

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO, :

Plaintiff, :

vs. : Case No. 16 CR I 07 0349

WESLEY P. HADSELL, :

Defendant. :

CLERK OF COURTS  
DELAWARE COUNTY, OHIO  
COMMON PLEAS COURT  
FILED  
2017 MAR 15 AM 11:05

**MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISS**

Now comes the State of Ohio, by and through Assistant Delaware County Prosecutor Douglas Dumolt, respectfully requesting the Court deny the instant motion as the Defendant has not, and cannot, demonstrate any actual prejudice that resulted from the preindictment delay in this case. Because the Defendant cannot carry his burden in this case, dismissal of the Indictment would be improper.

**Statement of Facts**

On August 21, 2005 Det. Brenda Wadsworth of the Delaware Police Department responded to the alleged rape of Jane Doe. Jane Doe had arrived at the Delaware Police Department crying and with visible injuries to her face and neck. Jane Doe reported that earlier that day, the Defendant had forced her to engage in sexual activity against her will.

The incident had occurred where the Defendant had been temporarily residing at 28 Cheshire St. Jane Doe went to the residence at the Defendant's request to retrieve some of her personal property. Once there, the Defendant

attempted to persuade Jane Doe to engage in sexual conduct with him. When she declined, he stuck her and began to strangle her. As she felt she was losing consciousness, she relented and sexual conduct occurred. After the incident was over, Jane Doe left the apartment and went straight to the Delaware Police Department.

The Defendant was contacted by Detective Wadsworth for an interview. During the Defendant's interview, he admitted he digitally penetrated Jane Doe and engaged in vaginal intercourse with Jane Doe. He denied striking Jane Doe and denied forcing her to engage in sexual conduct. Analysis of the SANE kit revealed the presence of the Defendant's DNA.

On August 26, 2005 the Defendant in this case was indicted in Delaware County Case number 05 CRI 08 0424 for the same alleged misconduct that is at issue in the current case. At that time, the Defendant's whereabouts were unknown and a warrant was issued for his arrest. He was ultimately apprehended after committing a number of out-of-state criminal offenses and was arraigned on September 27, 2005.

Trial was scheduled to commence on that case on February 21, 2006. While the original indictment was pending, the Defendant was indicted in federal court regarding a bank robbery that was committed after the conduct alleged in this case, but before he was arraigned on the charges. Approximately two and a half months before the Defendant's trial was to commence, the United States Attorney's Office issued a warrant for the Defendant in relation to the robbery. On November 1, 2005 the Delaware County indictment was dismissed to allow the

Federal prosecution to commence first. It is the State's understanding the Defendant was sentenced to 54 months in prison on that offense.

During the course of the initial investigation, a number of items of potential evidentiary significance were collected (see attached State's ex. 1). Generally speaking, these items included Jane Doe's clothing, photographs of her injuries, the bedding from where sexual conduct occurred, some personal property of the Defendant, the sexual assault kit, recordings of the Defendant's interview, recordings of the victim's interview, and recordings of voicemails left for Jane Doe by the Defendant.

When the original indictment was dismissed On November 1, 2001, the evidence in possession of the Delaware Police Department was marked for destruction. On June 11, 2008 the Delaware Police Department sought an order from the Delaware County Court of Common Pleas to destroy the evidence in this case. On June 13, 2008 Judge W. Duncan Whitney signed an order permitting the destruction of the property attached to this case. On November 12, 2012 a similar order was signed by this Court permitting the destruction of the property narratives and DNA swabs from Jane Doe and the Defendant.

Delaware Police Department continues to maintain the bedding that was collected in relation to the sexual conduct at issue in this case. Electronic copies of the photographs taken of Jane Doe remain in evidence. Additionally, all of the witness statements, DNA results, police reports, and investigatory narratives still exist.

In April of 2016, by the alleged victim in this case as well as law enforcement officers from the Commonwealth of Virginia regarding the dismissal of the original case. The decision was then made to seek a new indictment relating the original charges. On July 22, 2016 the Delaware County Grand Jury returned the Current Indictment.

