

OPINION NO. 74-062

Syllabus:

The provisions of R.C. 2945.71, with respect to the periods of time within which trials in criminal cases must be held, apply to violations of traffic laws. The judge presiding over such cases may, however, pursuant to R.C. 2945.72, grant a continuance which extends the periods set forth in R.C. 2945.71 upon a reasonable showing that there is insufficient time in which to try the case.

To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio
By: William J. Brown, Attorney General, August 2, 1974

I have before me your request for my opinion which reads as follows:

"We are writing to request your opinion as to whether the time limitations within which trials in criminal cases must be held, as provided in Ohio Revised Code Section 2945.71 as amended effective January 1, 1974, apply to traffic cases.

* * * * *

"We have had requests from the county courts in particular because of a large backlog of traffic cases in some areas because of the presence of heavily traveled freeways or turnpikes in those areas. There is a belief that the requirements set by Section 2945.71, Subsections (A) and (B), cannot be met if those subsections apply to traffic offenses.

"We have been unable to find any authority on the subject in question. We note that in Rule 1 (C) of the Ohio Rules of Criminal Procedure, it provides that the rules do not apply to procedure in cases covered by the Uniform Traffic Rules. There appears to have been some recognition, at least in the Rules, that traffic cases create special problems. We request your opinion, therefore, as to whether traffic cases are similarly exempt from the provisions of Ohio Revised Code Section 2945.71."

Article I, Section 10 of the Constitution of the State of Ohio, provides in part as follows:

"* * * In any trial, in any court, the party accused shall * * * have * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed * * *"

In order to implement this provision, the General Assembly has enacted several statutes dealing with the right of the accused to a speedy trial.

R.C. 2945.71, which provides time limitations within which a hearing or a trial must be had on criminal charges, reads as follows:

"(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within fifteen days after his arrest or the service of summons.

"(B) A person against whom a charge or misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

"(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

"(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

"(C) A person against whom a charge of felony is pending:

"(1) Shall be accorded a preliminary hearing within fifteen days after his arrest;

"(2) Shall be brought to trial within two hundred seventy days after his arrest.

"(D) For purposes of computing time under divisions (A), (B), and (C) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.

"* * * * *"

R.C. 2945.73, which requires a discharge in the event that a trial or hearing is unduly delayed, provides as follows:

"(A) A charge of felony shall be dismissed if the accused is not accorded a preliminary hearing

within the time required by sections 2945.71 and 2945.72 of the Revised Code.

"(B) Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.

"(C) Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge:

"(1) For a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged;

"(2) For a total period equal to the term of imprisonment allowed in lieu of payment of the maximum fine which may be imposed for the most serious misdemeanor charged, when the offense or offenses charged constitute minor misdemeanors.

"(D) When a charge of felony is dismissed pursuant to division (A) of this section, such dismissal has the same effect as a nolle prosequi. When an accused is discharged pursuant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him based on the same conduct."

Since the foregoing statutes apply to all cases involving criminal charges, the proper disposition of your question depends in part upon the precise nature of traffic offenses.

It has been held that a violation of the Motor Vehicles Act, R.C. Chapter 4511., constitutes a crime. Dayton v. Brennan, 64 Ohio L. Abs. 525 (1952). Moreover, R.C. 2901.03, which sets forth the definition of a criminal offense, reads in part as follows:

"(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty."

It is apparent, therefore, that traffic violations are criminal offenses and as such are included within the scope of R.C. 2945.71 et seq.

Violations of the Uniform Traffic Act, R.C. Chapter 4511., are not handled in all instances as other criminal violations. Rule 1(C), Ohio Rules of Criminal Procedure, provides that those Rules do not apply to cases covered by the set of Uniform Traffic Rules adopted by the Supreme Court in 1967. See 12 Ohio St. 2d XV, and 24 Ohio St. 2d XIX. However, the General Assembly, in adopting the new Criminal Code, did not except traffic viola-

tions from the trial time limitations set forth in R.C. 2945.71. On the other hand, those limitations are subject to extension for good cause. R.C. 2945.72 provides as follows:

"The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

" (A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

" (B) Any period during which the accused is mentally incompetent to stand trial, or is physically incapable of standing trial;

" (C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in assigning counsel to an indigent accused upon his request as required by law;

" (D) Any period of delay occasioned by the neglect or improper act of the accused;

" (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

" (F) Any period of delay necessitated by a removal or change of venue pursuant to law;

" (G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order.

