

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

:

14-0228

Appellee

:

-vs-

:

MARLON CLEMONS

:

Appellant

:

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 99754

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MARLON CLEMONS

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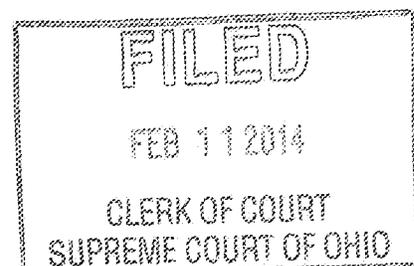
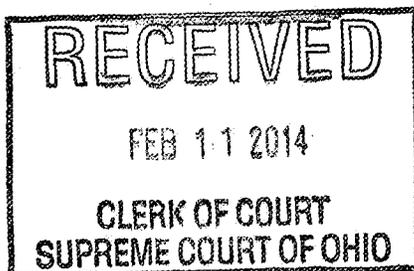


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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND
PUBLIC INTEREST:**

The Cuyahoga County Prosecutor's Office convinced two judges on the Eighth District Court of Appeals to adhere to an opinion that effectively overrules a decision of this Court on a constitutional question. The Eighth District has adopted its own rule that it is totally out of step with the other appellate districts of this State and with precedent directly on point from this Court. In Ohio's other appellate districts, a defendant's constitutional speedy trial rights are implicated by an "official" or "formal" accusation, regardless of whether that accusation comes in the form of a criminal complaint or an indictment. *See State v. Selvage* (1997), 80 Ohio St. 3d 465, 468. With its decision in the instant case, the Eighth District stands alone in concluding that a criminal defendant's constitutional right to a speedy trial is not triggered unless and until he is indicted by a grand jury. This Court should accept the instant case to correct this erroneous view of the law before it spreads.

In this case, Marlon Clemons was *charged by criminal complaint on August 6, 2009* for alleged crimes committed in July 2009. Despite having Clemons in custody in March 2010, the State took no steps to further Clemons' prosecution in the instant case during his year-long incarceration, though it did prosecute him in an unrelated case. The case then dragged on for another 2 years (eight months of which Clemons was again in custody) until the trial court finally *dismissed the case on March 15, 2013* based on a violation of Clemons' constitutional right to a speedy trial.

The Cuyahoga County Prosecutor's Office argued on appeal that Clemons constitutional speedy trial rights were not implicated in this case because, in its view, a

defendant's constitutional speedy trial rights only cover "the period from indictment to trial." Although the Eighth District seemed to acknowledge that a defendant has some speedy trial rights prior to an indictment, it ultimately agreed with the State that a criminal complaint does not constitute an "official accusation" and thus reversed the trial court's decision.

The Cuyahoga County Prosecutor's Office and the Eighth District were simply wrong. In arguing that a criminal complaint does not trigger a speedy trial analysis, the Cuyahoga County Prosecutor's Office failed to cite this Court's decision in *Selvage* which held to the contrary. In *Selvage*, this Court held that a criminal defendant becomes "formally accused" and enjoys the protections of his state and federal speedy trial rights once he is charged by "criminal complaint." *Id.* at 468. And while the Eighth District cited *Selvage* in passing, it did not articulate this specific holding and apparently failed to appreciate its obvious application to this case. The Eighth District held that Clemons speedy trial rights were not triggered by his criminal complaint in August 2009 and were not triggered until "his indictment on March 21, 2011." *State v. Clemons*, 8th Dist. No. 99754, 2013-Ohio-5131, ¶ 11.

Clemons filed a motion to reconsider explaining that the Eighth District clearly misapplied *Selvage* and that a speedy trial analysis was triggered by his criminal complaint in August 2009. The State did not even reply to Clemons' motion. Over the dissent of one member of the panel, the Eighth District denied Clemons' motion to reconsider without opinion and thus adhered to its holding that a criminal complaint does not constitute an official accusation for purposes of state and federal constitutional speedy trial.

