



IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff,

Vs.

WESLEY P HADSELL,
Defendant.

862
336

Case No. 16 CR I 07 0349

EVERETT H. KRUEGER, JUDGE

CLERK OF COURTS
DELAWARE COUNTY, OHIO
COMMON PLEAS COURT
FILED
2017 MAY 31 AM 11:34

JUDGMENT ENTRY DENYING DEFENDANT'S MOTION TO DISMISS FILED
FEBRUARY 17, 2017

This matter came before the court on the defendant's motion to dismiss filed February 17, 2017. The State responded March 15, 2017. The court conducted hearings on March 15, 2017 and May 8, 2017. The April 11, 2017 date was continued to explore a resolution of the issues.

The defendant's motion to dismiss is based on pre-indictment delay and a violation of the defendant's federal due process rights under the 5th amendment to the U.S. Constitution and Section 10, Article I of the Ohio Constitution.

FACTS

The defendant was first indicted August 25, 2005 for the same crimes charged in this indictment which are alleged to have occurred August 21, 2005. It should be noted that the defendant left the jurisdiction with the victim (his spouse) on August 26, 2005. He was arrested September 9, 2005 in Illinois, transported back to Delaware County September 22, 2005 and held in the county jail until November 1, 2005 when the indictment was dismissed in order for an unrelated federal prosecution to take place. The defendant was sentenced to federal prison and released in 2011. No further

investigation took place on the charges in the dismissed indictment. All evidence collected was available prior to the first indictment.

Another Grand Jury proceeding took place on June 21, 2006. Det. Otto of the county sheriff's office testified according to the defendant and the defendant testified. Sadly, Det. Otto passed away since those events. A no-bill was returned on the charge of kidnapping. The defendant was initially charged with kidnapping for the August 21, 2005 date which city police investigated. The evidence presented at the oral hearing on this motion on May 8, 2017 reflected that the investigation by the sheriff's office involved the removal of his spouse to another state on August 26, 2005. Consequently, the proceedings before the Grand Jury on June 21, 2006 had nothing to do with the events of August 21, 2005 and the fact that Det. Otto is not available to testify is irrelevant to these proceedings. Transcripts of the initial Grand Jury proceeding from August 25, 2005 are no longer available. The Grand Jury proceeding transcript under this current indictment was presented as a disc and marked, as well as interviews relating to the crime of removing the victim out of state.

The victim, according to defendant's testimony, reneged on her previous statement in a conversation with the defendant's father who is now deceased.

Sgt. Wadsworth of the Delaware Police Department testified about her investigation into the rape accusations. She prepared an affidavit for a search warrant but was not present when the search warrant was executed. However, she returned to the residence at a later time and discovered that the bedding which was on the bed and identified in pictures taken during the initial search, were not laundered and were concealed under other laundered items on the washing machine.

State's Exhibit 1 lists items destroyed.

Most items of evidence which were collected, were destroyed in 2008 and 2012 in applications to the court as unwanted and unnecessary. Recordings of the victim's statement and defendant's statement, were destroyed, as well as bedding, DNA samples and a telephone call. Det. Wadsworth (now Sgt. Wadsworth) only discovered last year that the initial indictment was dismissed without prejudice when someone asked about it. However, the detective did take notes and recovered those which quoted the defendant's statements as recorded by the victim on her phone. The defendant was given a copy of an interview. Some bedding was photographed and electronic copies of pictures and witness statements, police reports and investigation narratives are available.

The items listed on Exhibits 2 and 3, reflect all property destroyed, not just property from this case.

DECISION

The defense seeks dismissal under constitutional grounds of the 6th amendment to the U.S. Constitution and the Ohio constitution guarantees of speedy trial. The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. This provision has been held to be applicable to state criminal trials via the Fourteenth Amendment. *Klopfer v. North Carolina* (1976), 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1. The Ohio Constitution provides similar protection. The Supreme Court of Ohio stated, "Considering the basic purpose of the constitutional right to a 'speedy trial,' we conclude that such constitutional guarantees are applicable to *unjustifiable delays in commencing*

prosecution as well as to unjustifiable delays after indictment.” (Emphasis added.)
State v. Meeker, (1971) 26 Ohio St.2d 9, at 16, 55 O.O.2d 5, 268 N.E.2d 589.

Subsequently, the United States Supreme Court announced that the guarantee of a speedy trial under the Sixth Amendment of the federal constitution does not apply to pre-indictment delays. *United States v. Marion*, (1971), 404 U.S. 307, 313. As a result, the Supreme Court of Ohio noted that within the context of *Marion*, the law defined in *Meeker* had not been nullified, but rather, had been limited to being viable only in cases which were factually similar. *State v. Luck*, (1984) 15 Ohio St. 3d, 150, 153, 472 N.E.2d 1097, 1101. Accordingly, Section 10, Article I of the Ohio Constitution remains applicable to cases involving pre-indictment delay where the factual presentation is like that in *Meeker*. Similar reasoning was clarified by the decision in *State v. Selva*, 80 Ohio St.3d 465, 466, wherein the court again noted the continuing validity of *Meeker* and further held that simply satisfying the requirement of the statutory period of limitations is not relevant in determining whether a defendant’s constitutional right to a speedy trial has been violated by an unjustified delay in prosecution. This case is not factually similar to *Meeker* where the prosecution indicted a defendant on only one charge out of an incident and later indicted on additional charges.

