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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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THE STATE OF OHIO
Plaintiff

ROBERT EDWARDS
Defendant

Case No: CR-17-623337-A

Judge: JOHN P O'DONNELL

INDICT: 2907.02 RAPE /FRM1 /FRM3
2907.02 RAPE /FRM1 /FRM3
2907.02 RAPE /FRM1 /FRM3
ADDITIONAL COUNTS...

JOURNAL ENTRY

JUDGMENT ENTRY DENYING THE DEFENDANT'S MOTIONS TO DISMISS AND TO SUPPRESS. O.S.J.

07/24/2018
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Judge Signature

Date
7/25/2018

HEAR
07/24/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 17 623337**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY DENYING**
	)	**THE DEFENDANT'S MOTIONS**
ROBERT EDWARDS	)	**TO DISMISS AND TO SUPPRESS**
	)	
Defendant.	)	

John P. O'Donnell, J.:

Robert Edwards is charged with four counts of rape and two counts of kidnapping. The crimes are alleged to have been committed on August 28 and 29, 1999, against the same victim, named in the indictment as Jane Doe. I will refer to her in this judgment entry by her initials, S.S.

Edwards was indicted on December 22, 2017. He has since filed motions to dismiss the indictment and to suppress evidence. The motions are fully briefed and an evidentiary hearing was held. This judgment follows.

The evidence

At about 1:30 a.m. on August 29, 1999, S.S. called her mother and told her she had just been raped and was coming home. When S.S. got home her mother, E.S., noticed scratches and blood on her daughter's face and called 911. Cleveland police officer Shamode R. Wimberly was

dispatched to the home and an ambulance was called to bring S.S. to the emergency department at University Hospital with Wimberly following.

S.S. told the medical staff at the emergency department that she had been raped near East 120 and Wade Park in Cleveland by a boy who put a gun in her back and made her walk to a field and take off her clothes. She described being vaginally raped and forced to perform oral sex on the perpetrator. She said she was taken to an abandoned house and punched in the face two or three times.

S.S. was examined and evidence was collected for preservation in a sexual assault kit.

She spoke to at least one social worker at the hospital. S.S. reported to the social worker that she was taken to three fields and two abandoned houses over a three-hour period. She said her rapist told her his name but she had forgotten it. She estimated his height at 5 feet and 2 inches.

Wimberly's report provides more details given by S.S. She said she had been at a bus stop around 10:00 p.m. with two friends when a car with three men inside pulled up. The men started talking to her friend Rena, who then drove away with the men. Her other friend then left, after which one of the three men from the car, who was now on foot, walked up behind her and started grabbing her. When she told him to stop he punched her in the face, knocking her out. When she regained consciousness she was in a field near East 120 and Wade Park with a gun in her mouth. The man then proceeded to rape her in at least two abandoned houses and open fields, finally releasing her, saying "if you tell anyone I'll kill you."

When S.S. ran outside she saw "an uncle of a friend" who helped her get home, where she saw her mother and arranged to go to the hospital.

The record is devoid of additional investigation by the Cleveland police department until 2004. In the meantime, on May 9, 2002, Robert Edwards pleaded guilty to the July 23, 2001, murder of Starr Hudson and was sentenced to life in prison.

On August 17, 2004, the Ohio attorney general's bureau of criminal identification and investigation made a preliminary match between Edwards's DNA on file with BCI and DNA evidence from S.S.'s sexual assault kit. The BCI recommended that another DNA specimen be taken from Edwards to confirm the match.

A detective from Cleveland then made several unsuccessful attempts in the mid-2000s to locate S.S. to interview her, apparently to determine whether she remained willing to assist in the prosecution of the case. The Cleveland police department ultimately ceased its active investigation of the case in May 2007 because its officers could not locate S.S. At that time a city prosecutor marked the file as "hold in abeyance" until the victim could be located. Since then – and before the investigation resumed in 2016 – S.S. was in county jail for varying lengths of time in 2008, 2009 and 2010, and there is no evidence that police or prosecutors sought her during any one of those incarcerations to further investigate her rape allegation.

