

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2011-A-0023</b>
MICHAEL RIVERA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 390.

Judgment: Affirmed.

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

*Michael P. Maloney*, 24441 Detroit Road, Suite 300, Westlake, OH 44145-1543 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Michael Rivera, appeals the March 16, 2011 decision and entry of the Ashtabula County Court of Common Pleas. Appellant argues that his statutory rights to a speedy trial were violated. Based on the following, we affirm the decision of the trial court.

{¶2} In an entry dated March 16, 2011, the trial court overruled appellant's motion to dismiss and accepted appellant's no contest plea. Appellant filed a timely notice of appeal and asserts the following assignment of error for our review:

{¶3} "Appellant was deprived of his right to a speedy trial in violation of Fifth and Sixth Amendments to the United States Constitution, Section 10, Article I of the Ohio Constitution, and Ohio Revised Code 2945.71."

{¶4} "Speedy trial issues present mixed questions of law and fact. \*\*\* We accept the facts as found by the trial court on some competent, credible evidence, but freely review the application of the law to the facts." *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, at ¶18, citing *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261.

{¶5} The Supreme Court of Ohio, in *State v. O'Brien* (1987), 34 Ohio St.3d 7, stated:

{¶6} "The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a speedy trial by the state. \*\*\* This same right is assured an accused by Section 10, Article I of the Ohio Constitution[.] \*\*\*"

{¶7} "The General Assembly, in its attempt to prescribe reasonable speedy trial periods consistent with these constitutional provisions, \*\*\* enacted R.C. 2945.71[.]

{¶8} "\*\*\*\*

{¶9} "[F]or purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 et seq. and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." *Id.* at 7-9.

{¶10} "It is well-established that the Ohio speedy trial statute is mandatory, constitutional, and must be construed strictly against the state. \*\*\* Once a criminal

defendant shows that he was not brought to trial within the permissible period, the accused presents a prima facie case for dismissal. \*\*\* At that point, the burden shifts to the state to demonstrate that sufficient time was tolled or extended under the statute.” (Internal citations omitted.) *State v. Rumer*, 6th Dist. No. L-07-1178, 2009-Ohio-265, at ¶9.

{¶11} Since appellant was charged with a felony, he was required to be brought to trial within 270 days of his arrest. R.C. 2945.71(C)(2). If the accused is not brought to trial within the time specified by R.C. 2945.71, the accused “shall be discharged” “upon motion made at or prior to the commencement of trial.” R.C. 2945.73(B).

{¶12} In addition, the time within which appellant must be brought to trial may be tolled, as specified in R.C. 2945.72, which provides, in pertinent part:

{¶13} “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:

{¶14} “\*\*\*

{¶15} “(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

{¶16} “\*\*\*

{¶17} “(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.”

{¶18} We will address appellant’s tolling events under R.C. 2945.72(E).

{¶19} In this case, appellant was incarcerated due to another felony offense. The record reflects that appellant was served in jail with the indictment on December

15, 2008. As appellant was not arrested for the instant offense, speedy trial time begins on the day he is served with the indictment. *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, at ¶20. (Citation omitted.) Therefore, if no tolling events occurred, appellant would have to be brought to trial within 270 days from December 15, 2008.

{¶20} On December 16, 2008, appellant filed a request for discovery and a request for bill of particulars. “A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E).” *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. The state responded to these requests on December 22, 2008.

{¶21} Appellant’s speedy trial time began running again and ran for a total of 17 days. Then, on January 8, 2009, appellant filed a motion for additional discovery. While awaiting a response, defendant filed a motion for funds for expert assistance on January 14, 2009. On January 15, 2009, the state responded to the request for additional discovery. The trial court issued a judgment on appellant’s motion for expert assistance on February 2, 2009. Therefore, the time from January 8, 2009, until February 2, 2009, was tolled.

{¶22} On February 3, 2009, appellant’s counsel filed a motion to withdraw. The trial court granted this motion on February 19, 2009. Appellant’s speedy trial time was tolled from February 3, 2009, until February 19, 2009. See *State v. Matland*, 7th Dist. No. 09-MA-115, 2010-Ohio-6585, at ¶42; *State v. Younker*, 4th Dist. No. 07CA18, 2008-Ohio-6889, at ¶21; *State v. Allen*, 8th Dist. No. 90552, 2008-Ohio-5251, at ¶14; *State v. Kemper*, 2d Dist. Nos. 2002-CA-101, 2002-CA-102, 2004-Ohio-6055, at ¶26.

