



Ohio Prosecuting Attorneys Association

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Delay in Sentencing

In *State v. Martinez*, 6th Dist. No. WD-09-068, 2010-Ohio-2007, the defendant pleaded guilty to two counts in April 2007. When he failed to appear for sentencing in June 2007, an arrest warrant was issued. Two years later, the court imposed sentences totaling almost five years

On appeal, the defendant complained about the delay in holding the sentencing hearing. The 6th District noted the existence of case law holding that a court can lose jurisdiction if there is unnecessary delay in sentencing: "Under Crim.R. 32(A)(1), a sentence shall be imposed without unnecessary delay. An unreasonable delay between a plea and a sentencing, which cannot be attributed to the defendant, will invalidate that sentence. *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, ¶ 31. *City of Willoughby v. Lukehart* (1987), 39 Ohio App.3d 74. The remedy for an unreasonable delay in sentencing is the vacation of the sentence. *Brown*, supra at 26-28."

In *Martinez*, the 6th District distinguished the general case law on the ground that the prosecution and court had no specific information as to the defendant's location:

{¶ 16} The facts in this case are distinguishable from the facts in the cases cited by appellant. In the latter cases, the state and or the trial court were shown to have relevant, specific information of the defendants' whereabouts yet they simply failed to act on said information in a timely manner. Furthermore, the records in those cases showed the state and or the trial court had no valid excuse for their inaction.

{¶ 17} The record in this case shows that appellee had no notice of appellant's whereabouts until appellant filed his "sentencing memorandum" in 2009. We find appellant's contention that appellee had knowledge of his whereabouts is without merit. The prosecutor, as shown on the record, had received vague information in 2007 about possible pending charges in Lucas County but then became convinced, based on his own investigation, that there were no such charges. Thus, the prosecutor had no reason to seek out appellant in the State penal system. Accordingly, we find appellant's delay in sentencing is solely attributable to his failure to appear at his initial sentencing date. * * *

Although the prosecution prevailed in *Martinez*, there are serious flaws in the court's analysis that are worth exploring. First, any delay should have been deemed solely attributable to the

defendant. The court had set a timely sentencing date in 2007; the defendant's failure to appear was his own doing, apparently because the defendant had committed new offense(s) resulting in detention in another part of the State. The invited-error concept should apply here.

Second, even the *constitutional* right to a speedy trial has a factor that addresses the extent to which the defendant demanded a speedy trial or objected to the failure to provide a speedy trial. The defendant's failure for two years to notify the court of his location in an Ohio prison showed that he did not really desire a speedy sentencing hearing. Regardless of whether the prosecution or court knew of the defendant's location, the defendant's failure to seek an earlier sentencing should have been almost preclusive under the purported speedy-sentencing case law relying on Crim.R. 32(A)(1). See *Barker v. Wingo* (1972), 407 U.S. 514, 531-32 ("failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.").

Most importantly, though, the case law is fundamentally flawed in relying on Crim.R. 32(A)(1) as creating a "jurisdictional" right to a sentencing without unnecessary delay. Criminal Rule 32(A) cannot be "jurisdictional" because it is a mere rule of practice or procedure promulgated pursuant to the Supreme Court's rule-making authority under Article IV, Section 5(B), of the Ohio Constitution. The Supreme Court cannot prescribe rules governing "substantive" matters, and "jurisdictional" matters are substantive, not procedural. *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶ 30 (subject matter jurisdiction "is substantive law rather than procedural"); *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 18 (jurisdictional statute is "substantive law"). The "unnecessary delay" provision in a mere criminal rule cannot be "jurisdictional."

Nor is there any indication that the Court adopting the rule intended the rule to have a jurisdictional effect. Statutory time limits are generally treated as directory, not jurisdictional. *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467. "[I]t is only where a statutory time requirement evinces an object or purpose to limit a court's authority that the requirement will be considered jurisdictional." *State v. Bellman* (1999), 86 Ohio St.3d 208, 210. A directory-only interpretation is particularly appropriate when the statutory time provision relates to the time in which a court must act, as time limits directed at court actions are generally treated as directory. *State ex rel. Turrin v. County Court* (1966), 5 Ohio St.2d 194, 196; *James v. West* (1902), 67 Ohio St. 28, 44, & at paragraph three of the syllabus. Such time limits are binding on the conscience of judges, but they "are not matters affecting their jurisdiction." *Id.* at 44; see, also, *In re Davis* (1999), 84 Ohio St.3d 520,522 (provision "does not include any expression of intent to restrict the jurisdiction of the court for untimeliness."). A jurisdictional provision should not be read into a statute or rule. *State ex rel. Skinner Engine Co. v. Connar* (1931), 124 Ohio St. 404, 406 (time limit deemed directory; "There is no propriety in reading into the statute a provision which the Legislature did not place there.").

