

[Cite as *State v. Gonzalez*, 2009-Ohio-3236.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 08AP-716
v.	:	(C.P.C. No. 06CR11-8328)
	:	
Francisco Gonzalez,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a judgment entry entered by the Franklin County Court of Common Pleas dismissing criminal charges against defendant-appellee, Francisco Gonzalez, due to the state's violation of Gonzalez's statutory right to a speedy trial. For the following reasons, we reverse that judgment and remand the matter for further proceedings.

{¶2} On November 13, 2005, Gonzalez was served with a traffic ticket for failure to control his car, a violation of Columbus City Code 2131.33(A), and for operating a

vehicle under the influence ("OVI"), a violation of Columbus City Code 2133.01(A)(1), both misdemeanor charges (hereinafter referred to as the "first municipal court case"). The charges arose out of an automobile accident in which Gonzalez apparently drove his car into another car. The ticket summoned him to appear before the Franklin County Municipal Court on November 18, 2005. On that day, Gonzalez entered a no contest plea to one count of failure to control. The trial court dismissed the OVI charge. The trial court scheduled the matter for sentencing on January 10, 2006.

{¶3} On January 30, 2006, Gonzalez was served with another ticket arising out of the same traffic offenses. This ticket charged him with one count of OVI, alleging that appellant had a prohibited blood alcohol concentration of .20 (hereinafter referred to as the "second municipal court case"). The charge was also a misdemeanor offense. The ticket summoned him to appear before the Franklin County Municipal Court on February 21, 2006. On that day, Gonzalez entered a not guilty plea to the OVI charge. On February 24, 2006, Gonzalez filed a demand for discovery.

{¶4} On July 18, 2006, the municipal court granted Gonzalez's motion to withdraw his plea in the first municipal court case¹ and consolidated the charges into the second municipal court case. The court scheduled the case for a pretrial on September 19, 2006. That pretrial was continued until October 25, 2006, and then continued again, at Gonzalez's request, until November 14, 2006. On that day, the municipal court dismissed the second municipal court case because a Franklin County Grand Jury indicted Gonzalez on November 7, 2006 for felony and misdemeanor

¹ His sentencing in the first municipal court case had been continued a number of times.

offenses arising from the same November 13, 2005 traffic incident ("common pleas court case").

{¶5} On November 20, 2006, Gonzalez appeared in the common pleas court case and entered a not guilty plea to the charges. He was released on recognizance the same day and spent no time in jail. On December 1, 2006, Gonzalez filed a demand for discovery in the common pleas court case. The state responded to Gonzalez's demand for discovery on December 29, 2006 and demanded reciprocal discovery from Gonzalez on the same day. On January 11, 2007, Gonzalez requested a continuance of the jury trial in the matter. After a number of additional continuances either requested or agreed to by Gonzalez, Gonzalez filed a motion to dismiss the charges pursuant to R.C. 2945.71 on September 25, 2007. Gonzalez argued that the charges in the common pleas court case should be dismissed because the state violated his statutory right to a speedy trial by failing to timely bring him to trial. The trial court agreed and dismissed the charges.

{¶6} The state appeals and assigns the following error:

THE TRIAL COURT ERRED IN DISMISSING THE
INDICTMENT ON STATUTORY SPEEDY TRIAL
GROUND.

{¶7} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I, Ohio Constitution. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶32. Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 55; *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶10. The constitutional guarantee of a speedy trial was originally considered necessary to prevent oppressive pretrial

incarceration, to minimize the anxiety and concern accompanying public accusation, and to limit the possibility that a long delay will impair the ability of an accused to defend himself. *State v. Adams* (1989), 43 Ohio St.3d 67, 68; *Brecksville*.

{¶8} The speedy trial statutory provisions are mandatory and require strict compliance by prosecutors as well as strict enforcement by the courts. *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶16. If the trial court and prosecution fail to bring a defendant to trial within the time required, the trial court shall discharge the defendant. *Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, ¶23.