### **Argument of Law**

The Due Process Clause of the Fifth Amendment provides limited protection against preindictment delay. United States v. Lovasco, 431 U.S. 783, 789–790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The Ohio Supreme Court has recognized a comparable due-process protection under Article I, Section 16 of the Ohio Constitution. State v. Luck, 15 Ohio St.3d 150, 472 N.E.2d 1097, at paragraph two of the syllabus. See State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶¶ 51–52. Under certain circumstances, unjustified preindictment delay can require the dismissal an indictment.

However, a defendant alleging a due-process violation based on preindictment delay must present evidence establishing substantial prejudice to his right to a fair trial. United States v. Rogers, 118 F.3d 466, 475 (6th Cir.1997); Walls at ¶ 51. Unlike a Sixth Amendment speedy-trial claim, no presumption of prejudice arises in the due-process context when a preindictment delay exceeds a particular length of time. United States v. Schaffer, 586 F.3d 414, 425 (6th

Cir.2009); State v. Adams, 144 Ohio St. 3d 429, 444–45, reconsideration denied, 144 Ohio St. 3d 1480.

Once a defendant shows actual material prejudice, the Ohio Supreme Court has held that the burden shifts to the state to present evidence of a justifiable reason for the delay. State v. Whiting, 84 Ohio St.3d 215, 217 (1998); Walls at 452–453, 775 N.E.2d 829. Some courts, including the Sixth Circuit, have held that under the Fifth Amendment, the defendant retains the burden of proof at all times and must affirmatively demonstrate both substantial prejudice to his right to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage. See Schaffer at 424.

The Ohio Supreme Court has recognized that “[t]he burden upon a defendant seeking to prove that preindictment delay violated due process is “ ‘nearly insurmountable,’ ” especially because proof of prejudice is always speculative. Adams, supra, quoting United States v. Montgomery, 491 Fed.Appx. 683, 691 (6th Cir.2012). Furthermore, the Adams Court explained that the death of a potential witness during the preindictment period can constitute prejudice, but only if the defendant can identify exculpatory evidence that was lost and show that the exculpatory evidence could not be obtained by other means. Adams ¶¶ 97-103.

In this case, the Defendant will not be able to carry his burden that the delay between the original indictment and the present indictment caused him substantial actual prejudice. The Defendant raises five potential ways in which he was prejudiced by the delay in this case. However, those fall into three

categories 1) diminution of witness memory due to the passage of time 2) destruction of physical evidence in this case and 3) the inability to call potential defense witnesses. Because each of these claims is purely speculative, and no actual prejudice has resulted, the Defendant's motion must be denied.

### **Witness Memory**

The Defendant alleges that given the passage of time, he is unable to account for the particulars of the events at the time of the alleged crime. In his motion, he fails to identify what particularity he can no longer recall and how his alleged inability to recall those facts would material prejudice his defense. At the time of the offense, the Defendant claimed he did not force Jane Doe to engage in sexual activity with him. He claimed they engaged in consensual sexual conduct on the date in question. To this date, the Defendant continues to maintain "consent" as his defense. The State unaware of how the loss of unspecified details regarding the incident will prejudice the Defendant in a tangible and substantial way.

More importantly, however, both the Ohio Supreme Court and United States Supreme Court have explained that "the possibility that memories will fade, witnesses will become inaccessible, or evidence will lost is not sufficient to establish actual prejudice." State v. Adams, 144 Ohio St.3d 429, ¶ 105, citing Marion, 404 U.S. at 325–326. While it may be true that a witness' memory of certain events might deteriorate over time, that would be true regardless of whether the case was prosecuted ten days, ten months, or ten years after the incident. The relevant inquiry is not whether certain details may have been lost.

The inquiry must be whether or not the defendant has suffered actual, substantial prejudice based upon what he has shown to have been lost.

### **Destruction of Evidence**

The Defendant alleges, and it is uncontested, that much of the physical evidence collected in this investigation was destroyed in 2008. The victim's clothing from the date of the incident, while photographed, has been destroyed. The SANE collection kit that was submitted to BCI for examination (as well as the DNA standards of the victim and defendant) were also destroyed. Some of the bedding that was collected as part of the investigation was destroyed. The personal items of the defendant placed into property when he was arrested were destroyed. Finally, the recordings of the victim's and defendant's interview were destroyed as well.

