

1992 Ohio App. LEXIS 3238, *

STATE OF OHIO PLAINTIFF-APPELLANT v. KEITH B. ROBERTS DEFENDANT-APPELLEE

CASE NO. 13-91-44

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, SENECA COUNTY

1992 Ohio App. LEXIS 3238

June 12, 1992, Entered

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

DISPOSITION: JUDGMENT: Judgment reversed and cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: The State appealed a judgment of the Seneca County Court of Common Pleas (Ohio), which dismissed the indictment alleging domestic violence and felonious assault against defendant. The trial court granted defendant's motion to dismiss on the basis of the State's failure to bring defendant to trial within 270 days after defendant's arrest as required by [Ohio Rev. Code Ann. § 2945.71\(C\)\(2\)](#).

OVERVIEW: After his arrest, defendant entered a plea of not guilty and not guilty-by reason of insanity. The trial court ordered defendant to be examined to determine his mental condition. An independent psychiatrist determined that defendant was not competent to stand trial and the trial court ordered defendant committed to a health center. After treatment and evaluation, a physician reported that defendant was competent to stand trial. After the trial court's finding that defendant was competent to stand trial, defendant made a motion for a continuance to allow a psychiatrist to do further evaluation. After the grant of the continuance, defendant made a motion to dismiss the complaint on speedy trial grounds. The court reversed the judgment granting defendant's motion to dismiss and held that the initial determination of defendant's competence to stand trial, the time between the appointment of the independent psychiatrist and the filing of his report, the time granted for the continuance, and the time that defendant was considered incompetent to stand trial and was institutionalized were delays under [Ohio Rev. Code Ann. § 2945.72](#) that were excludable from the total calculation of time.

OUTCOME: The court reversed the judgment of the trial court dismissing the indictment and remanded the cause.

CORE TERMS: indictment, psychiatrist, competent to stand trial, motion to dismiss, continuance, chargeable, competency, arrest, statutory period, incompetent, motion in limine, period of time, sanity, competence to stand trial, reason of insanity, speedy trial, stand trial, incompetency, incarcerated, appointed, examiner, seventy,

doctor, assignments of error, findings of fact, instituted, arrested, incompetent to stand trial, competency to stand trial, initial determination

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[Criminal Law & Procedure](#) > [Accusatory Instruments](#) > [Dismissal](#) 

[Criminal Law & Procedure](#) > [Accusatory Instruments](#) > [Informations](#) 

HN1  [Ohio R. Crim. P. 48\(B\)](#) states that if the court over objection of the State dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Pretrial Motions](#) > [Speedy Trial](#) > [Statutory Right](#) 

[Criminal Law & Procedure](#) > [Trials](#) > [Defendant's Rights](#) > [Right to Speedy Trial](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

HN2  A person against whom a felony charge is pending must be brought to trial within 270 days after his arrest. [Ohio Rev. Code Ann. § 2945.71\(C\)\(2\)](#). However, the time within which a defendant must be tried may be extended pursuant to [Ohio Rev. Code Ann. § 2945.72](#). [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Pretrial Motions](#) > [Competency to Stand Trial](#) 

HN3  [Ohio Rev. Code Ann. § 2945.371\(D\)](#) requires the examiner to file a written report with the court within 30 days after entry of an order for examination. [Ohio Rev. Code Ann. § 2945.37\(A\)](#) requires the court to conduct a hearing to determine the competency within 10 days after the filing of the report. [More Like This Headnote](#)

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HN4  [Ohio Rev. Code Ann. § 2945.72](#) states, in part, that the time within which an accused must be brought to trial, may be extended only by the following: (B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence is being determined. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Pretrial Motions](#) > [Speedy Trial](#) > [Excludable Time Periods](#) 

^{HNS} [Ohio Rev. Code Ann. § 2945.72\(E\)](#) provides that a delay necessitated by reason of motion, proceeding, or action made or instituted by the accused may extend the time within which the accused must be tried. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: ATTORNEYS: MR. JAMES S. NORDHOLT, JR., Reg. #: 0002759, Assistant Prosecuting Attorney, 81 Jefferson Street, Tiffin, OH 44883, For Appellant.

MR. KENNETH MURRAY, Attorney at Law, 336 S. High Street, Columbus, OH 43215, For Appellee. MR. **PAUL CROUSHORE**, Reg. #: 0055524, Attorney at Law, 601 South High Street, Columbus, OH 43215, For Appellee.

JUDGES: SHAW, EVANS, BRYANT

OPINIONBY: SHAW

OPINION: OPINION

SHAW, J. This is an appeal as of right by the state of Ohio from the decision of the Seneca County Court of Common Pleas which dismissed the indictment against defendant-appellee, Keith B. Roberts (Roberts).

