

[Cite as *State v. Mohamed*, 2009-Ohio-6658.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 08AP-960
Plaintiff-Appellant,	:	(C.P.C. No. 08CR01-255)
v.	:	
	:	(REGULAR CALENDAR)
Abdi Mohamed,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 17, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellant.

*Todd W. Barstow*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, State of Ohio ("appellant"), appeals from the September 30, 2008 decision and judgment entry of the Franklin County Court of Common Pleas granting defendant-appellee, Abdi Mohamed's ("appellee"), motion to dismiss indictment for speedy trial violations. For the reasons that follow, we reverse.

{¶2} On January 7, 2006, appellee was arrested after severely beating a man known as Abdi Hassan and contemporaneously stealing a box containing suspected

khat,<sup>1</sup> a controlled substance. Appellee was charged in municipal court with one count of aggravated robbery and one count of felonious assault. He was not charged in municipal court for any offense involving possession of drugs or khat.

{¶3} On January 9, 2006, the suspected khat was submitted to the Bureau of Criminal Identification and Investigation ("BCI&I") for analysis in order to determine the precise chemical make-up and quantity of the substance.

{¶4} On January 17, 2006, appellee was indicted by the Franklin County Grand Jury on one count of aggravated robbery, two counts of robbery, and one count of felonious assault for events that occurred on January 7, 2006. He was not indicted on any drug-related charges.

{¶5} On April 25, 2006, appellee entered a plea of guilty to the stipulated lesser included offense of count four of the indictment, aggravated assault. The trial court entered a nolle prosequi as to the remaining three counts of the indictment. At a sentencing hearing held on July 20, 2006, appellee was sentenced to a three-year period of community control.

{¶6} On June 22, 2007, the results of the analysis conducted with respect to the substance found in appellee's possession on January 7, 2006, were submitted to the Franklin County Sheriff's Office. The results revealed the substance consisted of 40 bundles of shoots and leaves containing khat and weighing in excess of 3,188 grams.

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<sup>1</sup> Khat is the popular name of an exotic plant known as *catha edulis*. It is a shrub grown in countries of East Africa and the Arabian peninsula. Its use is widespread in Somalia. It is typically consumed by chewing the leaves or by brewing it in tea. Fresh khat contains cathinone, a potent psychoactive stimulant, and cathine, a less potent stimulant. Cathinone and cathine are in the same class of chemicals as amphetamines. As khat loses its freshness, the cathinone decomposes into the less potent cathine. See "Khat" available at <http://en.Wikipedia.org/wiki/Khat>, November 6, 2009. See also Street Drugs a drug identification guide (Publishers Group, ed. 2009).

{¶7} On January 11, 2008, appellee was indicted on one count of aggravated possession of drugs, a felony of the first degree, with a major drug offender specification. Specifically, the indictment charged appellee with possession of cathinone in an amount equal to or exceeding one hundred times the bulk amount. Appellee was also indicted on one count of aggravated robbery and one count of felonious assault. All three charges arose from the January 7, 2006 incident.<sup>2</sup>

{¶8} On May 20, 2008, appellee filed a motion to dismiss the indictment based upon alleged speedy trial violations. Appellee argued the 2008 indictment must be dismissed because the new drug charge arose out of the same set of facts as the 2006 aggravated robbery/felonious assault indictment. Because he previously pled guilty to a lesser offense with respect to that indictment and was held in jail prior to entering that plea, appellee argued his statutory speedy trial time had expired, and thus, the new charge for aggravated drug possession had to be dismissed.

{¶9} Appellant filed a memorandum contra to appellee's motion to dismiss, arguing the aggravated possession of drugs charge arose out of facts which were distinct from those supporting the original charges and that appellant was unaware of those facts at the time of the indictment on the original charges. Thus, appellant argued there were no statutory speedy trial violations because the time began running anew when the second indictment was filed.

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<sup>2</sup> In addition to the new possession charge, appellant reindicted appellee on the previous aggravated robbery and felonious assault charges which were originally set forth in the first indictment and resolved when appellee was sentenced to the stipulated lesser included offense of aggravated assault. Although the issue of double jeopardy as to these charges is not specifically before us, it should be noted that appellant has indicated that it does not intend to attempt to prosecute appellee for these two reindicted offenses, stating their reindictment was a clerical error.

{¶10} Appellee filed a response to appellant's memorandum contra. Appellee argued that because he had confessed that the substance in his possession was in fact khat, and because only probable cause was needed to indict, there was sufficient information for appellant to go forward with the drug charges at the same time as the aggravated robbery and felonious assault charges, without a lab analysis report. Additionally, appellee argued that because he was on community control, and also periodically in jail due to various probation holders, he was still under the supervision of the court following his July 2006 sentencing. As a result, appellee argued his speedy trial time had continued to run and had expired.

