

ORIGINAL

NO. 14-0228

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99754

STATE OF OHIO,

Plaintiff-Appellee

-vs-

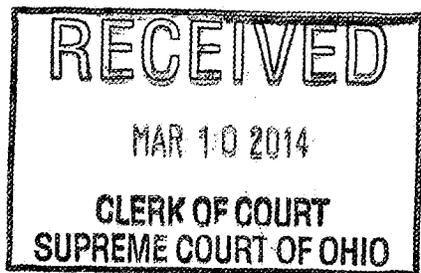
MARLON CLEMONS,

Defendant-Appellant

STATE OF OHIO'S MEMORANDUM IN RESPONSE TO JURISDICTION

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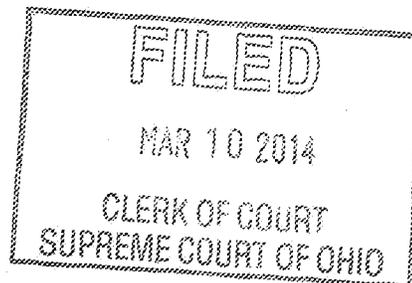


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**THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND ISSUE OF GREAT GENERAL AND PUBLIC INTEREST**

This case does not present a constitutional question as to Defendant's Sixth Amendment Right to a Speedy Trial. The Defendant's proposition of law oversimplifies the triggering event for a defendant's speedy trial rights. In doing so, he fails to recognize that there were no restraints on his liberty in connection to the felonious assault complaint until his arrest in March 11, 2011. Prior to March 11, 2012, he was never held to answer on that charge. *See, State v. Azbell*, 112 Ohio St. 3d 300 (2006) (emphasis added) (discussing that speedy trial rights are "triggered only where it is the beginning of continuing restraints on defendant's liberty imposed *in connection* with the formal charge."). Defendant's proposition of law ignores this Court and United States Supreme Court's "focus on the restraints upon an individual's liberty which accompan[y] a formal accusation" in determining the triggering event for speedy trial rights. *Azbell*, at ¶ 14.

The issue before this Court arises from an alleged felonious assault committed by Defendant on July 25, 2009. The Defendant discharged a firearm several times at Villard Bradley and his habitation. Defendant then eluded arrest. The Cleveland Police Department subsequently issued an arrest warrant, and filed a criminal complaint on August 6, 2009. A summons was never issued. Following this incident, the Defendant committed an escape offense, was prosecuted and sentenced to prison. On March 11, 2001, after completing his sentence, the State arrested Defendant on the felonious assault charge committed on July 25, 2009. Defendant was indicted on March 21, 2001.

Because Defendant's speedy trial rights were not triggered until his arrest on March 11, 2012, there were no speedy trial issues for the Eighth District to address. When the defendant is not the subject of official accusation, a delay in commencing prosecution does not implicate the

defendant's constitutional speedy trial rights. *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468; *State v. Luck* (1984), 15 Ohio St.3d 150, 153, 472 N.E.2d 1097, 1102. Accordingly, there is no need to conduct an analysis under *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. Further, the Defendant's reliance on *State v. Selvage*, 80 Ohio St.3d 465, 467 (1997) is wholly misplaced. Unlike the facts in *Selvage*, no speedy trial violation occurred in the instant case. In *Selvage*, the state purposely avoided prosecuting the defendant on the complaint to preserve the anonymity of the officers involved in the undercover marijuana investigation. Moreover, while the defendant was left in "limbo," the state prosecuted other individuals implicated in the undercover investigation. Thus, in *Selvage*, the state strategically and purposefully avoided prosecuting the defendant. The Defendant in this case was prosecuted under vastly different circumstances. Here, the Defendant was never in "limbo." Rather, while eluding arrest in this case, he committed an escape offense and was involved in a jury trial on charges of aggravated robbery, kidnapping and having weapons while under a disability. After the Defendant completed his sentence, the State arrested him on the felonious assault charge. Any delay was caused solely by the Defendant.

Lastly, the Defendant does not demonstrate in his memorandum in support how the factors set forth in *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 weigh in his favor. This is likely due to the fact that the Eighth District reviewed the entire record and determined that there was not a single instance of prejudice against the Defendant. Under these circumstances, there cannot be a Sixth Amendment violation.

