

[Cite as *State v. Anderson*, 2011-Ohio-22.]

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

STATE OF OHIO	:	
	:	Appellate Case Nos. 2009-CA-60
Plaintiff-Appellee	:	2009-CA-61
	:	
v.	:	Trial Court Case Nos. 2009-CR-0044
	:	2009-CR-0327
	:	
LORENZO ANDERSON	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

.....
OPINION

Rendered on the 7th day of January, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Lorenzo Anderson appeals from his conviction and sentence for one count of Failure to Comply and three counts of Possession of Narcotics (crack cocaine, heroin, and powder cocaine). He argues that his statutory right to a speedy trial was violated and that the trial court should have granted his motion to suppress.

{¶ 2} We conclude that Anderson was not denied his right to a speedy trial. We conclude that because Anderson was not searched pursuant to a lawful arrest, the trial court should have granted his motion to suppress. Accordingly, that part of the judgment of the trial court convicting Anderson of Failure to Comply is Affirmed, that part of the judgment convicting him of three counts of Possession of Narcotics is Reversed, and this cause is Remanded for further proceedings.

I

{¶ 3} In January and February, 2008, Springfield police arranged for a confidential informant to make two controlled buys of narcotics from Anderson. In April of 2008, police began a surveillance of Anderson's home. They neither sought nor obtained a warrant for Anderson's arrest, yet he was arrested during a traffic stop, as a result of the two controlled buys that had occurred earlier in the year. Pursuant to that arrest, officers searched Anderson and found both crack and powder cocaine in his pocket. After Anderson admitted that he had additional narcotics in his home, a search warrant was obtained. Officers seized crack cocaine, heroin, and powder cocaine from Anderson's home.

{¶ 4} No charges were filed against Anderson at that time, because he agreed to act as a confidential informant. Anderson cooperated briefly, but then ceased communicating with the officers.

{¶ 5} In January, 2009, using both lights and sirens, officers attempted to conduct a traffic stop of the vehicle that Anderson was driving. He fled at a high rate of speed, running through several stop signs before he was finally stopped.

Anderson was arrested for, and later indicted on, one count of Failure to Comply. Later that month, Anderson was indicted on three counts of Possession of Drugs and two counts of Trafficking in Drugs, for the events that occurred in 2008.

{¶ 6} Anderson filed motions to dismiss all charges, arguing that his statutory right to a speedy trial had been denied. The State responded, and the trial court overruled the motions. Anderson also filed a motion to suppress, which the trial court overruled.

{¶ 7} In June, 2009, Anderson pled no contest to Failure to Comply and to the three counts of Possession; the two counts of Trafficking were dismissed. Anderson was ordered to serve a cumulative sentence of seven years in prison. From his conviction and sentence, Anderson appeals.

II

{¶ 8} Anderson's First Assignment of Error is as follows:

{¶ 9} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HIS MOTION TO DISMISS BASED UPON THE LACK OF A SPEEDY TRIAL WAS DENIED."

{¶ 10} In his First Assignment of Error, Anderson argues that his statutory right to a speedy trial was violated. "A person against whom a charge of felony is pending [s]hall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). Furthermore, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). However, the "'triple-count' provision applies only when the defendant is being held in jail solely on the pending charge. *State v. MacDonald* (1976), 48 Ohio St.2d 66, paragraph one of the syllabus (construing former R.C.

2945.71(D), now (E)). Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to other charges. *Id.*” *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478. ¶7. See, also, *State v. Baker*, 78 Ohio St.3d 108, 1997-Ohio-229, syllabus.

{¶ 11} Anderson was arrested on January 1, 2009. The parties appear to agree that he remained in jail throughout the pendency of his cases, but this conclusion is not definitively supported by the record. For example, on January 21 and April 20, 2009, warrants were issued for Anderson’s arrest, and returns were made, indicating that Anderson was not in jail at least on those dates. Nevertheless, even if we assume that Anderson was in jail throughout the pendency of both of his cases, we conclude that his statutory right to a speedy trial was not violated in either case.

{¶ 12} From his arrest until the State indicted Anderson on the narcotics charges on January 21, 2009, he was being held in jail only on the Failure to Comply charge, and the triple-count provision applied. Thus, for the twenty days from January 1st through January 21st, sixty days are charged against the State in regard to the Failure to Comply charge. However, after the second indictment was issued, the triple-count provision no longer was applicable. *Id.* With the filing of the second indictment, the State had 210 days left in which to bring Anderson to trial for the Failure to Comply charge, and 270 days for the narcotics charges.

{¶ 13} The last ten days of January, the 28 days of February, the 31 days of March, and the first seven days of April (totaling 76 days), prior to defense counsel’s motion to withdraw, count against the State in both cases, leaving 134 days for the Failure to Comply charge to be brought to trial and 194 days for the five narcotics charges. The motion to withdraw was granted on the same day, and new counsel was appointed the following day. As the result of appointing new trial counsel for

Anderson, the trial court was obliged to reschedule his trial, which had been set for the following day. Only nineteen days passed between the appointment of new counsel and counsel's filing of several motions on April 27, 2009, including motions to dismiss the indictments on speedy trial grounds and a motion to suppress. The twenty-day delay occasioned by Anderson's request for new counsel does not count against the State. R.C. 2945.72(C). Furthermore, the motions to dismiss and suppress stop the tolling of speedy trial time against the State. R.C. 2945.72(C).