On August 25, 2016, the Office of the Cuyahoga County Prosecuting Attorney issued a grand jury subpoena to the Richland Correctional Institution to produce Edwards for testimony before a grand jury. He was transported from prison to the Cuyahoga County jail on September 7, 2016. Over the next several days he gave a statement to the prosecutor's investigators after being informed of, and waiving, his *Miranda* rights, and a search warrant for collection of a specimen of his DNA was executed by taking swabs from the inside of his cheek.

Over a year later, on September 18, 2017, S.S. was found and she gave a statement to detectives of the prosecutor's cold case task force. She affirmed the essence of the version of

events she had given at the time of the incident – namely that she was raped – but her recollection of many details differed from the contemporaneous statements memorialized in the police report and medical records. On November 16, 2017, the prosecutor filed with the clerk of courts a "complaint summary and bond report" and Edwards was then indicted on December 22 and arraigned on January 12, 2018.

The defendant's motions

Edwards has two pending motions. On March 16 he filed a motion to dismiss and a motion to suppress. He then supplemented the motion to dismiss on April 12. The motion to dismiss seeks a dismissal of the indictment on two separate grounds: a violation of his constitutional right to a speedy trial and the denial of his constitutional right to the due process of law by the delay from the date of the crime until indictment. The motion to suppress argues that Edwards's statements and DNA evidence derived from the buccal swab should be excluded from evidence at trial because the state violated the Fourth Amendment's prohibition against unreasonable seizure when the prosecutor had him returned to Cuyahoga County jail from a state prison. Since the motion to suppress will be moot if the indictment is dismissed, I will address the motion to dismiss first.

Speedy trial right

The Sixth Amendment to the United States Constitution declares that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. The same right is guaranteed by Article I, Section 10 of the Ohio Constitution. The United States Supreme Court has observed that the right to a speedy trial is a more vague concept than other procedural rights; it is "amorphous" and "slippery," making it impossible to determine with precision when the right has been denied. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). But judicial decisions have

established that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision. *United States v. Marion*, 404 U.S. 307, 320 (1971). Thus any consideration of whether a defendant has been denied a speedy trial begins not from the time of a crime but instead at the point of a formal charge or an arrest to answer a forthcoming charge.

Edwards points to the preparation of the complaint summary and bond report as the formal charge giving rise to the defendant's speedy trial right in this case. The document was admitted at the hearing as defendant's Exhibit C. It was apparently prepared by a prosecutor on July 7, 2016. It includes Edwards's name and other biographical information (incorrectly listing his age as 16) plus the date of the offense and "potential charges" listed as rape and kidnapping. As mentioned above, the document was ultimately filed with the clerk of courts on November 16, 2017, about five weeks before indictment. But even though this report was filed by a member of the executive branch of government with the court there is no evidence that it was intended to serve as the formal notice to Edwards that he was being accused of crimes allegedly committed in August of 1999. Indeed, there is no evidence explaining the purpose of the bond report. Moreover, the fact that it was prepared in July 2016 means only that the executive branch was considering bringing charges against Edwards. But the report is not a formal charge; rather, it is in the nature of an internal summary report. Finally, to the extent that the report does serve as a formal charge, the date of such a charge would be when it was filed with the court, not when it was prepared for the internal uses of the executive branch. As a result, Edwards's speedy trial right was not activated until November 16, 2017, at the earliest.

Ohio's legislature has enacted sections 2945.71 *et seq.* of the Ohio Revised Code to implement the federal and state constitutional guarantees. *State v. Cross*, 26 Ohio St. 2d 270, 271

(1971). The statutory speedy trial provisions are coextensive with the constitutional rights. *Ohio v. O'Brien*, 34 Ohio St. 3d 7, 9 (1987). Still, the statute and the constitutions are separate and must be analyzed separately.

