

IN THE COURT OF APPEALS FOR THE FIFTH APPELLATE DISTRICT
DELAWARE COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee

-vs-

WESLEY HADSELL
Defendant-Appellant

Case No. 18 CAA-06-0044

BRIEF OF APPELLEE

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2018

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ASSIGNMENTS OF ERROR

- I. Appellant's Due Process Rights were not violated by the pre-indictment delay in this case.

Issues for Review

- I. Is this appeal moot as Appellant was only convicted of a misdemeanor offense and has already served his entire sentence?
- II. Does Appellant's consent to the dismissal of his original case without prejudice preclude him from alleging prejudice from the subsequent delay in prosecution?
- III. Has Appellant suffered any actual prejudice by the delay between the first and second indictment?

STATEMENT OF THE CASE

On August 26, 2005 Appellant was indicted in Delaware County case 05 CR I 08 0424 for rape, kidnapping, felonious assault, and domestic violence against his then spouse M.H. The incident giving rise to those charges was alleged to have occurred on August 21, 2005 in the City of Delaware. The investigation of that incident was conducted by the Delaware Police Department. Before Appellant could be taken into custody on the 2005 indictment it was learned he left the jurisdiction. At the time, it was suspected he had kidnapped M.H. upon his departure.¹ Appellant was ultimately apprehended in Illinois and brought back to Ohio for arraignment on September 27, 2005. See 5/31/2016 Judgment Entry Denying Defendant's Motion to Dismiss Filed February 17, 2017.

The 2005 case proceeded in due course and was set to be tried on February 21, 2006. On October 14, 2005, Appellant disclosed he intended to call his former associates Frank Andrews and Deanna Andrews as possible witnesses at trial. Appellant disclosed no other witnesses. On November 1, 2005 the State filed a motion to dismiss the 2005 case without prejudice on the basis that the United States Attorney's Office had indicted Appellant and issued a warrant for Appellant's arrest. That same day, the judge, prosecutor, and defense counsel all approved an entry dismissing the case without prejudice. In 2008 and in 2012, items reflected in State's Ex. 1 were destroyed pursuant to court order. Nothing further occurred under the 2005 case number.

¹ The investigation of this offense was conducted by the Delaware County Sherriff Deputies Dan Otto and Chad VanSickle. No indictment was ever returned relating to that alleged misconduct by Appellant.

On July 22, 2016 Appellant was reindicted for the alleged misconduct occurring in the City of Delaware on August 21, 2005. No charges were sought for the alleged kidnapping of M.H. on August 26, 2005 investigated by the Delaware County Sheriff's Office. Appellant was transferred to Ohio from the Western Tidewater Regional Correctional Facility and arraigned on the charges on December 14, 2016. Appellant's bond was set in the amount of \$80,000 and he was held in the Delaware County Jail until he was sentenced on June 8, 2018.

Appellant's trial was originally scheduled to commence on February 28, 2017. However, that date was continued at Appellant's request to allow his counsel time to recover from an illness. In that motion, Appellant waived his rights to a speedy trial. On February 17, 2017 Appellant filed a motion to dismiss alleging preindictment delay. A hearing was held on that motion on March 15, 2017. At the conclusion of testimony that day, the trial court allowed Appellant to supplement the record at a future date, and ultimately held a second hearing on the motion on May 8, 2017. On May 15, 2017 Appellee filed a supplemental response to Appellant's motion to dismiss based upon the evidence adduced at the oral hearings. On May 31, 2017 the trial court denied Appellant's motion to dismiss based upon preindictment delay.

On July 27, 2017, Appellant retained new counsel for the jury trial scheduled on August 8, 2017. After the August 8 trial was continued, Appellant filed a motion to "reconsider" his prior motion the earlier motion to dismiss alleging additional issues relating to preindictment delay.² The trial court granted that motion and allowed Appellant to have a third oral hearing on the motion to dismiss in question on January 5, 2018. On January 9, 2018 Appellee filed a memorandum contra the supplemental

² Appellant filed numerous other motions that are not relevant to this appeal.

arguments raised in the motion to “reconsider” and presented at the oral hearing on the motion to dismiss. On January 17, 2018 the trial court denied Appellant’s motion to “reconsider” the motion to dismiss. Two days later, that denial was appealed to this court. Once this court disposed of that appeal, the matter was rescheduled for trial.

