IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 14 582060**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
ANTJUAN LATHON,	)	**JOURNAL ENTRY DENYING**
DAMON MEGGERSON and	)	**THE DEFENDANTS' MOTIONS**
TODD SAVAGE	)	**TO DISMISS FOR**
	)	**PREINDICTMENT DELAY**
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendants Antjuan Lathon, Damon Meggerson and Todd Savage were indicted on January 27, 2014. They are charged with the January 28, 1994, rape and kidnapping of two women. Specifically, Savage and Lathon are accused of four counts of rape and two counts of kidnapping against "Jane Doe 1," whose initials are D.M., and Meggerson is charged with three counts of rape and one charge of kidnapping against "Jane Doe 2," whose initials are L.H.

All three defendants have pled not guilty. On March 17, 2014, Savage filed a motion to dismiss the indictment on the basis that his defense has been prejudiced by the delay of almost twenty years between the time of the alleged crimes and the indictment. Meggerson and Savage followed with similar motions on March 27, and the plaintiff opposed the motions in a brief filed on May 2. A hearing was then held over two days on May 9 and November 20. With leave of court, Lathon filed a written closing argument on December 16. This entry follows.

STATEMENT OF THE FACTS

On January 29, 1994, L.H. and D.M. reported to the Cleveland police that they had been raped by three men the night before. Both women submitted to sexual assault examinations for the collection of potential biological evidence in a sexual assault kit, colloquially known as a rape kit. One piece of evidence placed in the rape kit was D.M's brassiere. The women also identified as the alleged perpetrators two of the three defendants in this case: L.H. could name Meggerson because she was in a dating relationship with him and D.M. knew Lathon from high school. In a statement to police, Meggerson identified Savage as the third person. When Savage gave a statement he claimed that he tried unsuccessfully to have sex with D.M.

Evidence in the case was then presented to a grand jury and the grand jury returned a no bill. Since then, the transcript of the 1994 grand jury proceedings has been lost or destroyed through no fault of the plaintiff and there is no reliable evidence today about what the 1994 grand jury witnesses said. Despite that, the defendants here assert, without evidentiary support, that D.M. testified and told the 1994 grand jury that she was not raped.

In late 2012 or early 2013, the evidence in the rape kit was submitted by the Cleveland police department to the bureau of criminal identification of the Ohio attorney general's office to test for the presence of DNA evidence. That test determined that semen found on D.M.'s brassiere contained DNA that matched Antjuan Lathon's. The attorney general's office then reopened the case and obtained additional interviews from the complaining witnesses. The investigation was done by special agent John Saraya. According to Saraya, he asked L.H. why the case was "no billed" in 1994 and she responded that she was not sure, but it could have been because D.M. changed her story or did not want to pursue the case. D.M. was also asked why no indictment was returned and said she had no idea.

Saraya then presented the case to a grand jury and the indictment was returned one day before the expiration of the 20-year statute of limitations.

LAW AND ANALYSIS

Preindictment delay

The Ohio Supreme Court has held that an 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 Fourteenth Amendments to the United States Constitution. *State v. Luck*, 15 Ohio St. 3d 150 (1984), syllabus 2. Basic fairness requires that charges against a defendant who has been denied his constitutional right to due process must be dismissed.

In order to warrant dismissal because of preindictment delay, a defendant must present evidence establishing substantial prejudice. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶51. The Eighth District Court of Appeals has capsulized the law on how prejudice can, and cannot, be demonstrated:

> The determination of actual prejudice that results from preindictment delay involves a delicate judgment based on the circumstances of each case. (Citation omitted.) Courts 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. (Citation omitted.) The defendant must show the exculpatory value of the alleged missing evidence. (Citation omitted.) The defendant, in other words, must show how lost witnesses and physical evidence would have proven the defendant's asserted defense. (Citation omitted.) The possibility that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient, in and of itself, to establish actual prejudice to justify the dismissal of an indictment. (Citation omitted.) Moreover, when asserting preindictment delay, prejudice may not be presumed from a lengthy delay. (Citation omitted.) *State v. Clemons*, 8th Dist. No. 99754, 2013-Ohio-5131, ¶15.