{¶11} Appellant filed a response, arguing the second indictment involved distinct facts that were unknown to the state prior to the receipt of the BCI&I lab analysis report. Under a new speedy trial clock, appellant calculated speedy trial time at 79 days, not the 482 days argued by appellee.

{¶12} Appellee filed a final response, further arguing that his speedy trial rights should not be ignored simply because the drug lab failed to provide the results of the analysis in a reasonable time. In addition, appellee argued for the first time that appellant's delay in bringing the drug charges violated his constitutional right to a speedy trial.

{¶13} On September 29, 2008, the trial court held a hearing on the motion to dismiss on statutory and constitutional speedy trial grounds. Following arguments from counsel, the trial court orally granted the motion to dismiss on constitutional speedy trial grounds. The trial court determined appellee's rights had been violated based upon the length of time, based upon the "inordinate delay in providing the test results," and based

upon the fact that appellee had previously pled guilty to a "related charge" with a nexus to the instant drug charge, thereby prejudicing his defense. (Tr. 19-20.) On September 30, 2008, the trial court filed a decision and judgment entry formally granting appellee's motion to dismiss. This appeal followed.

{¶14} Appellant raises the following assignment of error for our review:

THE TRIAL COURT ACTED CONTRARY TO LAW BY GRANTING THE DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATIONS WHERE THE STATE WAS WITHIN THE CONSTITUTIONAL TIME REQUIREMENTS.

{¶15} In its sole assignment of error, appellant contends the trial court erred in finding that a constitutional speedy trial violation occurred. Appellant argues that the trial court should have determined there was no speedy trial violation because: (1) the second indictment arose out of different facts, which were distinct from those supporting the original charges, thereby starting a new speedy trial clock; or (2) even if the drug possession charges arose out of the same facts as those alleged in the original indictment for aggravated robbery and felonious assault, the length of time during which those charges were pending was not so substantial as to constitute a violation of appellee's constitutional right to a speedy trial.

{¶16} In reviewing a defendant's claim that he was denied his right to a speedy trial, an appellate court reviews questions of law de novo and applies the clearly erroneous standard to questions of fact. *State v. Yuen*, 10th Dist. No. 03AP-513, 2004-Ohio-1276, citing *State v. Auterbridge* (Feb. 25, 1998), 9th Dist. No. 97CA006702.

{¶17} The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a speedy trial. This same right is also

guaranteed by Article I, Section 10 of the Ohio Constitution. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 8; see also *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶10. Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to incorporate these constitutional protections. *State v. Broughton* (1991), 62 Ohio St.3d 253, 256.

{¶18} In *Smith v. Hoey* (1969), 393 U.S. 374, 89 S.Ct. 575, the United States Supreme Court set forth the purpose behind the constitutional right to a speedy trial under our criminal justice system:

*"(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself."*

*Id.* at 377-78, 577, quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773.

"The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" *State v. Triplett* (1997), 78 Ohio St.3d 566, 568, quoting *United States v. MacDonald* (1982), 456 U.S. 1, 8, 102 S.Ct. 1497, 1502.

{¶19} Under R.C. 2945.73(B), a person charged with an offense shall be discharged, upon his own motion made at, or prior to, the commencement of trial, if he is not brought to trial within the timeframe set forth in R.C. 2945.71. See *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357. In the instant case, because appellee was indicted on felony charges, he was required to be brought to trial, pursuant to statute, within 270 days. When computing the time for purposes of applying R.C. 2945.71(C)(2),

each day during which the accused is held in jail in lieu of bail solely on the pending charge shall be counted as three days, meaning the accused must be tried within 90 days if he or she is incarcerated. R.C. 2945.71(E). However, the time period in which to bring a defendant to trial may be extended for any of the reasons enumerated in R.C. 2945.72.

{¶20} In the instant case, the trial court did not engage in any type of "day-to-day" counting, nor did it attempt to calculate the number of days during which appellee was incarcerated prior to trial and then determine the number of days chargeable to either party, based upon any applicable tolling events. Instead, the trial court ignored appellee's statutory speedy trial argument and focused solely on his constitutional speedy trial argument. Therefore, we shall focus our analysis upon appellee's constitutional speedy trial rights.

{¶21} *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, established a balancing test for courts to use in determining whether trial delays are reasonable under the Sixth Amendment of the United States Constitution or whether a particular defendant has been deprived of his speedy trial rights. The four factors to be balanced are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *Id.* at 530, 2192. This test has been adopted by the Supreme Court of Ohio in the context of Article I, Section 10 of the Ohio Constitution. *State v. Salvage*, 80 Ohio St.3d 465, 1997-Ohio-287.

{¶22} Under the *Barker* balancing test, the 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." *Id.* at 530; 2192. See also *Yuen*, *supra*.

