

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DONALD A. OSTERLAND

Defendant-Appellant

: JUDGES:

:  
: Hon. William B. Hoffman, P.J.  
: Hon. Sheila G. Farmer, J.  
: Hon. Patricia A. Delaney, J.

: Case No. 08-CA-4

: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Ashland Municipal Court  
Case No. 2007-TRC-740

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

February 20, 2009

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant Donald A. Osterland appeals his conviction for one count of operating a vehicle under the influence of alcohol.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On November 6, 2006, Appellant was arrested for operating a motor vehicle while under the influence of alcohol. He was transported to the Ashland County jail. The case was forwarded to the Ashland County Prosecutor on November 7, 2006, but no charges were filed against Appellant at that time.

{¶3} Appellant was released from the Ashland County Jail on November 8, 2006, and transported to the Richland County Jail, where he was held until December 12, 2006. He was released from Richland County and transported to the Huron County Jail, where he was incarcerated until December 21, 2006.

{¶4} On February 2, 2007, the Ohio State Highway Patrol was able to serve Appellant with the ticket from the November 6, 2006, Ashland County incident. The ticket was then filed with the Clerk's office on February 5, 2007. Appellant requested that his arraignment be continued from February 6, 2007, to February 13, 2007. The court granted the continuance and on February 13, 2007, Appellant failed to show for his arraignment and a warrant was ordered. The warrant was then issued on April 10, 2007.

{¶5} Appellant was arrested on the warrant on September 7, 2007, where he was held until September 10, 2007. He was released on his own recognizance on September 10, 2007. He then filed a motion to dismiss his case on speedy trial grounds on October 18, 2007. The trial court issued a written decision denying that motion on

January 22, 2008. Appellant then pled no contest to the OVI charge on February 21, 2008.

{¶6} Appellant raises one Assignment of Error:

{¶7} “I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT’S MOTION TO DISMISS AND IN REQUIRING DEFENDANT-APPELLANT TO FACE CHARGES MONTHS OUTSIDE OF APPLICABLE SPEEDY TRIAL PARAMETERS.”

I.

{¶8} In Appellant’s sole assignment of error, he argues that the trial court erred in denying his motion to dismiss on speedy trial grounds. Specifically, Appellant claims that speedy trial time began to run on November 6, 2006, when he was originally arrested on the OVI charge, and that time expired before he was even arraigned on that charge. We disagree.

{¶9} Appellant’s arrest in and of itself does not trigger the speedy trial clock. “[I]t intimates an arrest that ‘is the beginning of continuing restraints on defendant’s liberty imposed in connection with the formal charge on which defendant is eventually tried.’ *United State v. Stead*, (C.A.8, 1984), 745 F.2d 1170, 1172.

{¶10} The right to a speedy trial as set forth in the Ohio Constitution, Article I, Section 10, states “In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf,

and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed \* \* \*.”

{¶11} Revised Code 2945.71 codifies a defendant's right to a speedy trial and provides the time within which a hearing or trial must be held for specific offenses. In general, subsection (A) addresses minor misdemeanors, subsection (B) addresses misdemeanors other than minor misdemeanors, subsection (C) addresses felonies, and subsection (D) addresses cases involving both misdemeanors and felonies. Subsection (B), which applies to Appellant in the present case, requires a State to bring the defendant to trial within 90 days after the person's arrest for *pending* charges.<sup>1</sup>

{¶12} The Ohio Supreme Court has recently held, “a charge is not pending for purposes of calculating speedy-trial time pursuant to R.C. 2945.71(C) until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance.” *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, 859 N.E.2d 532, at ¶1.

{¶13} In *Azbell*, the defendant was originally arrested at a pharmacy on May 30, 2003, for deception to obtain dangerous drugs. Officers took Azbell to the police station, where police provided her with *Miranda* warnings, gave her an opportunity to make a statement, and then photographed, fingerprinted, and released her. No charges were filed at that time, and Azbell was not indicted until April, 2004. Azbell was arrested on

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<sup>1</sup> We do not find *State v. Dotson*, 4th Dist. No. 99CA03, cited by Appellant, to be persuasive. The time period questioned in *Dotson* was after a formal complaint had been filed against the defendant and the parties were disputing whether a continuance should be charged against the defendant or the State. Such is not the case here, as Appellant is contesting time prior to being officially charged, not during the pendency of the case after charges were filed..