Although it might be unusual for this Court to re-affirm a fourteen-year old decision, the issue presented in this case goes to the heart of a defendant's constitutional rights and has established a conflict among the appellate districts. Perhaps because *Selvage* primarily addressed the relationship between the statute of limitations and a defendant's right to a speedy trial, its holding, that a criminal complaint triggers a speedy trial analysis, got lost. Even a summary reversal on the authority of *Selvage* will have a powerful precedential effect by ensuring that subsequent courts do not rely on the Eighth District's misapplication of the law.

STATEMENT OF THE CASE AND FACTS

On July 25, 2009, Marlon Clemons allegedly fired a weapon at Villard Bradley's home. He was charged by criminal complaint in Cleveland Municipal Court on August 6, 2009 with discharging a firearm into a habitation and a warrant was issued for his arrest. *Cleveland v. Clemons*, Cleveland Municipal Court Case No. 2009 CRA 026300 ("the Bradley case.") Clemons was not immediately apprehended in this case.

On March 12, 2010, Clemons was arrested by Cleveland Police and taken into custody. The State prosecuted him for an unrelated escape case that allegedly occurred in August 2009. *State v. Clemons*, Cuyahoga Common Pleas No. 530392. Clemons pleaded guilty to attempted escape and received a one-year prison sentence. Despite having Clemons in custody and a pending warrant in the Bradley case, the State took no steps to prosecute him in that case. Instead, Clemons was transported to Lorain Correctional on April 5, 2010.

A little over a month later, on May 28, 2010, the State had Clemons returned from state prison to Cuyahoga County for prosecution in another, unrelated case. In Case No.

536887, Clemons was found not guilty, after a bench trial, of aggravated robbery, kidnapping, and having weapons while under disability. And once again, despite having Clemons in custody and a pending warrant in the Bradley case, the State took no steps to prosecute him in that case. Instead, Clemons was returned to Lorain Correctional on September 8, 2010 to serve the remainder of his one-year prison sentence for attempted escape.

On March 11, 2011, the day Clemons was released from prison, he was arrested on the 2009 warrant still pending in the Bradley case. Clemons posted bond on March 14, 2011. The State elected to prosecute the Bradley case in Common Pleas Court and indicted Clemons on March 21, 2011 in the instant case, Case No. 548254. Given this choice, the State thus dismissed the criminal complaint pending in Cleveland Municipal Court because the “Grand Jury has issued an indictment for defendant.”

When Clemons did not appear for his arraignment, the State issued a new warrant for Mr. Clemons and he was taken into custody on July 11, 2012. Mr. Clemons remained in custody for the next eight months awaiting trial. On March 15, 2013, Clemons filed a motion to dismiss the instant case due to violations of his constitutional speedy trial rights pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. The State filed a brief in opposition, arguing that there was no constitutional speedy trial violation because a defendant’s constitutional speedy trial rights only cover “the period from indictment to trial.” The State apparently did not believe that a defendant has any constitutional speedy trial rights after being charged by criminal complaint and therefore did not address the merits of Clemons’ constitutional speedy trial argument.

On March 29, 2013, the trial court granted Clemons motion to dismiss and dismissed the case with prejudice. The State filed an appeal with the Eighth District Court of Appeals. In its brief, the State asserted a single assignment of error: “The trial court erred in dismissing case with prejudice when there was no pre-indictment delay and the defendant did not demonstrate actual prejudice.” The State asserted this assignment of error despite the fact that Clemons did not ask for his case to be dismissed due to pre-indictment delay and thus clearly the trial court did not dismiss it on that basis. The State devoted less than a page of its brief to the actual basis of the trial court’s dismissal and simply reasserted the claim that “The Constitutional right to a speedy trial is the period from the indictment to trial.” (State’s Appellant’s Br. at 4).