{¶23} The United States Supreme Court has described the length of the delay as a double inquiry. *Doggett v. United States* (1992), 505 U.S. 647, 651, 112 S.Ct. 2686, 2690. First, the defendant must make a threshold showing of a "presumptively prejudicial" delay in order to trigger the application of the *Barker* analysis. *Doggett* at 651-52, 2690, citing *Barker*. See also *State v. Sellers*, 10th Dist. No. 08AP-810, 2009-Ohio-2231, ¶14. Second, after the initial threshold showing of "presumptively prejudicial" delay, the court again considers the length of delay with the other *Barker* factors. *Doggett* at 652, citing *Barker*, *Sellers* at ¶14.

{¶24} Courts have generally found postaccusation delay to be "presumptively prejudicial" as it approaches one year. *Doggett* at fn. 1. Therefore, our initial inquiry must focus on the length of the delay and whether such delay is presumptively prejudicial. We note that the trial court did not make a determinative ruling as to the length of the delay (as in the number of days or months), nor did it determine when the speedy trial clock began to run. Additionally, the trial court did not specifically find that the delay here was "presumptively prejudicial."

{¶25} In *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, the United States Supreme Court found that the protections of the Sixth Amendment's speedy trial provision were triggered by either a formal indictment or by the actual restraints imposed by arrest and by being held to answer to a criminal charge. Specifically, the court held, "it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Id.* at 320; 463. The *Marion* court found the Sixth Amendment speedy trial provision had "no

application until the putative defendant in some way becomes an 'accused [.]' " *Id.* at 313, 459.

{¶26} Speedy trial rights are not invoked until "arrest, indictment, or other official accusation." *Doggett* at 652, 2691. In order to trigger a speedy trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Id.* at 651-52; 2690.

{¶27} In *State v. Weiser*, 10th Dist. No. 03AP-95, 2003-Ohio-7034, this court determined that the defendant's speedy trial rights were not triggered when he was arguably "arrested" on the day the alleged crime occurred because he was released without any criminal charge being filed and because he was not required to post a bond. The arrest "must be the beginning of continuing restraints on an individual's liberty." *Id.* at ¶20. Thus, we determined that his speedy trial rights were not triggered until he was indicted 14 months later. We further found that Weiser failed to demonstrate that he was prejudiced by the 14-month preindictment delay.

{¶28} However, cases involving subsequent indictments can be problematic with respect to the issue of speedy trial rights. In *State v. Adams* (1989), 43 Ohio St.3d 67, the Supreme Court of Ohio determined that where new and additional charges arise from the same set of facts as those found in the original charge, *and the state knew of those facts at the time of the initial indictment*, the time frame within which the new charge is to be tried is subject to the same statutory limitations period as that which is applied to the original charge.

{¶29} Later, in *State v. Baker*, 78 Ohio St.3d 108, 1997-Ohio-229, the Supreme Court of Ohio established that, where additional charges arose from the same facts as

the facts supporting the original indictment, the subsequent charges are subject to the same speedy trial constraints as the original charges. But, "in issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." *Id.* at 110.

{¶30} The Supreme Court of Ohio, in *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, went on to decide "the holdings of *Baker* and *Adams* \* \* \* combined, stand for the proposition that speedy-trial time is not tolled for the filing of later charges that arose from the facts of the criminal indictment that led to the first charge." *Id.* at ¶20. Therefore, under *Parker*, the time would count against the state if the subsequent indictment arose from the same facts as those that made up the original indictment. However, *Baker* does provide for two scenarios in which the state is not held to the speedy trial time clock of the initial indictment: (1) when additional criminal charges arise from new facts not present at the time the original charges were filed, or (2) when the state did not know of these facts at the time of the initial indictment. "The holding in *Baker* is disjunctive and specifically sets forth two scenarios, either of which will reset the speedy-trial timetable for charges arising from a subsequent indictment." *State v. Thomas*, 4th Dist. No. 06CA825, 2007-Ohio-5340, ¶17.

{¶31} Appellee seems to argue that a criminal prosecution had been initiated and/or an official accusation was made prior to indictment with respect to the aggravated possession of drug offense. Appellee contends that because the drug possession offense occurred on the same day as the aggravated robbery and felonious assault offenses, and because it involved the same series of events (keeping in mind that the

theft element involved in the aggravated robbery was the theft of a box containing suspected khat), appellee's arrest and incarceration on the aggravated robbery and felonious assault offenses also started the running of the speedy trial clock as to the drug offense, even though appellee was never arrested or charged with possession of drugs until 2008.

{¶32} The fact that the trial court found there was a "nexus" between the two indictments is not dispositive of the speedy trial issue here. The key question in this case is whether all of the offenses at issue arose out of the same set of facts, or whether additional charges arose from new facts that were either not present at the time of the original arrest or not available to the state at the time of the original arrest and indictment.