Only if a defendant fulfills the burden of presenting evidence establishing substantial prejudice does the state then have the burden of producing evidence of a justifiable reason for the delay. *State v. Mack*, 8th Dist. No. 100965, 2014-Ohio-4817 , ¶9.

Summary of the parties' arguments

Lathon and Meggerson have filed identical motions and identical written closing arguments. They contend that the passage of time between investigation and indictment has prejudiced them because: the transcripts of the 1994 grand jury proceedings are unavailable, the "detectives and officers are unavailable for testimony,"[1] and the detectives and witnesses have "very limited memories"[2] of the allegations and investigation. Savage makes essentially the same argument, but also claims that prejudice has been shown because he cannot "photograph the alleged crime scene or preserve other evidence."[3]

Additionally, all three defendants argue that the only difference between the evidence that was presented to a grand jury in 1994, which was not enough to secure an indictment, and the evidence presented in 2013, which did persuade a grand jury to return an indictment, was the result of the DNA test that the state waited for no reason almost 20 years to perform. As a result, they claim they have not received the due process of law.

For its part, the plaintiff argues that the defendants have not produced evidence demonstrating that their defenses have been prejudiced.

Witnesses' availability and faded memories; crime scene inspection

From the names on the witness list produced in discovery by the state and the evidence at the hearing on the motions to dismiss it appears the known potential witnesses in the plaintiff's case are: L.H., D.M. and their mothers; Cleveland police detectives William Miller and Greg King; various Cleveland police patrol officers; the doctor who examined one or both of the complaining witnesses soon after the allegations in 1994; and members of law enforcement needed to establish the chain of custody of the rape kit, its testing, and the DNA match.

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[1] Defendant Lathon's 12/16/2014 closing argument, seventh page. (The pages are not numbered.)
[2] *Id*.
[3] Defendant Savage's 3/27/2014 motion to dismiss, page 4.

Despite Lathon's assertion that "it is without dispute"[4] that "[d]etectives and officers are unavailable for testimony"[5] there is no evidence that any of them are not available as witnesses. At most, the evidence shows that detective King is retired and living in Georgia. But that doesn't mean he's unavailable. His testimony can be taken on videotape or through a live videoconference at trial. If necessary, he can be compelled to appear in Ohio through the issuance of a commission to a Georgia court to serve a subpoena. More importantly, there is no evidence that King is a competent witness to any fact that would assist the defendants in proving a defense or otherwise defeating the state's ability to prove their guilt beyond a reasonable doubt, which is to say that, even assuming King is not available, the defendants haven't demonstrated prejudice by his unavailability.

The defendants have also failed to produce evidence for their assertion that the state's witnesses who are still available have "very limited memories." Because there is no evidence of lost recollection the defendants cannot show prejudice. But even assuming the memories of the prosecution's witnesses have dimmed, the defendants have not posited any scenario where the inability of the state's witnesses to testify about things that happened 20 years ago would inure to their detriment. To the contrary, it's reasonable to infer that such a failure would hamper the state's ability to meet its burden of proof. That is the opposite of prejudice to the defendants.

As for defense witnesses, two of the defendants (Lathon and Meggerson) have not proffered witness lists. Savage produced a witness list and the only witness he proposes to call who is not on the state's witness list is federal prosecutor Carol Skutnik.[6] I also presume the defendants may testify. Yet the record is bare of evidence that the defendants' own memories

[4] Lathon's closing argument, *supra*, seventh page.
[5] *Id*.
[6] Skutnik was apparently a county grand jury prosecutor in 1994.

have faded and there is no evidence that Skutnik is unavailable or that she doesn't remember the case, nor is there any evidence about the purpose of her testimony in the first place.

The same analysis applies to inspections and photographs of the crime scene. According to the prosecutor, the evidence will show that these crimes were committed on the second floor of a home at 10301 Empire Avenue in Cleveland.[7] There is no evidence that the house is no longer standing or that its configuration has changed to the point that an inspection or photographs now would have no evidentiary value. On top of that, even if the house is gone or its layout completely different, the defendants have not offered evidence, much less a reasonable argument, to support a claim that the inability to procure an inspection and photographs of the crime scene has prejudiced their defense. To the contrary, experience shows that the failure of the state to present this kind of evidence buttresses a defendant's argument in support of reasonable doubt.

