

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-232
DOROTHY COLON	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2009CR0550

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 24, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Appellant, Dorothy Colon, appeals the August 17, 2009 Judgment Entry of the Stark County Court of Common Pleas that overruled her motion to dismiss for the state's failure to comply with her speedy trial rights as guaranteed by R.C. 2941.401.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 9, 2008, appellant used the identity of another individual as her own and without that person's consent to secure a loan. As a result, appellant was charged with identity fraud and forgery.¹

{¶3} Proceedings against appellant began on October 31, 2008 when a complaint was filed and a warrant issued in the Massillon Municipal Court. On January 30, 2009, appellant began serving a two-year prison term on an unrelated case. On February 6, 2009, appellant submitted a request for final disposition and a notice of availability pursuant to R.C. 2941.401 concerning the instant case with the warden at the Ohio Reformatory for Women. The notice of availability was filed in the Massillon Municipal court on February 17, 2009.

{¶4} On April 13, 2009, a direct indictment was filed in the common pleas court and the complaint in Massillon Municipal Court was dismissed.

{¶5} Appellant pled not guilty to the charges and trial was set for August 10, 2009. Appellant filed a request for discovery on April 28, 2009. The state provided a response on April 30, 2009 and, on the same date, requested reciprocal discovery from appellant. Appellant did not respond to the state's request for discovery.

¹ A Statement of the Facts underlying Appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein.

{¶6} On August 6, 2009, appellant filed a Motion to Dismiss. The state filed a response on August 7, 2009, and a hearing was held on August 10, 2009. The Court denied appellant's Motion in an entry filed August 17, 2009. In that Judgment Entry, the trial court concluded that: 1) appellant had failed to comply with the state's request for discovery; 2) the tolling provisions of R.C. 2945.72 apply to R.C. 2941.401, and 3) appellant's failure to respond to the state's request for discovery constituted neglect and tolled time pursuant to R.C. 2945.72(D).

{¶7} On August 10, 2009, appellant entered a plea of no contest and was sentenced to a nine (9) month prison term. Because one of the counts in the indictment is a felony of the third degree, the Court held a re-sentencing hearing at which the sentence was modified to a one (1) year prison term with judicial release after nine months.

{¶8} Appellant now appeals, assigning as error:

{¶9} "I. THE TRIAL COURT ERRED BY NOT GRANTING THE APPELLANT'S MOTION TO DISMISS BASED UPON THE STATE'S FAILURE TO TIMELY COMPLY WITH HER REQUEST FOR THE EARLY DISPOSITION OF THIS UNTRIED INDICTMENT."

I.

{¶10} In her sole assignment of error, appellant argues that the trial court erred when it found that the tolling provisions of R.C. 2945.72 are applicable to R.C. 2941.401.

{¶11} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin*, Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we

must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a *de novo* standard of review and thus freely review the trial court's application of the law to the facts. *Id.*

{¶12} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

{¶13} R.C. 2941.401 governs the speedy trial rights of an imprisoned defendant, and it reads, in pertinent part,

{¶14} "When a person has entered upon a term of imprisonment in a correctional institution of this state, and * * * there is pending in this state any untried indictment * * * against the prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court * * * written notice of the place of his imprisonment and a request for a final disposition to be made of the matter * * *. The request of the prisoner shall be accompanied by a certificate of the warden or superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time served and remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the adult parole authority relating to the prisoner.

{¶15} "The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall

promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.

{¶16} * * *

{¶17} "If the action is not brought to trial within the time provided * * * no court any longer has jurisdiction thereof, the indictment * * * is void, and the court shall enter an order dismissing the action with prejudice."

{¶18} The Ohio Supreme Court has held that, pursuant to R.C. 2941.401, the initial duty is placed on the defendant to notify the prosecutor and the court of his place of incarceration and to request final disposition of outstanding charges. *State v. Hairston*, 101 Ohio St.3d 308, 804 N.E.2d 471, 2004-Ohio-969. "In its plainest language, R.C. 2941.401 grants an incarcerated defendant a chance to have all pending charges resolved in a timely manner, thereby preventing the state from delaying prosecution until after the defendant has been released from his prison term." *Id.* at 311, 804 N.E.2d 471.

{¶19} In the case at bar, the state's argument concerning R.C. 2941.401 focuses only on the section that states the inmate must cause the notice to be delivered to " * * * the prosecuting attorney and the appropriate court in which the matter is pending." Accordingly, the state contends that the 180-day clock begins to run on the date the inmate's notice is filed with the clerk of courts. However, the statute itself specifically states what the inmate is required to do to start the 180-day clock running. *State v. Gill*, Cuyahoga App. No. 82742, 2004-Ohio-1245 at ¶ 14.