{¶33} Appellant argues the indictment for aggravated possession of drugs arose from facts that were distinct from those facts which supported the original indictment and/or from facts which were not available at the time of the original indictment. Appellee, on the other hand, contends the charges in the two indictments arose out of the same facts. Appellee further argues the lab results were not new facts because appellant suspected the recovered substance was khat, even at the time of his initial arrest.

{¶34} In support of his argument, appellee primarily cites to two cases from the Eighth District Court of Appeals, as well as one case from the First District Court of Appeals. Specifically, appellee cites to *State v. Rutkowski*, 8th Dist. No. 86289, 2006-Ohio-1087; *City of Shaker Hts. v. Kisse*, 8th Dist. No. 81301, 2002-Ohio-7255; and *State v. Cooney* (1997), 124 Ohio App.3d 570. However, we respectfully disagree with the rulings in those cases.

{¶35} In comparing the instant case to *Rutkowski*, we cannot deny that there are strong factual similarities. Rutkowski was stopped by police while driving on the interstate. Pursuant to a search, officers found marijuana, drug paraphernalia, and suspected ecstasy. Rutkowski was charged with misdemeanor offenses of possession of marijuana and possession of drug paraphernalia. At that time, he was not charged with any offenses involving the suspected ecstasy pills, but the pills were sent to BCI&I for testing. Approximately two weeks after his arrest, on December 4, 2003, Rutkowski entered pleas of no contest, and was found guilty of the misdemeanor charges. He was sentenced to one year of probation. In January 2004, the Euclid police received the results from BCI&I confirming that the confiscated pills had tested positive for ecstasy. Eleven months later, Rutkowski was indicted for felony drug charges arising out of the confiscation of the ecstasy pills.

{¶36} Rutkowski filed a motion to dismiss on both statutory and constitutional speedy trial grounds. The Eighth District Court of Appeals determined the only new or additional facts were the BCI&I lab results, which indicated that the confiscated pills tested positive for ecstasy. Because those pills were discovered at the same time as the evidence used against Rutkowski in his first conviction on the misdemeanor offenses, and because Rutkowski admitted to having ecstasy prior to his first conviction, the Eighth District Court of Appeals determined that, with respect to the felony ecstasy charges, the speedy trial clock should have started on the date of Rutkowski's initial arrest. "These facts do not arise to a level to allow appellant's speedy trial rights to be ignored, and any charges to be made pursuant to any suspected drugs confiscated on the day of

[Rutkowski's] arrest should have culminated in a speedy trial from the date of that arrest."

*Rutkowski* at ¶26.

{¶37} The Eighth District Court of Appeals went on to use the *Barker* balancing test and found "the only justification for the delay was a delayed receipt of the lab results and a backload of paperwork. A large amount of paperwork does not allow the state to sit on felony charges for almost a year while a defendant remains in limbo. We find the length of the delay in this case to be unjustified." *Rutkowski* at ¶28. The Eighth District Court of Appeals clearly focused on the delay between the time that the offense occurred, and the date on which the lab results first became available, as well as the delay that occurred in indicting Rutkowski after the results became available. The court noted that nearly one year had passed between the time the lab results became available to the police and the date of Rutkowski's indictment.

{¶38} We also mention that the decision in *Rutkowski* may conflict with an earlier Eighth District Court of Appeals ruling in *State v. Wangul*, 8th Dist. No. 79393, 2002-Ohio-589. In *Wangul*, the court determined that the speedy trial clock did not start running on the defendant's cultivation of marijuana charges on the same date he was arrested on an outstanding felony warrant for grand theft, even though the marijuana plants were discovered that same day, since the marijuana had to be tested and weighed to determine if the offense constituted a felony or a misdemeanor. The *Wangul* court found the weighing of the marijuana and the subsequent test results constituted new and additional facts which were not known at the time Wangul was initially arrested on the outstanding warrant for grand theft. It is difficult to reconcile this ruling in *Wangul* with the court's more recent ruling in *Rutkowski*.

{¶39} The *Rutkowski* court relied upon another Eighth District Court of Appeals decision, *City of Shaker Hts. v. Kisse*, which is distinguishable,<sup>3</sup> as well as the First District Court of Appeals decision in *State v. Cooney*, which was released only a few months after *Baker*.

{¶40} In *Cooney*, the defendant was arrested and charged with one count of driving under the influence. That same day, a blood sample was taken. The state did not receive the results of the blood sample for two months. Upon receipt of the results, the state changed the charge to driving with a prohibited blood-alcohol content. Cooney filed a motion to dismiss on speedy trial grounds.