April 16, 2004, and was served with an indictment charging her with illegal possession of drug documents and deception to obtain a dangerous drug.

{¶14} Azbell filed a motion to dismiss, claiming that speedy trial time began to run in 2003 when she was initially arrested. The Supreme Court rejected this claim, finding that “it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *Azbell*, supra, at ¶11, quoting *United States v. Marion* (1971), 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468. “[A] literal reading of the [Sixth] Amendment suggests that this right attaches only when a formal criminal charge is instituted and a criminal prosecution begins.” *United States v. MacDonald* (1982), 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696.<sup>2</sup>

{¶15} Although Azbell was arrested in May, 2003, the Court determined that she was not “held to answer” because she was immediately released after being photographed and fingerprinted at the police station. “At the time of her arrest, she was not charged with any offense. Thus, she was never subject to ‘actual restraints imposed by arrest and holding to answer a criminal charge.’” *Azbell*, supra, at ¶20.

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<sup>2</sup> See also *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 402 N.E.2d 530, wherein the Court held that the speedy-trial statute was tolled after a misdemeanor charge was nolle until the felony indictment, based upon the same conduct, was issued. Specifically, the court stated, “After the Government’s dismissal of the complaint against him appellant \* \* \* was no longer under any of the restraints associated with arrest and the pendency of criminal charges against him. He was free to come and go as he pleased. He was not subject to public obloquy, disruption of his employment or more stress than any citizen who might be under investigation but not charged with a crime. Unless and until a formal criminal charge was filed against him, neither he nor the public generally could have any legitimate interest in the prompt processing of a nonexistent case against him.” (internal citations omitted); see also *Westlake v. Cougill* (1978), 56 Ohio St.2d 230, 234, 383 N.E.2d 599, where the Supreme Court held that the speedy-trial statute was tolled during the time between a nolle prosequi of a misdemeanor charge and the service of summons of the second filing of a misdemeanor charge arising out of the same conduct, since no charge was pending against the defendant during that period.

{¶16} Based on the Supreme Court's ruling in *Azbell*, Appellant's argument does not hold, as Appellant was not served with the ticket until February 2, 2007, and the ticket was not filed, thus instituting charges, until February 5, 2007. Therefore, the speedy trial clock did not begin to run until February 5, 2007.<sup>3</sup>

{¶17} From February 5, 2007, until Appellant's February 13, 2007 arraignment date, eight days are counted against the State. On February 13, 2007, Appellant failed to appear for court and a warrant was issued for his arrest. He was not arrested until September 7, 2007, and he was held in jail for three days. He was released from jail on his own recognizance on September 10, 2007. Accordingly, nine days are counted against the State for that period of time, because "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." See R.C. 2945.71(E).

{¶18} Between September 10, 2007, and October 18, 2007, when Appellant filed his motion to dismiss, 38 days elapsed and that time is counted against the State. Once Appellant filed a motion to dismiss, speedy trial time is tolled until the court rules on that motion. R.C. 2945.72(E). The trial court ruled on Appellant's motion on January 22, 2008. Appellant entered a no contest plea to the charge of OVI on February 22, 2008. Accordingly, 31 days were counted against the State for that period of time.

{¶19} Totaling the time counted against the State for speedy trial purposes, a total of 86 days had run of the 90 days in which the State was required to try Appellant. Based on this court's calculations, the trial court properly denied Appellant's motion to dismiss.

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<sup>3</sup> Even if we begin counting time on February 2, 2007, Appellant's argument still fails as the state would still be within the 90 day time period proscribed by R.C. 2945.71.

{¶20} For the foregoing reasons, we overrule Appellant's assignment of error.

The judgment of the Ashland Municipal Court is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON SHEILA G. FARMER

PAD:kgb

[Cite as *State v. Osterland*, 2009-Ohio-800.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONALD A. OSTERLAND	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-4
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland Municipal Court is affirmed. Costs assessed to appellant.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER