

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2013 CR 00279**  
vs. : **Judge McBride**  
**ANTHONY JOHN HARVEY** : **DECISION/ENTRY**  
Defendant :

Catherine Adams, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2<sup>nd</sup> Floor, Batavia, Ohio 45103.

Chris Feldhaus, assistant public defender for defendant Anthony John Harvey, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion to dismiss filed by the defendant Anthony John Harvey.

The court scheduled and held a hearing on the motion to dismiss on June 11, 2014. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

After considering the issues raised by the motion, the court issued an order on July 11, 2014, setting the matter for an evidentiary hearing to be held on July 30, 2014. That evidentiary hearing did not go forward on that date and was continued to and held

on August 20, 2014. After the evidentiary hearing was completed, the court again took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

### **FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

The state filed a three-count indictment against the defendant in the present case on May 7, 2013, charging the defendant with one count of theft from an elderly person in violation of R.C. 2913.02(A)(1) and two counts of theft in violation of R.C. 2913.02(A)(1). A warrant on indictment was issued on May 15, 2013.<sup>1</sup> The defendant was also declared a "violator at large" by the Ohio Adult Parole Authority effective May 15, 2013.<sup>2</sup>

On May 28, 2013, the defendant was arrested in Volusia County, Florida and placed in a local jail.<sup>3</sup> On September 9, 2013, the defendant was sentenced to a split sentence of incarceration in the county jail and community control.<sup>4</sup> The defendant was released from the Volusia County jail on October 24, 2013.<sup>5</sup> Accordingly, the defendant was held in the Volusia County jail from May 28, 2013 until October 24, 2013.

Corporal William Welch of the Clermont County Sheriff's Office, who was an extradition officer and supervisor at the time in addition to being the supervisor of court

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<sup>1</sup> State's Exhibit 1 from June 11, 2014 hearing.

<sup>2</sup> State's Exhibit 2 from June 11, 2014 hearing.

<sup>3</sup> State's Exhibit 3.

<sup>4</sup> Id.

<sup>5</sup> Id.

services, testified that the Clermont County Sheriff's Office faxed a copy of the warrant to Volusia County on May 29, 2014 at that county's request. On that same date, Corporal Welch spoke to Dana King of the Volusia County Sheriff's Office who advised him that there were no local charges pending at that time and that she would fax the defendant's waiver of extradition once it was signed.

While incarcerated in Volusia County, the defendant executed a waiver of extradition which was signed by a Florida County/Circuit Court Judge on May 30, 2013.<sup>6</sup> A Volusia County officer confirmed the active warrant on indictment with an employee of the Clermont County Sheriff's Office and noted "[w]arrant confirmation indicated full extradition and a hold to be placed on defendant."<sup>7</sup>

On May 31, 2013, Deputy Eric Campbell of the Clermont County Sheriff's Office followed up with Dana King, at which time King faxed Deputy Campbell a copy of the waiver of extradition.<sup>8</sup> On that same date, the Prisoner Transport System was ordered to pick the defendant up from Volusia County.<sup>9</sup>

However, on June 3, 2013, Deputy Campbell was advised by Dana King that the Daytona Beach Police Department had filed additional new charges against the defendant and that he was no longer ready to be picked up to be brought back to Ohio.<sup>10</sup> As a result, the order to the Prisoner Transport System to pick up the defendant was cancelled.<sup>11</sup>

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<sup>6</sup> State's Exhibit 4.

<sup>7</sup> Defendant's Exhibit 2.

<sup>8</sup> State's Exhibit 1 from August 20, 2014 hearing.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

Dana King indicated that she would advise when the defendant was ready for pick-up; however, the Clermont County Sheriff's Office received no future contact from King that the defendant was ready to be picked up at any later date.

