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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Wood County.

STATE of Ohio, Appellant,

v.

Richard LEWIS, Appellee.

No. WD-98-014.

Aug. 14, 1998.

Alan R. Mayberry, Prosecuting Attorney, and Gary D. Bishop, for appellant.

Konrad Kuczak, for appellee.

OPINION AND JUDGMENT ENTRY

RESNICK, J.

*I This case is before the court as an accelerated appeal from a judgment of the Wood County Court of Common Pleas, which dismissed one count of vehicular homicide against appellee on speedy trial grounds. Appellant, the state of Ohio, raises the following sole assignment of error:

"II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS FOR AN ALLEGED SPEEDY TRIAL VIOLATION."

On July 9, 1997, appellee, who was employed as a truck driver, was involved in an accident with another vehicle. The driver of the other vehicle was killed. On August 7, 1997, appellee was indicted on one count of vehicular homicide, in violation of R.C. 2903.07, which is generally a first degree misdemeanor unless certain circumstances exist. The indictment, however, stated the offense was a felony of the third degree. On September 8, 1997, at the time of arraignment, the indictment was amended to accurately reflect an offense of vehicular homicide, a first degree misdemeanor instead of a third degree felony. Appellant was served his summons at arraignment. The trial court scheduled a pretrial conference for September 21, 1997. At the pretrial conference, the court scheduled a trial date for October 7, 1997. However, appellee filed a motion to suppress on September 29, 1997. The court granted that motion on November 5, 1997.

The trial court held a second pretrial conference on December 9, 1997 to schedule a new trial date. Defendant, his attorney, and the prosecuting attorney were present. No

transcript of the pretrial proceedings was submitted for our review. At that pretrial, counsel for appellee indicated that he had a criminal trial pending in federal court and requested that appellee's trial be scheduled to avoid a conflict. The record does not reveal the dates set for the trial in federal court.

Appellant, apparently believing the offense was a felony as originally indicted instead of a misdemeanor as amended, incorrectly represented that the speedy trial date was June 14, 1998. However, the time for a speedy trial for a misdemeanor expired January 14, 1998. [FNI] The trial court scheduled appellee's trial for February 24, 1998, with an alternate trial date of April 21, 1998. The trial court's judgment entry, entered December 19, 1997, reflected the orders made during the pretrial conference:

FNI. R.C. 2945.71(C)(2) requires a person accused of a felony to be brought to trial within two hundred seventy days after arrest. R.C. 2945.71(B)(3) requires that a person accused of a first or second degree misdemeanor should be brought to trial within ninety days after arrest or service of summons. As a misdemeanor, speedy trial limits would be computed as follows, beginning the day after service of summons:

September 9-29, 1997 20 days
September 29, 1997 - November 5, 1997 while suppression motion pending 0 days
charged to defendant
November 6, 1997 - January 14, 1998 70 days

90 days

"After discussion the following dates were agreed to and are hereby ORDERED and Defendant is ordered to be present on the dates where hearing times are indicated:
*** Trial Date (2.5 days) *** February 24, 25, and 26, 1998 ***."

On January 27, 1998, appellee filed a motion to dismiss on the basis that the state had violated appellee's statutory right to a speedy trial. According to appellee, the time requirements for speedy trial had expired on January 18, 1998.

The trial court rejected appellant's argument that defense counsel's voluntary agreement to the February 24, 1998 trial date extended the time limits within which appellee could be tried. The trial court found that the December 10, 1997 pretrial order simply listed the dates chosen for trial. The trial court concluded that the pretrial order did not indicate that appellee waived his right to speedy trial or that the court had considered a continuance or found that reasons existed for a continuance. The trial court discharged appellee.

*2 The right to a speedy trial is established by R.C. 2945.71 through 2945.73. Because Ohio's statutory speedy trial provisions enforce an accused's constitutional right to a speedy trial, trial courts must strictly enforce that right. *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Consequently, the speedy trial statute must be strictly construed against the state. *State v. Singer* (1977), 50 Ohio St.2d 103, 105-106, 362 N.E.2d 1216.

The right to a speedy trial may be waived by a defendant if such waiver is made knowingly and voluntarily. *State v. King* (1994), 70 Ohio St.3d 158, 160, 637 N.E.2d 903. To be effective, the trial court's journal must affirmatively demonstrate that the accused waived his right by a signed written waiver, an act, or by acquiescence made in open court on the record. *Id.* at 161, 637 N.E.2d 903; *State v. Davis* (1976), 46 Ohio St.2d 444, 449, 349 N.E.2d 315.

