Oberlin Municipal Court
Oberlin, Ohio

Case No.14CRB00024

STATE OF OHIO
Plaintiff

vs.

JOSHUA R. BROWN
Defendant

Entry and opinion Granting Motion to Dismiss

This matter is before the Court on Defendant's "Motion to Dismiss Due to Prosecution's Failure to Execute Arrest Warrant." The facts of this case are:

1. On January 11, 2014 Emily Chonko, the alleged victim appeared at the Amherst Police Department to report a threatening communication that she received from Joshua R. Brown via text message.
2. On January 11, 2014 Officer Michael Taliano contacted Mr. Brown to inform him of the allegations and inviting him to come to the Amherst Police Department to provide a statement.
3. Mr. Brown did not appear at the Amherst Police Department.
4. On January 14, 2014 as a result of his failure to appear a complaint for Telecommunication Harassment and Domestic Violence was filed with the Oberlin Municipal Court and a request for warrant was also filed.
5. On January 14, 2014 a warrant was issued for Mr. Brown's arrest.
6. Mr. Brown's address was 248 7th Street, Elyria, Ohio at the time of filing the complaint.
7. Mr. Brown has resided at the following addresses since January 11, 2014:

    - 248 7th Street, Elyria, Ohio 10.3 miles – 19 minutes from Amherst Police Department

- 5394 Grove Avenue, Lorain, Ohio 8.5 miles 12.5 minutes from the Amherst Police Department

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8. The Amherst Police Department made the following efforts to enforce the warrant: After the warrant was issued the warrant was picked up by the Amherst Police Department from the court and the warrant was entered into LEADS. No other effort was made to serve the warrant by the Amherst Police Department. No other effort was made to confirm the address of Mr. Brown. No telephone calls were made or further communication appears to have been had with the alleged victim after the warrant was entered into LEADS.

9. The explanation for the failure to make any effort to serve the warrant was that the Amherst Police Department has "hundreds of warrants" and does not have the resources to serve warrants outside its jurisdiction which is solely within the City limits of Amherst, Ohio.

10. The records of the Clerk of Court show that there are not "hundreds of warrants" outstanding for the jurisdiction of the City of Amherst. There are presently only 30 un-served warrants. Of the 30, eight of them are "John Doe" warrants issued from 2007 -2010. Of the remaining 22, 19 are theft related. There are only 3 warrants outstanding for non-theft related offenses: one for criminal trespass, one for assault and one for complicity to assault.

11. There are no outstanding warrants for Domestic Violence crimes.

12. There are approximately 93 persons [a few of these persons have multiple warrants] who have bench warrants outstanding who have failed to appear for hearings after being served or are alleged to be in violation of probation or terms and conditions of suspended sentence.

13. The court has not taken the time to determine which of these persons, if any, have City of Amherst addresses.

14. On November 4, 2015 Mr. Brown was arrested by the Ohio State Highway Patrol on the outstanding warrant. The circumstances were that Mr. Brown was stopped for a minor traffic offense. The alleged victim was in the vehicle with Mr. Brown and Mr. Brown was arrested on the warrant that had been entered into LEADS.

15. Mr. Brown was arraigned on November 4, 2015 and entered a plea of not guilty.

16. On November 23, 2015 Mr. Brown was found to be indigent and Attorney Ashley Jones was appointed to represent Mr. Brown.

17. Pre-trials were held on January 7, 2016 and March 3, 2016. Mr. Brown waived his right to speedy trial.

18. On March 15, 2016 Mr. Brown filed a Motion to Dismiss for a violation of his speedy trial rights.

19. Defendant has resided in Lorain County Ohio with the alleged victim for at least the past 18 months. During this period of time the couple has had a child together born in August 2015.

The Defendant argues that the prosecution failed to exercise reasonable diligence in executing the arrest warrant and therefore his Constitutional right to a speedy trial was violated.

First, this is not a case where the prosecution was commenced outside the Statute of Limitations and therefore the prosecution is not barred by R.C. 2901.13(A)(1)(b) that provides that a prosecution for a misdemeanor is barred unless it is commenced within 2 years following the date it was committed.

