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As of: Jul 02, 2008

**State of Ohio, Plaintiff-Appellee, v. Richard Boyer, Defendant-Appellant.**

**No. 94APA06-938 (REGULAR CALENDAR)**

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

*1994 Ohio App. LEXIS 6065*

**December 27, 1994, Rendered**

**NOTICE:**

[\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the Franklin County Court of Common Pleas (Ohio), which denied defendant post-conviction relief. Defendant argued that his constitutional rights were violated by an excessive delay in continuing his second trial when the delay caused the second trial to have been held more than 90 days after the mistrial.

**OVERVIEW:** Defendant was arrested and a mistrial was declared. His second trial was set, but was continued by the trial court. Following his conviction defendant contended that his right to a speedy retrial was violated because his second trial was held more than 90 days after the mistrial. The court affirmed the judgment and held that the time limitations of *Ohio Rev. Code Ann. § 2945.71* did not apply to retrials, but constituted some evidence of what was considered a "reasonable" time. The court then held that the factors militated against finding a violation of the right to a speedy trial. First, the length of delay was only four days longer than that re-

quired between the arrest and first trial, and four days in excess of that standard was not prejudicial. Second, the trial was delayed because the prosecution's eyewitness was not available. Therefore, the trial court's granting of a continuance was not an abuse of discretion. Third, defendant did not assert his right to a speedy trial. Finally, defendant did not claim any prejudice and no evidence of prejudice was presented.

**OUTCOME:** The court affirmed the trial court's judgment.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Pretrial Motions > Speedy Trial > General Overview*

*Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial*

[HN1] *Ohio Rev. Code Ann. § 2945.71* allows 90 days of in-jail time prior to the first trial. Those time limitations do not apply to retrials, but they may constitute some evidence of what is considered a "reasonable" time. The factors to be considered in determining whether a right to speedy trial has been violated are: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his speedy trial rights; and (4) prejudice to defendant.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial*

*Criminal Law & Procedure > Counsel > Effective Assistance > Tests*

***Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Effective Assistance***

[HN2] Defendant, in asserting ineffective assistance of counsel, must prove both that: (1) his counsel was ineffective; and (2) that he was prejudiced as a result.

**COUNSEL:** Michael Miller, Prosecuting Attorney, and Joyce S. Anderson, for appellee.

Bernard Z. Yavitch; Paul Croushore, for appellant.

**JUDGES:** CLOSE, J., STRAUSBAUGH, J., concurs. WHITESIDE, P.J., concurs separately. STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

**OPINION BY:** CLOSE

**OPINION**

OPINION

CLOSE, J.

This is an appeal from a judgment of the Franklin County Court of Common Pleas denying defendant-appellant, Richard Boyer, post-conviction relief. Appellant brings the following three assignments of error:

"Assignment of Error No. 1:

"APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE EXCESSIVE DELAY IN CONTINUING HIS SECOND TRIAL WHERE THE DELAY CAUSED THE SECOND TRIAL TO BE HELD MORE THAN NINETY DAYS AFTER THE MISTRIAL.

"Assignment of Error No. 2:

"THE TRIAL COURT ERRED IN FINDING THAT THE FAILURE OF DEFENSE COUNSEL TO RAISE THE SPEEDY [\*2] TRIAL ISSUE WAS INEFFECTIVE ASSISTANCE OF COUNSEL BUT THEN CONCLUDING THAT THE APPELLANT WAS NOT PREJUDICED BY THE DELAY.

"Assignment of Error No. 3:

"THE TRIAL COURT ERRED IN FINDING THAT THE REASON FOR THE DELAY WAS REASONABLE WHERE THE PROSECUTION WITNESS WHOSE UNAVAILABILITY CAUSED THE CONTINUANCE WAS NOT SUBPOENAED."

Appellant was arrested in April 1988 and, ultimately, after the jury was unable to reach a verdict, a mistrial was declared on February 3, 1989. His second trial was set for April 4, 1989, and was later continued by the trial court until May 8, 1989.

In his first assignment of error, appellant contends that his right to a speedy retrial was violated because his second trial was held more than ninety days after the mistrial. *R.C. 2945.71* [HN1] allows ninety days of in-jail time prior to the first trial. *State v. Fanning* (1982), 1 *Ohio St.3d* 19, 437 *N.E.2d* 583, specifically holds that those time limitations do not apply to retrials, but that they may constitute some evidence of what is considered a "reasonable" time. As that statute does not control, it is appropriate to look at the case of *Barker v. Wingo* (1972), 407 U.S. [\*3] 514, 92 *S.Ct.* 2182, 33 *L. Ed. 2d* 101, to identify the factors to be considered in determining whether a right to speedy trial has been violated. That court held that the factors to be considered were: (1) length of delay; (2) reason for delay; (3) appellant's assertion of his speedy trial rights; and (4) prejudice to appellant.

In the case at bar, the length of delay was only four days longer than that required between the arrest and first trial. Applying the holding in *Fanning*, namely that the ninety-day time limit constitutes some evidence of what is considered reasonable, we hold that four days in excess of that standard is not prejudicial.