Trial was scheduled to commence on June 5, 2018. Prior to trial, the parties filed a variety of motions addressing potential evidentiary issues expected to arise at trial. On May 31, 2018 the trial court issued an order precluding Appellant from introducing evidence of the lack of charges against him for his post-rape conduct (the alleged kidnapping of M.H. investigated by the Delaware County Sheriff but never charged). Additionally, the trial court issued an order precluding Appellant from introducing extrinsic evidence on collateral matters that occurred in the days and weeks following the alleged rape in the City of Delaware. The Court explained that extrinsic evidence of M.H.’s alleged post-rape conduct goes only to her credibility and must be excluded.

When the case proceeded to trial, the State presented the testimony of M.H., the officers who investigated the offense, admissions by the defendant on recorded calls to engaging in sexual conduct with M.H. on the day in question, and photographs showing injuries to M.H. After the close of the case, the defendant was acquitted of all counts with the exception of the lesser included offense of assault. The court proceeded directly to sentencing and imposed a six month jail sentence. Appellant was granted jail time credit in excess of 180 days. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

Appellant’s statement of facts largely outlines the testimony presented at trial and need not be restated in full. Appellee would supplement his statement with the following.

M.H. met Appellant when she was eighteen and he was twenty four years old. Between May and July of 2005, M.H. and Appellant were married but periodically separated and then reconciled in light of marital issues they were having. However, as of August 2005 they were no longer residing together. Trans. 134-135. On August 21, 2005, Appellant placed a call to M.H. and let her know where she could meet him to pick up some of her personal belongings. Trans. 139. When she arrived with her mother to pick up the items, Appellant claimed he did not have the items and M.H. left empty handed. Trans. 140-141. Appellant called M.H. later that afternoon and advised he now had the items; this time M.H. met Appellant on her way to work (without her mother) at the Cheshire St. residence in Delaware, Ohio. Trans. 141-143.

Once inside the Cheshire St. residence, M.H. described Appellant as approaching her affectionately and expressing a desire to reconcile. When M.H. declined his advances, he physically assaulted her and attempted to strangle her. Before M.H. lost consciousness, she said she relented and agreed to have sexual intercourse with him. She described the physical assault occurring in the living room and then continued in the room with the waterbed. After they had sexual intercourse, she went directly to the Delaware Police Department and reported the incident. Trans. 143-150.

At the police department, photographs were taken of contusions on her face and injuries to her neck. States Ex 2A, 2B, and 2C; Trans 151-152. She was then taken to Grady Memorial Hospital where additional photographs were taken. State's Ex. 3A-3G; Trans. 154. M.H. testified she and Appellant had no children together and, at the time of her testimony, had not had contact for over a decade. Trans. 158.

M.H. explained five days after the alleged rape, she found Appellant waiting for her at her parents' house. Trans. 218. After a brief interaction with him at the residence, she said she left with him out of fear. Trans 218-219. Appellant took her to numerous states including Alabama, Florida, Georgia, North Carolina, Virginia, and Illinois. Trans. 190-191. M.H acknowledged that Appellant took her to his grandma's house, some friends of his in North Carolina, a nursing home, to the residence of Dora Carol, and that she did not tell anyone at those places she was being held against her will. M.H testified that Appellant had threatened her and her family. M.H. believed him capable of hurting her and her baby niece. Because of this, she tried to placate him while they were out of State. Trans. 196-201.

ASSIGNMENTS OF ERROR

- I. Appellant was not denied due process of law as a result of the preindictment in prosecuting this case.**
 - A. This appeal is moot as Appellant has completed the entirety of his sentence and was only convicted of a misdemeanor offense.**

The Ohio Supreme Court has long recognized that upon completion a sentence, a defendant no longer has a substantial stake in his conviction. Accordingly, any appeal of that conviction is rendered moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral consequence or loss of civil rights from such judgment or conviction. *State v. Wilson* (1975), 41 Ohio St.3d 236, syllabus; *State v. Berndt* (1987), 29 Ohio St.3d 3, 4-5.

While the Ohio Supreme Court has recognized the unfairness of applying this holding to felony convictions (given the collateral consequences accompanying a felony conviction), the Court has repeatedly reaffirmed its applicability to misdemeanor

convictions. *State v. Golston* (1994), 71 Ohio St. 3d 224, 227. It is incumbent upon the Appellant to establish by evidence that he has a substantial stake in the judgment of conviction after he has completed serving his sentence. See *Berndt*, supra. Appellant has failed to demonstrate any resulting prejudice in this case.

Appellant was convicted of the lesser included offense of simple assault, a misdemeanor of the first degree. On that count, he was sentenced to six month jail term. However, Appellant had been held in custody in relation to this charge from December 14, 2016 to June 8, 2018. By Appellee's count, Appellant had approximately 541 days credit toward his 180 day sentence as of the day he was sentenced. Accordingly, the instant appeal is moot as there is no meaningful relief this Court can afford Appellant now that he has completed his sentence.

Additionally, Appellant cannot assert that he will suffer collateral consequences as a result of his sentence like those discussed in *Golston*. As discussed at the time of sentencing, Appellant had an extensive record including prior convictions for felonious restraint, being a felon in possession of ammunition, armed robbery, burglary, and a number of lesser offenses. Trans. 655:1-10. Given his lengthy history of violent offenses, including felony offenses, the additional misdemeanor conviction imposed no new collateral consequences or disabilities upon him.

Appellant was being held in federal custody as he awaited trial on this case and is currently serving a ten year prison sentence in federal court. Trans. 658. Aside from perhaps a perceived benefit to him in a possible civil suit, Appellant has no stake in continuing to litigate this matter. The mere desire to have his Due Process claims

litigated does not itself create a live controversy for this Court to address. Accordingly, this Court should dismiss the instant appeal as moot.

B. Appellant's agreement to the dismissal of the 2005 case precludes him from claiming prejudice by the delay in prosecuting this case.

Generally speaking, a party is not permitted to take advantage of an error that he himself invited or induced the court to make. *State ex rel. Soukup v. Celebrezze* (1998), 83 Ohio St.3d 549, 550. This doctrine of invited error is merely an extension of the waiver doctrine. *Davis v. Wolfe*, 2001-Ohio-1281, 92 Ohio St. 3d 549, 552. Generally, failure to raise an issue at a time where the court can avoid the alleged harm constitutes waiver of the issue. While courts have the power to notice plain error, such authority is one which courts exercise only in exceptional circumstances, and exercise cautiously even then. *State v. Long* (1978), 53 Ohio St. 2d 91, 94–95 (internal citations omitted).

On November 1, 2005 the State filed a motion to dismiss the 2005 case without prejudice on the basis that the United States Attorney's Office had indicted Appellant and issued a warrant for his arrest. Appellant had been indicted for armed robbery after fleeing Ohio and was ultimately sentenced to remain in federal prison until 2011.

5/31/17 Judgment Entry. Appellant had the opportunity to object to the State's request to dismiss the 2005 case and have his case heard on the merits at that time. However, Appellant not only failed to object to the motion to dismiss, he affirmatively approved its dismissal. Presumably, he felt it was in his interest to deal with the federal indictment and any consequences flowing from that indictment first. Regardless, the entry he approved clearly indicated the case would be dismissed without prejudice.

Had Appellant wished to have the Delaware County charges relating to M.H. litigated in a timelier manner, he had the opportunity to voice that desire when the State filed its motion to dismiss. Appellant was clearly aware he would be taken into custody by the federal authorities and would have no way of knowing how long he would be in their custody. This is not a case where the State investigated an incident and simply never charged Appellant. Appellant faced charges relating to this incident in 2005 and had every right to insist on a prompt resolution of the matter on the merits. Because he failed to do so, he should not be permitted to object when the State resumes prosecution of the case within the statute of limitations.

Appellant is not arguing he did not commit the offense of assault in this appeal. He merely argues his ability to defend the case was prejudiced by passage of time. Because Appellant consented to the original dismissal, and does not deny he committed the underlying offense, this is not an exceptional case where the Court can find a manifest injustice occurred.

C. Appellant failed to demonstrate the preindictment delay in this case resulted in actual prejudice.

Should this Court address the merits of Appellant's arguments, the Court should hold the trial court properly denied Appellant's motion to dismiss. The Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution "the right to a speedy and public trial." However, it does not "require the Government to discover, investigate, and accuse any person within any particular period of time." *United States v. Marion* (1971), 404 U.S. 307, 313. Statutes of limitations provide the ultimate time limit within which the government must prosecute a defendant—a definite

point “beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.” *Id.* at 322. See also *United States v. Lovasco* (1977), 431 U.S. 783, 789, (stating that statutes of limitations provide predictable limits to prevent initiation of overly stale charges). However, courts have long recognized that when unjustifiable preindictment delay causes actual prejudice to a defendant's right to a fair trial despite the state's initiation of prosecution within the statutorily defined limitations period, the Due Process Clause affords the defendant additional protection. *Id.*

