

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

STATE OF OHIO :
Plaintiff : **CASE NO. 2012 CR 00310**
vs. : **Judge McBride**
CHARLES MICHAEL WINTERMAN : **DECISION/ENTRY**
Defendant :

Lara A. Molnar, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

The Law Office of Steven R. Adams, R. Shane Herzner, attorney for the defendant Charles Michael Winterman, 8 West Ninth Street, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion to dismiss filed by the defendant Charles Michael Winterman. On August 29, 2012 the parties agreed to submit the motion to dismiss without oral argument and the court took the motion under advisement at that time.

Upon consideration of the motion, the record of the proceeding, the written arguments of counsel, and the applicable law, the court now renders this written decision.

On April 11, 2012, the defendant appeared in the Clermont County Municipal Court and entered a waiver of his preliminary hearing.¹ The court then ordered that the defendant be bound over to the Court of Common Pleas.² On June 20, 2012, the indictment was filed in the present case.

In his motion to dismiss, the defendant notes that the indictment in the present case was returned from the grand jury seventy days after the case was bound over from Municipal Court. Consequently, the defendant argues that the case should be dismissed pursuant to Ohio Rules of Superintendence Rule 39(B)(2), which states as follows:

“When an accused has been bound over to a grand jury and no final action is taken by the grand jury within sixty days after the date of the bindover, the court or the administrative judge of the court shall dismiss the charge unless for good cause shown the prosecuting attorney is granted a continuance for a definite period of time.”

In support of his position, the defendant cites to the case of *State v. Tyler*, 67 Ohio App.3d 455, 587 N.E.2d 367 (Ohio App. 4th Dist., 1990). In that case, the indictment against the defendant was returned in excess of sixty days after bindover.³ The trial court dismissed the indictment with prejudice and the state appealed.⁴ The appellate court found that the Rule of Superintendence [Rule 8(A) which has been reissued as Rule 39(B)(2)] had been violated and that the rule does call for dismissal of the charge, but not with prejudice.⁵ In its discussion, the court stated as follows:

“Section 5(A), Article IV, Ohio Constitution authorizes the Ohio Supreme Court to establish Rules of Superintendence.

¹ Waiver of Preliminary Hearing and Journal Entry, filed April 11, 2012.

² Id.

³ *State v. Tyler*, 67 Ohio App.3d 455, 587 N.E.2d 367 (Ohio App. 4th Dist., 1990), at 455.

⁴ Id. at 456.

⁵ Id.

‘ * * * These Rules of Superintendence are designed (1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts.

‘ * * * The Rules of Superintendence are not designed to alter basic substantive rights of criminal defendants.’ *State v. Singer* (1977), 50 Ohio St.2d 103, 109-110, 4 O.O.3d 237, 240-241, 362 N.E.2d 1216, 1220-1221.

The court in the instant case was correct in finding C.P.Sup. 8(A) had been violated; however, it was incorrect in the sanction it imposed for the violation. Although the rule calls for a dismissal of the charge, it does not state the dismissal should be with prejudice. Appellee cites no authority for the court's use of the superintendence rules as an absolute bar to criminal prosecution.

In *State v. Porter* (1976), 49 Ohio App.2d 227, 230, 3 O.O.3d 276, 278, 360 N.E.2d 759, 761, the court stated:

‘This court has consistently held that the Superintendence Rules are guidelines for judges only and cannot be used by criminal defendants as a ground for discharge.’

The court in *State v. Gettys* (1976), 49 Ohio App.2d 241, 243, 3 O.O.3d 286, 287, 360 N.E.2d 735, 737, found the Rules of Superintendence to be:

‘ * * * [P]urely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants. * * * ’⁶

In *State v. Perry* (Jan. 20, 2006), 4th Dist. No. 05CA2839, 2006-Ohio-220, that same appellate court was faced with a challenge to the defendant's conviction based on noncompliance with the sixty-day requirement.⁷ The defendant filed a *pro se* motion requesting dismissal of his case based on the state's failure to comply with Sup.R.

⁶ Id. at 456-457.

⁷ *State v. Perry* (Jan. 20, 2006), 4th Dist. No. 05CA2839, 2006-Ohio-220, at ¶ 13.

39(B)(2), which was never ruled on by the trial court.⁸ The appellate court noted that, “had the [trial] court ordered a dismissal, the state could have simply re-filed the charges[,]” and, as a result, the defendant failed to demonstrate any prejudice that would warrant a reversal of his conviction.⁹

In *State v. Navedo* (May 9, 2008), 11th Dist. No. 2007-L-094, 2008-Ohio-2324, the defendant argued that the trial court had no jurisdiction in his case because his indictment was returned more than sixty days after bindover.¹⁰ The appellate court, citing the *Singer*, *Porter*, and *Gettys* cases discussed by the *Tyler* court, held that, since the Rules of Superintendence are merely guidelines for judges that are not designed to alter substantive rights of criminal defendants, the trial court had jurisdiction to hear the defendant’s case, despite the state’s failure to comply with Sup.R. 39(B)(2).¹¹ The appellate court also noted that there was no ineffective assistance of counsel for failing to raise the issue at the trial court level because “[i]neffective assistance of counsel manifestly does not arise when counsel does not pursue a fruitless argument.”¹²

Similarly, in *State v. Miller* (Aug. 22, 1997), 11th Dist. No. 96-P-0253, 1997 WL 589979, the court held that the defendant was not entitled to dismissal of his case even when there was not compliance with the sixty-day requirement because “it is well established that the Superintendence Rules are merely guidelines for judges which cannot be used by criminal defendants seeking a dismissal of their case.”¹³ The court in *State v. Parker* (Feb, 5, 1997), 9th Dist. No. 17874, 1997 WL 66221, also held that a

⁸ Id.

⁹ Id. at ¶ 15.

¹⁰ *State v. Navedo* (May 9, 2008), 11th Dist. No. 2007-L-094, 2008-Ohio-2324, at ¶ 15.

¹¹ Id. at ¶¶ 18-19. See, also, *State v. Burnette* (Dec. 5, 2011), 7th Dist. No. 09-CO-44, 2011-Ohio-6400, ¶¶ 11-14 (“* * the failure to indict within sixty days of bindover does not divest the trial court of jurisdiction.”).

¹² Id. at ¶ 19.

¹³ *Miller* at *2, citing *Tyler* at 456.

defendant was not entitled to have the charges against him dismissed based on noncompliance with the sixty-day requirement set forth in the Rules of Superintendence because the Rules of Superintendence “cannot be used by criminal defendants as a ground for discharge.”¹⁴

In the case at bar, the state returned the indictment against the defendant seventy days after bindover and the state never made a request for a continuance of the sixty-day time period. Therefore, the state failed to comply with the time requirement set forth in Sup.R. 39(B)(2). However, as discussed above, the Rules of Superintendence are merely guidelines for judges which cannot be used by a criminal defendant as grounds for dismissal of his case.

As a result, the court finds that the defendant’s motion to dismiss is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

¹⁴ State v. Parker (Feb, 5, 1997), 9th Dist. No. 17874, 1997 WL 66221, at *2.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 12th day of September 2012 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride