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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

MICHAEL J JENKINS
Defendant

Case No: CR-14-585521-B

Judge: JOHN P O'DONNELL

INDICT: 2907.02 RAPE
2907.02 RAPE
2923.03 COMPLICITY
ADDITIONAL COUNTS...

JOURNAL ENTRY

JUDGMENT ENTRY DENYING THE MOTION TO DISMISS FOR PREINDICTMENT DELAY. O.S.J.

06/04/2018
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Judge Signature

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6/4/2018

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CUYAHOGA COUNTY

HEAR
06/04/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 14 585521 A & B**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY DENYING THE DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT FOR PREINDICTMENT DELAY**
	)	
OSCAR DICKERSON and MICHAEL JENKINS	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

In late 2014 a jury found Oscar Dickerson and Michael Jenkins guilty of kidnapping and raping Judith Roy on July 2, 1994. The jury also found that each defendant was complicit in the other's rape. After both men were sentenced to prison they appealed their convictions and the Eighth District Court of Appeals reversed on the basis that they were denied the effective assistance of counsel. In Dickerson's case his attorney's ineffectiveness was the failure to file a timely pretrial motion to dismiss the indictment based on a claim of prejudicial preindictment delay. Jenkins's lawyer did not move to dismiss for prejudicial preindictment delay and the court of appeals deemed that to constitute the ineffective assistance of counsel.

Upon the remand to this court, Dickerson and Jenkins moved to dismiss the indictment on the basis that the law of the case doctrine requires a dismissal. That motion was denied, whereupon both defendants filed motions to dismiss for prejudicial preindictment delay. An

evidentiary hearing on the motions was held over two days on February 22 and May 3, 2018, with written closing arguments filed of record between those two dates. This judgment follows.

Prejudicial preindictment delay

Although the Sixth Amendment to the United States Constitution guarantees a person accused of a crime "the right to a speedy and public trial," the Sixth Amendment does not require the government to discover, investigate, and accuse any person within any particular period of time. *United States v. Marion*, 404 U.S. 307, 313 (1971). Ordinarily a prosecution brought within the time limit of the applicable statute of limitations is permissible. But there may be situations where compelling an accused to stand trial within a statute of limitations but after the prosecutor unreasonably delayed investigation and indictment violates fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency. *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Such unreasonable delay implicates the Fourteenth Amendment to the United States Constitution, which prohibits states from depriving any person of liberty without due process of law.

But delay in a prosecution alone does not establish a violation of the due process clause. The Ohio Supreme Court has said that

> [a]n 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), paragraph two of the syllabus.

Accordingly, a defendant's rights are violated by a delay between the time a crime is committed and an indictment returned only if 1) he incurs actual prejudice because of the delay and 2) the state cannot justify the delay between the crime and the indictment. When a defendant claims a due process violation it is his obligation to present evidence of actual prejudice through the delay. Only if the defendant demonstrates actual prejudice, the burden then shifts to the state to produce evidence of a justifiable reason for the delay. *State v. Whiting*, 84 Ohio St. 3d 215, 217 (1998).

A determination of actual prejudice involves a delicate judgment and a case-by-case consideration of the particular circumstances. *State v. Jones*, 148 Ohio St. 3d 167, 172 (2016). 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.* But speculative prejudice does not satisfy the defendant's burden. *Id.* The possibility that memories will fade, witnesses will become inaccessible, or evidence was lost is not sufficient to establish actual prejudice. *Id.* The job of a trial court considering a claim of prejudicial preindictment delay is to scrutinize the claim of prejudice vis-à-vis the particular evidence that was lost or unavailable as a result of the delay and, in particular, to consider the relevance of the lost evidence and its purported effect on the defense. *Id.*, 173. Actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense. *Id.*, 174. The Eighth District Court of Appeals has acknowledged that since proof of prejudice is almost always speculative, defendants have a nearly insurmountable burden to prove that preindictment delay violated due process. *State v. McDonall*, Cuyahoga App. No. 105787, 2018-Ohio-2065, ¶30.

The defendants' evidence in support of their claim of prejudice

[redacted] was a 16-year-old walking to her home near West 148 and Puritas Avenue in the early morning of July 2, 1994. She had been at her boyfriend's house on West 129, where she admits to drinking alcohol and smoking marijuana, when she was approached on West 140 by a car with three men inside. She tried to ignore the car – she testified that "I waved them off and just kept walking" – but, near Puritas, the car pulled over and one of the men got out and offered her a ride. According to her trial testimony:

> I was scared, but I wasn't really sure what to do. And I wasn't sober and I wasn't thinking clear. . . I thought if they had made this effort to approach me – he's bigger than me, so if he wants to do something to hurt me, he can. So I was kind of just quiet and tried to be agreeable I guess. I wasn't sure what to do.

She estimated it was around 1:30 a.m. when she ultimately accepted the offer of a ride even though she "didn't really believe" the men planned just to give her a ride home.

The car she got into was similar to a Toyota Camry and occupied by two black men and one white man, with the white man driving. The two black men were "younger, maybe a few years older than" [redacted] and the "white guy was considerably older; he looked kind of frail" as if "he probably used drugs for some time; he looked kind of messed up and worn out." She described what happened next:

> They started driving and I told them where I lived. And I remember going past where I lived and I brought that up, you know, that was where we turned – that's where I lived. And nobody responded . . . I believe one of them told me to either be quiet or something like that, but nobody would address my nervousness in telling them, you know, that is the street, that's where I need to be, that's where I need to go. And they

continued driving. . . I don't recall much more of the driving aside from we got up to Brookpark Road where there was a hotel. And the driver went inside of the hotel, and I assumed he was securing the room that I was taken to a little bit later. When he came back out, he drove around to the back side of the hotel, and the two younger guys got out with me and walked me into where there was a room. The white guy took off; I didn't see him again after that.

The driver was later identified as Jerry Polivka and the hotel's records show that Polivka signed for the room at 4:42 a.m., although [redacted] estimated in her testimony that they reached the hotel when "it was late, maybe 1:00 in the morning, even 2:00; I don't know, I just knew it was late." Other than the preceding excerpt from her testimony about driving around, [redacted] was not able to describe what went on between the time she was picked up and the time she got to the hotel.

[redacted] testified that she was raped by Dickerson and Jenkins at the hotel. She was able to escape after the two men fell asleep and she arrived home after dawn. [redacted] told her mother what happened, the police were called and [redacted] told the investigating officers where the hotel room was. The police went there and found Dickerson and Jenkins still on the premises. They were arrested, and at the same time the police identified Polivka as the driver of the car through the hotel registry. In the meantime, [redacted] went to Fairview Hospital for an examination and the collection of evidence in a sexual assault kit.

Very little, if any, additional investigation was done. In particular, neither police nor the prosecutor ever looked for Polivka, much less interviewed him, and Polivka died around 2007.

Sometime in 2012 the contents of the sexual assault kit were finally analyzed and biological evidence consistent with the defendants' DNA was discovered. The investigation was

then resumed and when [redacted] was shown a photo array she identified a picture of Polivka as the driver of the car on the night of the crime. Dickerson and Jenkins were ultimately indicted on May 15, 2014.

The defendants argue that they are prejudiced by the absence of Polivka as a possible witness because Polivka is a "critical witness"[1] on the kidnapping claim and "on the issue of consent"[2] by [redacted] to sexual conduct with the men. The defendants claim that Polivka "could have shed light on what occurred during" the three hours they say elapsed between the time [redacted] got into the car until she reached the hotel. According to the defendants, without this "key testimony as to the kidnapping charge and the events leading up to the alleged rapes"[3] they are precluded from offering their best possible defense. As Dickerson puts it:

> Polivka would have been able to [contradict [redacted] testimony] in two respects. First, he could have contradicted the victim's testimony about being forced into the car, and thus refuted the kidnapping charge. Second, his testimony about what occurred during that three-hour car ride could have provided evidence supporting the claim that the sex was consensual.[4]

As discussed above, the Ohio Supreme Court has said that actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense. *Jones*, supra, 174. I have little doubt that Polivka, if he were alive and willing to testify, would have relevant testimony. But there is no reason to believe his testimony would "minimize or eliminate" the force of the state's evidence or "bolster" the defense. No conclusions to that

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[1] Dickerson's motion to dismiss, page 7.
[2] *Id.*
[3] *Id.*
[4] Dickerson's written closing argument, p. 5.

effect can be made without some basis for inferring what Polivka's version of events would be. Here, the only way to conclude that Dickerson and Jenkins are prejudiced without Polivka being available as a witness is to make several assumptions, not all of which are plausible and, more importantly, none of which are grounded in reasonable inferences from the known evidence.

