[Cite as *State v. Howard*, 2009-Ohio-3251.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 BE 6
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
SCOTT D. HOWARD	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court, Northern Division of Belmont County, Ohio
Case No. 07 CRB 0814

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Christopher Berhalter
Belmont County Prosecutor
Atty. Grace L. Hoffman
Assistant Prosecuting Attorney
147-A West Main Street
St. Clairsville, Ohio 43950

For Defendant-Appellant:

Atty. Thomas M. Ryncarz
3713 Central Avenue
Shadyside, Ohio 43947

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: June 26, 2009

[Cite as *State v. Howard*, 2009-Ohio-3251.]
WAITE, J.

{¶1} Appellant, Scott D. Howard, appeals his conviction on domestic violence stemming from his no contest plea in Belmont County Court, Northern Division. Appellant contends that his speedy trial rights were violated because he was held beyond the time permitted by R.C. 2945.71. A review of the record does not support this contention. The court ruled three times that all time delays were attributable to Appellant, including three instances in which his attorneys withdrew and the court was required to appoint new counsel. The judgment of the trial court is affirmed.

{¶2} The record in this case is somewhat incomplete because it involves the initial filing of a domestic violence complaint on or about October 4, 2007, a dismissal of the charge, nolle prosequi, on November 7, 2007, and a refiling of the charge on November 30, 2007. The documentation for the charge as originally filed is not in the record, except for transcripts of some of the hearings held during the period during which the original charge was pending. The parties do agree on the critical dates necessary to determine the speedy trial issue on appeal, but such basic facts as to the actual date Appellant was originally charged and arraigned are not present in the record.

{¶3} It appears that Appellant was arrested on or about October 4, 2007, and charged with domestic violence, R.C. 2919.25(A), a first degree misdemeanor. It was his third domestic violence offense. Allegedly, he attempted to cause physical harm to Sharon Neer. Appellant was arraigned on or about October 5, 2007, but the

arraignment was continued to October 12, 2007. A public defender was appointed as counsel.

{¶4} On October 24, 2007, Appellant's counsel moved to withdraw. The motion was sustained. The record does not indicate when new counsel was appointed, other than the appointment was made prior to October 31, 2007.

{¶5} On October 31, 2007, Appellant's second appointed counsel moved to withdraw due to a conflict of interest, and this motion was also granted. The record does not indicate when his third counsel was appointed, except that it must have occurred prior to November 7, 2007.

{¶6} On the scheduled day of trial, November 7, 2007, the victim did not appear to testify. The prosecutor requested that the charges be dismissed, nolle prosequi. The motion was granted.

{¶7} The domestic violence charge was refiled on November 11, 2007, and an arrest warrant was issued.

{¶8} Appellant voluntarily appeared in court on December 14, 2007, and the warrant was withdrawn. Appellant was arraigned and counsel was appointed. Appellant was not arrested and did not remain in jail in lieu of bond.

{¶9} Appellant's appointed counsel in the refiled complaint filed a motion to withdraw on December 17, 2007. This was Appellant's fourth court-appointed lawyer. The court held a hearing on December 19, 2007, and new counsel was again appointed. At that same hearing, counsel moved for a continuance, which was granted. (12/19/07 Tr., p. 17.)

{¶10} Counsel requested another continuance on January 2, 2008, which was also granted.

{¶11} Appellant filed a motion to dismiss on speedy trial grounds on January 9, 2008. The court held a hearing on January 16, 2008. The motion was overruled on January 23, 2008.

{¶12} Appellant entered a no contest plea on February 13, 2008. The court sentenced him to 180 days in jail. Appellant was to serve 50 of these days, was given credit given for 35, and 130 days were suspended. The court also imposed a fine and costs, as well as two years of probation. This appeal followed on February 29, 2008.

ASSIGNMENT OF ERROR

{¶13} "THE TRIAL COURT COMMITTED ERROR IN OVERRULING THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF THE SPEEDY-TRIAL STATUTE."

{¶14} The Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 10, Article I, Ohio Constitution, guarantee a criminal defendant the right to a speedy trial by the state. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 8, 516 N.E.2d 218. In addition to these constitutional protections, R.C. 2945.71(B)(2) provides that, for a person charged with a first degree misdemeanor, a trial must be conducted within 90 days after arrest or the service of summons. Each day that the defendant is held in jail in lieu of bond on the pending charge is counted as three days for purposes of speedy trial computations. R.C. 2945.71(E). The date

of arrest is not included when calculating the time in which an accused must be brought to trial. *State v. Steiner* (1991), 71 Ohio App.3d 249, 250-252, 593 N.E.2d 368; see also R.C. 1.14, Crim.R. 45.