Insofar as the right to a "speedy trial" is concerned, there is some case law indicating that the speedy-trial right does not extend to sentencing. "[A]s a general rule, the right to a speedy trial

applies to the trial of pending criminal charges, not sentencing.” *State v. Christian*, 7th Dist. No. 05-MA-89, 2006-Ohio-3567, ¶48, citing *State v. Keeble*, 2nd Dist. No. 03CA84, 2004-Ohio-3785. “[T]rial’ in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict * * *.” *Thomas v. Mills* (1927), 117 Ohio St. 114, 119; *State v. Barnes* (1984), 14 Ohio App.3d 351 (indictment not “untried” if awaiting sentencing). “[T]he purpose of speedy trial protections is to insure that factual guilt is validly established.” *Montpelier v. Greeno* (1986), 25 Ohio St.3d 170, 172 (internal quotation marks omitted). As used in the Sixth Amendment, the word “trial” is “properly construed as referring to the adversary hearing that determines guilt or innocence.” *State v. Johnson* (La. 1978), 363 So.2d 458, 460. If sentencing were part of the “trial,” then “trial” by jury would include jury sentencing, but “[t]here is no Sixth Amendment right to jury sentencing * * *.” *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 93.

Although the speedy-trial right probably does not apply to sentencing, a fair number of federal courts use procedural due process as the basis to apply a *Barker*-like approach to delays in sentencing and/or delays in appeal.

Delayed Appeal

In *State v. Zimcosky*, 11th Dist. No. 2010-L-045, 2010-Ohio-2585, the 11th District recognized that a defendant could not use a motion for delayed appeal in an effort to pursue a second appeal from the same judgment of conviction:

{¶9} This court, and other Ohio courts, have held that an App.R. 5(A) delayed appeal cannot be utilized as a means of maintaining successive appeals from the same judgment. See *State v. Cioffi*, 11th Dist. Nos. 2009-T-0065 and 2009-T-0066, 2009-Ohio-4932 at ¶10; *State v. Perry*, 11th Dist. No. 2008-T-0127, 2009-Ohio-1320 at ¶5; *State v. Haynes* (1996), 111 Ohio App.3d 244, 245; *State v. Komora* (Oct. 9, 1998), 11th Dist. No. 98-G-2167.

{¶10} * * * [P]ursuant to the foregoing cases, the procedure provided in App.R. 5(A) is not available to appellant in his present attempt to take a successive appeal from the same judgment entry which he has already appealed to this court.

Consciousness of Guilt Instruction

In *State v. Wilson*, 3rd Dist. No. 1-09-64, 2010-Ohio-2294, an arrest warrant was issued for the defendant based on his involvement in a shooting. When the police attempted to arrest the defendant, they approached the defendant and announced that he was under arrest, but defendant fled, despite several “stop – under arrest” commands by the police. When the defendant was apprehended, he volunteered without prompting that he did not have anything to do with the shooting.

At the State’s request, the court gave the following instruction on consciousness of guilt:

Now, testimony has been admitted indicating that the defendant resisted arrest. You are instructed that defendant's running alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness or awareness of guilt. If you find that the facts do not support that the defendant resisted arrest, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct, and if you decide the defendant was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone will determine what weight, if any, to give to this evidence.

Convicted on all charges, the defendant complained on appeal that the instruction had not been supported by sufficient evidence. The 3rd District rejected that contention.

{¶9} “It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.” *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, reversed in part on other grounds as stated by *Eaton v. Ohio* (1972), 408 U.S. 935, quoting 2 Wigmore, Evidence (3 Ed.), 111, Section 276. Accordingly, a jury instruction on consciousness of guilt based upon the flight of the accused is appropriate when supported by sufficient evidence in the record. See *State v. Jeffries*, 182 Ohio App.3d 459, 2009-Ohio-2440, ¶80, citing *State v. Davilla*, 9th Dist. No. 03CA008413, 2004-Ohio-4448, ¶12. * * *

{¶10} Here, Patrolman Caldwell testified that Wilson took off running when he approached Wilson's residence and informed Wilson that he was under arrest; that Wilson ran despite not being informed of the reason for the arrest; that he never told Wilson the basis for the arrest warrant; that the warrant was also based upon charges unrelated to the Brown shooting, including obstructing official business and failure to appear; and, that, as he was walking Wilson to the patrol car, Wilson made the unsolicited statement that he “didn't shoot at nothing.” (Trial Tr., p. 123). Although Wilson argues that his flight could have been due to his knowledge of other bases for the arrest warrant, and that he could have made the statement about the shooting because he lives in close proximity to Brown's residence and was aware of the shooting, these arguments only serve to demonstrate reasons the jury could find that his flight was not evidence of consciousness of guilt, not that a consciousness of guilt instruction was unwarranted. There was clearly sufficient evidence to allow a reasonable inference that Wilson's flight, coupled with his subsequent comment to Patrolman Caldwell, indicated a consciousness of guilt such that a jury instruction on the issue was not an abuse of discretion by the trial court. We also note that the trial court's consciousness of guilt jury instruction mirrored the instruction as set forth in Ohio Jury Instructions (2009), Section CR 409.13(1), was clearly neutral in its effect, and only permitted, not required, the jury to draw the conclusion that Wilson displayed a consciousness of guilt by fleeing the police.