The Defendant fails to allege how the destruction of any of these items has created actual material prejudice to him in this case. The Defendant presently claims, as he has always claimed, the sexual conduct in question was consensual. None of the physical evidence seized in this case would make it more likely (or less likely) that the sexual conduct was consensual. The photographs showing the condition of the victim and her clothing still exist. The results of the DNA testing in this case still exist. The DNA profiles remain intact for comparison to other suspects upon request. Should he so choose, the Defendant can still testify that he did not force Jane Doe to engage in sexual activity against her will. If anything, the destruction of the physical evidence in

this case would inure to the defendant's benefit as the State will be unable to play his recorded interview at trial.

### **Unavailability of Potential Witnesses**

The State recognizes that under certain circumstances the death of a witness can result in actual prejudice to a defendant. However, for that to be the case, the witness must possess relevant admissible evidence that is material to his defense that is unavailable from alternative sources. Under those limited circumstances, a Defendant may be able to demonstrate actual prejudice from the death (or unavailability) of a witness.

The Defendant has alleged that the death of two individuals has caused him prejudice in this case. However, it is telling that neither of these individuals were disclosed as potential witnesses when this matter was originally set for trial. The only two witnesses disclosed by the Defendant as potential witnesses were Frank Andrews and Deanna Andrews. If the Defendant's father, or Det. Otto, had relevant material information to assist in his Defense, he would have disclosed them with his other potential witnesses in October of 2005. It appears their "value" as potential witnesses was triggered by their deaths.

In any event, neither witness had relevant admissible evidence material to his defense in this case. Det. Otto was not involved in the investigation of this case and possessed no personal information about what occurred (or did not occur) at the Cheshire St. residence. Any information he may have had regarding the Cheshire St. incident was provided to him by third parties. Similarly, both the Defendant and Jane Doe previously stated they were alone at the Cheshire St.



residence when the sexual activity occurred. There is no reason to believe that the Defendant's father has personal knowledge of what did (or did not) occur at the residence. The only information about the offenses he could have possessed would have come from third parties.

Finally, the Defendant references the "loss of contact information for potential witnesses on the Defendant's behalf." From this vague description, the State has limited ability to address this issue. As discussed above, the Defendant had only disclosed two potential witnesses when this case was previously indicted (see attached). The State has been in contact with both of those witnesses and they were subpoenaed to appear at the first trial date set in this case.

To date, the Defendant has disclosed no witnesses to the State in his case. Neither the victim nor the Defendant has ever claimed anyone witnessed the conduct that is alleged to have occurred in this case. Unless the unspecified witnesses have admissible testimony material to his defense, their absence cannot be found to cause actual prejudice. Should he have difficulty locating those witnesses, the State would be willing to assist him in that matter.

## **Conclusion**

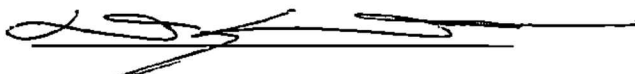
For better, or for worse, this case remains what it always has been. Whether this case was tried in 2005 or if the case was indicted in 2025, the material evidence remains the same. Jane Doe will testify the defendant forcibly raped her; the Defendant claimed that the sexual conduct was consensual. The photographs of the victim's injuries still exist and have been provided to the

Defendant. The witnesses the Defendant disclosed in 2005 as potential witnesses on his behalf have been located by the State and have been subpoenaed for trial. The evidence that has been destroyed has no bearing on whether or not the sexual conduct was consensual in this case.

Because the Defendant cannot establish actual prejudice that resulted from the delay, the State has no obligation to call witnesses or justify the delay in prosecution. See e.g., State v. Jones, 148 Ohio St.3d 167, 170-172 (2016). For the foregoing reasons, the State would respectfully request this Court deny the defendant's motion to dismiss.

RESPECTFULLY SUBMITTED,


CAROL HAMILTON O'BRIEN,  
PROSECUTING ATTORNEY



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing memorandum delivered to William E Leber, attorney for the defendant, on this, the 15<sup>th</sup> day of March, 2017.

  
Douglas N. Dumolt (0080866)