Under R.C. 2945.71(C) and (E), a person against whom a felony charge is pending must be brought to trial within 270 days of his arrest, with each day awaiting trial in jail in lieu of bail counting as three days. Thus, a defendant awaiting trial in jail must be brought to trial within 90 days of his arrest if he is held only on the pending charge. Here, Edwards is in custody serving a sentence for another crime and the triple-count provision is inapplicable, leaving the state with 270 days from the formal charge – since he was not "arrested" on this case – to bring him to trial. But some of those 270 days may be tolled by "any period of delay necessitated by reason of a . . . motion, proceeding or action made or instituted by the accused." R.C. 2945.72(E).

Applying these provisions, and giving the defendant the benefit of the filing of the bond report as the institution of the formal charge, 214 days[1] elapsed from November 16, 2017, through June 18, 2018, the date of closing arguments on the motions to dismiss and to suppress. Therefore, even before examining the record for any tolling events – which will include the motions to dismiss and to suppress – there are still 56 statutory speedy trial days remaining, and Edwards's statutory speedy trial right has not been violated.

That leaves the question of whether his constitutional speedy trial right has been abridged. Given the inherent imprecision of the constitutional standard, the *Barker v. Wingo* decision established a balancing test to be used in individual cases to determine whether a speedy trial has been denied. A court evaluating whether a defendant's constitutional right to a speedy trial has

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[1] The date the charge is filed is not included in the calculation.

been violated must take into account the length of the delay from charge to trial, the prosecutor's asserted reason for the delay, whether the defendant asserted the right, and the prejudice to the defendant because of the delay. *Barker*, 531-532. The Supreme Court went on to say:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. *Id.*

Keeping this in mind, I will discuss the factors in order as necessary.

First is the length of delay. The bond report was filed in mid-November and Edwards was indicted in late December. I am not obligated to find that the speedy trial right was triggered by the bond report – to the contrary, I find that both the statutory and constitutional speedy trial calculations begin with the indictment – but even taking November 16, 2017, as the date the constitutional right was activated, there was a five-week delay from the bond report until indictment, and no reason for that delay can be discerned from the record.

Upon indictment, the clerk, at the prosecutor's request, issued a warrant for Edwards under Rule 9 of the Ohio Rules of Criminal Procedure ordering the sheriff to bring Edwards to court for an arraignment. Because Edwards was in the custody of the Ohio Department of Rehabilitation & Corrections, the warrant was the administrative means used to get the defendant before a judicial official for arraignment under Criminal Rule 10. The warrant was executed and Edwards was brought to Cuyahoga County and arraigned on January 12, 2018.[2] Considering the indictment was

[2] The docket in this case is not an evidentiary exhibit but I am taking judicial notice of the docket pursuant to Rule 201 of the Ohio Rules of Evidence.

returned three days before Christmas and the defendant was arraigned less than two weeks after New Year's Day, I find that the arraignment was prompt and there was no delay from indictment to arraignment.

The prosecutor and Edwards's counsel met at the courthouse for a pretrial conference on January 22, at which time the conference – the ordinary purpose of which is to set a trial date – was continued at defense counsel's request for a week. In the meantime, on January 23, the defendant requested discovery under Criminal Rule 16. The second pretrial was then held and continued again at Edwards's lawyer's request until February 7; on that date a third continuance until February 28 was given at the defendant's request.

On February 28, a trial date of April 23 was set with the agreement of all counsel. Through February 28, any "delay" bringing Edwards to trial was upon request of the defendant or his counsel. Then in mid-March he filed the motions under consideration here, and on March 22 I set a motion hearing date of April 12, i.e. before the scheduled trial date. But that hearing was continued at Edwards's explicit request – necessarily resulting in a trial continuance – and the proceedings since have focused on the motions, not the trial.

Taking all of this timeline into account – and remembering that there are still many days left on the statutory speedy trial count, while still acknowledging that the statutory count and constitutional "count" are done separately – I find that there has been no delay in bringing Edwards to trial not caused by his own counsel's actions. Accordingly, I find no reason to address the other three *Barker v. Wingo* factors, and the defendant's motion to dismiss the indictment on the grounds that his statutory or constitutional rights to a speedy trial have been violated is denied.