The Eighth District issued its decision on November 21, 2013. Although the Eighth District appeared to acknowledge the legal principle that constitutional speedy trial rights arose after “an official accusation prior to indictment,” it nonetheless agreed with the State’s argument that Clemons speedy trial rights did not begin to run until his indictment almost *two years after* he was charged by criminal complaint. Opinion Below at ¶ 11. The Eighth District then analyzed the pre-indictment delay issue never raised by Clemons and reversed and remanded the case to the trial court.

Because the Eighth District’s decision was inconsistent with well-established Ohio Supreme Court precedent, Clemons filed a motion to reconsider. The State filed no response. And, although two members of the panel denied the motion without an opinion, one of the panel judges dissented.

This timely appeal now follows.

LAW AND ARGUMENT

Proposition of Law I: A criminal complaint constitutes a “formal” accusation for purposes of triggering a criminal defendant’s state and federal constitutional right to a speedy trial (State v. Selvage (1997), 80 Ohio St. 3d 465 applied).

When, as here, a defendant is charged by criminal complaint, his speedy trial rights, guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, are triggered. In analyzing a speedy trial claim, courts must consider the delay from the point in time a defendant stands formally accused, such as when charged by criminal complaint, and should not limit its analysis to purely post-indictment delay. This Court should reverse the Eighth District’s holding that the filing of a criminal complaint against Marlon Clemons on August 6, 2009 did not trigger his constitutional guarantees to a speedy trial.

In *Doggett v. United States*, the United States Supreme Court held that a defendant’s Sixth Amendment right to a speedy trial is “triggered by arrest, indictment, or other official accusation.” (1992), 505 U.S. 647, 655 (emphasis added). In *Selvage*, this Court addressed the meaning of “official” or “formal” accusation and held that it includes the filing of a criminal complaint. 80 Ohio St. 3d at 468.

In this case, Clemons was charged by criminal complaint on August 6, 2009 for the same alleged criminal conduct for which he was eventually indicted in March 2011. Applying *Selvage*, it is clear that the trial court correctly analyzed Clemons’ motion to dismiss as raising a constitutional speedy trial claim triggered by the filing of the criminal complaint. And, it is equally clear that the Eighth District incorrectly held that Clemons’ speedy trial rights did not arise until he was indicted and incorrectly reviewed the

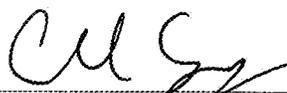
dismissal of his indictment as a due process pre-indictment delay claim. This Court should therefore reverse the Eighth District's decision.

Properly viewed as a dismissal based on a constitutional speedy trial violation, the trial court's decision must be affirmed. Unlike with pre-indictment delay claims, proof of particularized prejudice is not essential. *Doggett*, 505 U.S. at 655. On the contrary, "excessive delay presumptively compromises the reliability of the trial in ways that neither party can prove, or for that matter, identify." *Id.* Indeed, a delay of one year is "presumptively prejudicial" for speedy trial purposes. *Id.* at 652, n. 1. Here there was a four-year, post accusation delay and, for one of the years, Clemons was being held continuously in state custody. Because the State offered no reasonable justification for the excessive delay, the trial court properly dismissed the case on constitutional speedy trial grounds.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Marlon Clemons respectfully asks this Court to accept jurisdiction over this matter as it presents a substantial constitutional question for review. This Court should then either summarily reverse the Eighth District's ruling on the authority of *State v. Selvage* (1997), 80 Ohio St. 3d 465 or establish a briefing schedule.

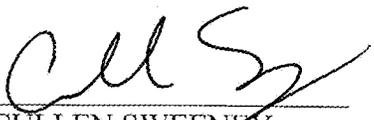
Respectfully Submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon
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1200 Ontario Street, Cleveland, Ohio 44113 on this 4 day of February, 2014.