First, one must assume that Polivka would agree to testify. Given that [redacted] testimony makes Polivka a co-conspirator on at least the kidnapping count, if not the rapes, it is more likely that if Polivka were alive he would have been the third defendant at trial and thus no more or less available than Dickerson and Jenkins, the other two witnesses to the *res gestae* of July 2, 1994.

Second, to find Polivka's unavailability as a witness prejudicial one must assume that he would contradict [redacted] about how she came to be with the three men by testifying that she joined them in the car and went to the hotel room of her own volition. But given that [redacted] has been telling the same story since the day of the incident – i.e. she was compelled to get into the car and go to the hotel, albeit not physically dragged – what is there in the record to support an inference that Polivka would have told a different story? The only way to conclude that he would testify that she voluntarily rode along with the men is to simply speculate about what he would say, and the Eighth District Court of Appeals has made clear that

> [a] defendant may not rely on speculation or vague assertions of prejudice. Rather, proof of actual prejudice must be specific, particularized and non-speculative. The defendant must show the exculpatory value of the alleged missing evidence to prove substantial prejudice. *State v. Kirk*, Cuyahoga App. No. 104866, 2016-Ohio-8296, ¶8.

Third, even assuming that Polivka would testify that Roy was neither removed from the place where she was found nor restrained of her liberty when she got in the car and rode around with the men, to find prejudice by his absence as a possible trial witness requires the further

assumption that he would be able to tell a jury what happened in the hotel room, despite the absence of any record evidence even suggesting that he ever stepped foot into the room and would have personal observations of what went on there.

The defendants also point to [redacted] inability to account for over three hours as a reason they are prejudiced by the absence of Polivka. But it is worth noting that [redacted] estimated the time she was picked up as 1:30 a.m. and she estimated getting to the hotel room between 1:00 and 2:00. Having made that estimate on direct examination she was at a loss, when confronted on cross-examination with the hotel log showing Polivka signed for the room after 4:00 a.m., to detail what went on in the car for three hours. But finding that the car ride lasted over three hours requires believing her testimony that she was picked up at 1:30 while disbelieving that she got to the hotel by 2:00. In short, the defendants presume that one must construe the separate parts of [redacted] testimony as favorably as possible to them, but they have not identified any decisional authority mandating that a finder of fact – i.e., the trial court in the context of a motion to dismiss for preindictment delay – must consider all of the evidence in a light most favorable to the defendants. Instead, a reasonable conclusion based on her testimony, the distance from West 140 and Puritas to the hotel on Brookpark Road, and the hotel's log is that she was wrong about the time she was picked up.

Ultimately, the defendants rely only on the fact that Polivka is now dead to support their claim of prejudice. Yet 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. *State v. Adams*, 144 Ohio St. 3d 429, 445 (2015). Dickerson and Jenkins have utterly failed to identify the substance of the alleged lost testimony.

It's worth comparing the state of the evidence in this case to the evidence in other cases where prejudicial preindictment delay was claimed. In *State v. Luck*, supra, the Ohio Supreme Court found actual prejudice due to preindictment delay when a murder defendant was indicted fifteen years after the crime was committed. Luck was arrested soon after the crime and made a statement where she named two witnesses and described what they knew about relevant events: 1) a person named Larry Cassano, who was said by Luck to be present at the time the decedent was killed, and who would support her own testimony that the decedent physically attacked Luck; and 2) a physician who Luck claimed treated her for a hand injury on the date of the murder. By the time of indictment, both witnesses were dead. At trial, Luck's statement was suppressed, leaving the state with mostly circumstantial evidence. Luck argued that her defense was prejudiced by the intervening unavailability, through death, of the two witnesses. Thus *Luck*, like this case, involved dead potential witnesses. But unlike this case, there was record evidence – Luck's contemporaneous statement – supporting a reasonable inference about what the witnesses would have testified to at trial.