Next, this is not a case where the Defendant was served and then failed to appear for a hearing. The rules in those circumstances do not apply to the facts of this case. See *Village of Wellington v William J. Vittori*

95TRD07907 decided by this court on October 9, 2002 for an analysis with regard to post service cases. [copy of Opinion attached]

The Defendant's argument is that the State violated his right to a speedy trial under the United States and Ohio Constitutions by not timely serving him with the charge. In *State v O'Brien* (1987) 34 Ohio St. 3d 7 the Ohio Supreme Court recognized and held:

> "As we noted in*State v. Ladd* (1978), 56 Ohio St.2d 197, 200, 10 O.O.3d 363, 364, 383 N.E.2d 579, 581:
> "The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a speedy trial by the state. *Klopfer v. North Carolina* (1967), 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1, 41 O.O.2d 168. This same right is assured an accused party by Section 10, Article 1 of the Ohio Constitution."[2]
> The General Assembly, in its attempt to prescribe reasonable speedy trial periods consistent with these constitutional provisions, see *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, enacted R.C. 2945.71 which provides, in part:
> "(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:
> " * * *
> *9 "(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."
> We have determined that " * * * R.C. 2945.71 *et seq.*, constitute a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state." *State v. Pachay* (1980), 64 Ohio St.2d 218, 18 O.O.3d 427, 416 N.E.2d 589, syllabus; see, also, *State v. Pudlock* (1975), 44 Ohio St.2d 104, 73 O.O.2d 357, 338 N.E.2d 524. Thus, for purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 *et seq.* and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive.

> Of course, the accused may waive his constitutional right to a speedy trial, provided such waiver is knowingly and voluntarily made. *Barker v. Wingo, supra,* 407 U.S., at 529, 92 S.Ct. at 2191. Similarly, an accused, or his counsel, may validly waive the speedy trial provisions of R.C. 2945.71 *et seq. State v. McBreen* (1978), 54 Ohio St.2d 315, 8 O.O.3d 302, 376 N.E.2d 593; *Westlake v. Cougill*(1978), 56 Ohio St.2d 230, 10 O.O.3d 382, 383 N.E.2d 599. It follows, then, that a knowing, voluntary, express written waiver of an accused's statutory speedy trial rights may equate with a waiver of the coextensive constitutional ***221* rights, at least for the time period provided in the statute.
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> **However, although the statutory and constitutional speedy trial provisions are coextensive, the constitutional guarantees may be found to be broader than speedy trial statutes in some circumstances. As we noted in *State v. Ladd, supra,* 56 Ohio St.2d at 201, 10 O.O.3d at 365, 383 N.E.2d at 582:**
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> **" * * * [I]t is clear that there may be situations wherein the statutes do not adequately afford the protection guaranteed by the federal and state constitutions, in which case it is our duty to see that an accused receives the protection of the higher authority * * *."**

In this case the question is also not whether R.C. 2945.71 has been complied with – it has. R.C. 2945.71 provides that a person is to be brought to trial within 90 days – from the date of service of the complaint. Mr. Brown was served with the complaint on November 4, 2015. Mr. Brown waived his right to a speedy trial prospectively after that date and the State has complied with R.C. 2945.71.

The question in this case is whether the delay in arresting Mr. Brown, from January 14, 2014 to November 4, 2015 – approximately 22 months – is a violation of Mr. Brown's right to a speedy trial. It has been held that in examining a constitutional claim on speedy trial grounds the statutory time requirements of R.C. 2945.71 to 2945.73 are not relevant and instead a balancing test is used:

> "{¶ 15} In examining a constitutional claim on speedy trial grounds, the statutory time requirements of R.C. **2945.71** to 2945.73 are not relevant; instead, courts

> should employ the balancing test enunciated by the United States Supreme Court in ***Barker v. Wingo*** (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. The test includes considering (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant. *Id.* at 530-32; see, also, *State v. Triplett,* 78 Ohio St.3d 566, 679 N.E.2d 290, 1997-Ohio-182.
> {¶ 16} The length of the delay is the "triggering mechanism" that determines the necessity of inquiry into the other factors. *Barker,* 407 U.S. at 530. Until there is some delay that is presumptively prejudicial, "there is no necessity for inquiry into the other factors that go into the balance." *Id.* The delay, however, relates to the time that it takes the state to bring an accused to trial *after* an arrest, indictment, or other official accusation. See *Doggett v. United States* (1992), 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520.
> See *State v Ennist* 2008 WL 4439105

The balancing test requires the court to hear facts regarding the delay in bringing the accused to trial. A case from the 9th District Court of Appeals is instructive and sets forth the analysis to be used and is set forth at length.