{¶20} In *Gill*, the Eight District Court of Appeals noted,

{¶21} “Where an inmate makes an application under R.C. 2941.401, strict compliance by the inmate with the notice and information requirements in the statute are necessary in order for the inmate to take advantage of the subsequent burden placed on the warden and hence the state. If an inmate provides satisfactory notice and request for disposition, using the procedure under R.C. 2941.401, the statute makes clear what the inmate and warden must do:

{¶22} “The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.’

{¶23} “This language does not mean the inmate must personally insure the delivery of the documents to both the appropriate court and prosecutor, an unlikely task for a jailed inmate. Rather, the inmate must properly complete and forward all necessary information and documents to the warden for processing as prescribed by the statute. Where the inmate forwards incomplete, inaccurate, misleading or erroneous information, any subsequent errors by the warden or superintendent will be imputed to the inmate. Where, however, as here, the evidence is that the inmate fully complied with the statutory requirements of R.C. 2941.401, by including all the proper information, the error cannot be imputed to the inmate.” *State v. Gill*, Cuyahoga App. No. 82742, 2004-Ohio-1245 at ¶ 16-17. I

{¶24} In the case at bar, appellant submitted a correct and complete request for final disposition of the above-captioned matter to the warden on February 6, 2009. In addition, on February 6, 2009 appellant requested the Massillon Municipal Court be

notified of her request for disposition. The request was filed with the clerk of courts on February 17, 2009.

{¶25} In *State v. Drowell* (1991), 61 Ohio Misc.2d 623, 581 N.E.2d 1183, the inmate, on his own, did actually serve both the prosecutor and the court, but the warden never forwarded the appropriate certificate. The court held: “* * * the failure of the warden of the institution having custody of defendant to forward the appropriate certificate when defendant filed the subject request is not grounds to deny said motion.” *Id.* (concluding an official's failure to send the certificate of inmate status should not vitiate an inmate's right to a speedy trial once requested, citing *State v. Ferguson* [1987], 41 Ohio App.3d 306, 311, 535 N.E.2d 708). Once the inmate strictly complies with the requirements of R.C. 2941.401, the failure of the warden or superintendent cannot be attributed to the inmate. *Gill*, supra at ¶25. The purpose of R.C. 2941.401 is to prevent the State of Ohio from delaying prosecution until after a defendant has been released from his or her prison term. See *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471 at paragraph 25. If the State were permitted to delay prosecution until after release, a defendant who, if he or she was prosecuted while still in prison on another offense might have received a concurrent sentence, would not have such an opportunity.”

{¶26} Appellant's written notice and request was sent to the warden on February 6, 2009. Upon appellant doing so, R.C. 2941.401 requires the warden to then promptly forward it with the certificate to the appropriate prosecuting attorney and court. We find the act of giving or sending the written notice and request for disposition to the warden satisfies the “causes to be delivered” requirement of the statute. To rule otherwise

circumvents the remedy afforded an inmate under R.C. 2941.401, by allowing the warden to ignore or delay an inmate's request for final disposition. The right of a defendant to a speedy trial should not be excused by the failure of a state agent to perform his statutory duty.

{¶27} Appellant next contends that time is to be tolled under R.C. 2941.401 only in specific instances where a continuance is granted in open court and not for appellant's motions to dismiss or failure to respond to the state's request for discovery. However, the factors set forth in R.C. 2945.72 for tolling time are applicable to R.C. 2941.401.

{¶28} Although R.C. 2945.72 does not specifically state that the tolling provisions therein are applicable to R.C. 2941.401, the Fourth District Court of Appeals has reasoned, and we agree, that "R.C. 2941.401 states, in pertinent part, 'except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance.' The General Assembly, in enacting R.C. 2945.72, has legislated what are reasonable continuances. We therefore conclude that the factors set forth in R.C. 2945.72 are applicable to R.C. 2941.401." *State v. Nero* (Apr. 4, 1990), Athens App. No. 1392, at fn. 1; *State v. Smith*, 140 Ohio App.3d 81, 746 N.E.2d 678, 2000-Ohio-1777 at fn. 1.

{¶29} Indeed, In *State v. Skorvanek*, Lorain App. No. 08CA009400, 2010-Ohio-1079 the Court noted,

{¶30} "Numerous Ohio appellate districts have held that 'the tolling provisions of R.C. 2945.72 apply to the 180-day speedy trial time limit of R.C. 2941.401.' *Murphy* at ¶ 15, citing *State v. Shepherd*, 11th Dist. No. 2003-A-0028, 2006-Ohio-4315, at ¶ 50;

State v. Ray, 2d Dist. No.2004-CA-64, 2005-Ohio-2771, at ¶ 30; *State v. Roberts a.k.a. Brown*, 6th Dist. No. WD-04-028, 2004-Ohio-5509, at ¶ 11; *State v. Nero* (Apr. 4, 1990), 4th Dist. No. 1392. Without making that express holding, other courts ... have recognized that a criminal defendant's actions may toll or extend the 180-day time limit imposed by R.C. 2941.401. See, e.g., *State v. McGowan* (June 21, 2000), 9th Dist. No. 19989 (agreeing with the State's assertion that certain time must be charged to the defendant for purposes of calculating time under R.C. 2941.401 based on the defendant's having moved for a continuance)." *Id.* at ¶ 21.