Hamilton County and Butler County, Ohio both issued arrest warrants for the defendant while he was incarcerated in the Volusia County jail, on June 19, 2013 and August 30, 2013, respectively.<sup>12</sup>

On or about September 5, 2013, the Clermont County Sheriff's Office received a fax from Dana King from Volusia County which indicated that the defendant was sentenced to 180 days in the county jail, with credit for 94 days of time already served.<sup>13</sup>

The defendant was picked up from the Volusia County Jail by the Ohio Adult Parole Authority on November 9, 2013 and was delivered to the Correctional Reception Center in Orient, Ohio on November 15<sup>th</sup>.<sup>14</sup> The Clermont County Sheriff's Office was notified of this fact on November 18, 2013; however, they could not retrieve the defendant from the prison without an order of the court. A hearing was held on the defendant's violation of the terms and conditions of his parole on December 16, 2013 and the defendant was sentenced to a prison term of 120 days to begin on December 17<sup>th</sup>.<sup>15</sup>

The defendant's Hamilton County warrant was returned as served on April 14, 2014 and indicates that he was delivered before the Hamilton County court.<sup>16</sup> At the hearing on this matter held on August 20, 2014, the defendant indicated that he was released from prison on April 15, 2014.

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<sup>12</sup> State's Exhibits 5-6.

<sup>13</sup> State's Exhibit 2 from the August 20, 2014 hearing.

<sup>14</sup> State's Exhibit 7.

<sup>15</sup> State's Exhibit 8.

<sup>16</sup> State's Exhibit 9.

The defendant was then served with the indictment in the present case on April 22, 2014 and he was arraigned the next day, April 23<sup>rd</sup>.<sup>17</sup> The defendant made a demand for discovery on April 24<sup>th</sup> and the state responded to that discovery request on May 6, 2014.<sup>18</sup>

A pre-trial conference was held on April 29, 2014, at which time the case was set for a 2<sup>nd</sup> pre-trial conference to be held on May 14<sup>th</sup>.<sup>19</sup> Speedy trial time was not waived in the entry of continuance executed at the time of the first pre-trial conference.<sup>20</sup>

At the 2<sup>nd</sup> pre-trial conference which was held on May 14, 2014, the case was set for a plea or trial setting conference on May 29<sup>th</sup>, and the entry of continuance indicates that time was not being waived for the days that elapsed between those two hearings.<sup>21</sup>

The defendant filed the present motion to dismiss on May 29, 2014. On that same date, the matter was set for hearing on June 11, 2014 on the motion to dismiss and time was waived in the interim.<sup>22</sup> As noted above, the hearing was held on the motion to dismiss on June 11<sup>th</sup> and was taken under advisement at the conclusion of that hearing and later set for an evidentiary hearing.

The defendant argues in his motion that the present case against him should be dismissed on the basis of a violation of his right to a speedy trial.

## **LEGAL ANALYSIS**

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<sup>17</sup> State's Exhibit 10 and Judgment Entry on Arraignment, filed April 23, 2014.

<sup>18</sup> Demand for Discovery, filed April 24, 2014 and Discovery Response, filed May 6, 2014.

<sup>19</sup> Entry of Continuance, filed April 29, 2014.

<sup>20</sup> Id.

<sup>21</sup> Entry of Continuance, filed May 14, 2014.

<sup>22</sup> Entry of Continuance, filed May 29, 2014.

First, the court will note that the defendant's motion to dismiss specifically states that the present motion is based on "a violation of [the defendant's] statutory right to speedy trial."<sup>23</sup> However, pursuant to R.C. 2945.71(C)(2), "[a] person against whom a felony is pending \* \* \* [s]hall be brought to trial within two hundred seventy days after the person's arrest." As such, statutory speedy trial analysis begins on the date of the defendant's arrest, with the actual day of arrest not included in computing the time limit.<sup>24</sup>

The defendant's argument in the case at bar regarding speedy trial time elapsing addresses pre-arrest delays and, as such, the motion will be deemed to have raised a constitutional speedy trial challenge. Additionally, the defendant filed a supplemental memorandum on September 3, 2014, addressing the constitutional speedy trial issues.

The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial.<sup>25</sup>

"In *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, the United States Supreme Court set out a balancing test to determine whether a defendant has been deprived of his constitutional right to a speedy trial."<sup>26</sup> "A court should weigh the length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant caused by the delay in deciding whether the right has been violated."<sup>27</sup>

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<sup>23</sup> Motion to Dismiss, filed May 29, 2014.