In *State v Osborn* 2001 WL 1338966 2001 -Ohio- 1666 the court noted and held:

> On October 13, 1995, State Trooper Myers arrested Defendant for possession of marijuana, operating a vehicle with unauthorized license plates, and lane straddling. Four days later Defendant appeared before the Oberlin Municipal Court with counsel where he waived the preliminary hearing and the case was bound over to the Lorain County Grand Jury. On March 27, 1996, the grand jury indicted Defendant for one count of trafficking in marijuana, in violation of R.C. 2925.03(A)(4) and one count of the use of unauthorized plates, in violation of R.C. 4549.08(C). Subsequently, the trial court continued a previously scheduled arraignment, **since Defendant had not been served with the indictment.**
> **On March 29, 1996, the Lorain County Sheriff's Department attempted to serve Defendant with the indictment and summons at the address provided by**

Defendant at the time of his arrest. However, Defendant no longer lived at that address. Defendant was not served until August 11, 2000, approximately 53 months later.
Defendant appeared for arraignment on August 16, 2000. The trial court continued the arraignment on two occasions and continued the subsequent pretrial hearing, in order to allow Defendant to obtain legal counsel. The court held the first pretrial hearing on September 22, 2000, at which Defendant was represented by counsel and waived his right to a speedy trial, pursuant to R.C. 2945.71.
Defendant then moved the court to suppress the evidence, alleging that it was illegally obtained. The trial court denied Defendant's motion. On October 27, 2000, Defendant requested that the next pretrial be continued until December 8, 2000, and waived his right to a speedy trial. Then, on December 8, 2000, Defendant moved to dismiss the charges based on post-indictment delay. **After a hearing, the trial court granted Defendant's motion to dismiss. The State timely appealed raising one assignment of error for review.**

ASSIGNMENT OF ERROR

The trial court erred to the prejudice of the State * * * by granting [Defendant's] motion to dismiss for post-indictment delay.

In its sole assignment of error, the State contends that the trial court erred in granting Defendant's motion to dismiss for post-indictment delay. We disagree.

When reviewing an assignment of error raising a defendant's denial of his right to a speedy trial, this court applies the *de novo* standard to questions of law and the clearly erroneous standard to questions of fact. *State v. Thomas* (Aug. 11, 1999), Lorain App. No. 98CA007058, unreported, at 4.

"Post-indictment delay is cognizable under both the Ohio and United States Constitutional guarantees of a speedy trial." *State v. Coleman* (Jan. 19, 1977), Lorain App. No. 2479, unreported, at 2, citing *Marion v. United States* (1971), 404 U.S. 307. When analyzing whether an accused has been denied the right to a speedy trial, a court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the accused's assertion of his right; and (4) prejudice to the accused. *Barker v. Wingo* (1972), 407 U.S.

514, 530, 33 L.Ed.2d 101, 117. None of the individual factors is decisive. *Id.* at 533, 33 L.Ed.2d. at 118. The court must consider them together, along with any other relevant circumstances in a sensitive balancing process. *Id.*

*2 The United States Supreme Court has noted that the first factor, the length of the delay, actually involves a double inquiry. *Doggett v. United States* (1992), 505 U.S. 647, 651, 120 L.Ed.2d 520, 528. First, an accused must make a threshold showing of delay beyond that which is ordinary, i.e., a "presumptively prejudicial" delay, to trigger application of the *Barker* balancing test. *Id.* at 651-52, 120 L.Ed.2d at 528. Second, once the *Barker* analysis is triggered, the length of the delay, beyond the initial threshold showing, is again considered and balanced against other relevant factors. *Id.*