{¶15} R.C. 2945.72 sets forth circumstances that toll the period of time for a speedy trial. R.C. 2945.72(C) states: "(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law[.]"

{¶16} R.C. 2945.72(H) tolls the speedy trial time period for any continuance resulting from the accused's own motion.

{¶17} Under Ohio's speedy trial statutes, a trial court shall discharge a defendant if the trial court and prosecution fail to bring the defendant to trial within the time required by R.C. 2945.71 and 2945.72. See R.C. 2945.73(B). The Supreme Court of Ohio has, "imposed upon the prosecution and the trial courts the mandatory duty of complying with," the speedy trial statutes. *State v. Singer* (1977), 50 Ohio St.2d 103, 105, 362 N.E.2d 1216. Thus, courts must strictly construe these statutes against the state. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 707.

{¶18} "[W]hen a defendant moves for discharge on the basis that he has not been brought to trial within the time limits set forth in R.C. 2945.71, and he presents a prima facie case that he is entitled to discharge, the burden of production of evidence shifts to the state." *State v. Price* (1997), 122 Ohio App.3d 65, 68, 701 N.E.2d 41, citing *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368.

{¶19} Appellant argues that the delay in prosecuting this case occurred primarily between the initial filing of the charge and the dismissal, nolle prosequi, of the charge on November 7, 2007. The speedy trial clock is tolled, but not reset, during the period between a nolle prosequi of a charge and subsequent refiling of the charge. *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 12, 402 N.E.2d 530. The difficulty of Appellant's argument is that many of the details of the original filing of the charge and nolle prosequi are not in the record before us. We cannot confirm from the record that Appellant was arrested on October 4, 2007. We have no way to determine from this record the period of time he was held in jail in lieu of bond while the case was pending. The record is also silent as to the date new counsel was appointed when counsels' motions to withdraw were granted on October 24, 2007, and again on October 31, 2007. Although some of the details of the earlier originally filed charges can be gleaned from the transcripts that Appellant has provided, the record as it stands does not establish a prima facie case that a speedy trial error occurred. An accused must establish a prima facie case of speedy trial error before the burden is shifted to the state to prove that it complied with the requirements of R.C. 2945.71 et seq.

{¶20} Assuming arguendo that some of the basic facts alleged by Appellant are correct, the record still does not establish a speedy trial violation. If Appellant had been arrested on October 4, 2007, the record indicates that on October 31, 2007, his counsel moved to withdraw for the second time, the motion was granted, and trial was continued until November 7, 2007. The court expressly attributed the

delay to Appellant. As pointed out above, delays necessitated by the accused's lack of counsel are not attributable to the state in computing speedy trial time. Thus, the amount of time attributable to the state would have been, at most, 27 days (October 5th through October 31st, not counting the day of arrest). Assuming the triple-count provision applied, 81 days would have passed.

{¶21} After the charges were refiled and an arrest warrant was issued, Appellant appeared in court on December 14, 2007. Appellant did not know an arrest warrant had issued. He appeared in court because he thought he had outstanding court costs to pay. The arrest warrant was withdrawn, and the court conducted an arraignment. Appellant was not arrested or held in jail in lieu of bond on the refiled charge. New counsel (for the fourth time) was appointed on December 14, 2007. Counsel filed a motion to withdraw on December 17, 2007. Once again, any delay relating to counsel's motion to withdraw is attributable to Appellant. A hearing was held on December 19, 2007, and counsel was permitted to withdraw. New counsel (the fifth) was appointed, and this counsel immediately requested a continuance, which was granted until January 2, 2008. On January 2, 2008, counsel again asked for a continuance, which was granted until January 23, 2008. Delays occasioned by counsel's own motion for a continuance are not attributable to the state in computing speedy trial time. R.C. 2945.72(H). Appellant filed his motion to dismiss on January 9, 2008. The only time attributable to the state during the period after the charge was refiled was between December 14th and 17th; 3 days (the first day not being counted in the calculation). The triple-count provision clearly does not

apply here because Appellant was not in jail in lieu of bond at this time. If Appellant was being held pending the first complaint, adding 3 days to the prior 81 days brings Appellant to a total of 84 days at the time he filed his motion to dismiss on speedy trial grounds. This is obviously less than the 90 days allowed by statute. Thus, there was no statutory speedy trial violation when the motion to dismiss was filed.

{¶22} Appellant has not provided a record sufficient to establish any speedy trial error, and his assignment of error is overruled. The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.