With regard to the second factor, the reason for delay, we note that the trial court specifically continued the second trial, from April 4 to the actual trial date of May 8, because the prosecution's eyewitness was not available. Appellant takes issue with the fact that a subpoena was not issued to the witness who was "unavailable." The trial court factually found that the continuance was not improper. This factual determination was well within the trial court's discretion, particularly given that trial courts are required to [\*4] make this type of factual determination when conducting a motion hearing. See *State v. Clay* (1973), 34 *Ohio St.2d* 250, 298 *N.E.2d* 137. We will, therefore, not find the granting of a continuance

for the reason requested in this case to be an abuse of discretion.

The third factor to consider is whether appellant asserted his right to a speedy trial. Appellant did not assert this right; however, this may have been his trial counsel's fault. As noted below, this does not, on balance, give rise to a violation of his speedy trial rights.

The fourth and final factor, regarding prejudice to appellant, was not in any way plead or argued in the trial court below and, as such, it likewise fails. No evidence of prejudice was presented, nor were adverse findings made in the trial court regarding the delay in bringing the case to trial. It would fly in the face of reason for us to hold that, on that record, appellant's right to a speedy trial has been violated. Furthermore, three of the four factors militate against finding a violation of the right to a speedy trial.

Appellant's first assignment of error is overruled.

In his second assignment of error, appellant takes issue with the [\*5] trial court's finding of fact and ultimate conclusion of law. Specifically, appellant disputes, as incongruous, the trial court's finding of ineffective assistance of counsel based upon the failure to raise the speedy trial issue, while also concluding that appellant was not denied effective assistance of counsel because he was not prejudiced by the delay. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674, stands for the proposition that [HN2] appellant must prove both that: (1) his counsel was ineffective; and (2) that he was prejudiced as a result. As determined under our analysis of the first assignment of error, appellant clearly was not prejudiced by the delay. Therefore, even though we concede that counsel was ineffective in not demanding a trial sooner, we conclude that the trial court was correct in holding that such ineffectiveness did not give rise to a constitutional violation of appellant's right to the effective assistance of counsel. The second assignment of error is, therefore, overruled.

In his third assignment of error, appellant takes issue with the reason for the continuance. It is again clear, however, that, even if the continuance [\*6] was improper, the trial was still conducted in a timely manner. As we held under the first assignment of error, our *Barker v. Wingo* analysis establishes that the delay in the retrial did not violate appellant's speedy trial rights. In addition, appellee's motion to continue was properly granted by the trial court based on the unavailability of the eyewitness, whether or not the witness was subpoenaed. There is no requirement that the prosecuting attorney do a vain act. If a subpoena to this witness would not result in the witness' attendance, it is not an act the prosecution is required to do prior to filing for a continuance.

The trial court's grant of this continuance was within its sound discretion and will not now be overturned.

Appellant's third assignment of error is overruled.

Based on all of the above, appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

*Judgment affirmed.*

STRAUSBAUGH, J., concurs.

WHITESIDE, P.J., concurs separately.

**CONCUR BY: WHITESIDE**

**CONCUR**

WHITESIDE, P.J., concurring separately.

Although I concur in the judgment, I do so for slightly different reasons than those expressed in the majority opinion.

[\*7] Initially, the issue is whether the continuance from April 4, to May 8, 1989, was unreasonable so as to deny appellant the right to a speedy trial after the original trial was aborted by declaration of a mistrial when the jury could not reach a verdict.

*R.C. 2945.72* sets forth a legislative determination of what constitutes reasonable delays in the prosecution of a criminal case. Even if not directly applicable to a new trial following declaration of a mistrial, *R.C. 2945.72(H)*, in effect, declares to be reasonable all delay resulting from "the period of any continuance granted on the accused's own motion, and the period of any reasonable continuances granted other than upon the accused's own motion." For the reasons set forth in the majority opinion, the continuance, from April 4 to May 8, 1989, was reasonable. The first assignment of error is not well-taken.

There remains the determination of whether the sixty-day period from the granting of the mistrial (February 3, 1989) and the originally scheduled trial date, of April 4, 1989, constituted unreasonable delay so as to deny defendant a speedy trial.

As is pointed out in the majority opinion, *R.C. 2945.71* allows ninety days [\*8] from the time of arrest until trial of an incarcerated defendant on a felony charge. Using that benchmark, a period of sixty days between the granting of a mistrial and the commencement of the new trial is not so unreasonable as to deny constitutional speedy-trial rights. Nor has appellant suggested any basis for finding to the contrary. Thus, appel-

lant's speedy-trial rights were not violated, and the third assignment of error is not well-taken.

As to the second assignment of error, I cannot concur in the majority opinion that embraces the trial court's finding that defense counsel was ineffective for failing to raise the speedy-trial issue prior to the commencement of the new trial. Defense counsel acted responsibly in not raising a meritless issue. Appellant's right to a speedy trial was not violated. The new trial was conducted with-

in a reasonable time following the granting of the mistrial. For this reason, the second assignment of error is not well-taken.

Accordingly, I concur in the judgment only.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution*.