

[Cite as *State v. Sanchez*, 2010-Ohio-2387.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-31
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-862
v.	:	
	:	
EVELIO A. SANCHEZ	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 28th day of May, 2010.

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STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor’s Office, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

REBEKAH S. NEUHERZ, Marlow & Neuherz, LLC, 150 North Limestone Street, Suite 218, Springfield, Ohio 45501
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Evelio A. Sanchez appeals from his conviction and sentence, following a no-contest plea, for failure to comply with sex offender registration requirements, in violation of R.C. 2950.05(F). Sanchez contends that the trial court erred when it overruled his motion to dismiss the charge against him on speedy-trial grounds, under R.C. 2945.71, et seq.

{¶ 2} The State contends that the statutory speedy-trial time in this case was extended by reason of R.C. 2945.72(H), which provides for an extension for “the period of any reasonable continuance granted other than upon the accused’s own motion.” The State contends that an order transferring the case from the docket of one trial judge to another “in order to promote docket efficiency and calendar control,” operated to extend the statutory speedy-trial time. We conclude that even if that order could be construed as setting forth a sufficient explanation of a reason for a continuance other than upon the accused’s own motion, the record does not contain an order granting a continuance, as required by *State v. Mincy* (1983), 2 Ohio St.3d 6, and therefore is not sufficient to extend the statutory speedy-time.

{¶ 3} Accordingly, the trial court erred when it overruled Sanchez’s motion to dismiss. The judgment of the trial court is Reversed, and Sanchez is ordered discharged as to the offense giving rise to this appeal.

I

{¶ 4} The relevant facts are set forth in the order of the trial court overruling Sanchez’s motion to dismiss:

{¶ 5} “[Sanchez] was originally indicted in Case No. 2008 CR 707 on October 3, 2008 for basically the same offense for which he was indicted in Case No. 2008 CR 862.

{¶ 6} “Both the State of Ohio and the Defendant stipulate that for purposes of speedy trial [Sanchez’s] time began to run on October 3, 2008. The Court notes from its record that [Sanchez] was placed under bond in both cases and remained in jail the

entire time since October 3, 2008. As a result, [Sanchez's] 270-day trial time days would be credited 3 days for 1 since he remained in jail[,] and [he] would be required to be brought to trial within 90 days from October 3, 2008.

{¶ 7} “[Sanchez] maintains that the 90 days would have run on December 28, 2008. By the Court’s calculation, it appears the time would have run on December 31, 2008.

{¶ 8} “Nevertheless, in Case No. 2008 CR 707, the Defendant was arraigned on October 10, 2008 and trial was set for December 1, 2008, within the 90-day period.

{¶ 9} “On November 24, 2008, a Motion to Dismiss the Indictment due to a defect in the charging language was filed by the State of Ohio and granted by the Court on November 24, 2008.

{¶ 10} “[Sanchez] was then re-indicted on December 3, 2008 on the same offense for which the previous indictment had been dismissed.¹

{¶ 11} “On December 16, 2008, the Administrative Judge transferred the case from Judge Stephen A. Wolaver to Judge J. Timothy Campbell in order to promote docket efficiency and calendar control. The State’s Memorandum in response to [Sanchez’s] Motion further clarifies that this was done because Judge Wolaver had participated in the prosecution of [Sanchez] in the case that gave rise to the current indictment.

{¶ 12} “On January 7, 2009, the Defendant filed his Motion to Dismiss and the Defendant was arraigned on January 9, 2009 with a trial date set for February 18,

¹The record reflects that the new indictment was filed on December 4, 2008. Sanchez remained in jail during the interim between the dismissal of the original indictment and the new indictment.

2009. After the State's Response was filed on January 24, 2009, the hearing was held on the Motion on January 26, 2009.

{¶ 13} " * * * * . Based upon the stipulated date of the parties as to when the time began to run, the Court finds that the Defendant's 90-day period ran on December 31, 2008.

{¶ 14} " * * * * .

{¶ 15} "Section 2945.72 does provide for circumstances whereby the time for calculating speedy trial time is tolled. The State contends that Subdivision (H) of Section 2945.72 is applicable in this case as while the Defendant has never requested a continuance, that subdivision does provide that the time for trial may be extended for ' . . . the period of any reasonable continuance granted other than upon the accused's own motion; . . . ' While the accused has never requested a continuance, neither has the State of Ohio.

{¶ 16} "In this case, it became apparent to the Court on December 16, 2008 that the Judge to which the case was assigned had been previously involved with prosecuting [Sanchez] when he was in the County Prosecutor's Office. Consequently, to insure no conflict of interest and that [Sanchez] would receive a fair trial, the case was transferred to the other general division Judge. This transfer took place within the 90-day period that [Sanchez] was to be brought to trial.

{¶ 17} "[Sanchez] was then promptly arraigned and the matter set for trial on the first available date on the Court's calendar.

{¶ 18} "The Court finds that the actions of the Court in transferring the case for the benefit of [Sanchez] is [sic] reasonable and appropriate under the circumstances

and that the time from the date of transfer, December 16, 2008, until the trial date of February 18, 2009, is tolled and the trial can be extended to February 18, 2009.”

{¶ 19} We would just add that the original indictment charged Sanchez with a violation of R.C. 2950.04(E), which prohibits a person required to register as a sexually oriented offender from failing to do so. The later indictment charged Sanchez with a violation of R.C. 2950.06(F), which prohibits certain persons who are required to verify current personal information from failing to do so.