<sup>24</sup> *State v. Stokes*, 12<sup>th</sup> Dist. Warren No. CA2010-09-086, 2011-Ohio-2104, ¶ 11.

<sup>25</sup> *State v. Kerby*, 162 Ohio App.3d 353, 360, 2005-Ohio-3734, 833 N.E.2d 757, ¶ 17 (2<sup>nd</sup> Dist.).

<sup>26</sup> *State v. Kelly*, 12<sup>th</sup> Dist. Clermont No. CA2004-12-104, 2005-Ohio-7032, at ¶ 11.

<sup>27</sup> *Id.*

The *Barker* court noted that “[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.”<sup>28</sup>

The United States Supreme Court has also stated that “postaccusation delay [is] ‘presumptively prejudicial’ at least as it approaches one year.”<sup>29</sup> The Ohio Supreme Court has held that “[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment.”<sup>30</sup>

As set forth above, the indictment was filed in the present case on May 7, 2013. A warrant on indictment was issued on May 15, 2013, the same date the defendant was declared a violator at large by the Adult Parole Authority. The defendant was arrested pursuant to the warrant on indictment in this case on April 22, 2014, almost one year after the issuance of the warrant. Since the post-accusation delay amounts to almost one year in the present case, the court finds that it is presumptively prejudicial.

The Ohio Supreme Court has held that “the filing of [a] criminal complaint triggered the speedy trial inquiry under *Barker*.”<sup>31</sup> “Courts reviewing post-accusation

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<sup>28</sup> *Barker*, supra, 407 U.S. at 530-531.

<sup>29</sup> *Armstrong v. Altieri*, 11<sup>th</sup> Dist. No. 2006-T-0011, 2006-Ohio-2390, ¶ 18, citing *Doggett v. United States* (1992), 505 U.S. 647, 652, fn. 1, 112 S.Ct. 2686.

<sup>30</sup> *State v. Sears*, 166 Ohio App.3d 166, 2005-Ohio-5963, 849 N.E.2d 1060, ¶ 6 (1<sup>st</sup> Dist.), citing *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971), paragraph three of the syllabus.

<sup>31</sup> *State v. Selvage*, 80 Ohio St.3d 465, 468-469, 687 N.E.2d 433 (1997).

delay have considered delays from the date of indictment to the date of arrest as well as from the date of indictment or arrest to the date of trial.”<sup>32</sup>

Therefore, the court will begin measuring the defendant’s speedy trial time from the date of his indictment.

Under the first *Barker* factor, “the Ohio Supreme Court assigned weight to the length of the delay on the basis of what it identified as ‘[t]he interests which the Sixth Amendment was designed to protect - freedom from extended pretrial incarceration and from the disruption caused by unresolved charges[.]’ ”<sup>33</sup> In *State v. Triplett*, 78 Ohio St.3d 566, 679 N.E.2d 290 (1997), the defendant was incarcerated on different charges at the time he was awaiting trial and, as a result, the court assigned “negligible weight in the defendant’s favor to the fifty-four month delay she experienced.”<sup>34</sup> Likewise, in *State v. Worthy*, 9<sup>th</sup> Dist. Lorain No. 96CA006576, 1997 WL 422884, the court held that a thirteen month delay between indictment and arrest weighed negligibly in the defendant’s favor because he was incarcerated on other charges and as a result the delay in prosecution “did not effect his interests in freedom from pretrial incarceration and in avoiding disruption from unresolved charges.”<sup>35</sup>

Similarly, in the case at bar, the almost year-long delay between indictment and arrest in the case sub judice did not affect the defendant’s interest in freedom from pretrial incarceration or in avoiding disruption from unresolved charges. The defendant was incarcerated in Florida for several months, his Florida case was ultimately

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<sup>32</sup> *State v. Messer*, 12<sup>th</sup> Dist. Clermont No. CA2006-10-084, 2007-Ohio-5899, ¶ 9, citing *State v. Webb*, 4<sup>th</sup> Dist. Washington No. 01CA32, 2002-Ohio-3552, ¶ 25; and *State v. Carter*, 9<sup>th</sup> Dist. Lorain No. 97CA006703, 1998 WL 150380, \*3 (April 1, 1998).