The case also reiterated the United States Supreme Court’s recognition that “courts have generally found post-accusation delay ‘presumptively prejudicial’ at least as it approaches one year.” *Id.* at 468, citing with approval, *Doggett v. United States*, (1992), 505 U.S. 647,652, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520, 528, fn.1.

Thus, in cases involving pre-indictment delay, the Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to the defense caused by the

passage of time; this interest is protected by the Due Process Clause. *United States v. MacDonald*, (1982) 456 U.S. 1, 8, 102 S.Ct.1497, 1502, 71 L.Ed.2d 696, 704. This reasoning was conceded in *Marion* wherein the United States Supreme Court noted that the Due Process Clause of the Fifth Amendment would require dismissal of an indictment in selected situations:

“*** we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case.” *United States v. Marion*, (1971), 404 U.S. 307, 324.

The Supreme Court of Ohio noted that the parameters of *Marion*, and the later language in *United States v. Lovasco*, (1977), 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752, support the proposition that pre-indictment delay resulting in actual prejudice to a defendant will render a due process claim “concrete and ripe for adjudication.” *State v. Luck*, (1984), 15 Ohio St.3d 150, 153-154, 472 N.E.2d 1097, 1102. However, *Lovasco* asserted that a showing of prejudice alone is insufficient to automatically validate a due process claim. *Id.* citing *United States v. Lovasco*, *supra*, at 789-790, S.Ct. at 2048-2049. The defendant must show substantial prejudice to his right to a fair trial. *U.S. v Rogers* 118 F.3rd 466 (6th cir 1997).

A balancing test between the prejudice suffered by the defendant and the reason for the state's delay must also be performed. *Id.* A delay in the commencement of prosecution by the state will be found unjustified where it is done in an attempt to gain a tactical advantage over the defendant, or through negligence or error in judgment, that

effectively results in the state ceasing the active investigation of a case and later proceeding upon the same evidence that was available at the time of the original investigation. *Id.* The length of the delay is normally a key factor in this determination. *Id.*

The defense does not maintain that the prosecution destroyed evidence to gain a tactical advantage. In fact, the State stands to lose as much if not more than the defendant over the loss of evidence. The defendant lists witnesses who are no longer available to testify. Most witnesses are from days after the alleged rape when the defendant and victim traveled out of state. They have no first-hand knowledge of the event. The defendant in his supplemental filing only lists those he asserts are exculpatory yet no evidence was presented through his testimony about these witnesses, (with the exception of his father), and what they would have said at trial .

Grandmother residence- No evidence was presented at the hearing on what she would have said if she were still living. *Unnamed nurse-* No evidence was presented as to what the significance this testimony may have. *"Frank from Virginia Beach"-* The court heard no testimony as to the relevance of his testimony. *Nelda and Scott Creech from Virginia Beach-* No evidence was presented at the hearing regarding these witnesses. *Doug and Shirley Braughton of Virginia Beach-* No evidence was presented at the hearing regarding these potential witnesses. *Nextel phone records-* No evidence was presented regarding these records nor as to their unavailability. *Dana Carroll of Virginia Beach-* No evidence was presented at the oral hearing regarding this witness. *Police reports, security videos from Fredericksburg, Va. -* The court recalls no testimony about the significance of this evidence and the unavailability of the evidence.

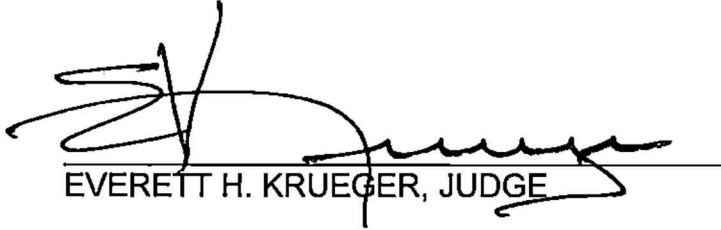
The loss of DNA evidence does not prejudice the defendant in that he admitted in engaging in sexual conduct but maintains it was consensual. He does have recall about the incident. Previous detective notes of interviews are available to refresh memories or to impeach memories. The defendant could not articulate any prejudice he suffered as a result of the destruction of any item.

The prosecution was clearly negligent in not pursuing another, more timely re-indictment and in the destruction of evidence. Prosecutors and detectives had opportunity to prevent the destruction of property and failed to do so. However, the court must determine whether any substantial prejudice to the defendant occurred as a result before a balancing test is performed between the prejudice and the negligence. The court determines from the evidence and arguments of counsel that the defendant is not prejudiced by the loss of physical evidence and loss of witnesses. Some of the physical evidence was recovered from computers and from photographs. The witnesses are determined to not have significant testimony to contribute. This case involves a rape of a spouse. There are two important witnesses: the victim and the defendant. The court need not reach the next step in the analysis in weighing any prejudice against the negligence of the prosecution

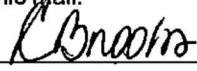
Therefore, the Court determines that no speedy trial violation occurred under the Sixth Amendment nor under Section 10, Article 1 of the Ohio Constitution for the pre-indictment delay.

MOTION DENIED.

Dated: May 31, 2017


EVERETT H. KRUEGER, JUDGE

I have served a copy of this Judgment Entry upon all counsel by electronic mail.



5-31-17

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by ☐ Regular Mail, ☒ Mailbox at the Delaware County Courthouse, ☐ Facsimile transmission

Cc: ASSISTANT PROSECUTING ATTORNEY
WILLIAM E LEBER, ATTORNEY FOR DEFENDANT

This document sent to each attorney/party by:

☒ ordinary mail
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Date: 5-31-17 By: 

CR-26