{¶31} In the case at bar, appellant filed a request for discovery on April 28, 2009. The state provided the discovery on April 30, 2009 and on the same date, requested reciprocal discovery. Appellant never responded to the state's request for discovery.

{¶32} In *State v. Palmer* (2007), 112 Ohio St.3d 457, 860 N.E.2d 1011, the Ohio Supreme Court considered a criminal defendant's failure to respond to discovery to be the kind of neglect contemplated by R.C. 2945.72(D) that tolls the speedy trial time. In *Palmer*, the defendant responded to the State's discovery request sixty (60) days after it was made by replying that he had no discoverable information to provide. On review, the Supreme Court stated:

{¶33} "That response clearly could have been prepared and served much earlier than 60 days after it was requested, and it was neglect on the part of Palmer not to have done so. The trial court therefore did not abuse its discretion in tolling the running of speedy trial time after 30 days had passed from service of the State's request." *Palmer* at 462, 860 N.E.2d 1011.

{¶34} The *Palmer* Court held that the failure of a criminal defendant to respond to the State's request for reciprocal discovery within a reasonable time constitutes neglect that tolls the running of speedy trial time pursuant to R.C. 2945.72(D) Id. at paragraph one of the syllabus. The court further held:

{¶35} "The trial court should determine the date by which a defendant should reasonably have responded to a reciprocal discovery request based on the totality of facts and circumstances of the case, including the time established for response by local rule, if applicable." Id. at paragraph 3 of the syllabus.

{¶36} Shortly after *Palmer* was decided by the Ohio Supreme Court, this court considered a case where the appellant contended he had no duty to respond to the state's discovery demand based on the wording thereof, and he had essentially responded sub silentio. This Court held, "As we are not fact-finders, and given that *Palmer* had not yet been decided at the time of the relevant proceedings sub judice, we find that the proper remedy in this matter is to remand the case to the trial court for a review on the record of whether appellant's 'silent' response to the State's discovery request was reasonable under the local rules and practices of the Mount Vernon Municipal Court." *Moore*, supra, at ¶ 21. See also *State v. Hart*, Columbiana No. 06-CO-62, 2007-Ohio-3404, ¶ 18 ("[i]n accordance with *Palmer*, we remand the case to the trial court to determine how much of that 97 day time period should be tolled against Hart.")

{¶37} In the case at bar, appellant's notice was filed February 6, 2009. Thus, the one hundred eighty (180) day trial by date would be August 5, 2009².

² February 22 days + March 31 days + April 30 days + May 31 days + June 30 days + July 31 days + August 5 days = 180 days.

{¶38} The state requested reciprocal discovery from appellant on April 30, 2009. Thus, eighty-three (83) of the one hundred eighty (180) days had elapsed prior to the tolling event. Appellant filed a motion to dismiss on August 6, 2009. She entered her plea on August 10, 2009.

{¶39} In *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 461 N.E.2d 892 the Ohio Supreme Court noted with respect to R.C.2945.72(E): "[i]t is evident from a reading of the statute that a motion to dismiss acts to toll the time in which a defendant must be brought to trial." *Id.* at 67, 461 N.E.2d 892; *State v. Neal*, Delaware App. No. 2005CAA02006, 2005-Ohio-6699 at ¶ 47. Accordingly, the time between August 6, 2009 and the trial court's overruling of the appellant's motions on August 10, 2009 is not included for speedy trial purposes.³ In *Bickerstaff*, *supra*, the Court found no prejudice from a five-month delay between the filing of the Motion to Dismiss and the trial court's ruling upon the motion. *Id.*

{¶40} Appellant agrees that she was required to be brought to trial on or before August 5, 2009. [Appellant's Brief at 5]. As the time between August 6, 2009 and August 10, 2009 would be tolled due to the appellant's filing of a motion to dismiss, her entry of the plea on August 10, 2009 would be, at most, one day beyond the 180-day period. The trial court in appellant's case determined the date by which she should reasonably have responded to the state's reciprocal discovery request based on the totality of facts and circumstances of the case was seven (7) days. (T. March 10, 2009 at 11). Thus, appellant's time for trial was tolled for seven days and would be extended to August 12, 2009. Appellant entered her plea on August 10, 2009.

³ We note that the trial court orally overruled appellant's motion to dismiss after the hearing on August 10, 2009; however, the trial court's Judgment Entry overruling the motion was not filed until August 17, 2009. Appellant's plea was entered on August 10, 2009.

{¶41} Accordingly, we find no abuse of discretion in the trial court's overruling appellant's motion to dismiss, as appellant's right to a speedy trial was not violated.

{¶42} Appellant's sole assignment of error is overruled.

{¶43} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas Ohio is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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