{¶9} The proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶32, citing *State v. DePue* (1994), 96 Ohio App.3d 513, 516. In the common pleas court case, Gonzalez faced both felony and misdemeanor charges that arose out of the same act or transaction. As a result, R.C. 2945.71(C)(2) required the state to bring him to trial within 270 days from arrest. See R.C. 2945.71(D).

{¶10} To properly count and charge the days involved in this case, we must analyze each of the three cases to determine how much time passed for speedy trial purposes. Because the state later obtained a felony indictment based upon the same conduct that previously gave rise to misdemeanor charges against Gonzalez, we are required to deduct the speedy trial time expended in the previously nolleed misdemeanor charges from the 270-day period imposed by R.C. 2945.71(C). *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 11; *State v. Broughton* (1991), 62 Ohio St.3d 253, 261.

{¶11} There are also two other important concepts that direct how we are to charge the days in this case: tolling and waiver. Tolling and waiver are distinct concepts that affect speedy trial calculations in different ways. *Blackburn* at ¶16.

{¶12} A waiver is a voluntary, intentional relinquishment of a known right. *Id.* at ¶17. Thus, a defendant may waive his right to a speedy trial, and those days in which a defendant waives his right would not count toward the state's deadline. Tolling, on the other hand, occurs by operation of R.C. 2945.72 when certain circumstances occur. *Id.* at ¶17. A defendant does not have to agree to the tolling of time; the tolling occurs by operation of the statute.

{¶13} The distinction between tolling and waiver is significant because the Supreme Court of Ohio has determined that "[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." *Adams*, syllabus. The court reasoned that an accused could not knowingly and intelligently relinquish speedy trial rights for charges not yet brought by the state, because the accused could not know how his decision in the first case could affect a subsequent case. *Id.* at 69.

{¶14} The Supreme Court of Ohio, however, does not treat time that is tolled in the same manner. Time that has been tolled in a previous case by operation of R.C. 2945.72 is also tolled in a subsequent case involving different charges based on the same underlying facts. *Blackburn* at ¶23. The *Blackburn* court noted that the justification for its decision in *Adams* did not apply to statutory tolling, because the tolling occurs by operation of statute and does not require a knowing and voluntary waiver. *Id.* at ¶19.

{¶15} Therefore, Gonzalez's waiver of speedy time rights in the two municipal court cases would not apply to his speedy trial rights in the subsequent common pleas court case. On the other hand, because the charges in the common pleas court case arose out of the same underlying facts, time that was tolled for speedy trial purposes in the municipal court cases would apply to his speedy trial rights in the common pleas court case.

{¶16} With these concepts in mind, we first analyze the time expended in the municipal court cases.

{¶17} In the first municipal court case, Gonzalez was served with his summons for the misdemeanor charges on November 13, 2005. Normally, when a defendant faces misdemeanor charges, the speedy trial clock starts to run upon the defendant's arrest or the service of summons. R.C. 2945.71(B). Because Gonzalez was served with his summons on November 13, 2005, the clock would normally start on that day.

{¶18} The state contends, however, that the clock should not start on that day because Gonzalez's indictment in the common pleas court case charged him with both felonies and misdemeanors. The state argues that pursuant to R.C. 2945.71(D), when a defendant has pending charges that are a combination of felonies and misdemeanors, all of which arose out of the same act or transaction, the state must bring the defendant to trial within 270 days after the defendant's arrest. The state contends that because Gonzalez was not arrested, but only received a summons in the first municipal court case, the clock did not begin to run until he was arraigned and released on his own recognizance in the common pleas court case. We disagree.