{¶41} The *Cooney* court found the state knew all of the operative facts at the time Cooney was originally charged and held that the speedy trial clock began to run at the time of Cooney's arrest on the original charge. The court determined that because the state had probable cause to believe that Cooney was driving with a prohibited blood-alcohol content, he could have easily been charged on the second offense at the same time. "We do not believe that his speedy trial rights should be ignored simply because the laboratory processing the blood test failed to provide the results within a reasonable time." *Id.* at 573. The First District Court of Appeals further found that, "[w]hile the state did not know what the exact results of the blood test would be, those results were simply proof of the facts the state already knew or should have known." *Id.* at 573. We disagree with that analysis and conclusion.

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<sup>3</sup> In *City of Shaker Hts.*, the Eighth District Court of Appeals determined that statutory speedy trial rights begin at the time of an accused's arrest, even if he is not incarcerated pursuant to the arrest. This is not determinative of the issues in the instant case.

{¶42} In spite of the holdings in *Rutkowski* and *Cooney*, several appellate districts have analyzed similar facts and repeatedly found that laboratory results that were not known at the time of the original indictment constituted "additional facts," which warranted the triggering of a new speedy trial clock. The Second, Fourth, Ninth, Eleventh, and Twelfth District Courts of Appeals have all held that a subsequent indictment which was dependent upon a lab analysis that was not available to the state at the time of the original indictment starts the running of a new speedy trial clock. We find this approach to be persuasive, particularly in light of the circumstances here.

{¶43} The Second District Court of Appeals has repeatedly found that subsequent indictments based upon facts which were not known to the prosecution at the time of the original indictment trigger a new speedy trial clock. In *State v. Lekan* (June 27, 1997), 2nd Dist. No. 16108, the defendant was charged with driving under the influence. After results of a urine sample were returned, Lekan was charged with driving with a prohibited concentration of alcohol in his system. Lekan moved to dismiss, arguing this violated his speedy trial rights. The court of appeals found the second offense did not arise from the same set of facts as the original charge, since the second offense was dependant upon a lab analysis that was not available to the police on the date Lekan was first charged. The court went on to find that a delay of several months between the time the urine results were known and the time Lekan was charged was "without consequence."

{¶44} A similar result was reached in *State v. Cantrell* (Sept. 7, 2001), 2nd Dist. No. 00CA0095. Cantrell was originally charged with OVI. Blood test results later revealed he had a prohibited concentration of alcohol. Based upon these results, Cantrell was charged with a second alcohol-related offense. He then claimed his speedy trial

rights were violated. Again, the court determined that the facts giving rise to the second charge, which were the lab results showing Cantrell's blood contained a prohibited concentration of alcohol, were not available to the state at the time of the original charge. Thus, the court found the state was not subject to the speedy trial timetable applicable to the first charge. Additionally, the court determined the new speedy trial clock began to run from the date the second charge was filed, not from the date when the state learned of the facts that prompted it to file the new charge.

{¶45} The Second District Court of Appeals continued to apply this reasoning in *State v. Dalton*, 2nd Dist. No. 2003CA96, 2004-Ohio-3575. Dalton was indicted for the offenses of burglary, rape, kidnapping, and gross sexual imposition. Six months later, he was reindicted on the original charges, plus three new drug-related charges based upon lab results received after the original indictment. Prior to trial, Dalton moved to dismiss the three new counts, arguing they violated his speedy trial rights. The motion was overruled and Dalton was convicted on the three drug-related counts. On appeal, Dalton argued the speedy trial calculation on the three drug charges should run from the date of the original indictment because they arose from the same set of facts as the charges filed in the original indictment. The court disagreed and cited to the testimony of a police officer, who testified the results of the laboratory analysis on the pills, powder, and other items were needed in order to bring charges against Dalton. The court found that, because those results were not known by the state until after the original indictment, the speedy trial timetable did not run from the time of the initial indictment. Additionally, the court found that a lapse of over five months between the time the state was in possession

of the lab results and the time it indicted Dalton on the drug charges was "inconsequential" under *Baker*.

{¶46} The Twelfth District Court of Appeals has also held that a subsequent indictment based upon a lab analysis not previously available starts the running of a new speedy trial clock. In *State v. Riley* (June 12, 2000), 12th Dist. No. CA99-09-087, the defendant was stopped for a traffic violation and suspected to be driving under the influence. He was arrested and charged for that offense. After Riley was taken into custody, his vehicle was searched. An officer found a glass vial and a small plastic bag with a white powder. The officer suspected the white powder might be cocaine, but Riley was not charged with possession of cocaine at that time. Riley subsequently pled guilty to DUI. Lab results later determined the seized white powder was in fact cocaine. Nearly eight months after his initial arrest for the DUI, Riley was charged with possession of cocaine in municipal court and then later indicted by the grand jury. His motion to dismiss on speedy trial grounds was denied. The court of appeals determined his motion was properly denied. Although the officer suspected that the white powder was cocaine, that fact did not give rise to probable cause to arrest until later. The court determined the possession charge resulted from an operative fact that was not present with respect to the DUI charge, specifically, the confirmation from the lab that the white powder was cocaine.