The Ohio Supreme Court has been unequivocally clear that that preindictment delay violates due process only when it is unjustifiable and causes actual prejudice. *State v. Luck* (1984), 15 Ohio St.3d 150, paragraph two of the syllabus. Additionally, the Court has a well-established burden-shifting framework for analyzing a due-process claim based on preindictment delay. Once a defendant presents evidence establishing actual prejudice, only then does the burden shift to the state to produce evidence of a justifiable reason for the delay. *State v. Whiting* (1998), 84 Ohio St.3d 215, 217; *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 99. Unless and until a defendant demonstrates actual prejudice has resulted from the delay, the State has no obligation to justify the delay in prosecution. *State v. Jones*, 2016-Ohio-5105, ¶¶ 11-13, 148 Ohio St. 3d 167, 170–71.

A determination of actual prejudice involves “a delicate judgment” and a case-by-case consideration of the particular circumstances. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 52, quoting *Marion*, 404 U.S. at 325, 92 S.Ct. 455, 30 L.Ed.2d 468. A court must “consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay.” *Id.* The Court

has declined to adopt any bright line test for demonstrating actual prejudice and explained the alleged prejudice in each case must be evaluated in light of its own unique circumstances. *State v. Jones*, 2016-Ohio-510, 148 Ohio St. 3d 167. An appellate review of the trial court's decision in this matter is reviewed for an abuse of discretion. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 33, citing *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983).

Appellant presently claims he suffered actual prejudice by the unavailability of two potential witnesses whom cannot testify in light of the delay. First he claims he was prejudiced by the untimely death of Detective Dan Otto. While Detective Otto had no role in the investigation of the alleged rape of M.H. (occurring on August 21, 2005) he was assigned to investigate the disappearance of M.H. (occurring on August 26, 2005). Appellant alleges Detective Otto made statements to him claiming the August 21, 2005 incident was some sort of "misunderstanding." However, despite having the recordings and transcripts of Detective Otto interviews with M.H., as well as his narratives, Appellant presented no evidence in support of this assertion.³ Additionally, while Appellant was free to inquire regarding these alleged statements on cross examination of M.H. at trial, he declined to do so.

Similarly, he claims he was prejudiced by the unavailability of his father as a potential witness. Appellant claims that M.H. called his father after Appellant taken into custody and stated she was sorry that she had reported the incident to the police and that she would not testify against Appellant. Even if the trial court believed that to be true, Appellee fails to see how Appellant was prejudiced by this witnesses'

³ To the extent that Appellant asserted such statements were made (or implied) to him by Detective Otto, the trial court appears to have found the allegation incredible as its May 31, 2017 as it found Appellant failed to present demonstrate any prejudice to Appellant as the result of Detective Otto's death.

unavailability. Hearsay testimony related by Appellant's father, in which M.H. expressed her regret for involving the police and her desire not to testify is marginally relevant, if relevant at all.

Surely if Appellant had a good faith basis to believe M.H. had recanted the August 21, 2005 allegations, he would have inquired regarding such statements when he cross examined her at trial. He did not. Appellant could have asked M.H. regarding any statements she made to Detective Otto or to Appellant's father. Despite asking about other statements M.H. made to Detective Otto, and her interactions with various individuals after the alleged rape, he failed to inquire about any alleged recantation of the August 21, 20105 incident.. Assuming, *arguendo*, M.H. had in fact made such statements, Appellant would only have a colorable arguable he suffered prejudice if M.H. denied making the statement at trial. Because that did not occur, he cannot claim actual prejudice occurred.

Additionally, Appellee finds it significant Appellant never disclosed his father or Detective Otto as potential witnesses on his behalf when this matter was originally set for trial. In response to Appellee's demand for discovery in the 2005 case, Appellant merely listed Frank and Deanna Andrews, the two individuals he was residing with while separated from M.H., as potential witnesses. Surely, if Appellant believed Detective Otto or his father had relevant admissible evidence to offer on his behalf, they would have appeared on the witness list he filed. Appellee suspects this is a case where the witnesses only became useful to Appellant once they became unavailable to testify.⁴

⁴ The record reflects Appellant subpoenaed former Detective Chad Vansickle, the detective who worked the investigation into M.H.'s disappearance with Detective Otto. Despite his availability, Appellant declined to call him as a witness either at pretrial motion hearings or at trial.