{¶ 14} Anderson's motions were pending until June 9, 2009, at which time the trial court overruled the motions, and Anderson pled no contest to the three counts of Possession. There were still 194 days remaining as to the narcotics charges at the time of his plea. Ten days later Anderson pled no contest to the Failure to Comply charge. Those ten days count against the State, still leaving 124 days of speedy trial time as to that charge. Therefore, in neither case was Anderson denied his statutory right to a speedy trial.

{¶ 15} Anderson's First Assignment of Error is overruled.

III

{¶ 16} Anderson's Second Assignment of Error is as follows:

{¶ 17} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HIS MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNLAWFUL SEARCH WAS DENIED, BECAUSE THE POLICE OFFICER LACKED A REASONABLE AND ARTICULABLE SUSPICION THAT DEFENDANT MIGHT BE ARMED AND/OR DANGEROUS, AND IT WAS NOT IMMEDIATELY APPARENT TO THE OFFICER THAT THE ITEMS IN HIS SHORTS WERE CONTRABAND."

{¶ 18} In his Second Assignment of Error, Anderson claims that the trial court should have granted his motion to suppress evidence seized in April, 2008, because

the officer exceeded the permissible scope of a pat-down for weapons when he continued to search Anderson even after he had discovered no weapons. The State argues that the narcotics were properly seized incident to Anderson's arrest. An appellate court reviews a trial court's decision on a motion to suppress de novo. *State v. Bing* (1999), 134 Ohio App.3d 444, 448, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911. We conclude that because Anderson was not searched pursuant to a lawful arrest, the trial court should have granted Anderson's motion to suppress.

{¶ 19} The Fourth Amendment to the United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Furthermore, Section 14, Article I of Ohio's State Constitution provides: "The right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing * * * the person * * * to be seized."

{¶ 20} Generally, a warrantless arrest based upon probable cause, which occurs in a public place, does not violate the Fourth Amendment. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶66, citing *United States v. Watson* (1976), 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." R.C. 2935.04.

{¶ 21} A warrantless arrest is permitted when the officer has probable cause to make the arrest and it is impracticable under the circumstances for the officer to have obtained an arrest warrant prior to the defendant's arrest. *State v. Jones*, 183 Ohio App.3d 839, 2009-Ohio-4606, ¶12, citing *State v. Heston* (1972), 29 Ohio St.2d

152, paragraph two of the syllabus, and *State v. Woodards* (1966), 6 Ohio St.2d 14. See, also, *State v. VanNoy*, 188 Ohio App.3d 89, 2010-Ohio-2845, ¶23. While the controlled buys in January and February, 2008 established probable cause to support Anderson's arrest, there were no exigent circumstances that justified officers arresting him in April without first obtaining a warrant. We have previously held that "the passage of several weeks [between the alleged crimes and the arrest make] it virtually impossible to establish the impracticability of obtaining a warrant." *Jones*, at ¶27. It is even less likely that the State can establish that a warrantless arrest is justified when there is a delay of several months between the existence of probable cause and the arrest. *VanNoy*, at ¶27.

{¶ 22} The State bears the burden of proving that it was impracticable to obtain an arrest warrant prior to the defendant's arrest. *VanNoy*, at ¶25, citing *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218. In this case, the State offered no explanation for the lapse of two months from the time of the second controlled buy until Anderson's arrest. Nor did the State prove that it was impracticable to have obtained an arrest warrant during that time. Therefore, Anderson's warrantless arrest was not lawful. Anderson's warrantless arrest not having been lawful, any evidence obtained as a result of that unlawful arrest was tainted and should have been suppressed as "fruit of the poisonous tree." *Wong Sun v. United States* (1963), 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441.

{¶ 23} "The exclusionary rule is a judicially created remedy applied to exclude evidence from the government's case in chief when it has been obtained by police through an illegal search or seizure in violation of the Fourth Amendment. *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. The exclusionary rule applies not only to primary evidence directly obtained by police during an illegal search or seizure but also to 'derivative evidence,' that is, evidence discovered from

knowledge gained by the police as a result of the illegal search or seizure. *Silverthorne Lumber Co. v. U.S.* (1920), 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed.2d 319. Derivative evidence is known as ‘fruit of the poisonous tree.’ *Nardone v. U.S.* (1939), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307.” *State v. Kelly* (Sept. 24, 1993), Clark App. No. 3007.

{¶ 24} The narcotics found in Anderson’s pocket should have been suppressed because they were found as a direct result of his unlawful arrest. Similarly, the incriminating statements regarding the presence of additional narcotics in his home were made as a direct result of the unlawful arrest and should have been suppressed. See, e.g., *State v. Cooper*, Montgomery App. No. 20845, 2005-Ohio-5781, ¶28, citing *New York v. Harris* (1990), 495 U.S. 14, 19, 110 S.Ct. 1640, 109 L.Ed.2d 13. Finally, the search warrant for Anderson’s home having been issued primarily based upon the illegally seized narcotics from Anderson’s pocket and his incriminating statements resulting therefrom, the narcotics found in his home also should have been suppressed.

{¶ 25} Anderson’s Second Assignment of Error is sustained. Because the evidence that should have been suppressed is immaterial to the Failure to Comply charge, our sustaining this assignment of error only affects Anderson’s Possession of Narcotics charges.

IV

{¶ 26} Anderson’s Second Assignment of Error having been sustained, and his First Assignment of Error having been overruled, that part of the judgment of the trial court convicting him of Failure to Comply is Affirmed; that part of the judgment convicting him of three counts of Possession of Narcotics is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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

Copies mailed to:

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