{¶ 20} The trial court overruled Sanchez’s motion to dismiss on statutory speedy trial grounds. Thereafter, he pled no contest to the charge, was found guilty, and was sentenced accordingly. From his conviction and sentence, Sanchez appeals.

II

{¶ 21} Sanchez’s sole assignment of error is as follows:

{¶ 22} “THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT’S MOTION FOR DISMISSAL ON SPEEDY TRIAL GROUNDS.”

{¶ 23} Both parties agree that the dispositive issue in this appeal is whether the trial court properly found that the 90-day time limit for bringing Sanchez to trial had been extended by R.C. 2945.72(H), which provides, in pertinent part, as follows:

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

{¶ 25} “ * * * *

{¶ 26} “(H) * * * , and the period of any reasonable continuance granted other

than upon the accused's own motion;

{¶ 27} “ * * * * .”

{¶ 28} On December 16, 2008, following the later of the two indictments, and before the 90-day speedy-trial time limit had run, the following order was entered on the record:

{¶ 29} “By order of the Administrative Judge, this case is transferred from the Honorable Stephen A. Wolaver to the Honorable J. Timothy Campbell in accordance with C. P. Sup. R. 3(B), in order to promote docket efficiency and calendar control.”

{¶ 30} The arguments of the parties center on whether this order satisfies the requirement of *State v. Mincy* (1982), 2 Ohio St.3d 6, that satisfactory reasons for the continuance of a trial date must be put upon the record before the speedy-trial time has expired. The State seeks to rely upon the trial court's citation, in its entry overruling the motion to dismiss, of the State's own memorandum's explanation that the transfer of this case from Judge Wolaver's docket to Judge Campbell's docket was done because Judge Wolaver had been involved in the prosecution of Sanchez giving rise to Sanchez's duty to verify his personal information. Of course, *State v. Mincy*, at 9, holds that a satisfactory explanation of the reasons for a continuance of a trial date must be put on the record before the running of the speedy-trial time, so that reliance upon an explanation that is not put into the record until after the speedy-trial time has run is not permitted.

{¶ 31} We are inclined to the view that the explanation tendered before the running of the speedy-trial time – “in order to promote docket efficiency and calendar control” – is an insufficient explanation. See *Cleveland v. Jones* (1996), 110 Ohio

App.3d 791, 793, where a trial court's reference to "the judge's two-week vacation and a 'jammed docket,' " were held not to constitute a sufficient explanation.

{¶ 32} But even if we were inclined to accept the explanation tendered in the trial court's entry of December 16, 2008, as a satisfactory basis for a continuance, that would only satisfy one part of the *Mincy* requirement. *State v. Mincy*, supra, at 9, holds:

{¶ 33} "We therefore hold that, when *sua sponte* granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limits prescribed in R.C. 2945.71 for bringing a defendant to trial."

{¶ 34} Thus, even if the trial court in the case before us could be deemed to have put in the record, by journal entry, a satisfactory basis for which it could have continued the trial date, there is no order of continuance in the record. The requirement that the continuance, itself, must be the subject of a journal entry has been strictly upheld. *State v. Geraldo* (1983), 13 Ohio App.3d 27, 30-31. See, also, *Cleveland v. Jones*, supra.

{¶ 35} It may seem overly technical to require that an entry of continuance be put upon the journal before the speedy-trial time has run, when a satisfactory reason for granting a continuance is in the record, but the requirement of an entry of continuance serves the purpose of avoiding after-the-fact rationalizations for a statutory speedy-trial violation, which was of obvious importance in *State v. Mincy*, supra. If we were to dispense with the requirement, expressly stated in *Mincy*, that a continuance must be put upon the record by journal entry, a trial court could come up

with an after-the-fact rationalization for a speedy-trial violation, as an afterthought, based upon circumstances that appear in the record, but which were never actually invoked to justify a continuance. That would describe this case. Nothing in the trial court's entry of December 16, 2008, indicates that it intended to continue anything; the trial court merely transferred the case from one judge's docket to another.

{¶ 36} In this case, no trial date had been set after the second indictment, when the trial court transferred the case from one judge's docket to another. But we know that the mere setting of a trial date outside of time does not constitute a continuance of statutory speedy-trial time under R.C. 2945.72(H). *State v. Cutcher* (1978), 56 Ohio St.2d 383, 385. If, before the statutory speedy-trial time had expired, the trial court had set a trial date outside the speedy-trial time limit, and had accompanied that trial-date setting with a suitable explanation of the reasons for setting it outside of the statutory speedy-trial time, all in an order entered upon the record, that might well have satisfied the requirements, under *State v. Mincy*, supra, for an extension of speedy-trial time under R.C. 2945.72(H). But that did not happen here. There was nothing in the record either setting a trial date, or continuing a trial date, until Sanchez filed his motion to dismiss on January 7, 2009, by which time, the statutory speedy-trial time had already expired.

{¶ 37} Sanchez's sole assignment of error is sustained.

III

{¶ 38} Sanchez's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and Sanchez is ordered Discharged with respect to the

offense of Failure to Verify, in violation of R.C. 2950.06(F), with which this appeal is concerned. Our judgment of reversal and discharge is without prejudice to Sanchez's prosecution for any subsequent, or other, violations of Ohio's sexual offender registration, notification and verification laws, with which he may be charged.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

Stephen K. Haller
Elizabeth A. Ellis
Rebekah S. Neuherz
Hon. J. Timothy Campbell