A. Threshold Showing of Delay

Here, the Lorain County Grand Jury indicted Defendant on March 27, 1996, but Lorain County officials did not serve Defendant with the indictment and summons until August 11, 2000. Courts generally find a post-accusation delay "presumptively prejudicial" as it approaches the one year mark. *Id.* at 652, 120 L.Ed.2d at 528, fn. 1. In accordance with this general guideline, we find the approximate 53 month delay between the indictment and the service of the indictment presumptively prejudicial, thus triggering the application of the*Barker* balancing test. *State v. Triplett* (1997), 78 Ohio St.3d 566, 569 (finding that a 54 month delay is enough to trigger the *Barker*inquiry).

B. The Length of the Delay

Revisiting the issue of length of delay within the context of the *Barker* analysis, the trial court found that this first factor weighed slightly in favor of Defendant, since he was not incarcerated during the delay. In *Triplett,* 78 Ohio St.3d at 569, the Ohio Supreme Court addressed similar facts and stated as follows:

[T]he [54 month] delay in this case, while significant, did not result in any infringement on [Defendant's] liberty. In fact, according to her own testimony, she was completely ignorant of any charges against her. The interests which the Sixth Amendment was designed to protect-freedom from extended pretrial incarceration and from the disruption caused by

unresolved charges-were not issues in this case. Therefore, while the first factor does technically weigh in [Defendant's] favor, its weight is negligible.

Further, in its appellate brief the State concedes and we agree that this factor weighs slightly in favor of Defendant.

C. The Reason for the Delay

In terms of the second factor, the reason for the delay, we must be aware of the differing weights that are assigned to different reasons. *Thomas, supra,* at 6. If the defendant caused or contributed to the delay, this factor would weigh against him. If the government's negligence caused the delay, this factor would weigh somewhat in the defendant's favor. *State v. Alston* (Oct. 29, 1997), Lorain App. No. 97CA006727, unreported at 6, citing *State v. Grant* (1995), 103 Ohio App.3d 28, 35. If the government deliberately delayed, hoping to impinge on the defendant's ability to mount a defense, it would weigh heavily in the defendant's favor. *Alston, supra,* at 6, quoting *Barker,* 407 U.S. at 531, 33 L.Ed.2d at 117.

***3** "Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground." *Doggett,* 505 U.S. at 656-657, 120 L.Ed.2d at 531. Negligence, however, "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657, 120 L.Ed.2d at 531-532. The longer the delay due to official negligence, the less tolerable the delay becomes. *Id.* at 657, 120 L.Ed.2d at 532. The trial court's determination of negligence should be reviewed with considerable deference. *Id.* at 652, 120 L.Ed.2d at 528-529.

In the case before us, the trial court held that this factor weighed slightly in favor of Defendant. It found that the State's efforts to serve Defendant were "weak." Further, the trial court noted that Defendant could have advised the court of his periodic changes in addresses, but failed to do so.

The record indicates that at the time of Defendant's arrest, he indicated to the arresting state trooper that his current address was 3296 W. 98th in Cleveland. Defendant testified that he had been living at that location with a friend and remained there until late 1995 or early 1996. Subsequent to his arrest, Defendant moved four times within Lorain and Cuyahoga

counties and also served three months on an assault conviction in Hamilton County.[1] Defendant failed to notify the trial court or the police of his changes of address.