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 from 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 missing evidence giving rise to prejudice

Edwards has identified many holes in the evidence that he claims exist only because of the passage of time and all of which he alleges have resulted in prejudice to his defense justifying dismissal of the indictment. He puts these delay-caused evidentiary deficiencies into four broad

categories of 1) lost evidence, 2) destroyed evidence, 3) faded memories and 4) unfair litigation tactics. These items, by category, are as follows:

Lost evidence: witness who gave S.S. a ride

The narrative summary of S.S.'s oral statement to officer Wimberly contained in the police report, defendant's Exhibit H, describes S.S. as saying she "saw an uncle of a friend (name unknown) who assisted her home." The medical record – defendant's Exhibit N – includes a social worker's summary of a conversation with S.S. noting that S.S. "states she was driven home by the uncle of [a] friend 401-8849 (carphone)." Edwards complains that he has been deprived of the ability to cross-examine the driver because his identity cannot be established at this late date. As partial support for the argument he points to defendant's Exhibit M, a reverse lookup of the phone number that S.S. gave to the social worker which failed to identify the user of that number as of 1999. Moreover, when S.S. was interviewed in 2017 after the DNA match she still maintained that she "ran into her 'dude' uncle" after the rape and he took her home, but she again said she could not name him.

Lost evidence: phone records of the witness who gave S.S. a ride

Edwards has been unable to find phone records of the call S.S. made to her mother from the car phone of the "uncle" who drove her home after the rape. He argues that the record is important because it would show whether such a call was actually made and, if so, at what time.

Lost evidence: a recording of the 911 call

The parties agree that a recording of S.S.'s mother's 911 call no longer exists. According to Edwards the recording would be valuable to show exactly what was said and exactly when it was made on the morning of the alleged rape.

Lost evidence: the run report of Emergency Medical Services

The parties agree the EMS run report for the call to take S.S. to University Hospital is not extant. Edwards says the report would be valuable for its descriptions of the injuries, or lack thereof, to S.S. observed by emergency medical technicians immediately upon her report of the incident and before the hospital. He also notes that S.S., in her 2017 statement, said that the rapist "broke my face" to the point that teeth were "flying out of my mouth," and the EMS report would discredit any testimony to that effect.

Lost evidence: witness Debra Crawford and the absence of CCDCFS records

The emergency department record includes a form captioned as "Uniform Report – Suspected Child Abuse or Neglect." This page was admitted at the hearing as part of defendant's Exhibit N and separately as defendant's Exhibit E. This form is meant to be transmitted by the hospital to the Cuyahoga County Department of Children and Family Services. It lists Debra Crawford as the medical social worker reporting the suspected abuse or neglect, and defendant's Exhibit R is the result of a June 12, 2018, search of a database of professionally or occupationally licensed individuals in Ohio. The search did not turn up a Debra Crawford who fits the description of the person named in the 1999 medical record. Edwards argues that Crawford is now unavailable as a trial witness. Additionally, Edwards claims that the records he has obtained from CCDCFS by subpoena do not include any contemporaneous report of this incident or any follow up on such a report done by the agency.

Lost evidence: witness Janessa Slade

Edwards alleges that Janessa Slade is a CCDCFS employee who, at some time between 1999 and 2017, referred S.S. for an evaluation or assessment because she was a habitual liar. The defendant, however, did not produce at the hearing any evidence to support the claim. Edwards

did produce defendant's Exhibits P and R, two fruitless occupational license searches for Janessa Slade and Janessa Hill (apparently another name used by Slade).

Lost evidence: no University Hospital or other records of reconstructive surgery to S.S.

During her 2017 statement, S.S. said that the injuries inflicted by the rapist to her face and jaw eventually required surgery and that she had her jaw "wired shut" and "could not talk for a whole year." But S.S. cannot remember where the surgery was done and Edwards has thus found no records supporting such an operation.