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Court of Appeals of Ohio, Eighth District

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STATE OF OHIO

Appellant

COA NO.
99754

LOWER COURT NO.
CP CR-548254

COMMON PLEAS COURT

-vs-

MARLON CLEMONS

Appellee

MOTION NO. 470335

Date 01/09/14

Journal Entry

Motion by Appellee for reconsideration is denied.

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OF THE COURT OF APPEALS
By TIM MCCORMACK Deputy



Presiding Judge MELODY J. STEWART,
Concurs

Adm. Judge, MARY J. BOYLE, Dissents

TIM MCCORMACK
Judge

NOV 21 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99754

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MARLON CLEMONS

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-548254

BEFORE: McCormack, J., Stewart, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 21, 2013



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PER APP.R. 22(C)

NOV 21 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

TIM McCORMACK, J.:

{¶1} The state of Ohio appeals the trial court's dismissal of the case against Marlon Clemons for want of prosecution. For the following reasons, we reverse the decision of the trial court.

Procedural Facts and Substantive History

{¶2} This appeal stems from an incident on July 25, 2009, where Clemons allegedly engaged in felonious assault against Villard Bradley. According to the police report filed by the Cleveland Police Department, Clemons fired a weapon several times at Mr. Bradley and his home. The Cleveland police issued a warrant for Clemons's arrest on August 6, 2009, for discharging a firearm into a habitation. According to the state, Clemons eluded capture.

{¶3} In 2010, while the outstanding warrant that was issued in August 2009 remained active, the Cleveland police apprehended and arrested Clemons for two different crimes. Clemons was prosecuted in Cuyahoga C.P. No. CR-530392 for escape, purportedly occurring on August 28, 2009. He was indicted in November 2009, and he was in custody beginning on March 12, 2010. On March 30, 2010, Clemons pleaded guilty to attempted escape and he was sentenced to one year incarceration, with credit for time served.

{¶4} While incarcerated, Clemons was indicted in Cuyahoga C.P. No. CR-536887 for aggravated robbery, kidnapping, and having weapons while under a disability for alleged criminal activity that approximately occurred on

January 19, 2010. A jury found Clemons not guilty of these charges, and he was returned to the Lorain Correctional Institution to serve out the balance of his sentence in Case No. CR-530392.

{¶5} On March 11, 2011, the day Clemons was released from prison after serving the one-year term in Case No. CR-530392, he was arrested by the Cleveland police for the crimes that allegedly occurred nearly two years earlier on July 25, 2009, and is the subject of this appeal. He was indicted on March 21, 2011, and charged with three counts of improper discharging into a habitation, in violation of R.C. 2923.161(A)(1), and two counts of felonious assault, in violation of R.C. 2903.11(A)(2). All counts included firearm specifications. According to the state, Clemons posted bond and went *capias* on April 6, 2011, until he was ultimately apprehended and arrested again on July 10, 2012. He was arraigned on July 11, 2012.¹

{¶6} On March 15, 2013, Clemons filed a motion to dismiss for want of prosecution. The trial court granted Clemons's motion without a hearing or a written decision on March 29, 2013, and the case was dismissed with prejudice.

The state's appeal follows.

¹Following Clemons's arrest on July 10, 2012, he was charged with two additional crimes. In Cuyahoga C.P. No. CR-555643, he was charged with escape and he was sentenced to six months in county jail. He was diverted to the residential sanctions program and, with time served, released. In Cuyahoga C.P. No. CR-566953, he was charged with two counts of felonious assault, one count of aggravated robbery, and one count of having a weapon while under a disability, all of which he was found not guilty.

Assignment of Error

{¶7} “The trial court erred in dismissing the case with prejudice when there was no preindictment delay and the defendant did not demonstrate actual prejudice.”

Law and Analysis

{¶8} Clemons’s motion to dismiss was based upon the premise that his constitutional speedy trial rights were violated where almost two years had passed between the alleged incident in July 2009, which formed the basis for his arrest warrant issued in August 2009, and his indictment in March 2011. The state contends that Clemons’s speedy trial time did not begin until he was indicted on March 21, 2011, and he failed to show he was prejudiced by any preindictment delay.