Also, during the timeframe from arrest to service of the indictment, Parma police in Cuyahoga County cited Defendant for a moving violation; Cincinnati police arrested Defendant on assault charges for which he served a three month sentence in Hamilton County; and North Ridgeville police in Lorain County arrested Defendant for driving under the influence. Defendant testified that on each occasion he provided police with his correct current address. However, Defendant's testimony with regard to the Parma citation indicates otherwise. Specifically, Defendant stated that he received the ticket in November 1995. According to his testimony, Defendant was still residing at 3296 W. 98th in Cleveland at that time. Nevertheless, Defendant stated that he provided Parma police with his parents' address, the address at which he claimed he received all of his important papers. This was also the address where police ultimately served Defendant with the indictment. **The State points to the testimony of the arresting officer, Sergeant Myers of the Ohio State Highway Patrol, to demonstrate the State's continuing efforts to locate Defendant during the timeframe in question. Sergeant Myers testified that after Defendant's indictment, he tried to locate Defendant. He stated that he did so in an effort to comply with the State Highway Patrol Division's policy, which required him to follow up on the case until the indictment was served or was no longer valid. Specifically, Sergeant Myers contacted the Lorain County Sheriff's Department each month to ascertain whether Defendant had been served with the indictment. Sergeant Myers stated that every three to four months he would input Defendant's name and social security number into the computer system to try to locate any change of address or newly-issued drivers license that would indicate a current address. Eventually, Sergeant Myers located a new address for Defendant. He called the Sheriff's Department to confirm that they could still find the indictment and gave them the new address for service.**

***4 The record before us demonstrates that other than the single attempt by the Lorain County Sheriff's Department to serve the indictment and summons upon Defendant, no other attempts at service were made. No return was filed indicating additional attempts. There is no evidence that the Lorain County authorities made any effort to locate Defendant through contacts with potential friends, family, or acquaintances of Defendant. More importantly, as noted by the trial court, they did not take any additional steps to serve or locate Defendant, such as the issuance of a warrant. The initial failure of service of the summons and indictment did not preclude resort to issuing a warrant for Defendant's arrest. See Crim.R. 4(B) (providing that "more than one warrant or summons may issue on the same complaint[ ]"). This affirmative step is in place to allow the prosecutor and the court to ensure that speedy trial violations do not defeat the successful prosecution of criminal offenders. See *State v. Tope* (1978), 53 Ohio St.2d 250, 252.**

Although there is no indication that the State acted in bad faith, on the record before us it is apparent that the Lorain County authorities viewed the charges to be a low priority, as evidenced by the county's lone attempt at service over the 53 month period. However, in the State's favor, Defendant admitted that he failed to notify the court or police of his change of address. Further, Defendant provided Parma police with a different address than that which he provided police at the time of the arrest in question, even though he resided at 3296 W. 98th on both occasions. In light of the foregoing facts, we find this factor weighs equally in favor of Defendant and the State. See*Thomas, supra,* at 6-7 (finding that this factor weighed equally in favor of both parties, where the State was negligent in its efforts to serve and Defendant provided police with less than forthright information regarding his shifting addresses).

D. Defendant's Assertion of his Right

Regarding the third factor, whether a defendant has asserted his right, the United States Supreme Court reiterated that a defendant has no duty to bring himself to trial. *Barker,* 407 U.S. at 527, 33 L.Ed.2d at 115. It is the burden of the state to ensure that a defendant is afforded a speedy trial. *Id.* However, the

Court went on to say that a defendant's assertion of, or failure to assert, the speedy trial right is a factor to consider in determining whether that right was denied. *Id.* at 528, 33 L.Ed.2d at 116. A defendant's timely assertion should be afforded moderate weight. *Triplett,* 78 Ohio St.3d at 570; *State v. Auterbridge* (Feb. 25, 1998), Lorain App. No. 97CA006702, unreported, at 8.

In the instant case, the trial court held that Defendant timely raised this issue. The record indicates that after service of the summons and indictment, Defendant first appeared in court on August 16, 2000, at which time he was not represented by legal counsel. He obtained counsel for the first pretrial hearing on September 22, 2000. One month later, Defendant moved to suppress the evidence, which the trial court denied on November 30, 2000. Shortly thereafter, Defendant asserted his right to a speedy trial by moving to dismiss for post-indictment delay.

***5** In sum, Defendant did not fail nor neglect to timely assert his right to a speedy trial. Approximately two months after obtaining legal counsel, he moved to dismiss for the post-indictment delay. Additionally, contrary to Appellant's argument, this is not a case where Defendant waited until the eleventh hour to assert his rights. See *Thomas, supra,* at 8. Thus, we find that this factor weighs in favor of Defendant.

