

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**STATE OF OHIO**

**PLAINTIFF-APPELLEE**

**CASE NUMBER 9-2000-53**

**v.**

**WILLIAM SIMMERS**

**OPINION**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.**

**JUDGMENT: Judgment reversed, complaint dismissed and the appellant discharged.**

**DATE OF JUDGMENT ENTRY: November 15, 2000**

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**ATTORNEYS:**

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For Appellant.

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For Appellee.

**HADLEY, P.J.** This is an appeal from a judgment and sentence of the Marion County Municipal Court in which the defendant-appellant, William A. Simmers ("the appellant"), was convicted of operating a motor vehicle while under the influence of alcohol. For the following reasons, we reverse the judgment of the trial court.

The facts and procedural history of the case are as follows. On the morning of December 4, 1999, the appellant was arrested for operating a motor vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(1). The appellant entered a plea of not guilty to the charges on December 7, 1999.

On December 28, 1999, the appellant filed a motion to suppress alleging that Sergeant Jones, the officer that had performed the investigatory stop of the appellant's vehicle, lacked reasonable suspicion to justify the stop, as well as probable cause to arrest. A hearing on the motion was scheduled for February 10, 2000, more than two months after the appellant's arrest. On February 10, 2000, the prosecution filed a motion requesting a continuance alleging that Sergeant Jones was unavailable to testify. By judgment entry of February 24, 2000, the trial court granted the prosecution's motion for a continuance. Shortly thereafter, the trial court reassigned the hearing on the motion to suppress for March 9, 2000.

A hearing on the matter was held on March 9, 2000. The trial court overruled the appellant's motion by judgment entry of April 11, 2000. The trial court set the case for jury trial on May 3, 2000.

On April 25, 2000, the prosecution filed its second motion for a continuance, alleging that Sergeant Jones would be unavailable to testify at the trial on May 3, 2000. By judgment entry of April 28, 2000, the trial court granted the prosecution's motion for a continuance. Shortly thereafter, the trial court reassigned the appellant's trial for May 10, 2000.

On May 9, 2000, the appellant filed a motion to dismiss and supporting memoranda asserting the ninety-day statutory period during which the State was required to bring him to trial had elapsed. The appellant was tried before a jury on May 10, 2000, which found him guilty of driving under the influence of alcohol. The conviction and sentence was journalized on May 17, 2000. By judgment entry of May 17, 2000, the trial court overruled the appellant's motion to dismiss.

The appellant now appeals, asserting the following assignment of error.

**Assignment of Error**

**The trial court erred to he prejudice of defendant-appellant by denying his motion to dismiss and violating his right to a speedy trial.**

In his sole assignment of error, the appellant maintains the trial court erred in overruling his motion to dismiss. Specifically, the appellant asserts the State of

Ohio failed to try him within the ninety day statutory time period. For the following reasons, we agree.

In the case herein, the appellant was charged with a violation of R.C. 4511.19(A)(1), a misdemeanor of the first degree. Since the appellant was charged with a misdemeanor of the first degree, the State of Ohio was statutorily obligated to bring him to trial within ninety days of his arrest. R.C. 2945.71(B)(2) states, in pertinent part, as follows:

(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:

\* \* \*

(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 \* \* \*.

R.C. 2945.72, however, contains an exclusive list of reasons which justify an extension of time for purposes of calculating the speedy trial date under R.C. 2945.71. Among the categories set forth in R.C. 2945.72 is R.C. 2945.72(E) and (H), which state, in pertinent part, as follows:

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:

(E) Any period of delay necessitated by reason of a \* \* \* motion, proceeding, or action made or instituted by the accused;

\* \* \*

(H) 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[.]

Pursuant to R.C. 2945.73, the remedy for a violation of a defendant's speedy trial rights is as follows:

(B) Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.

In the present case, the ninety-day limit in which the State had to bring the appellant to trial was extended by the appellant's filing of a motion to suppress on December 28, 1999. The trial court scheduled the original hearing on the motion to take place on February 10, 2000. At the request of the prosecution, however, the hearing was continued until March 9, 2000. On that date, a hearing was held on the matter. From the bench, the trial court overruled the appellant's motion. No further action was taken on the motion until the trial court entered its judgment into the record on April 11, 2000, over three months after the motion to suppress was filed.

This Court has held that the extension of time to rule on a defendant's motion to suppress is subject to a requirement of reasonableness. *State v. Arrizola* (1992), 79 Ohio App.3d 72, 76. The question of what is a reasonable time does not have a *per se* rule. *State v. Campbell* (May 13, 1998), Auglaize App. No. 2-97-31

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and 2-97-32, unreported, *State v. Safely* (1988), 35 Ohio St.3d 90. "Invariably, resolution of such a question depends on the peculiar facts and circumstances of the particular case." *Campbell, supra*, quoting *Safely*, 35 Ohio St.3d at 91.

Nonetheless, "[a] strict adherence to the spirit of the speedy trial statutes requires a trial judge, in the sound exercise of his judicial discretion, to rule on these motions in as expeditious a manner as possible." *Campbell, supra*, quoting *State v. Martin* (1978), 56 Ohio St.2d 289, 297.

In the case herein, the State filed its initial motion for a continuance, which the trial court granted, on the basis that Sergeant Jones, the officer that had conducted the investigatory stop of the appellant's vehicle, did not receive the notice of the hearing scheduled for February 10, 2000. Sergeant Jones had apparently received a promotion and had been transferred from the Marion, Ohio, Post of the Ohio State Highway Patrol to the Delaware, Ohio, Post.

A continuance based upon the fact that an arresting officer is unavailable at the time of trial is not unreasonable. *State v. Saffell* (1988), 35 Ohio St.3d 90, 91. Thus, the trial court's granting of the State's initial motion for a continuance due to the unavailability of Sergeant Jones was not unreasonable. However, we do take issue with the reasonableness of the length of the delay between the appellant's filing of the motion to suppress, which took place on December 28, 1999, and the

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date of the hearing, originally scheduled for February 10, 2000. We find that such a delay was unreasonable.

We also take issue with the length of the delay between the hearing held on March 9, 2000, and the trial court's judgment entry overruling the appellant's motion on April 11, 2000.<sup>1</sup> As we previously stated, under normal circumstances, we would not regard the time spent by a trial court in determining the issues raised in a defendant's motion to count against the statutory ninety-day limit in which the defendant must be brought to trial. However, in consideration of the facts of this case and the nature of the appellant's motion to suppress, we find this amount of time to be unreasonably excessive.

Accordingly, the appellant's assignment of error is sustained. Pursuant to App. 12(B), this Court enters the judgment that should have been rendered by the trial court and dismisses the complaint filed against the appellant and orders that he be discharged.

***Judgment reversed,  
complaint dismissed, and the  
appellant discharged.***

**WALTERS, J., concurs.**

**SHAW, J., concurs in judgment only.**

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<sup>1</sup> It is a basic rule of law that a court speaks only through its journal entries. *San Filippo v. San Filippo* (1991), 81 Ohio App.3d 111, 112.