The record reveals that, on September 8, 1990, Roberts and his wife were arguing. In the early evening, they went to the Pit Stop in Tiffin, Ohio. Roberts' wife asked the clerk to call the police. Roberts heard his wife, grabbed her and hit her. Roberts left his wife at the store, but returned shortly with a knife. The police were summoned. Roberts began arguing and threatening the police. Roberts was shot. Roberts was arrested, but released later [***2**] that evening.

On September 27, 1990, the Grand Jury returned an indictment against Roberts for violating [R.C. 2919.25\(A\)](#), domestic violence, and [R.C. 2903.11](#), felonious assault. Roberts was arrested on the indictment on September 27, 1990. During the bond hearing that same day, the trial court appointed counsel for Roberts and, based upon counsel's suggestion, ordered that Roberts be examined to determine his competence to stand trial. On November 6, 1990, Roberts was arraigned and the trial court found Roberts competent to stand trial. Roberts entered a plea of not guilty and not guilty-by reason of insanity. Pursuant to [R.C. 2945.39](#), the trial court ordered Roberts to be examined to determine his mental condition at the time of the offense.

On January 18, 1991, Roberts moved the court to appoint an independent psychiatrist. The trial court granted Roberts' motion on January 31, 1991, ordering Roberts to be examined by Dr. Eisenberg on February 12, 1991. Dr. Eisenberg determined that Roberts was not competent to stand trial and further indicated that, as a result, no evaluation of Roberts' sanity at the time of the offense could be made. Based upon Dr. Eisenberg's report, [***3**] the trial court found Roberts incompetent on February 19, 1991 and ordered Roberts to be committed to the Toledo Mental Health Center. On April 3, 1991, Dr. Rab of the Toledo Mental Health Center informed the trial court that he believed that Roberts was competent to stand trial. The matter was heard on April 22, 1991, with the trial court finding Roberts competent to stand trial on April 25, 1991. Then, the trial court set the matter for

trial on April 29, 1991.

On April 26, 1991, Roberts moved to continue the trial, on the grounds that the appointed psychiatrist had not received all the materials required in order to determine whether Roberts was insane at the time of the offense. The trial court granted the continuance and rescheduled the trial for May 20, 1991. On May 20, 1991, Roberts filed a motion to dismiss the indictment on the grounds that he had not been brought to trial within two hundred and seventy days, as required by [R.C. 2945.71\(C\)\(2\)](#). Together with the May 20, 1991 motion to dismiss, Roberts filed a motion in limine and Roberts' attorney again questioned Roberts' competency to stand trial. The trial court ordered another evaluation of Roberts. Based [*4] upon the doctor's report, the trial court found Roberts incompetent to stand trial on June 12, 1991. On August 22, the trial court granted Roberts' motion and dismissed the indictment.

Thereafter, the state instituted this appeal, asserting three assignments of error:

I. The trial court erred by failing to issue findings of fact and reasons for dismissal of the indictment.

II. The trial court erred by dismissing the indictment "due to the violation of defendant's speedy trial rights under [Ohio Revised Code Section 2945.71](#)".

III. The trial court erred by dismissing the indictment for "violation of defendant's speedy trial rights under the state and federal constitution [sic]".

In the state's first assignment of error, it argues that the trial court's response to the state's request for findings of fact and reasons for the dismissal was so deficient that the judgment should be reversed and the cause remanded to the trial court. After the trial court granted Roberts' motion and dismissed the indictment, the state requested findings and reasons. In response, the trial court stated in its Journal Entry of August 29, 1991 that:

this matter [*5] cue to the court's attention upon the Request for Findings of Fact and Reason [sic] for Dismissal filed by the prosecution.

The Court ordered the dismissal of this matter as required under [Ohio Revised Code Section 2945.73](#) due to the violation of defendant's speedy trial rights under the state and Federal Constitution [sic] and [Ohio Revised Code Section 2945.71](#).

The record reveals that the state clearly made its request for findings and reasons pursuant to [Crim. R. 48\(B\)](#). [Crim. R. 48\(B\)](#) ^{HNT} states that:

if the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.

The judgment entry dismissing the indictment does not state particular findings or reasons for dismissing the indictment. Instead, the judgment entry simply states that the court found Roberts' motion to be well taken. The record further reveals that the parties disagreed on many aspects of calculating the time which was left to try

Roberts.

Based upon the foregoing, we find that the trial court's Journal Entry of August 29, 1991 is inadequate and erroneous. However, we further find [*6] that, when taken together with the record in this matter, the error can be construed as harmless. See [Crim. R. 52\(A\)](#). Accordingly, we overrule the first assignment of error.

We will address the second and third assignments of error together. ^{HN2} A person against whom a felony charge is pending must be brought to trial within two hundred seventy days after his arrest. See [R.C. 2945.71\(C\)\(2\)](#). However, the time within which a defendant must be tried may be extended pursuant to [R.C. 2945.72](#).