With respect to the destruction of various items in this case, the trial court properly found appellant suffered no prejudice. While it is true that some of the bedding, the sexual assault evidence collection kit, and the recorded interviews were destroyed prior to trial, Appellant failed to establish this resulted in any actual prejudice to him. Appellant admitted, almost from the start, that he had had sexual intercourse with M.H. on the date in question. There was no dispute that at trial that he and M.H. had sex at the residence in question on the date in question. Accordingly, the evidence destroyed had little to no bearing on case.

While Appellant also claims the delay in prosecution deprived him of access “to a wider range of evidence demonstrating that Michelle did not behave like someone who had just been raped and assaulted” this does not give rise to actual prejudice even if true. The trial court repeatedly issued orders that Appellant would not be permitted to introduce extrinsic evidence on collateral matters at trial. Whether this case was tried in 2006, or 2018, Appellant would not be permitted to introduce testimony and evidence suggesting M.H. did not “behave like someone who had just been raped and assaulted” in the days and weeks following the incident. Appellant cannot claim prejudice based on the unavailability of inadmissible evidence.

Finally, Appellant cites “faded memories” of various individuals who testified at trial as evidence of preindictment delay (Ofc. Moore, Det. Pijanowski, Ruth Downing, and M.H.). It should be noted these facts were not developed at any of the three hearings the trial court afforded Appellant on his motions to dismiss. If Appellant believed he was prejudiced by the lack of memory of any particular witness, he had ample opportunity to subpoena said witness and develop a record regarding the same

prior to trial. Given that it was his burden to establish actual prejudice, it is unfair to suggest the trial court abused its discretion in denying a motion when Appellant failed to provide the trial court an evidentiary basis to grant him the relief he requested.

More importantly, however, the alleged “faded memories” were on collateral issues that had little or no bearing on the disputed facts. The parties agreed Appellant and M.H. were separated at the time of the alleged rape. The parties agreed Appellant and M.H. met at the Cheshire St. residence on the date in question and engaged in sexual conduct. The sole disputed issue was what occurred inside the Cheshire St. residence immediately before and after the sexual conduct. If Appellant felt the jury needed more clarity on any of the collateral issues set forth in his brief, he was free to take the witness stand and set the record straight. He did not.

CONCLUSION

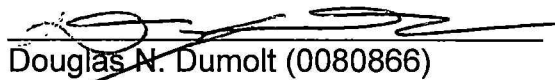
The trial court was not unreasonable, arbitrary, or capricious in its denial of his motions to dismiss. The trial court afforded Appellant every opportunity to establish a record prior to trial. Appellant filed successive supplemental motions to dismiss alleging preindictment delay and was given three evidentiary hearings on those motions. As this Court can see from the transcripts of those hearings, both the trial court and Appellee provided Appellant every opportunity to establish actual prejudice. However, Appellant was unable to do so as the relevant evidence remained largely unchanged between 2005 and 2018.

When this case was indicted in 2005, it was a spousal rape case in which Appellant alleged consent. A little over a decade later when it was reindicted, the relevant evidence remained essentially unchanged. None of the now unavailable

witnesses had any personal knowledge of whether the alleged offenses occurred. None of the destroyed evidence had any bearing on whether the sexual conduct alleged was consensual or the product of force.

While Appellant has alleged prejudice based upon the loss of evidence on collateral matters, he was able to present the information to the jury by other means. M.H. did not deny that she was in various other States with Appellant in the weeks after the assault and readily admitted she told no one of the alleged rape or assault. None of the "evidence" lost to him because of the delay had any bearing on what did or did not occur at the Cheshire St. residence on August 21, 2005. For those reasons, and the reasons set forth in the trial court's May 31, 2017 and January 17, 2018 entries, the trial court properly denied his motions to dismiss.

Respectfully submitted,
CAROL HAMILTON-O'BRIEN,
PROSECUTING ATTORNEY



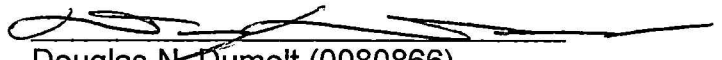
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CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and accurate copy of the foregoing document was served upon the following counsel via ordinary mail on this 5th

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