By contrast, Harold V. Davis was indicted in 2016 for allegedly raping K.G. in 2000. Davis asked the trial court to dismiss due to preindictment delay because K.G.'s mother died before he was charged, thereby prejudicing his defense. Davis asserted that K.G.'s mother told her on the night of the incident that "you need to stop lying, you didn't get raped, you need to go down there and tell them you didn't get raped." *State v. Davis*, Cuyahoga App. No. 105256, 2018-Ohio-841, ¶31. Davis also referred to K.G.'s testimony that she refused to prosecute after "me and my mother had spoke" as evidence that the mother would support his defense if she were alive to testify. *Id.* Despite this modicum of evidence about what the victim's mother would have testified to, the trial court denied the motion to dismiss and the Eighth District Court

of Appeals affirmed, finding that Davis did not demonstrate actual prejudice through the unavailability of the mother as a potential witness.

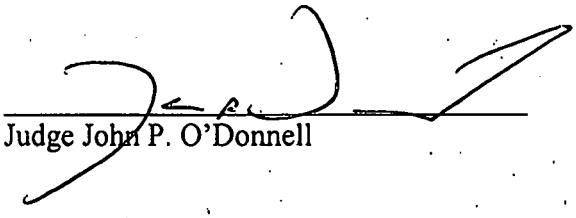
In *State v. Young*, Cuyahoga App. No. 104627, 2017-Ohio-7162, the disappearance by indictment in 2013 of the defendant's employer's time records that would have shown he was at work at the time of a 1993 rape was deemed insufficient evidence of prejudice.

Closer to Dickerson and Jenkins's situation, Van Patterson was indicted in 2015 for the rape of T.T. in 1995. The day of the rape a sexual assault kit was collected and T.T. identified Patterson as the rapist but only by his nickname of "Apples" because she did not know his real name. DNA testing in 2013 linked Patterson to the biological evidence preserved in the sexual assault kit. Before trial Patterson moved to dismiss for prejudicial preindictment delay on the grounds that T.T.'s mother was dead and she could have provided exculpatory testimony since she had told the police in 1995 that her daughter was lying about being raped. In affirming the trial court's denial of the motion to dismiss, the Eighth District Court of Appeals noted that Patterson "cannot speculate about the extent and effect of [the mother's] testimony. There is no way of knowing what information would come from [her] testimony or even that it would be exculpatory." *State v. Patterson*, Cuyahoga App. No. 104266, 2017-Ohio-1444, ¶13. Exactly the same could be said about Polivka as a witness in this case, but with even greater force since Patterson had at least some evidence of what the dead witness would have testified to while here the defendants have no evidence about what Polivka might have said.

For these reasons, the defendants have not demonstrated 1) that Polivka, a co-conspirator of the defendants who was not presumptively available as a witness when he was alive, became unavailable as a witness because of the delay in indictment until after he was dead and 2) that

their defenses to the indictment are prejudiced by Polivka's unavailability to testify.[5] Accordingly, their motions to dismiss for prejudicial preindictment delay are denied.

IT IS SO ORDERED:



Judge John P. O'Donnell

Date: June 4, 2018

SERVICE

A copy of this judgment entry was sent by email on June 4, 2018, to:

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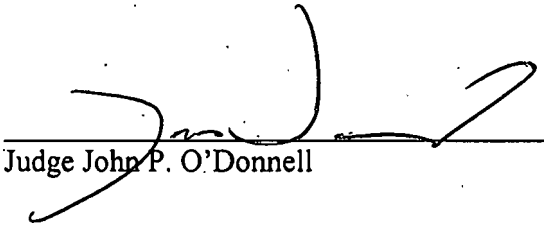

Judge John P. O'Donnell

[5] Because prejudice hasn't been proved it is not necessary to make a finding of whether the delay from the crime until the indictment was justified. Nevertheless, because of the possibility that prejudice would be found the parties made a full record of the evidence and their respective arguments in support of their competing claims that delay was or was not justified.