First, the parties disagree as to the date that the statutory period began. Roberts argues that his original arrest on September 8, 1990 triggers the statute, while the state argues that only his arrest on the indictment on September 27, 1990 triggers the statute. Although Roberts was released on September 8, 1990 and no charges were brought until the Grand Jury indicted him, we find that it was his conduct on September 8, 1990 which was the basis of the Grand Jury indictment and, hence, the statutory period began to run on September 8, 1990.

The parties also disagree about several aspects of the calculations required to determine whether the statutory period is extended. The first passage [*7] of time concerns the initial determination of Roberts' competence. On September 27, 1990, the issue of Roberts' competence to stand trial was raised by his attorney. The next day, the trial court ordered that Roberts be examined. [R.C. 2945.371\(D\)](#) ^{HN3} requires the examiner to file a written report with the court within thirty days after entry of an order for examination. [R.C. 2945.37\(A\)](#) requires the court to conduct a hearing to determine the competency within ten days after the filing of the report. The record shows that the examiner's written report was forwarded to the court late. Nevertheless, the trial court held the hearing required under [R.C. 2945.37\(A\)](#) within ten days after the report was supposed to be filed. Thus, we find that the late filing of the report is irrelevant.

[R.C. 2945.72](#) ^{HN4} states, in pertinent part, that:

the time within which an accused must be brought to trial, * * *, may be extended only by the following:

* * *;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence is being determined, * * *;

Thus, we find that, since the initial determination of Roberts' incompetence to stand trial was [*8] decided within the time constraints of [R.C. 2945.37](#) and [2945.371](#), that period is a reasonable delay. Accordingly, the original period for determining Roberts' competence (thirty-nine days) extends the statutory period and is chargeable to Roberts.

The second period of time revolves around Roberts' pleas. On November 6, 1990, Roberts entered a plea of not guilty and not guilty by reason of insanity. On November 7, 1990, Roberts' attorney requested that Roberts be examined. On November 8, 1990, the trial court ordered Roberts to be examined pursuant to [R.C.](#)

[2945.39](#). The record does not indicate that the report was ever filed or when it was provided to the court. The date of the report, December 10, 1990, indicates that the report may have been untimely. See [R.C. 2945.39\(C\)](#). Nevertheless, we find that, at the very least, the period of time from November 8, 1990, the date that the trial court granted the motion to examine Roberts to December 8, 1990, the date that the report would have been due pursuant to [R.C. 2945.39\(C\)](#), constitutes a delay necessitated by reason of a proceeding instituted by the accused, pursuant to [R.C. 2945.72\(E\)](#). See [State v. Spratz \(1979\), 58 Ohio \[*9\] St. 2d 61](#), [State v. Bowman \(1987\), 41 Ohio App. 3d 318](#), paragraph one of the syllabus, motion for leave to appeal overruled (February 17, 1988), No. 87-2106 and [State v. Wilson \(1982\), 7 Ohio App. 3d 219](#). Thus, thirty additional days must be charged to Roberts.

With regard to the third block of time about which the parties disagree, a recitation of the facts is necessary. On January 18, 1991, Roberts filed a motion for the appointment of an independent psychiatrist, pursuant to [R.C. 2945.39](#), examination and evaluation of defendant's mental condition at time of offense upon insanity plea. The trial court granted the motion on January 31, 1991. Dr. Eisenberg examined Roberts on February 12, 1991 and his report questioned Roberts' competency to stand trial. Dr. Eisenberg never reached the issue of Roberts' sanity at the time of the offense.

Based upon Dr. Eisenberg's report, the trial court held a hearing on February 19, 1991 and determined that Roberts was incompetent to stand trial. The trial court ordered Roberts to be committed to the Toledo Mental Health Center, to be examined periodically and to notify the court if it is believed that the defendant becomes competent **[*10]** to stand trial.

On April 3, 1991, a psychiatrist, Dr. Rab, sent a report to the trial court indicating his belief that Roberts was competent to stand trial. As a result of Dr. Rab's report, the trial court scheduled a hearing on April 15, 1991. At that time, Roberts objected to the report and requested a "full" hearing on the matter. The hearing was reset for April 22, 1991, so that Dr. Rab and other witnesses could appear. Following the April 22, 1991 hearing, the trial court found Roberts competent to stand trial.

[R.C. 2945.72\(E\)](#) states that ^{HNS} a "delay necessitated by reason of * * *, motion, proceeding, or action made or instituted by the accused" may extend the time within which the accused must be tried. We find that Roberts' motion for an independent psychiatrist extends that statutory period under [R.C. 2945.72\(E\)](#). Thus, from the time that the motion was filed through the time that Dr. Eisenberg made his report (twenty-seven days) is chargeable to Roberts.