For the aforementioned reasons, this Court should deny jurisdiction over this case.

STATEMENT OF THE FACTS AND CASE

On July 25, 2009, the Defendant committed a felonious assault against Villard Bradley. The police report indicates that the Defendant fired a weapon several times at Mr. Bradley and his home. Cleveland police officers responded, but the Defendant eluded arrest. A police report was subsequently filed, and on August 6, 2009, a warrant was issued and a criminal complaint filed. The warrant remained active until Defendant's arrest on March 11, 2011.

The Defendant was indicted in other criminal cases after the felonious assault. On August 28, 2009, the Defendant committed an escape offense. Cleveland police officers arrested him and the state prosecuted him on March 30, 2010 on attempted escape, a felony of the third degree. He was sentenced to a one year prison term. While serving his sentence, the Defendant was indicted for aggravated robbery, kidnapping, and having weapons while under a disability for criminal activity that occurred on January 19, 2010. The Defendant was found not guilty at a jury trial and was subsequently returned to the prison to complete his one year sentence.

The Defendant was released on March 11, 2011, and on that same day, he was arrested by Cleveland police officers on the outstanding warrant for the felonious assault charge. He was indicted on March 21, 2011, and formally charged with three counts of improper discharging into a habitation, in violation of R.C. 2923.161(A)(1), and two counts of felonious assault, in violation of R.C. 2903.11(A)(2). All counts included firearm specifications. On April 6, 2011, Defendant went *capias*. On July 10, 2012, he was apprehended by police, and arraigned the following day.

The Defendant filed a motion to dismiss for want of prosecution on March 15, 2013. The trial court granted the motion and dismissed the case with prejudice. The State then appealed the trial court's ruling contending that the Defendant's speedy trial rights were not violated. After a

de novo review of the facts of the case, the Eighth District Court of Appeals held that the Defendant's speedy trial rights were not implicated and that his due process rights were not violated by any pre-indictment delay.

ARGUMENT AND LAW

PROPOSITION OF LAW I: A criminal complaint constitutes a "formal" accusation for purposes of triggering a criminal defendant's state and federal constitutional right to a speedy trial.

I. There was no Violation of Defendant's Sixth Amendment Right to Speedy Trial Because Defendant's Speedy Trial Time did not Begin Until he was Arrested and Held to Answer to Formal Charges.

Defendant's Sixth Amendment Right to Speedy Trial was not violated in this case. The Defendant's speedy trial time did not commence on the date of the filing of the criminal complaint, but rather on the day he was arrested. The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. Section 10, Article I, of the Ohio Constitution guarantees an accused this same right. *State v. MacDonald* (1976), 48 Ohio St.2d 66, 68, 357 N.E.2d 40.

Relying on *United States v. Stead* (C.A.8, 1984), 745 F.2d 1170, 1172, this Court in *State v. Azbell*, 112 Ohio St. 3d 3001 (2006) reasoned that speedy trial rights are "triggered *only* where it is the beginning of continuing restraints on defendant's liberty imposed *in connection* with the formal charge." *Id.* at 300 (emphasis added). The defendant in *Azbell* was arrested and released on the same day. Eleven months later, the state indicted the defendant. *Id.* This Court concluded that a defendant's right to a speedy trial under the Sixth Amendment is not triggered until there is an actual restraint imposed by arrest and the defendant is held to answer to criminal charges. *Id.* at 304. Hence, a defendant's right to speedy trial begins when a defendant's liberty is placed in

jeopardy—one of the overriding concerns of speedy-trial violations. *Id.* (Citing *United States v. Loud Hawk* (1986), 474 U.S. 302). “It is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *Azbell*, at 302, citing *United States v. Marion* (1971), 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468.

In the instant case, the Defendant’s speedy trial rights did not commence until he was apprehended in March of 2011 for his felonious assault charge. Prior to that point in time, Defendant was never held to answer for his crimes. The Defendant cannot elude prosecution and later use his own successful evasive conduct to support a claim of a violation of his speedy trial rights. The restraint on his liberty, as defined by this Court in *Azbell*, did not commence until he was taken into custody in March of 2011, where he was formally held to answer for his crimes committed in 2009. Therefore, there exists no violation to the Defendant’s speedy trial rights. The fact that the Defendant was detained and arrested on other charges within the time of the crime and the indictment is irrelevant. If anything, it merely demonstrates that any delay was his own fault.