E. Prejudice to Defendant

In terms of the fourth factor, prejudice to the defendant can take three forms: lengthy incarceration, anxiety over unresolved criminal charges, and impediments to an effective defense. *Barker,* 407 U.S. at 532, 33 L.Ed.2d at 118.

In *Barker,* the Court further acknowledged that "[i]f witnesses die or disappear during a delay; the prejudice is obvious." *Id.* Furthermore, affirmative proof of particularized prejudice is not essential to every speedy trial claim. *Doggett,* 505 U.S. at 655, 120 L.Ed. at 530.

Defendant maintained that he was prejudiced by the 53 month delay because during that time a witness disappeared who would have allegedly testified on Defendant's behalf. Defendant stated that the witness, Boyd Taylor, the co-defendant, was going to inform the court that he was responsible for the marijuana found in the car. Defendant further testified that he

> searched the area where Taylor previously resided in an attempt to locate him; however, Defendant was unable to discover Taylor's whereabouts.
>
> The State attempted to rebut this argument during the hearing in its closing argument, where it alleged that Taylor currently resided at an address in Garrettsville, Ohio. Also, in its appellate brief, the State contends that Taylor contested his own charges at a previous bench trial in Lorain County; thus, it is unlikely that Taylor was going to testify that he owned the marijuana in question. The record before this court does not support either of the State's allegations. Had the State adequately supported these arguments with evidence in the record, we may have reached a different conclusion after considering the applicable factors.
>
> Therefore, the "prejudice is obvious" based on the record as it stands before this court, Defendant's specific, uncontradicted statements regarding the missing witness, and Defendant's testimony regarding his efforts and inability to locate the witness. See *Barker*, 407 U.S. at 532, 33 L.Ed.2d at 118. We agree with the trial court and find that this factor weighs significantly in favor of Defendant.
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> **Viewing the four *Barker* factors together in this case, as required, we hold that Defendant established that he was denied his right to a speedy trial due to the post-indictment delay. Thus, the trial court did not err in granting Defendant's motion to dismiss for post-indictment delay. The State's assignment of error is overruled."**

In this case the evidence is that the State entered the warrant in LEADS. No other effort was made to locate the Defendant to serve the warrant. The reason provided for not serving the warrant is that the City of Amherst lacked the resources, i.e. manpower, to serve warrants outside its jurisdiction because it has "hundreds of warrants" outstanding. The record does not support the reason provided. The court is not insensitive to the resources of the City of Amherst Police Department. The court is completely aware of the fact that the City of Amherst resources have been diluted by the rash of theft criminal activity including the excessive theft activity at the Amherst Target store. The court does not suppose to and would not criticize or tell the City of Amherst Police Department how to prioritize its resources. But the law does not permit lack of resources to be used in mitigation of

Constitutional considerations. In any event the records of the Clerk of Court do not support the factual basis provided for not pursuing this domestic violence warrant, to wit: that there are hundreds of warrants outstanding.

Warrants can be divided into two main categories insofar as the obligations of the police to serve the warrants. The first category is un-served warrants. Excluding the "John Doe" warrants there are only 22 un-served warrants not "hundreds of warrants." The second category of warrants is where a person has already been served and has either failed to appear after having been served and has failed to comply with their sentence. The duty to serve these warrants is a much lower standard and much lower priority under Constitution. See *Village of Wellington v William J. Vittori* 95TRD07907 decided by this court on October 9, 2002

Using the *Barker v Wingo* factors the court makes the following conclusions:

1. Length of Delay- Presumptively prejudicial – greater than one year – 22 months. Favors the accused.
2. Reason for Delay- alleged to be because the City of Amherst has "hundreds of warrants" outstanding. The reason is not supported by the record. The cases that this court has researched that have concluded in favor of the State have some fact that the State made an effort to serve a warrant. In this case the State admitted that no effort was made for the reason stated. Favors the accused.
3. Accused's assertion of his/her right – the court finds that the accused timely asserted his right after counsel was appointed and counsel discovered the issue. Favors the accused.
4. Prejudice to the accused – This is the most intricate issue for the court in this case. This is not a case where a witness has disappeared or evidence has disappeared. The court finds that the delay has prejudiced the accused, the victim and the State as follows:

Accused: Mr. Brown has apparently led a law abiding life since the issuance of the warrant. Mr. Brown has lived with the alleged victim for the past 18 months. Mr. Brown has had a baby with the alleged victim during this time period. Mr. Brown will now have to face charges while residing with the alleged victim and their young child.