The missing grand jury transcript and no new evidence

Which brings me to what I see as the heart of the defendants' claims that they have been denied due process by the state's nearly two-decade wait to test evidence collected the day after the alleged crimes. Lathon articulates those claims as follows:

> The loss of grand jury transcripts that netted two "no-bills" (*sic*) is the loss of tools that could have been critical in the Defendants' (*sic*) defense. Cases are not just no-billed (*sic*) for no reason and with several (albeit uncertain) assertions from [L.H.] and Detective Miller (who goes back and forth on the topic) that the no-bill (*sic*) was the result of a recantation it is of extreme prejudice that the defendants are not afforded the ability to obtain these transcripts. Additionally, it cannot be ascertained whether these proceedings were any different than the proceedings had in 2014 or whether the prosecutor went back to the grand jury with the exact same evidence.[8]

[7] See the state's 5/2/2014 brief in opposition to the motion to dismiss, second page. (The pages are not numbered.)
[8] Lathon's closing argument, *supra*, seventh page. Savage makes a similar argument at page 4 of his March 27, 2014, motion: [B]ecause of the delay, the [g]rand [j]ury transcript from 1993 (*sic*) is said to be unavailable, thereby making it impossible to determine whether any evidence not available to the 1993 (*sic*) [g]rand [j]ury was used to obtain their (*sic*) indictment.

The defendants' claim that they are prejudiced by not having the grand jury testimony rests on a sandy foundation because it depends entirely on the assertion that those transcripts included testimony by D.M. to the effect that her initial statement to the police was false and that she was never raped. But there is no evidence in this case that D.M. changed her story before the 1994 grand jury. That speculation appears to come from Miller, based on a notation in his file to the effect that D.M. must have recanted before the grand jury. But Miller has no personal knowledge of any recantation. The defendants did not call D.M. as a witness at the motion hearing to ask her whether she testified to the 1994 grand jury and, if so, what she recalls of it. Nor did the defendants even call Skutnik, who was apparently the 1994 grand jury prosecutor, as a witness at the motion hearing to ask if she remembers D.M. testifying. Moreover, only the grand jurors know why they didn't find probable cause. It is just as easy to speculate that the grand jurors knew evidence had been preserved in a rape kit and were skeptical about the strength of the state's case because the prosecution didn't give that evidence to them. But whatever the reason for the no bill, with only a guess about the contents of D.M.'s testimony to the grand jury the defendants have not met their burden of producing evidence demonstrating prejudice by the loss of the transcript.[9]

Because the defendants have not produced any evidence even tending to demonstrate prejudice, the state does not have to produce evidence justifying the delay.[10]

Which leaves the argument that the state got an indictment in 2014 using the same evidence that wasn't enough for a grand jury in 1994. That argument has resonance in this case,

[9] As an aside, if the grand jury transcript was extant I would investigate the claim of D.M.'s exculpatory testimony by examining the transcript *in camera* and if her testimony proved to be exculpatory I would order that it be disclosed to the defense. But even assuming the grand jury testimony was exculpatory, there is no evidence, or even a suggestion, that either the destruction of the transcript is attributable to the state or that the state deliberately delayed testing the rape kit until after the exculpatory testimony was destroyed in the ordinary course of the court's record retention system.

[10] Which is probably a good thing for the plaintiff, since the proffered reason for the delay – that DNA testing was not "routine and affordable" in 1994 – shows that justice gave way to expediency.

since it is quite clear that the state preferred convenience to thoroughness in 1994 when it chose not to test the rape kit evidence before going to a grand jury, instead gambling that an incomplete picture of the evidence would be enough to get an indictment. After losing that bet the state then waited for almost 20 years to do what it should have done in the first place. That chronology creates at least the whiff of unfairness to the defendants.