{¶47} The Ninth District Court of Appeals has held that because a possession of cocaine charge was dependent upon the results of the lab analysis, and that information was not available to the state at the time of the initial arrest, the state was not subject to the speedy trial timetable applicable to the initial charges, even though all of the charges

stemmed from the same arrest and arguably the same set of operative facts. In *State v. Armstrong*, 9th Dist. No. 03CA0064-M, 2004-Ohio-726, the defendant was arrested for possession of drug paraphernalia and criminal trespassing. At the time of his arrest, the police also found a white powder, which was sent to a lab for analysis. Prior to receiving the lab results, Armstrong pled no contest to possession of drug paraphernalia and the criminal trespassing charge was dropped. Approximately one month later, the police received the lab report, which indicated the white powder was cocaine. Armstrong was subsequently indicted and filed a motion to dismiss on speedy trial grounds. Armstrong's motion was denied. On appeal, the court determined the rule in *Baker* applied and the state was not subject to the timetable applicable to the original charges.

{¶48} The Fourth District Court of Appeals has made a similar determination. In *State v. Skinner*, 4th Dist. No. 06CA2931, 2007-Ohio-6320, the defendant was arrested for OVI. A urine sample was obtained. Based upon the results of the urine sample, Skinner was later charged with operating a motor vehicle with a prohibited concentration of alcohol in his urine. The trial court denied Skinner's motion to dismiss on speedy trial grounds. The court of appeals affirmed, finding the charge stemming from the second offense was not subject to the same speedy trial clock as the charge stemming from the first offense.

{¶49} Finally, the Eleventh District Court of Appeals has also followed the rule in *Baker* with respect to subsequent indictments involving drug charges which are dependent upon a laboratory analysis. In *State v. Clark*, 11th Dist. No. 2001-P-0031, 2004-Ohio-334, the defendant was indicted on one count of aggravated burglary, two counts of kidnapping, and one weapons charge. A jury trial was held. During the trial,

Clark testified that the cocaine found in a van during a search belonged to him. The jury hung on several charges and a mistrial was declared as to those charges. Clark was then indicted on the offense of possession of cocaine, which arose out of the same event. Clark's motion to dismiss on speedy trial grounds was denied. The denial of the motion was affirmed by the court of appeals, which determined that the state was not subject to the speedy trial timetable of the first indictment because it did not know of two important facts at the time of the original indictment. One of those facts was that the white substance found in the van was in fact cocaine. The court determined that, although the state may have had a good idea that the substance was cocaine prior to its analysis, it did not know for sure until it was actually analyzed. The results of the analysis were not received until after the first indictment was filed.

{¶50} Appellee has argued that this case is not analogous to *Baker* in that it involves a simple possession of drugs charge, rather than a complex investigation involving the auditing of numerous pharmaceutical and business records, as was the situation in *Baker*. Therefore, appellee contends that the rule in *Baker* regarding subsequent indictments is not applicable. We disagree.

{¶51} The subject of the second indictment at issue involves the possession of khat, which, at the time of its seizure in January 2006, was considered to be an exotic substance that was not widely known in the United States outside certain communities. There is limited evidence in the record to explain the challenges an analyst encounters when attempting to identify this controlled substance. However, appellant points out that it must be tested at a "specialized laboratory" and that, as an exotic substance, local law enforcement had not had much experience with this substance. Appellant also argued

there was only one laboratory available for the arresting agency to use for the analysis. Unlike many typical street drugs, appellant argued that the quantity of the drug at issue was not determinative of the felony charge to be brought against appellee. Instead, the level of cathinone contained in the substance would determine whether or not appellee should be charged with a first degree felony or a fourth degree felony.

{¶52} As appellant indicated, identification of this controlled substance is made more complicated by the complex analytical process that is required to determine its exact organic make-up, since the level of cathinone diminishes and converts to cathine as the khat ages. Cathinone is a Schedule I controlled substance under R.C. 3719.41, while cathine is a Schedule IV controlled substance under the same statute. Determination of the drug's exact organic make-up is critical to determining the level of the felony offense with which appellee should be charged, given that possession of this drug falls into two different schedules, depending on the "freshness" of the substance. See generally *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639. See also *State v. Roble*, 6th Dist. No. L-04-1374, 2006-Ohio-328. Given that determination of this important fact required the results of a lab analysis, we find that the results of the lab analysis constituted a new fact that was not available to the state at the time of the original arrest and/or indictment on the aggravated robbery, robbery, and felonious assault charges. Therefore, we find that appellee's speedy trial clock was triggered anew by the January 11, 2008 indictment.