In addition, R.C. 2945.72 provides that the time within which an accused must be brought to trial may be extended only under certain defined circumstances, including the following:

"(E) Any period of delay necessitated by reason of a *** motion, proceeding, or action made or instituted by the accused;

"(H) The period of any continuance granted on the

accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion ***"

Once a defendant demonstrates that the statutory time limit has passed, which in this case is ninety days, a prima facie case for discharge is established. See *State v. Thompson* (Sep. 23, 1997), Franklin App. No. 96APA12-1660, unreported. The state then bears the burden of proving time was extended or tolled under R.C. 2945.72 so that the defendant will be tried in less than the statutory limit. *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368.

Neither the judgment entry nor record affirmatively shows that appellee knowingly or voluntarily waived his speedy trial rights when he agreed to trial dates beyond the ninety days permitted for a first degree misdemeanor. Although appellee agreed to the trial dates, and did, in fact, request accommodation for counsel's trial schedule, appellee did not voluntarily or knowingly acquiesce to the trial dates beyond the statutory time limits where the speedy trial time limits being discussed were incorrect. See *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593. Here, the representations of the prosecution impaired the knowing and voluntary nature of the accused's consent to a trial date that was beyond the speedy trial date for a misdemeanor. The burden is on the prosecution and the courts, not the accused, to ensure that an accused is brought to trial within the speedy trial limits. *State v. Singer*, 50 Ohio St.2d at 106-107, 362 N.E.2d 1216.

In addition, the court did not consider a continuance or evaluate whether reasons existed for a continuance. Speedy trial dates may be extended when an accused requests an extension of time. Any other continuances, whether by the prosecution or by the court, will extend the speedy trial time only if reasonable and if the judgment entry is entered before the expiration of the time limits set in R.C. 2945.71. *State v. Reeser* (1980), 63 Ohio St.2d 189, 407 N.E.2d 25; *State v. Lee* (1976), 48 Ohio St.2d 208, 357 N.E.2d 1095.

*3 "When a trial date is set beyond the time limits of R.C. 2945.71 and the accused does not acquiesce in that date but merely fails to object to that date, the trial court's action does not constitute a continuance pursuant to R.C. 2945.72. *** However, the trial court has the discretion to extend the time limits of R.C. 2945.71 where counsel for the accused voluntarily agrees to a trial date beyond the statutory time limits. *** Moreover, the

trial court's exercise of that discretion constitutes a " 'continuance granted other than upon the accused's own motion' under the second clause of R.C. 2945.72(H)," ***; and, as long as that continuance is reasonable, it extends the time limits of R.C. 2945.71 and does not deny an accused the right to a speedy trial.****" State v. McRae (1978), 55 Ohio St.2d 149, 151-152, 378 N.E.2d 476 (citations omitted).

Although appellant voluntarily agreed to a trial date set beyond the time limits of the speedy trial statute, as in State v. McRae, this matter is distinguishable because the state incorrectly stated the basis upon which appellant agreed to the February 24, 1998 trial date. The accused's consent must be knowing and voluntary. State v. King, 70 Ohio St.3d at 160, 637 N.E.2d 903. Further, the record must affirmatively demonstrate that the trial court entered a judgment entry ordering a continuance and the reasons for the continuance before expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial. Id. 70 Ohio St.2d at 163, 436 N.E.2d 217. Because the judgment entry does not express a reason for any continuance beyond January 15, 1998 or who requested it, no time can be charged against appellee. State v. Payne (Nov. 7, 1997), Wood App. No. WD 97-005, unreported; State v. Edmunds (Nov. 17, 1995), Lucas App. No. L-95-102, unreported. Because the trial court relied upon appellant's representation of the speedy trial dates, the trial court had no reason to consider whether a continuance was needed let alone issue a judgment entry affirmatively demonstrating the necessity and reasonableness of the continuance.

Even though the burden is placed on the prosecution to ensure an accused is brought to trial within the speedy trial time limitations, the law also obligates the trial court to strictly enforce the speedy trial limitations. State v. Singer, 50 Ohio St.2d at 105-106, 362 N.E.2d 1216 (the prosecution and the trial court have a mandatory duty to comply with R.C. 2945.71 through 2945.73); see State v. Montgomery (1980), 61 Ohio St.2d 78, 80- 81, 399 N.E.2d 552. While a local rule of the trial court required the appellant to notify the trial court if a trial date is set beyond the speedy trial limits of R.C. 2945.71, we believe this is contrary to existing law. See Wood County Local Rule 5.03(I). That local rule, however, delegates the responsibility of the court to strictly construe the speedy trial statutes.

The record transmitted to us does not contain evidence of an affirmative waiver of speedy trial time by appellant or his attorney. The trial court's entry of December 19, 1997 indicates the trial dates were set by agreement, but appellee's agreement may have been secured by appellant's error in measuring the speedy trial time.

*4 Appellant's assignment of error is found not well-taken. The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of

this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

GEORGE M. GLASSER, MELVIN L. RESNICK and JAMES R. SHERCK, JJ., concur.

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