Destroyed evidence: DNA swabs consumed during lab testing

The sexual assault kit collected at the emergency department included several swabs from different parts of S.S.'s body where a rapist's biological material may have been deposited. Edwards contends in the brief in support of his motion to dismiss that testing at the BCI and an outside laboratory known as the Bode Technology Group found semen on the swabs from S.S's vaginal and rectal areas, but that the vaginal swabs were "consumed during analysis"[3] or thrown away so that he has been left with no ability to independently test the swabs, thereby denying him his constitutional right to the due process of law.

Hearing Exhibit Z, a September 23, 2016, laboratory report from BCI to the Cleveland police, contains a notation that "Item 1 1 3 1-1 1 3 2 was consumed during analysis." That item number refers to the vaginal swabs that were found to be presumptively positive for semen during an examination in 2003. But the report goes on to note that "additional samples may be obtained from the other items should independent analysis be requested."

[3] Defendant's motion to dismiss, p. 4.

Faded memories: witness Dianne Gerrity, M.D.

Dr. Dianne Gerrity treated S.S. at the University Hospitals emergency department on August 29, 1999. The parties agree that she is still available to testify at trial, but they also stipulate that she has no independent recollection of S.S. As a result, she will only be able to testify to her recorded past recollection and is unlikely to be able to expand upon anything she wrote in the medical chart.

Faded memories: witness S.S.

Edwards argues that the two written memorializations of statements by S.S. – the first on the morning of the alleged crimes, the second in 2017 – describe "two totally different events"[4] with completely disparate "core details."[5]

Tactical advantage through delay

As his final category of events caused or created by the state and which have prejudiced his ability to properly defend himself against the charges here, Edwards asserts that the police delayed investigation and prosecution to get a tactical advantage at trial. According to this line of reasoning, a Cleveland police officer named Gallagher found out in 2004 that Edwards was due for a parole hearing on October 25, 2016, so Gallagher deferred communicating with the defendant until late 2016 to tilt the parole authority against granting parole, thereby ensuring that Edwards would still be in prison once this case came on for trial and would thus be unlikely to testify that he had consensual sex with S.S. because he would be impeached by his murder conviction and the fact he was still in prison for it.

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[4] Defendant's closing argument.
[5] *Id.*

Discussion

It bears repeating that a defendant seeking to demonstrate prejudice through the passage of time from the date of a crime until indictment must show that the missing evidence would minimize or eliminate the impact of the state's evidence and bolster the defense. That showing necessarily requires some evidence about the actual content of the missing testimony or exhibits. As an example, it is not enough to show that the man who gave S.S. a ride home from the rape is no longer available to testify: Edwards must also show that the testimony he would have provided would buttress his defense of consensual sexual conduct.[6] The same is true of any other testimony or documents that would likely have been available *circa* 1999 but are not now, and the substance of which was never ascertained.

A review of a recent appellate decision illustrates the point.

Van Patterson was indicted in 2015 for raping T.T. in 1995. A sexual assault kit was collected on the day of the rape and T.T. also identified Patterson as the rapist but only by his nickname of "Apples" because she did not know his real name. The investigation ceased until DNA testing in 2013 linked Patterson to the biological evidence preserved in the sexual assault kit. After he was ultimately indicted, 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.

[6] See, generally, the defendant's closing argument asserting that he intends to defend at trial on the basis of consent.

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.

The same could be said in this case, but with even greater force since Patterson could point to at least some evidence of what the dead witness would have testified to while here the defendant has no evidence about what the lost witnesses – the driver, Crawford and Slade – might have said.

Edwards's argument that he is prejudiced by the unavailability of these three witnesses is premised on an assumption that they would support his version of events or, at a minimum, undermine S.S.'s version of events. But such an assumption is not just contrary to the body of law on prejudicial preindictment delay but also flies in the face of instinct, common sense and years of participating in jury trials where the opposite assumption is almost universally posited by defendants: that the absence from trial of particular witnesses prevents the plaintiff from meeting the burden of proof because it creates unanswered questions or other gaps in the evidence. On the other hand, instances of prosecutors arguing to juries that missing witnesses maximize or magnify the force of their evidence are either nonexistent or exceedingly rare.