{¶53} Having made the determination that the speedy trial clock began running upon the filing of the new indictment on January 11, 2008, we calculate the number of days from that date until the date appellee filed his motion to dismiss, May 20, 2008, to be

130 days, not taking into account any tolling events. This constitutes the length of the delay.

{¶54} Under the *Barker* balancing test, the length of the delay is essentially a triggering mechanism. Until there is a delay that is "presumptively prejudicial," it is unnecessary to inquire into the other factors. Under *Doggett*, prejudice is presumed when the delay approaches one year. Here, the delay is approximately four and one-half months. This court has previously found that a delay of 148 days (just under five months) is not presumptively prejudicial. *State v. Billups* (Aug. 15, 1991), 10th Dist. No. 91AP-68.

{¶55} Other appellate courts have found that similar delays were not "presumptively prejudicial." See *State v. Harrel* (Dec. 29, 1998), 5th Dist. No. 98CAA06029 (delay of four-to-five months is not presumptively prejudicial); *State v. Webb*, 4th Dist. No. 01CA32, 2002-Ohio-3552 (delay of 186 days is not presumptively prejudicial); *State v. Pinson*, 4th Dist. No. 00CA2713, 2001-Ohio-2423 (six and one-half month delay does not come close to approaching the threshold for presuming prejudice); *State v. Carter* (Apr. 1, 1998), 9th Dist. No. 97CA006703 (delay of nine months is not presumptively prejudicial). Because appellee has not met the threshold showing of a presumptively prejudicial delay, we need not weigh the other remaining factors under *Barker*. See *Harrel* and *Webb*. We further find the trial court erred in determining appellee's constitutional speedy trial rights were violated.

{¶56} "The vast majority of cases dealing with speedy trial rights are concerned with delay between the time of issuing the indictment and actually bringing the case to trial." *State v. Davis*, 7th Dist. No. 05 MA 235, 2007-Ohio-7216, ¶14. However, during the course of oral argument, appellee made reference to preindictment delay issues. To

the extent that appellee may have been attempting to argue that his *speedy trial rights* were violated as a result of "preindictment delay," since he was not indicted for aggravated possession of drugs until approximately two years after the alleged conduct occurred, we reject that argument as well.

{¶57} In *Marion*, supra, the United States Supreme Court established there are no speedy trial rights regarding preindictment delays under the federal constitution. The *Marion* court held "we decline to extend the reach of the [sixth] amendment to the period prior to arrest." *Marion* at 321, 463-64. The court further stated "[t]here is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function." *Id.* at 323, 465. While there are limited situations where constitutional challenges of preindictment delay could possibly be made under the Ohio Constitution, we find those circumstances are not present here.

{¶58} In *State v. Meeker* (1971), 26 Ohio St.2d 9, which was announced prior to *Marion*, the Supreme Court of Ohio found constitutional challenges of preindictment delay were permissible ("[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution as well as to unjustifiable delays after indictment"). However, this has subsequently been severely limited. In *State v. Luck* (1984), 15 Ohio St.3d 150, the Supreme Court of Ohio expressly limited *Meeker* by finding *Meeker's* application was restricted to cases that were factually similar. We do not find *Meeker* to be factually similar to the case before us.

{¶59} Additionally, in *Selvage*, supra, the Supreme Court of Ohio determined a defendant could only assert preindictment speedy trial rights where the state had actually

initiated criminal prosecution or issued an official accusation before indictment, such as the filing of the criminal complaint. Here, however, we find there was no official accusation or criminal prosecution for the drug offense at issue until appellee was indicted in January 2008 and we have determined that the facts which would have provided evidence to charge or indict on a drug offense were not available to appellant at the time of the original indictment.

{¶60} Furthermore, in *Davis*, the Seventh District Court of Appeals noted that "*Meeker* is one of the few Ohio cases that actually links speedy trial rights with preindictment delays." The *Davis* court went on to find that *Meeker* "is a fairly old case, and many subsequent cases have affected the practical effect of the *Meeker* holding." *Id.* at ¶24. Additionally, the *Davis* court questioned whether *Meeker* has any continuing validity in light of the United States Supreme Court's holding in *Marion*, *supra*.

{¶61} In *Meeker*, the defendant was initially charged in municipal court in 1963 with one count of armed robbery. He was bound over to the grand jury. He waived indictment and entered a plea of guilty to an information charging him with armed robbery. Later that same year, he was permitted to withdraw his guilty plea to armed robbery. He then pled guilty to the lesser included offense of robbery. He was sentenced to prison. Throughout these proceedings, Meeker was not represented by counsel. Then, six years later, following a postconviction proceeding, Meeker's motion for vacation of sentence and new trial was granted.