Alleged Victim: Perhaps the person who has been prejudiced the most by the delay is the alleged victim. The alleged victim has lived with Mr. Brown for the past 18 months. The alleged victim has had a baby with Mr. Brown during this time period. The alleged victim sought the assistance of law enforcement because she alleged Mr. Brown threatened to kill her. No one knows the circumstances behind the [re]unification of Mr. Brown and the alleged victim. The dynamics of domestic violence are complicated. We may not presume that the alleged victim desires or does not desire to be with Mr. Brown or if she so desires whether Mr. Brown is treating her or not treating her with the dignity and respect that she deserves. Had Mr. Brown been timely served and convicted [The court is aware that Mr. Brown is presumed innocent and does not presume he would have been convicted but assumes a conviction solely to illustrate a point] the court would have had the opportunity to fashion an appropriate sentence that may have included education and counseling and a meaningful consequence for this reprehensible allegation. That potential opportunity is now lost to the detriment of both Mr. Brown and of the alleged victim in this case.

If the court allows this case to go forward the alleged victim, the key witness in the case, will be placed in the unenviable position of having the agonizing stress of having to testify against Mr. Brown during the day and then having to go home with him at night. The alleged victim had the courage to report what she believed to be a crime. A Protection Order was issued and also was not served. The passage of time and subsequent birth of Mr. Brown's child and their living arrangement has prejudiced not only Mr. Brown but also undoubtedly the alleged victim. To require her to testify might now only to victimize a victim who had the courage to report a crime at the time of its occurrence.

State: The State's case is probably prejudiced greatly by this passage of time. Although it was not addressed one can only imagine that the State may have difficulty with the victim's testimony either due to reluctance or due to the passage of time. It may be difficult if not impossible for the State to prove its case beyond a reasonable doubt using potentially stale testimony. As pointed out by Justice Brennen in his concurring opinion in *Dickey v Florida (1970)* 90 S. Ct. 1564:

> "The Speedy Trial Clause protects societal interests, as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. **Just as delay may**

impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See Ponzi v. Fessenden, 258 U.S. 254, 264, 42 S.Ct. 309, 312, 66 L.Ed. 607 (1922). Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. **And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.**

Justice delayed is justice denied. In this case not only is justice denied the accused by not bringing the accused timely to justice but justice is denied the victim by not diligently serving the warrant and justice is denied society for the reasons set forth by Justice Brennen.

For all of the foregoing reasons the Motion to Dismiss is granted.

This decision should not be read that this court is making black letter law that a 22 month delay in serving a warrant automatically results in a dismissal. The circumstances of this case are unique and the decision of this court is limited to its particular and peculiar facts. And as a practical matter this decision is of very limited effect. Of the 22 outstanding un-served warrants [not counting the John Doe warrants that are all over 6 years old], 13 of the warrants are not even a year old. This is not a decision that should greatly affect the operation of the City of Amherst Police Department or its resources or its budget. The City will have to continue to weigh and balance its resources and efforts that it might make to serve un-served warrants.

This decision also should not be interpreted as the judge instructing the Amherst Police Department that the warrants must be served. The law seeks to determine efforts to serve a warrant and to balance those efforts versus prejudice to the Defendant.[1]

May 23, 2016

Judge Thomas A. Januzzi

[1] Also of note is that this court has made a concerted effort to minimize post conviction warrants to free up law enforcement resources. For example, this court for several years has discontinued issuing warrants for non-payment of fines. This court has also suggested that the Lorain County Sheriff run "wants and warrants" in the door in addition to out the door of the jail to timely serve outstanding warrants. This court typically rules on a warrant request the same day or the next day that a request is made. The court will continue its diligence when presented with requests for warrants.