Where a defendant proposes that the unavailability of a witness to testify at trial has prejudiced his defense he must be able to give some answer – grounded in the available evidence or reasonable inferences from it – to the question "what would the witness say?" If a satisfactory answer doesn't exist then neither does prejudice to the defense.

The same analysis applies to the missing records for the car phone, the 911 call, the EMS run report and the activities of the CCDCFS. As an initial matter, there is no reason, based upon the evidence, to think that the substance of the 911 call was anything other than what is summarized in the police report, namely the mother passing on to police what her daughter told her about being raped. Is Edwards really arguing that the recording would show something entirely different?

Perhaps the mother was calling to say her daughter just accused someone of having consensual sex with her? It is reasonable to infer that the mother said during the call essentially what is summarized in the report. If there is a reason to believe otherwise then Edwards has failed in his burden to produce evidence supporting a contrary inference.

That leaves the timing of the call as potentially bolstering the defense on the theory that the less urgently the call was made the less credible the accusation may seem. The police report describes the "date/time reported" as 4:12 a.m. The defendant did not proffer evidence about whether this refers to the time of the 911 call, the time the patrol officer received an assignment to respond to the call, the time the patrol officer got to S.S.'s house, or some other point entirely. But what would a record showing the exact time of the call add to the resolution of this question, and how would it bolster the defense? If it actually came before 4:12 a.m. that would marginally benefit the plaintiff, and the possibility that it was made after 4:12 a.m. is highly unlikely, especially given that S.S. was at University Hospital by 2:58 a.m., according to the medical record. And the fact that the medical chart shows her at the hospital before 3:00 a.m. tends to suggest that the 911 call was actually made more than an hour before the police report lists as the time the crime was reported. A reasonable inference from the evidence, then, is that the 911 call was made closer to the alleged time of the event than the police record currently shows. If so, the defendant's defense – that S.S. waited many hours to report a serious crime – would likely actually be undercut, not bolstered, by a record of the 911 call.

As for the EMS run report, there is no reason to assume it will contradict the hospital records or otherwise undermine S.S.'s claims. The records could just as well buttress her allegation of obvious facial injuries. To put it starkly: the defendant is better off arguing that there are no records supporting her story than trying to explain away an EMS record that backs up her claim of

being hit in the face. This is also true for the absence from evidence of records of a later reconstructive surgery. Moreover, the defendant does have the hospital record started probably minutes after S.S. was dropped off by the EMS, and those records are at least as useful for the purpose of contradicting S.S. as the EMS record likely would be.

And just as with the unavailable witnesses, there is no basis in the record to infer that the car phone records would bolster the defense. Ditto for records of the CCDCFS, and the agency's records are statutorily privileged from discovery to begin with. As for the absence of records of a reconstructive surgery at University Hospitals necessitated by the injuries to S.S. inflicted on the night of a crime, the fact they don't exist is itself useful to the defendant in impeaching S.S.'s credibility and Edwards cannot say he is prejudiced by not having the records.

Nor is Edwards prejudiced by the fading of Dr. Gerrity's memory. Initially, it is worth noting that in most instances medical professionals called as witnesses at criminal trials have no or limited actual recollection of the patient and thus often testify to their recorded recollection. Edwards offers no evidence – direct or inferentially – that Gerrity would have remembered S.S. if charges had been brought in 2004 when he was identified as a suspect here. Finally, Edwards isn't just not prejudiced by S.S.'s inconsistent 2017 statement, he benefits from her self-contradictions that would not have been present had he been charged in 2004.