Knock and Talk Approach Approved

In *State v. Birdsall*, 6th Dist. No. WM-09-016, 2010-Ohio-2382, the police went to the defendant's home based on the report that a methamphetamine lab was being operated there. Upon reaching the home, the officer heard loud music coming from the detached garage within the curtilage. The officer approached the garage on foot via the driveway and knocked on the garage door. An apparent guest answered the door and closed it behind him. The ensuing conversation with the guest, and the consent of the defendant's live-in girlfriend, led to the discovery of incriminating evidence.

After losing a suppression motion, the defendant pleaded no contest to illegal drug manufacturing and appealed, claiming that the police acted illegally in approaching the garage. After noting that the garage was within the curtilage, the 6th District nevertheless upheld the approach:

{¶ 13} Absent a warrant, police have no greater rights on another's property than any other visitor has. Thus, it has been held that the only areas of the curtilage where officers may go are those impliedly open to the public. This area includes walkways, driveways, or access routes leading to the residence. *State v. Dyreson* (Wash.App. 2001), 17 P.3d 668; *State v. Pacheco* (Mo.App. 2003), 101 S.W.3d 913, 918; *State v. Johnson* (N.J. 2002), 793 A.2d 619. The guiding principal is that a police officer on legitimate business may go where any "reasonably respectful citizen" may go. *Dyreson*, supra; see, also, *State v. Tanner* (Mar. 10, 1995), 4th Dist. No. 94CA2006. Police are privileged to go upon private property when in the proper exercise of their duties. See *State v. Chapman* (1994), 97 Ohio App.3d 687.

{¶ 14} As the Second District Court of Appeals aptly noted:

{¶ 15} "In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police, * * *. If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so." *State v. Alexander* (Oct. 6, 2000), 2d Dist. No. 2000-CA-6.

The 6th District found that the police officer had acted properly. "Ruskey, in entering appellant's property and knocking on the garage door was acting much like any 'reasonably respectful citizen' would. The fact that Ruskey was there based on information he received from an uncorroborated anonymous tip is irrelevant for our purposes here."

Vouching Claim Rejected

In *State v. Thompson*, 1st Dist. No. C-090450, 2010-Ohio-2366, the prosecutor made various statements in closing argument contending that the prosecution witnesses had been telling the truth:

{¶19} “[The state’s witnesses] were consistent throughout, consistent from their interviews with police until they testified here before you. None of them got any breaks. They had no reason to come in here and lie about anything.

{¶20} “They were all credible.

{¶21} “So these people were all very credible.

{¶22} “[Deandre Thomas] is the only one that saw what happened out there, except for [Thompson]. And Thomas is the only believable one that saw what happened out there.

{¶23} “You’ve heard [Thompson] testify, and you heard his prior statements, and I think [that] you know [that Thompson] is not credible; but Deandre Thomas is.

{¶24} “The truth is what Quincy Jones, Deandre Thomas, Dontai Robinson, Antuann [Watkins], that’s the truth, what they said. What [Thompson] told you via tape and then later via testimony, neither one of those is true.”

The 1st District upheld the comments because they were based on the evidence:

{¶25} A prosecutor may not express a personal belief or opinion on the credibility of a witness. Prosecutors are afforded a degree of latitude in their concluding remarks, and they are free to draw reasonable inferences from the evidence at trial and may comment on those inferences during closing arguments. We note in this case that the state was not vouching for its witnesses; it was merely commenting on which witnesses would have a motive to lie, while pointing out facts that were in evidence that made each witness more or less credible as compared with Thompson’s testimony and version of the facts. The evidence showed that Thompson had attempted to attack the veracity of the state’s witnesses by arguing that they were all criminals who had made deals with the state, and that they could not be believed. In rebutting Thompson’s attack on the credibility of its witnesses, the state did not improperly vouch for its witnesses; it merely commented on the evidence. The record does not support Thompson’s claim of improper personal vouching or any implication that such conduct occurred. We hold that the prosecutor’s statements were not improper — the closing remarks did not amount to improper vouching, nor did they give any impression that the state had personal knowledge about the motivations of witnesses. (Footnotes omitted)