{¶19} R.C. 2945.71(D) requires a defendant who is facing a combination of felony and misdemeanor charges to be brought to trial within 270 days of arrest. This statutory provision addresses the pending charges in the common pleas court case but does not address how to count "the residue" of days remaining from previous cases arising from the same set of facts. The state's interpretation of these statutes would always disregard days elapsed in previous misdemeanor cases, where there was likely no arrest, in calculating speedy trial limitations in a subsequent case involving both misdemeanor and felony charges arising from the same set of facts. Given the purposes behind a defendant's right to a speedy trial, and the strict construction of these statutes against the state,² we decline to interpret these statutes in this manner. In determining the residue of days applicable in a subsequent case involving the same underlying facts, we must count the number of days expended for speedy trial purposes in previous cases based upon the statutory requirements applicable to those cases. Accordingly, Gonzalez's speedy trial clock began to run on November 13, 2005, when he was served with his summons for the misdemeanor offenses. R.C. 2945.71(B).

{¶20} Five days later, on November 18, 2005, Gonzalez entered a no contest plea to one charge of failure to control. The trial court dismissed the OVI charge and scheduled the matter for sentencing. Pursuant to R.C. 2945.72(E), the speedy trial time is tolled by "[a]ny period of delay necessitated by reason of a plea in bar or abatement * * * made or instituted by the accused." Gonzalez's no contest plea stopped the speedy trial clock and tolled it for the remainder of the first municipal court case, because the trial court subsequently allowed Gonzalez to withdraw his plea and consolidated that charge

² *Brecksville* at 57.

in the second municipal court case. Therefore, a total of five days of speedy trial time was expended in the first municipal court case.

{¶21} In the second municipal court case, Gonzalez received his summons on January 30, 2006. He appeared before the court and entered a not guilty plea on February 21, 2006. Therefore, these 22 days count toward the state's 270 days for speedy trial purposes. R.C. 2945.71(B). Three days after his plea, on February 24, 2006, Gonzalez filed his request for discovery. These three days also count toward the state's 270 days.³

{¶22} A defendant's demand for discovery tolls the speedy trial time pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. However, the discovery request tolls the speedy trial period only for the time it would reasonably take the state to respond to that request. *Dublin* at ¶39.

{¶23} Here, the record does not indicate that the state ever responded to Gonzalez's demand. Therefore, speedy trial time is tolled for a reasonable amount of time. Cf. *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-4342 (tolling permitted for only a reasonable period where state's delay in responding to defendant's discovery requests deemed unreasonable).

{¶24} In this case, the trial court did not determine what would have been a reasonable amount of time for the state to have responded to Gonzalez's demand. The state, relying on *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, argues that it is entitled to a tolling period of 30 days as a reasonable time to respond to Gonzalez's

³ While the state contends Gonzalez conceded that these three days should not count, our review is to count days and charge them to each party as required by law. Therefore, any concession by Gonzalez does not impact our review of this matter. Further, the state does not provide any other reason why these three days should not count against it.

demand. However, the Supreme Court of Ohio in *Palmer* did not rule that 30 days is the only reasonable time period for a response to a demand for discovery. It concluded that the trial court did not abuse its discretion by determining that 30 days was a reasonable time. *Id.* at ¶23.

{¶25} This court reviews decisions; we are not a fact finder. Therefore, we will not determine, in the first instance, how many days would constitute a reasonable amount of time for the state to have responded to Gonzalez's demand under the facts and circumstances of this case. The trial court must initially make this factual determination. *Id.* at paragraph three of the syllabus (holding that it is the trial court that should determine reasonable amount of time, based on the totality of the circumstances of the case, including the time established for response by local rule). Accordingly, we must remand the matter for the trial court to make this determination. *State v. Hawk*, 5th Dist. No. 08 CA 05, 2009-Ohio-1955, ¶34-35; *State v. Hart*, 7th Dist. No. 06 CO 62, 2007-Ohio-3404, ¶17-18.

{¶26} After Gonzalez's demand, the second municipal court case was continued and rescheduled for a number of reasons until October 25, 2006. The state does not argue that this period should be excluded from the speedy trial count. We agree. Although it appears that Gonzalez waived speedy trial time for at least some of the continuances, those waivers are ineffective in the common pleas court case. *Adams*, *supra*. The exact number of days in this period can only be determined after the trial court determines how many days would constitute a reasonable amount of time for the state to have responded to Gonzalez's demand under the facts and circumstances of this

case. The speedy trial clock would be tolled for that period of time. The remainder of those days, until October 25, 2006, would count against the state's 270 days.