I. The Defendant Was Not Prejudiced By Any Delay And Thus His Right Speedy Trial Rights Under *Barker* Were Not Violated.

This Court should also deny jurisdiction because the record is devoid of any evidence demonstrating the Defendant suffered prejudice. While the State does not concede the fact that the Defendant’s speedy trial rights were implicated, assuming they were, the Defendant has not even attempted to demonstrate that the *Barker* factors weigh in his favor. The Defendant merely claims it was greater than one year and prejudice is presumed. This is not the end of the analysis, but the beginning. It merely triggers a full *Barker* analysis. *Doggett v. United States*, 505 U.S.

647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), fn.1; *State v. Selvage*, 80 Ohio St.3d 465, 468, 687 N.E.2d 433 (1997).

The factors to be weighed include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) prejudice to the defendant. *Id.* No single factor is regarded "as either a necessary or sufficient condition to the finding of a deprivation to the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker* at 533.

Notably, the Defendant makes no attempt to conduct this analysis for this Court. This is likely due to the fact that the Defendant cannot demonstrate a single instance of prejudice. The Eighth District Court of Appeals reviewed the record under the Defendant's pre-indictment delay claim and concluded it lacked any evidence of prejudice. There were no potential witnesses who would no longer testify, there was no fading of a witnesses' memory, or recollection of the events that would have affected the outcome or the preparation of his trial and there was no reason he reason he could not prepare an adequate defense. The court concluded that the Defendant only speculated as to his prejudice. Mere assertions and speculations are insufficient to warrant dismissal of a case. *State v. Ennist*, 8th Dist. No. 90076, 2008-Ohio-5100, 2008 WL 4439105, ¶ 27.

The Defendant also fails to recognize the factual differences in *State v. Selvage*, 1997-Ohio-287, 80 Ohio St. 3d 465, 470, 687 N.E.2d 433, 437. In *Selvage*, the defendant made two sales of marijuana to undercover police officers: one on March 17, 1994 and one on March 23, 1994. *Id.* at 434. A criminal complaint was filed on June 7, 1994, for which the defendant was never served. The defendant was subsequently indicted in April 1995 - ten months after the filing of the criminal complaint. The government did not pursue the complaint because it wanted

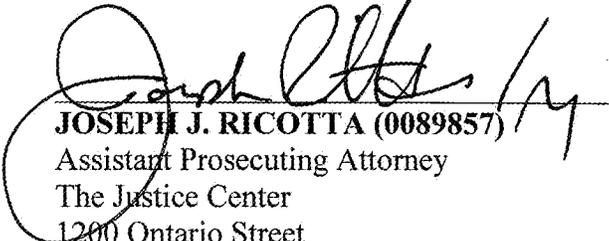
to preserve the anonymity of the undercover officers. Additionally, the government prosecuted other persons implicated in the undercover investigation, while the defendant was left in "limbo." This Court concluded that the defendant was prejudiced by the government's conduct. In stark contrast, here, the Defendant eluded arrest after the felonious assault and his whereabouts were unknown. Moreover, unlike the defendant in *Selvage*, the Defendant was not left in "limbo." Rather, he continued to violate the laws of the State of Ohio. In response, the State duly prosecuted him on those crimes. In *Selvage*, the delay was purposefully caused by the state. In this case, the delay was purposefully caused by the defendant. These cases are markedly different and the Defendant's reliance on *Selvage* is misplaced.

CONCLUSION

The State respectfully asks this Court to deny the Defendant Marlon Clemon's memorandum in support of jurisdiction.

Respectfully Submitted,

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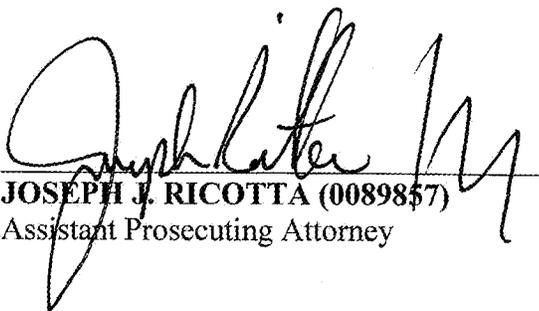
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response has been sent via U.S. regular mail this the 7th day of March 2014 to:

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