" (H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion."

(Emphasis added.)

Thus, an extension may be granted for a variety of reasons. Subsection (H) of R.C. 2945.72 bestows upon the presiding judge broad discretionary power to grant a continuance. The language of Subsection (H) is essentially the same as that adopted by the Supreme Court in its uniform traffic rules for courts inferior to common pleas. Rule .12, Rules of Practice in Traffic Cases, which provides for continuance, reads as follows:

"Continuances, other than the setting for trial at time of plea, may be granted to either party only for good cause shown. The court, on its own motion, may postpone the trial for good and sufficient reasons."

A "continuance" may, of course, mean an adjournment or a recess of trial already in progress, but its more common meaning is the postponement to a later date of the commencement of trial. See State v. Rourick, 245 Iowa 319 (1953), 60 N.W. 2d 529.

Thus, an extension of time is possible for "the period of any reasonable continuance granted other than upon the accused's own motion." It is necessary, therefore, to determine whether or not insufficient time in which to try a case is a proper reason for granting such a continuance.

Until recently, the General Assembly expressly provided that lack of time in the third term of court was a proper basis for granting a continuance until the next term. The former version of R.C. 2945.72, provided as follows:

"A person shall not be held by recognizance without trial for a period of more than three terms to answer an indictment or information, not including a term at which a recognizance was first taken thereon, if taken in term time. He shall be discharged unless a continuance is had on his motion, or the delay is caused by his act, or there is not time to try him at such third term, in which case he shall be brought to trial at the next term or be discharged."

(Emphasis added.)

As of January 1, 1974, however, R.C. 2945.72 was completely rewritten. The provision pertaining to insufficient time was deleted and a comprehensive clause conferring broad discretion upon the presiding judge with respect to continuances was added. Although the deletion permits the inference that the General Assembly no longer intended that such a circumstance be considered a suitable basis for extending the time during which a trial must be held, the addition of such a broad provision does, in my opinion, dispel any such inference.

Historically, lack of time to try a cause has been considered a sufficient reason for its continuance. In Johnson v. State, 42 Ohio St. 207 (1884), the defendant was in jail under indictment, and the cause was continued on motion of the state at the second term after such imprisonment, because of the absence of material witnesses, and the cause could not be tried at the succeeding term for want of time. The Supreme Court held that the court had power to continue the cause again. There was in effect a statute which specified want of time at the second term as a basis for a continuance, but the Court based its holding on other grounds as well, stating at 209 as follows:

"This, we think, left the court clothed with power to continue the cause, under the statute, on application of the state, where the term was near its close, and it had become apparent that it was impracticable to try the cause at that time; for independently of the statute, the court is clearly vested with authority to continue for such cause, and we are of opinion that by the statutory provisions referred to the power has not been denied. Nor in so holding do we take an unwarranted liberty with the language of the statute."

(Emphasis added.)

In view of the fact that the Ohio Supreme Court has stated that a court has inherent power to continue a case for lack of time to try it, such reason is sufficient for a continuance under R.C. 2945.72(H).

Such power, however, is not unfettered. Although it is rarely possible to delimit precisely a judge's discretion, it is clear that want of time to try a case will not always, in and of itself, be a sufficient reason for a continuance. The Court in State v. Gray, 1 Ohio St. 2d 21 (1964), discharged a defendant who was forced to wait ten months for a trial because there was no courtroom available. The Court said(at p. 26):

"We do not believe that the excuse offered is sufficient ground upon which to refuse to discharge the appellant within the provisions of the statutes made and provided. For approximately ten months the appellant was in jail while civil cases were being disposed of and subsequently indicted persons were brought to trial or their causes otherwise disposed of."

The reason for which a continuance is granted must, therefore, be "good and sufficient" (Rule 12, supra), and the duration of the continuance must be "reasonable" (R.C. 2945.72(H)).

In specific answer to your question it is my opinion, and you are so advised, that the provisions of R.C. 2945.71, with respect to the periods of time within which trials in criminal cases must be held, apply to violations of traffic laws. The judge presiding over such cases may, however, pursuant to R.C. 2945.72, grant a continuance which extends the periods set forth in R.C. 2945.71 upon a reasonable showing that there is insufficient time in which to try the case.