<sup>33</sup> *State v. Worthy*, 9<sup>th</sup> Dist. Lorain No. 96CA006576, 1997 WL 422884, \*2 (July 16, 1997), citing *State v. Triplett*, 78 Ohio St.3d 566, 679 N.E.2d 290 (1997), citing *Doggett*, supra.

<sup>34</sup> Id.

<sup>35</sup> Id.

adjudicated, and he served his jail sentence in that state. Upon his release, he was returned to Ohio to be sentenced on his parole violation and he was then brought to Hamilton County on its warrant.

The defendant argues that the fact that he signed a warrant of extradition during the early stages of his incarceration in Florida triggered the running of his speedy trial time and, as such, that any delay thereafter weighs in his favor. However, under Florida law, “[i]f a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the Governor, in his or her discretion, either may surrender the person on demand of the executive authority of another state or hold the person until he or she has been tried and discharged or convicted and punished in this state.”<sup>36</sup> “Accordingly, [the defendant] was not entitled to be immediately brought back to Ohio simply because he executed a waiver of extradition.”<sup>37</sup> “The State of Florida could maintain custody of appellant because criminal proceedings were pending against him in Florida.”<sup>38</sup> Just a few days after the defendant signed his waiver of extradition, new charges were filed against him by the Daytona Beach Police Department and the Clermont County Sheriff’s Office was advised that the defendant was no longer ready to be picked up. Therefore, the mere fact that the defendant signed a waiver of extradition does not make the length of the delay weigh heavily in his favor when, as in this case, there were factors preventing Clermont County from procuring the defendant on the warrant.

As such, the first *Barker* factor weighs only negligibly in favor of the defendant.

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<sup>36</sup> F.S.A. 941.19.

<sup>37</sup> *State v. Neal*, 5<sup>th</sup> Dist. Delaware No. 2005CAA02006, 2005-Ohio-6699, ¶ 36.

<sup>38</sup> *Id.*

The second *Barker* factor to be considered is the reason for the delay. “The reason-for-delay factor ‘is concerned with whether the government or the defendant is more to blame for the delay.’ ”<sup>39</sup> “ \* \* \* [I]t be noted that the second *Barker* factor ‘is not a search for a blameless party,’ \* \* \*; instead, the concern is with ‘whether the government or the criminal defendant is more to blame for [the] delay.’ ”<sup>40</sup>

“ ‘There must be some indication of attempts to serve the warrant by arrest or summons.’ ”<sup>41</sup> “ ‘This issue becomes whether the [the State] used reasonable diligence in execution of the warrant.’ ”<sup>42</sup>

The defendant was at large at the time the prosecution attempted to serve him with a summons on the indictment; as such, the state then filed a warrant on the indictment. The defendant was arrested in Florida less than a month after the indictment was filed and he was, therefore, effectively unavailable to Clermont County. The defendant signed a warrant of extradition and, upon being notified of such, the Clermont County Sheriff’s Office ordered the Prisoner Transport System to retrieve the defendant. However, just days later, the Sheriff’s Office was notified that the defendant was no longer available because he had new Florida charges filed against him and those charges needed to be adjudicated. After the defendant was sentenced on those new charges and his sentence was served, it would appear that Volusia County alerted the Ohio Parole Authority because it made arrangements to retrieve the defendant from Florida in November 2013.

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<sup>39</sup> *State v. Dennison*, 10<sup>th</sup> Dist. Franklin No. 12AP-718, 2013-Ohio-5535, ¶ 36, quoting *State v. Quinnie*, 10<sup>th</sup> Dist. Franklin No. 12AP-484, 2013-Ohio-1208, ¶ 14, citing *Doggett*, supra, 505 U.S. at 651.