The last claim of prejudice through lost or stale evidence arises from the unavailable vaginal swabs. Generally, as to the state's duty to preserve evidence for independent testing by the defense, it is well-settled that: the Due Process Clause of the Fourteenth Amendment does not require the prosecution to preserve evidence samples for independent analysis unless the samples possess an exculpatory value that is apparent before the sample is destroyed, and the defendant is unable to obtain comparable evidence by other reasonably available means. *State v. Leggett*, 6th

Dist. No. WM-97-029, 1998 Ohio App. LEXIS 4078, *33. Edwards has not demonstrated that the swabs had an exculpatory value that was apparent to agents of the executive branch before the swabs were used up in testing. And even if the swabs did have exculpatory value, the hearing evidence shows that "additional samples may be obtained from the other items should independent analysis be requested." Moreover, the defendant did not prove misconduct by the executive branch of government, and without a showing of bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Id.*

Although not in connection with the laboratory evidence, Edwards does assert misconduct by the executive branch as his final basis for his claim of prejudicial delay. As summarized above, he argues that the police intentionally waited to charge him until his parole date was nearing. As evidence he points to Hearing Exhibit A, a November 2, 2004, printout of offender data from the web site of the Ohio Department of Rehabilitation and Corrections. The printout was part of the Cleveland police file on the case and appears to show highlighting on Edwards's "next parole hearing date" of October 25, 2016. According to Edwards, the fact that his 2016 parole date was highlighted in 2004 proves the investigator's intention to delay an indictment until just before parole to ensure that he would not be paroled. The maxim that "anything is possible" is an apt description of Edwards's theory, but this claim of executive branch misconduct, however, is not supported by the entire record evidence.

For all of these reasons, the motion to dismiss for prejudicial preindictment delay is denied.

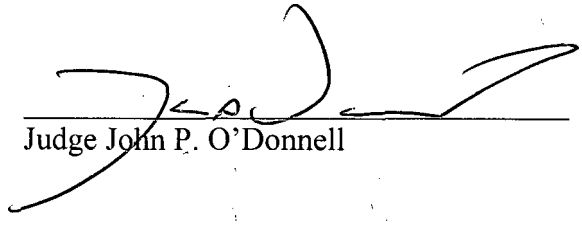
The motion to suppress

The Fourth Amendment to the United States Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The Fourth Amendment applies to agents of state governments

through the Fourteenth Amendment's due process clause and Article I, Section 14 of the Ohio Constitution contains virtually identical language. Edwards argues that he was seized without a warrant, and without probable cause under circumstances sufficient to excuse the lack of a warrant, when he was "torn away from his life at Grafton Correctional Institution"[7] and brought to Cuyahoga County's jail for questioning in September 2016.

For the Fourth Amendment to be implicated, Edwards must have been seized. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Thus Edwards was "seized" when he was sentenced to prison in 2002. That seizure was not constitutionally unreasonable given the fact that he admitted to committing a murder. Once he was lawfully seized and in the custody of the executive branch of state government any subsequent transfer – either to another prison, a county jail or another secure facility – did not constitute a seizure within the ambit of the Fourth Amendment, thus negating the possibility of a constitutional violation and the exclusion of evidence as a result of the violation. Accordingly, the motion to suppress is denied.

IT IS SO ORDERED:



Judge John P. O'Donnell

Date: July 25, 2018

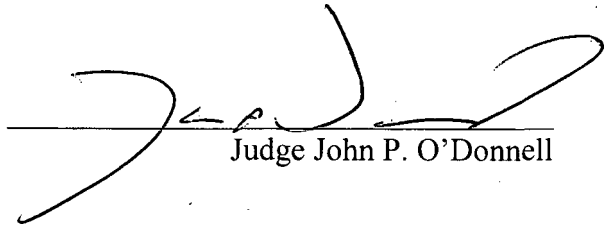
[7] Motion to suppress, p. 2.

SERVICE

A copy of this judgment entry was emailed to the following on July 25, 2018:

Oscar Albores, Esq.
oalbores@prosecutor.cuyahogacounty.us
Attorney for the plaintiff State of Ohio

Anduena Dobroshi, Esq.
adobroshi@cuyahogacounty.us
Paul J. Kuzmins, Esq.
pkuzmins@cuyahogacounty.us
Attorneys for defendant Robert Edwards



Judge John P. O'Donnell