{¶27} The trial scheduled for October 25, 2006 was continued at Gonzalez's request until November 14, 2006. A continuance granted at the defendant's request is a tolling event pursuant to R.C. 2945.72(H). *State v. Craig*, 8th Dist. No. 88039, 2007-Ohio-1834, ¶29. Therefore, these days do not count toward the state's 270 days. On November 14, 2006, the municipal court dismissed the charges against Gonzalez, ending the speedy trial calculations for the second municipal court case.

{¶28} In the common pleas court case, Gonzalez was indicted on November 7, 2006. However, the speedy trial clock did not begin to run until November 20, 2006, at which time Gonzalez appeared before the trial court, entered his not guilty plea, and was released on recognizance. *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, ¶21. Gonzalez filed a demand for discovery on December 1, 2006. The ten days between when Gonzalez entered his not guilty plea and when he demanded discovery count against the state's 270 days.

{¶29} As previously noted, Gonzalez's demand for discovery tolls the speedy trial clock for the time it would reasonably take the state to respond to that request. The state responded on December 29, 2006. Gonzalez does not argue that the state's response time was unreasonable. Therefore, the speedy trial time was tolled until December 29, 2006.

{¶30} On the same day, December 29, 2006, the state demanded reciprocal discovery from Gonzalez. The state contends that its request tolls the speedy trial time because its request for discovery was necessitated by reason of a motion or action made

or instituted by the accused. R.C. 2945.72(E). We disagree. The state's request for reciprocal discovery does not toll the speedy trial time clock. *State v. Feasal*, 12th Dist. No. CA2005-12-034, 2006-Ohio-7039, ¶42; *State v. Borrero*, 8th Dist. No. 82595, 2004-Ohio-4488, ¶41; *State v. Rupp*, 7th Dist. No. 05 MA 166, 2007-Ohio-1561, ¶105; *State v. Hart*, 7th Dist. No. 06 CA 62, 2007-Ohio-3404, ¶14; *State v. Moore*, 5th Dist. No. 06 CA 17, 2007-Ohio-2174, ¶15.

{¶31} The speedy trial time clock ran 13 days from December 29, 2006 until January 11, 2007, when Gonzalez requested a continuance. This event tolled the speedy trial clock. R.C. 2945.72(H). After January 11, 2007, the trial was continued a number of times at the request of or with the agreement of Gonzalez. These continuances also tolled the running of the speedy trial clock. R.C. 2945.72(H).

{¶32} Finally, on September 25, 2007, Gonzalez filed his motion to dismiss the charges based upon the state's failure to timely bring him to trial. The filing of such a motion was also a tolling event. *State v. Elliott*, 10th Dist. No. 03AP-605, 2004-Ohio-2134, ¶18. This motion ended the running of the clock in the common pleas court case because the trial court ultimately granted Gonzalez's motion and dismissed the pending charges.

{¶33} Therefore, a total of 23 days elapsed for purposes of speedy trial time in the common pleas court case.

{¶34} In conclusion, a total of five days of speedy trial time was expended in the first municipal court case and a total of 23 days elapsed for purposes of speedy trial time in the common pleas court case. Because we cannot calculate the number of days that were expended in the second municipal court case, we are unable to resolve the state's

assignment of error. Therefore, the judgment of the Franklin County Court of Common Pleas is reversed, and we remand the matter to the trial court to determine how many days elapsed for purposes of speedy trial time in the second municipal court case in accordance with law and this decision. The trial court shall then proceed accordingly to grant or deny Gonzalez's motion to dismiss.

*Judgment reversed and cause remanded
with instructions*

FRENCH, P.J., and SADLER, J., concur.