{¶23} Appellant’s speedy trial clock began to run and ran for seven days, when his new counsel filed a request for discovery and a request for bill of particulars on

February 26, 2009. The state responded on March 5, 2009. Therefore, speedy trial time was tolled from February 26, 2009, through March 5, 2009.

{¶24} “The period of any continuances granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion” tolls the speedy trial time. R.C. 2945.72(H). The record is replete with motions filed by the accused requesting continuances of various trial dates. For example, on March 27, 2009, appellant filed a motion to continue the trial set for April 7, 2009, stating that additional time was necessary for preparation. In a March 30, 2009 judgment entry, the trial court set the jury trial for July 7, 2009. Again, on June 26, 2009, appellant, acting pro se, filed a motion to continue the jury trial scheduled for July 7, 2009, stating that he had not communicated with appointed counsel. In a July 7, 2009 judgment entry, the trial court rescheduled appellant’s jury trial to September 1, 2009. As a result of the continuances filed by appellant, his speedy trial clock began to run from March 6, 2009, through March 27, 2009, for a total of 21 days. However, the above continuances at appellant’s request tolled the time from March 27, 2009, until September 1, 2009.

{¶25} In the interim, on August 26, 2009, the state filed a motion to continue the jury trial set for September 1, 2009, which was granted. In an August 27, 2009 judgment entry, the jury trial was rescheduled to November 3, 2009. Therefore, appellant’s speedy trial time began running again on September 1, 2009, but was tolled on October 21, 2009, when appellant, acting pro se, filed a motion to dismiss the pending charges claiming that his speedy trial rights had been violated—a total of 50 days.

{¶26} In his appellate brief, appellant argues that the trial court did not rule on his motion to dismiss until March 14, 2011, and, thus, his speedy trial rights were violated. Appellant argues that a 17-month delay in ruling on such a motion is unreasonable.

{¶27} The record reflects that at the time appellant filed his motion to dismiss, his speedy trial rights were not violated. At the change of plea hearing on March 14, 2011, the trial court stated, in part:

{¶28} “This Motion was filed on October 21st. So there’s clearly at the time this Motion was filed on October 21st, 2009, the 270 days speedy trial time had not run. Most of it had been waived.

{¶29} “Now, there’s other waiver provisions in here that I haven’t commented on. I just looked at the two big ones, but these two waive everything from March 27th to September 1st. \*\*\* So clearly, the Motion for – to Dismiss for failure of speedy trial – although 270 days may have transpired when that Motion was filed, at least five months was waived under those two Motions to Continue the Trial.”

{¶30} We need not determine whether the trial court’s delay in ruling on appellant’s motion to dismiss was reasonable as appellant filed other numerous motions which tolled his statutory speedy trial time.

{¶31} Before the trial court ruled on appellant’s motion to dismiss and during the tolling period, appellant’s counsel filed a motion for competency evaluation on October 30, 2009. In an October 30, 2009 judgment entry, the trial court appointed an examiner to complete appellant’s mental competency evaluation within 45 days of the entry. The competency evaluation was set for November 5, 2009, and the hearing was set.

{¶32} The Supreme Court of Ohio has stated, “[t]he express language of R.C. 2945.72(B) is broadly worded to include any period in which the accused’s mental competency is being determined. Thus, when the accused files a motion with the trial court for a competency evaluation, he or she is placing the court on notice that competency is at issue. It is at this time, when the competency motion is filed, that the tolling provision of R.C. 2945.72(B) comes into play. Therefore, we find that, pursuant to R.C. 2945.72(B), the time within which an accused must be brought to trial is tolled from the date the accused files a motion challenging his or her competency to stand trial.” *State v. Palmer* (1998), 84 Ohio St.3d 103, 106. Therefore, appellant’s speedy trial time was tolled until March 29, 2010, when appellant was found to be competent.

{¶33} Appellant’s speedy trial clock ran for 99 days, stopping on July 6, 2010, when appellant filed a motion for leave to file a motion to suppress, a motion to permit accused to appear in civilian clothes at all proceedings, and a motion in limine to exclude certain testimony from law enforcement officers. The Supreme Court of Ohio has held that “[a] motion in limine filed by a defendant tolls speedy-trial time for a reasonable period to allow the state an opportunity to respond and the court an opportunity to rule.” *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, paragraph two of the syllabus.

