

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

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-0081
Plaintiff-Appellant	:	
	:	Trial Court Case No. 06-CR-8
v.	:	
	:	(Criminal Appeal from
LARRY D. PERKINS	:	Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

.....  
OPINION

Rendered on the 19<sup>th</sup> day of June, 2009.

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FAIN, J.

{¶ 1} Plaintiff-appellant the State of Ohio appeals from an order of the trial court dismissing an indictment against defendant-appellee Larry Perkins, upon the ground that Perkins’s constitutional right to a speedy trial had been violated. We conclude that in exercising its discretion, the trial court erred when it failed to consider all four of the factors established by the United States Supreme Court in *Barker v. Wingo* (1972), 407

U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. Accordingly, the order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 2} On December 17, 2005, police officers saw Perkins walking down the middle of the street. Because he was wearing clothes matching the description of a suspect wanted for several breaking and entering crimes in the area, the officers approached him and asked his name. They learned that there was an outstanding arrest warrant for Perkins. The officers arrested Perkins and searched him, finding a pair of brass knuckles and a baggie containing six smaller baggies of crack cocaine and a baggie of powder cocaine.

{¶ 3} On January 3, 2006, Perkins was indicted on two counts of Felony Drug Abuse and one count of Carrying a Concealed Weapon. Perkins failed to appear for his arraignment the following month, and a warrant was issued for his arrest. Two months later, he appeared for arraignment, and the warrant was withdrawn. Final pre-trial and trial dates were scheduled for May, 2006, and Perkins was released on his own recognizance. Perkins failed to appear either for the pre-trial or for the trial.

{¶ 4} Approximately twenty months passed before a warrant was issued for Perkins's arrest on January 18, 2008. Perkins was arrested on the warrant on May 20, 2008. The following month, he filed a motion to dismiss, alleging a violation of his right to a speedy trial, which Judge O'Neill denied. On July 31, 2008, the case was reassigned to Judge Carey. During a telephone pre-trial the following day, Judge Carey

indicated his willingness to reconsider a motion to dismiss on speedy trial grounds, and Perkins filed a supplemental motion to dismiss. The trial court found a violation of Perkins's constitutional right to a speedy trial, and dismissed the indictment. The State appeals.

II

{¶ 5} The State's sole assignment of error is as follows:

{¶ 6} "THE TRIAL COURT ERRED IN CONCLUDING THAT DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE DEFENDANT'S FAILURE TO APPEAR IS A WAIVER OF HIS SPEEDY TRIAL RIGHTS."

{¶ 7} The State argues that the trial court erred in finding a violation of Perkins's constitutional right to a speedy trial and in dismissing the indictment against him. We review alleged constitutional speedy trial violations under an abuse of discretion standard. See, e.g., *State v. Humphrey*, Clark App. No. 2002 CA 30, 2003-Ohio-3401, ¶21, citations omitted. Although for reasons different from those argued by the State, we conclude that the trial court did abuse its discretion in finding a violation of Perkins's constitutional right to a speedy trial and in dismissing the indictment against him.

{¶ 8} The constitutional right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Section 10, Article I of the Ohio Constitution. When considering a claimed constitutional speedy trial violation, the court must balance four factors to determine whether a defendant has been deprived of this right, including the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo* (1972), 407 U.S. 514, 92

S.Ct. 2182, 33 L.Ed.2d 101. Accord, *Doggett v. United States* (1992), 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520. Moreover, these four factors are balanced considering the totality of the circumstances, with no one factor controlling. *Barker*, supra.

{¶ 9} In this case the trial court does not cite *Barker* or any of its factors. In fact, the only case cited by the court is *State v. Reese* (1980), 63 Ohio St.2d 190, which addresses a statutory speedy trial violation, and not a constitutional one. Nevertheless, the court appears to have engaged in at least a partial constitutional analysis. The court stated, “[t]his matter presents this Court with the interesting task of balancing the responsibilities of the criminal defendant to timely appear before the Court, and the State to exercise due diligence to prosecute its criminal cases.” It appears from the record that the trial court considered only the first two *Barker* factors.

{¶ 10} The first factor to weigh is the length of the delay, which in this case was twenty months. Neither party denies that the trial court properly found that, under the facts of this case, this delay was unreasonably long. One year is generally a long enough delay to warrant consideration of the remaining three *Barker* factors. *State v. Triplett* (1997), 78 Ohio St.3d 566, 569, citing *Doggett v. United States* (1992), 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520.

{¶ 11} There were two reasons for that twenty-month delay. The initial cause was Perkins’s failure to attend either the pre-trial or the trial. However, the State acknowledges that it was negligent in thereafter failing to secure a warrant for Perkins’s arrest in a timely manner, and that this negligence contributed to the delay. The trial court’s balancing ended with consideration of these first two factors, concluding that the

State was more at fault for failing to secure a timely arrest warrant than Perkins was for failing to comply with court orders to appear for the pre-trial and trial.

{¶ 12} With respect to the third factor under *Barker v. Wingo*, supra, the record reveals that Perkins failed to assert his right to a speedy trial until after his arrest on May 20, 2008, nearly two and one-half years after he was indicted. “It is well established under our law that the right to a speedy trial conferred by the Constitution is not self-executing. Affirmative action on the part of an accused in the nature of a demand to be tried is necessary to invoke the protection of the Constitution. \* \* \* \* In other words, there can be no denial where there has been no demand. The purpose of Section 10, Article I, is to provide a trial for an accused without undue delay with its attendant anxieties and the possibility that the defense might be prejudiced by the lapse of time. However, it was not intended as a shield to the guilty, the protection of which might be invoked by sitting silently back and allowing the prosecution to believe that the accused is acquiescing in the delay. It is a right which must be claimed or it will be held to have been waived.” *Partsch v. Haskins* (1963), 175 Ohio St. 139, 140, citations omitted. The record demonstrates that although fully aware of the charges pending against him, Perkins chose to wait, rather than to affirmatively assert his right to a speedy trial.

{¶ 13} The State appears to argue that Perkins’s failure to have demanded his constitutional right to a speedy trial is dispositive. But *Barker v. Wingo*, supra, establishes the defendant’s having demanded, or failing to have demanded, his right to a speedy trial as just one of the four factors to be weighed in evaluating a motion to dismiss on constitutional speedy trial grounds.

{¶ 14} Finally, the record offers no evidence that Perkins offered any specific allegation of prejudice. In *State v. Ellis* (Jan. 12, 2001), Montgomery App. No. 18092, we sustained the trial court's decision denying the defendant's motion to dismiss on constitutional speedy trial grounds, stressing the significance of the defendant's failure to demonstrate or even claim any actual prejudice as a result of the delay.

{¶ 15} Because the trial court ruled on Perkins's motion to dismiss without addressing, or apparently considering, all four of the *Barker* factors, the trial court abused its discretion in finding a constitutional speedy trial violation. Accordingly, the State's sole assignment of error is sustained.

III

{¶ 16} The State's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and the cause is Remanded to the trial court for reevaluation of Perkins's motion to dismiss, after taking into consideration all four of the *Barker* factors.

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DONOVAN, P.J., and GRADY, J., concur.

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