But the argument is faulty for two reasons. First, there is no question that the evidence presented to the 2014 grand jury was different because it included the result of the DNA test on the brassiere and the DNA match to Lathon. Neither of those things were known to the 1994 grand jury. While the evidence that Lathon's semen was found does not definitively establish that a crime was committed it is powerful corroborating evidence sufficient to swing a grand jury's decision on probable cause.

Second, the defendants have not produced any legal authority for the proposition that the prosecution is prohibited from making serial presentations of the same evidence to different grand juries. My own search for such precedent failed to turn up any. Indeed, it appears there is nothing to prevent the state from going back to a grand jury to ask for an indictment with the same evidence found wanting by a previous grand jury. The United States Supreme Court has held that there is no constitutional bar to a prosecutor presenting "to one grand jury charges which a previous grand jury has ignored." *U.S. v. Thompson*, 251 U.S. 407, 414 (1920). There is also no requirement that a second grand jury be told that an earlier grand jury had heard the same evidence and refused to find probable cause. *United States v. Barone*, 584 F.2d 118 (6th Cir. Ky. 1978). And the defendants have not directed me to any Ohio constitutional, common law or statutory precedent forbidding the procedure they deride.

Finally, even though it is not a question expressly raised by any of the defendants, I am compelled to address whether it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions"[11] to allow the executive branch of government to investigate and collect evidence at the time a crime is said to have been committed and consciously forgo available testing on that evidence for nearly 20 years, until the statute of limitations is about to expire, then resume the investigation and use the fresh test on stale evidence to convince a grand jury to return an indictment.

The answer to that question lies in the constitutional separation of the powers of the three co-equal branches of government. The executive branch has the power to investigate and prosecute crimes. With that power comes broad discretion in what crimes to investigate, how and when to investigate them and, after investigation, whether to seek an indictment from a grand jury. The legislative branch constrains the executive's discretion by enacting statutes of limitations setting time periods within which crimes must be prosecuted. Statutes of limitations are intended to discourage inefficient or dilatory law enforcement. *State v. Martin*, 8th Dist. No. 100753, 2015-Ohio-761, ¶12. The 20-year statute of limitations here is presumably a product of the legislature's balancing of the interests of prosecutors, suspects, victims and the people of the state. Weighing all those considerations, the legislative branch concluded that it is not *per se* unfair to require a defendant to answer to two-decade old accusations.

The judiciary can also limit the executive's discretion on when to bring charges, but only based on evidence that the executive power was used in bad faith to deny a defendant's constitutional rights, and that evidence doesn't exist here. Judges are not free, in defining due process, to impose on law enforcement officials our personal and private notions of fairness and

[11] *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

to disregard the limits that bind judges in their judicial function. *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

The defendants can't be blamed for feeling mistreated by the prosecution. Nearly 20 years ago they were implicated in the rapes of two young women. They knew at the time that they were suspects and with each day since a no bill was returned in the late spring of 1994 they likely became more and more confident that these charges were behind them, probably to the point they stopped considering the possibility altogether. Meanwhile, the state was sitting on evidence that would eventually directly implicate one of them and corroborate the complainants' statements against all three of them, until, one day short of 20 years later, they were indicted for the same crimes alleged and investigated in 1994.

The defendants are presumed innocent. After hearing the evidence a jury might find one, two or all of them guilty. But whatever the truth of the accusations, there is an air of arbitrariness, even cruelty, to the state's timing of the testing of the physical evidence.

Yet there is no evidence that the executive branch deliberately waited 20 years to gain an unfair advantage over the defendants. More to the point (and without intending to imply that the defendants should be glad they were charged after 20 years instead of a few weeks) it seems impossible that the prosecutor is in a better position now to prove its case beyond a reasonable doubt than it would have been if it had tested the rape kit in early 1994 and secured an indictment then. In other words, no advantage has been gained, whether by design or neglect, and thus no prejudice has been done to the defendants. In the absence of prejudice their constitutional right to due process has not been denied.

CONCLUSION

For these reasons, the motions of the defendants to dismiss for unconstitutional preindictment delay are denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email on March 9, 2014, to:

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Judge John P. O'Donnell