{¶62} Meeker chose not to waive indictment. The grand jury returned a four-count indictment this time, charging Meeker with armed robbery, theft of a motor vehicle, cutting with intent to wound, and assault with intent to commit robbery. Meeker then

moved for an order prohibiting the state from trying him on any charge other than unarmed robbery. The trial court granted Meeker's motion with respect to the three new counts, but denied the request with respect to the armed robbery charge. The appellate court reversed and remanded for proceedings under all four counts of the indictment. The case was then appealed to the Supreme Court of Ohio. The Supreme Court of Ohio reversed the court of appeals, determining the new counts were properly dismissed by the trial court.

{¶63} Although *Meeker* also involved a subsequent indictment, it is not factually similar to the case sub judice, most significantly, because the case before us involves additional facts which were unknown or unavailable to the prosecution at the time of the original indictment. "[W]here a defendant, at the same time and place, commits acts which would constitute four separate crimes, and the state *with knowledge thereof initially chooses to charge him with but one crime*, such defendant does not waive his constitutional right to a speedy trial as to the other three by failure to make a demand or request for trial." (Emphasis added.) *Meeker* at 18.

{¶64} The Supreme Court of Ohio emphasized in two separate parts of its opinion in *Meeker* that there was no indication that the state had not been in full possession of all of the necessary facts at the time the original proceedings were initiated. See *Meeker* at 15, 17 ("there is no indication or claim herein that such actions were not fully known to the prosecuting authorities in 1963"; "there is no indication and no claim that the prosecuting authorities were not in full possession of all the facts relative thereto in 1963").

{¶65} Here, appellant argues it was "not in full possession of all of the facts relative thereto," at the time of the initial indictment, as the laboratory analysis regarding

the chemical make-up of the suspected khat was not even made available to the arresting agency until June 2007, at the very earliest. Therefore, we find the preindictment speedy trial implications of *Meeker* are not applicable here.

{¶66} However, we find it necessary to clarify one additional point. At oral argument, appellee also speculated that the trial court actually determined the indictment should be dismissed on the basis of preindictment delay as a violation of due process, rather than on constitutional speedy trial grounds. Appellant objected to appellee's attempts to "recharacterize" the trial court's decision as a dismissal based upon preindictment delay. We agree that such a "recharacterization" at this stage is improper.

{¶67} Yet, we acknowledge that a delay between the commission of an offense and an indictment, which results in actual prejudice to the defendant, can, under certain circumstances, constitute a violation of the right to due process of law under the federal and state constitutions. See *State v. Collins* (1997), 118 Ohio App.3d 73, 76. In *Collins*, the court found that because the defendant was neither accused of a crime nor the subject of an official prosecution, the delay that occurred between the discovery of the crime and the commencement of formal charges via indictment did not violate her right to a speedy trial as guaranteed by Article I, Section 10 of the Ohio Constitution. However, the court went on to find that such a preindictment delay could, in some cases, constitute a violation of due process. *Id.* at 76. See also *Harrel*, *supra* (although the trial court erred in determining the defendant's speedy trial rights were violated by the preindictment delay, such delay still may have violated his due process rights).

{¶68} Under *Luck*, *supra*, "[a]n unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the

defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteen Amendments to the United States Constitution." *Id.*, paragraph two of the syllabus.

{¶69} In order to determine whether an accused's due process rights have been violated because of preindictment delay, a court must undertake a two-part test. First, the defendant must establish he suffered substantial actual prejudice as a result of the delay. Then, the defendant must demonstrate the actual prejudice suffered outweighs any legitimate or justifiable reason for the delay on the part of the state in bringing the prosecution. *United States v. Lovasco* (1977), 431 U.S. 783, 789-90, 97 S.Ct. 2044, 2048-49.

{¶70} We will not speculate on the trial court's purported "real" basis for determining the indictment should be dismissed. We are confined to the record, which indicates that a hearing was being held pursuant to appellee's motion to dismiss on speedy trial grounds. There is nothing within the transcript of the hearing or the record from which we can discern that the trial court actually dismissed the indictment on the basis of a Fifth Amendment due process violation involving preindictment delay. The proceedings did not address the two-part analysis for determining Fifth Amendment due process violations set forth under *Lovasco*. Additionally, neither party addressed the specific issue of a due process preindictment delay violation at the hearing before the trial court or in their briefs prior to oral argument. Therefore, we shall not address any purported preindictment delay issues outside of the speedy trial arguments here.

{¶71} In light of the foregoing, we find the trial court erred in dismissing the indictment on constitutional speedy trial grounds and we sustain appellant's sole

assignment of error. The judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded for further proceedings consistent with this decision.

*Judgment reversed; cause remanded.*

BRYANT and KLATT, JJ., concur.

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