motion to dismiss on speedy trial grounds. Thereafter, the following exchange occurred between the trial court and defendant:

THE COURT: All right. Now, I do note here as of January 5th, this case was continued until February 12th, at your request, to file motions, and then we were in court again on February 12th, continued the court trial until today, at your request, to see whether or not you were going to be represented by counsel; is that correct?

MR. COOPER: Correct.

THE COURT: Okay. Mr. Cooper, your motion to dismiss is overruled.

(Mar. 10, 2010 Tr. 4.) Thus, defendant did not dispute the trial court's assertion that defendant requested the continuance on January 5, 2010. This exchange supports the trial court's journal entry indicating defendant requested the continuance.

{¶17} Accordingly, the continuances granted on

January 5, 2010 and February 12, 2010 both qualify as tolling events under R.C. 2945.72(H) and thus do not count against the state for purposes of calculating speedy trial time. Defendant's trial on March 10, 2010 occurred 28 days after the speedy trial clock began to run, within the 30-day limit. Thus, the trial court did not err when it overruled defendant's motion to dismiss based on a speedy trial violation.

{¶18} Defendant's first assignment of error is overruled.

III. Second Assignment of Error - Failure to Record Proceedings

{¶19} In his second assignment of error, defendant asserts the trial court erred in failing to record the proceedings on January 5, 2010. Defendant argues the trial court's failure to record those proceedings prejudiced him in his ability to demonstrate on appeal that the trial court's January 5, 2010 journal entry contained the inaccurate statement that defendant requested the continuance.

{¶20} Crim.R. 22 provides that "[i]n petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded, and if requested by any party all proceedings shall be recorded." See also Traf.R. 20 (stating "[i]f no procedure is specifically prescribed by these rules, the Rules of Criminal Procedure and the applicable law apply"). Pursuant to Crim.R. 2(D), a "petty offense" is "a misdemeanor other than a serious offense." In turn, a "serious offense" is any felony and "any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Crim.R. 2(C); Traf.R. 2(D). A violation of Columbus City Code 2133.03(D)(2) is a minor misdemeanor punishable by a fine of not more than \$150. See Columbus City Code 2133.03(G); cf. R.C. 2929.28(A)(2)(a)(v). Thus, defendant's charged offense is a petty offense pursuant to Crim.R. 2(D).

{¶21} Crim.R. 22 requires that, with respect to petty offenses, the trial court must record all proceedings if either party so requests. The record does not indicate that either defendant or the state requested the trial court to record the proceedings on January 5, 2010. Further, defendant does not allege on appeal that he requested the trial court to record the proceeding but the trial court failed to heed his request. "It is well-established that the parties bear the responsibility of ensuring that important bench conferences and other discussions of legal matters are properly recorded for use in the event of an appeal." *City of Fairfield v. Proffitt* (Aug. 11, 1997), 12th Dist. No. CA96-11-240 (holding the trial court's failure to record any of the 15 bench conferences in a petty offense case did not violate Crim.R. 22 where neither party requested the proceedings be recorded), quoting *State v. Gray* (1993), 85 Ohio.App.3d 165, 169.

{¶22} Defendant argues that if the trial court had recorded the January 5, 2010 proceedings, the record would indicate that defendant did not request the continuance on that date. This argument is unpersuasive given that the journal entry and the record of the hearing on March 10, 2010 indicate it was defendant who sought the continuance.

{¶23} The trial court did not err in failing to record the proceedings on January 5, 2010 where neither party requested the trial court to record the hearing. Thus, we overrule defendant's second assignment of error.

{¶24} Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

TYACK, P., J, KLATT and FRENCH, JJ, concur.