Furthermore, we find that Dr. Eisenberg's report called Roberts' competency into question a second time. Thus, from the time of the report (February 14, 1991) until the trial court found Roberts incompetent (February **[*11]** 19, 1991) is a period "during which [the accused's] mental competence to stand trial is being determined". Therefore, those five days are chargeable to Roberts pursuant to [R.C. 2945.72\(B\)](#).

Roberts argues that Dr. Rab's testimony and his report indicate that Roberts' was competent to stand trial the entire time that he was committed to the Toledo Mental Health Center and, thus, that period of time is not chargeable to him. Dr. Rab's testimony did indicate that Roberts' symptoms remained the same during his admission. His report, dated April 3, 1991, states "* * * it is presently this examiner's opinion that Mr. Roberts is competent to stand trial * * *." However,

Roberts was committed so that he could be monitored and a doctor could suggest when he felt Roberts became competent. The court determines whether the accused is competent, not the doctor.

Also, we note that the hearing required under [R.C. 2945.37\(A\)](#) was not timely held. However, Roberts did not object and, in fact, requested a continuance so that he could challenge Dr. Rab's opinion. We, therefore, find that the entire time in which Roberts remained adjudicated incompetent (February 19, 1991 until April 25, 1991 [*12] or sixty-five days) is chargeable to him pursuant to [R.C. 2945.72\(B\)](#).

The fourth period of time commenced on April 26, 1991, when Roberts moved for a continuance of the trial. Roberts supported his motion on the ground that the independent psychiatrist which was appointed had just recently received the requisite preliminary information from the prosecution and could not evaluate or report on Roberts' sanity prior to the trial date. On April 29, 1991, the trial court granted the continuance and rescheduled the trial for May 20, 1991. Roberts now claims that he was forced to request the continuance because the prosecution delayed in providing the psychiatrist with the necessary information.

However, the motion for a continuance indicates that the psychiatrist's schedule prevented him from examining Roberts and making a report before the date set for trial. Furthermore, the record shows that Roberts was incompetent most of the time from the time that the psychiatrist was first appointed to determine Roberts' sanity. Thus, even if the prosecution had promptly forwarded the materials to the psychiatrist, he could not have examined Roberts as to the issue of sanity. Accordingly, [*13] we find Roberts' argument of prosecution delay unpersuasive and the period of the continuance (twenty-four days) is chargeable to Roberts, pursuant to [R.C. 2945.72\(H\)](#).

The final period of time began on May 20, 1991, when Roberts filed a motion in limine, a motion to dismiss and the question of his competence to stand trial was raised again. A psychiatrist examined Roberts, issued a report and the trial court held a hearing within the time constraints of [R.C. 2945.37](#) and [2945.371](#). Once again, Roberts was determined to be incompetent. The trial court's determination remained unchanged through the time that it granted the motion to dismiss. n1 Thus, pursuant to [R.C. 2945.72\(B\)](#) and (E), ninety-four days are chargeable to Roberts as a result of his motion to dismiss and the determination of his incompetency.

- - - - - Footnotes - - - - -

n1 As a result of the trial court ruling on the motion to dismiss, it never ruled upon the motion in limine.

- - - - - End Footnotes- - - - -

The time from which defendant was arrested on September 8, 1990 to the date the trial [*14] court dismissed the indictment on August 22, 1991 is three hundred forty-eight days. The record reveals that, from September 8, 1990 to September 27,

1990 (nineteen days), Roberts was not incarcerated. However, from September 27, 1990 until the trial court dismissed the indictment (three hundred twenty-nine days), Roberts was incarcerated. Thus, each of those days shall be counted as three days. See [R.C. 2945.71\(E\)](#). Consequently, the total number of days from Roberts' arrest until the trial court granted his motion to dismiss may be considered as one thousand and six days.

Accordingly, we calculate the time within which the prosecution had to bring Roberts to trial, including the appropriate time for the days which Roberts spent incarcerated, as follows:

1006 days (time of Roberts' arrest to the trial court's dismissal of the indictment)
- 117 days (first determination of Roberts' competency)
- 90 days (not guilty by reason of insanity delay)
- 81 days (motion for independent psychiatrist)
- 15 days (second determination of competency)
- 195 days (period of incompetency)
- 72 days (Robert's continuance)
- 282 days (motion to dismiss, motion in limine, third [*15] determination of competency and period of incompetency)
154 days

Therefore, we find that the prosecution was well within the two hundred seventy days it had to bring Roberts to trial. Thus, the trial court erred in dismissing the indictment. We sustain the second and third assignments of error, the judgment of the trial court is reversed and the cause is remanded to the trial court for further proceedings.

Judgment reversed
and cause remanded.

EVANS and BRYANT, JJ., concur.