{¶34} On July 14, 2010, the state responded to appellant’s motion in limine, but, before the court ruled on the various motions, appellant continued to file numerous motions during the tolling period. On July 7, 2010, appellant filed a motion to disqualify Ashtabula County Assistant Prosecutor Susan R. Thomas, as she had represented

appellant in her capacity as an assistant public defender. On July 8, 2010, appellant filed an amended motion to disqualify.

{¶35} A hearing was held on appellant's motion to disqualify on July 8, 2010, and the trial court issued a July 12, 2010 judgment entry indicating that the prosecutor's office had agreed to withdraw Attorney Thomas, but denied appellant's request to disqualify the entire Ashtabula County Prosecutor's Office. The trial court continued the trial until September 28, 2010, indicating that it would be necessary as "replacement counsel for the prosecution cannot be adequately prepared on four to five days prior notice."

{¶36} Before the trial court could rule on appellant's motion for leave to file a motion to suppress, appellant filed a notice of appeal from the trial court's denial of his request to disqualify the prosecutor's office on August 9, 2010. On August 18, 2010, the trial court issued a judgment entry stating that since there is an appeal pending, the case is to be placed on inactive status, "subject to being reopened on this Court's docket upon dismissal or at the conclusion of the pending appeal." This court, in an entry dated September 24, 2010, determined there was no final, appealable order and remanded the case to the trial court.

{¶37} In *State v. Boyd* (Nov. 17, 1989), 11th Dist. No. 88-L-13-165, 1989 Ohio App. LEXIS 4285, this court found that "speedy trial time is tolled during any period in which any further appellate action initiated by either party may be taken and lasts until appellate jurisdiction lapses.

{¶38} \*\*\*\*

{¶39} “The plain language of R.C. 2945.72(E) provides that the speedy trial time is tolled during an action instituted by the accused. An appeal, discretionary or by right, is clearly contemplated as an action on the part of the accused. Depending on the disposition of an appeal by the accused, further proceedings in the trial court may be affected or rendered moot.” *Id.* at \*7-8.

{¶40} Here, speedy trial time was tolled during the entire appellate process. Further, as a result of appellant’s various motions and his appeal to this court, the September 28, 2010 trial date was cancelled and, upon the reopening of his criminal case, a new trial date of November 30, 2010, was scheduled. We find that as a result of appellant’s actions, his statutory trial time was tolled until November 30, 2010.

{¶41} During this tolling period, appellant, on November 24, 2010, filed a motion to continue the trial, which was reset to January 25, 2011.

{¶42} The trial court issued a judgment entry on January 20, 2011, indicating that a hearing was held on pending motions on January 19, 2011. In the entry, the trial court ruled on appellant’s motions filed on July 6, 2010. The trial was rescheduled to April 5, 2011, as counsel for appellant orally requested leave to file a motion to suppress. Therefore, appellant’s speedy trial time was tolled until April 5, 2011.

{¶43} During the tolling period, the state filed a motion to continue the suppression hearing on January 31, 2011, which was scheduled for March 3, 2011. In the motion, the state cited to the unavailability of Ms. Deana Nielsen from the Ohio State Highway Patrol Crime Lab, a “key and necessary witness.” The trial court granted the continuance and rescheduled the hearing until March 14, 2011. As the continuance in this case was reasonable and necessary, speedy trial time was tolled from March 3,

2011, until March 14, 2011. See *State v. Shabazz*, 8th Dist. No. 95021, 2011-Ohio-2260, at ¶29 (stating “[a] prosecuting attorney’s motion to continue based on the unavailability of a witness acts to extend the speedy trial provisions if the length of the delay is reasonable”).

{¶44} On March 14, 2011, appellant entered a plea of no contest. All days from July 6, 2010, until the date of this plea hearing had been tolled for the reasons set forth herein.

{¶45} In accordance with all of the foregoing, we conclude the trial court properly denied appellant’s motion to dismiss. Based on our calculation, and recognizing the tolling events as permitted by law, 194 speedy trial days elapsed in this matter, which is within the statutory time period of 270 days. That is, appellant’s speedy trial time clock ran between December 22, 2008, through January 8, 2009, for a total of 17 days; from February 19, 2009, through February 26, 2009, for a total of seven days; from March 6, 2009, through March 27, 2009, for a total of 21 days; from September 1, 2009, through October 21, 2009, for a total of 50 days; and from March 29, 2010, through July 6, 2010, for a total of 99 days.

{¶46} Appellant’s assignment of error is without merit. The judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDALL, J.,

MARY JANE TRAPP, J.,

concur.