<sup>40</sup> *State v. Jenkins*, 5<sup>th</sup> Dist. Stark No. 2009-CA-00150, 2010-Ohio-2719, ¶ 54, quoting *Wilson v. Mitchell*, 250 F.3d 388, 395 (6<sup>th</sup> Cir.2001); and, *Doggett*, supra, 505 U.S. at 651.

<sup>41</sup> *Id.* at ¶ 59, quoting *State v. McNichols*, 5<sup>th</sup> Dist. Stark No. 2000CA00058, 2000 WL 1275491 (Sept. 5, 2000).

<sup>42</sup> *Id.*

The defendant's parole violations were adjudicated and he was sentenced to a new prison term in Ohio. Corporal Welch indicated that the Clermont County Sheriff's Office could not retrieve the defendant from prison without a court order. The defendant did not file a demand to have his Clermont County charges adjudicated at any time during his prison term. The defendant was released from prison and picked up by Hamilton County on its holder. Shortly thereafter, the defendant was picked up by Clermont County and served with the indictment in this case.

The state clearly made diligent efforts to serve the defendant with the indictment in this case. The defendant was incarcerated for months in a Florida county jail and was not available to be transported to Ohio. The defendant is more to blame for the delay in prosecution than is the state of Ohio. The defendant was unavailable to Clermont County for the majority of the time between May 2013 and April 2014 because he was serving time in Florida and then a prison sentence in Ohio for parole violations.

The court finds that the second *Barker* factor weighs in favor of the state.

The third factor to be weighed is the defendant's assertion of his right to a speedy trial.

"Generally, when the defendant has filed a motion to dismiss based on speedy trial violations, courts will weigh the third *Barker* factor in the defendant's favor."<sup>43</sup> In the present case, the defendant also signed a waiver of extradition in an attempt to have these charges adjudicated in a timely manner. As such, the third factor weighs in favor of the defendant.

The final *Barker* factor is the prejudice experienced by the defendant. "In terms of the fourth factor, prejudice to the defendant can take three forms: lengthy incarceration,

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<sup>43</sup> *State v. Williams*, 10<sup>th</sup> Dist. Franklin No. 13AP-992, 2014-Ohio-2737, ¶ 19.

anxiety over unresolved criminal charges, and impediments to an effective defense.”<sup>44</sup>

The United States Supreme Court has also noted that “[o]nce triggered by arrest, indictment, or other official accusation, \* \* \* the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized.”<sup>45</sup>

In the case at bar, there has been no allegation by the defendant of any specific, identifiable prejudice he has suffered as a result of the delay with regard to his ability to effectively defend against the charges in the case at bar. The defendant did not suffer lengthy incarceration on these charges and was instead incarcerated on other charges during the post-indictment delay and, as such, that consideration is not applicable here. This leaves only anxiety over unresolved criminal charges. The delay in this case was just slightly less than one year. During this time, the defendant was dealing with multiple charges in Florida, parole violation charges in Ohio and charges in Hamilton County and Butler County. It is unlikely that the defendant suffered much anxiety, if any, over the present unresolved charges since he had so many charges in so many counties pending at the time. Furthermore, while in prison in Ohio, the defendant never made an attempt to have these charges adjudicated, which demonstrates they were not at the forefront of his mind or worries.

As such, the court finds that there was no prejudice suffered by the defendant as a result of the post-indictment delay in this case and, therefore, the fourth and final *Barker* factor weighs in favor of the State.

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<sup>44</sup> *Barker*, supra, 407 U.S. at 532.

<sup>45</sup> *Doggett*, supra, 505 U.S. at 655.

Having weighed and balanced all of the *Barker* factors, the defendant has not demonstrated that he has been deprived of his constitutional right to a speedy trial.

**CONCLUSION**

Based on the above analysis, the defendant's motion to dismiss is not well-taken and is hereby denied.

A Plea or Trial Setting conference shall be held in this case on September 30, 2014 at 8:30 a.m.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

## **CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent by e-mail on September 26, 2014 to the following parties:

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