{¶9} The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The Ohio Constitution provides this same right. *See* Section 10, Article I of the Ohio Constitution; *State v. Eicher*, 8th Dist. Cuyahoga No. 89161, 2007-Ohio-6813, ¶ 28. The time requirements of R.C. 2945.71 to 2945.73 concerning a defendant’s statutory speedy trial rights “are not relevant to a determination of whether a defendant’s constitutional right to a speedy trial has been violated by an unjustified delay in prosecution.” *State v. Kutkut*, 8th Dist.

Cuyahoga No. 98479, 2013-Ohio-1442, ¶ 10, quoting *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 1999 Ohio App. LEXIS 5458, *3 (Nov. 18, 1999).

{¶10} The right to a speedy trial does not arise until a person has been “accused” of a crime. *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 9. The United States Supreme Court held that the speedy trial clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Similarly, the Ohio Supreme Court held that where the defendant is not subjected to any official prosecution, a delay between the offense and the commencement of prosecution is not protected by the speedy trial guarantee contained in Section 10, Article I of the Ohio Constitution. *State v. Luck*, 15 Ohio St.3d 150, 153, 472 N.E.2d 1097 (1984).

{¶11} In Ohio, however, a defendant may assert preindictment speedy trial rights where the state has actually initiated its criminal prosecution or has issued an official accusation prior to indictment. *State v. Davis*, 7th Dist. Mahoning No. 05 MA 235, 2007-Ohio-7216, ¶ 23, citing *State v. Selvage*, 80 Ohio St.3d 465, 466, 687 N.E.2d 433 (1997); *Luck* at 153. In this case, Clemons was not prosecuted for, or accused of, the crimes now under review prior to his indictment on March 21, 2011. Therefore, the facts of this case do not indicate any speedy trial violation.

{¶12} It is well settled, however, that preaccusation delay constitutes a violation of the constitutional guarantees of due process of law where the delay violates the “fundamental conceptions of justice which lie at the base of our civil and political institutions” and define “the community’s sense of fair play and decency.” *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); see *Copeland*. An “unjustifiable delay” between the commission of an offense and the defendant’s indictment, 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. *Luck* at paragraph two of the syllabus.

{¶13} Because the alleged delay in this case occurred prior to Clemons’s indictment and the state had not initiated an official accusation prior to indicting Clemons, we consider Clemons’s argument under a due process analysis. In reviewing the trial court’s decision on a motion to dismiss for preindictment delay, we apply a de novo standard of review to the legal issues but afford great deference to the findings of fact made by the trial judge.² *State*

² The trial court provided no findings of fact or written analysis in support of its decision to grant Clemons’s motion to dismiss for want of prosecution. We, therefore, cannot discern under which analysis the court reached its determination — a constitutional speedy trial violation, as alleged by Clemons in his motion, or a due process violation, as considered by this court. We note, however, that the standards of review in both analyses are the same. See *Kutkut*, 8th Dist. Cuyahoga No. 98479, 2013-Ohio-1442, at ¶ 7, citing *State v. Barnes*, 8th Dist. Cuyahoga No. 90847, 2008-Ohio-5472, ¶ 17.

v. *Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶ 45, citing *State v. Henley*, 8th Dist. Cuyahoga No. 86591, 2006-Ohio-2728.

{¶14} In order “[t]o warrant dismissal on the basis of preindictment delay, a defendant must present evidence establishing substantial prejudice.” *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51, citing *State v. Whiting*, 84 Ohio St.3d 215, 217, 1998-Ohio-575, 702 N.E.2d 1199. If the defendant establishes prejudice, the state then has the burden of producing evidence of a justifiable reason for the delay. *Id.* We, therefore, must consider the reasons for the delay as well as the prejudice to the accused. *Lovasco* at 790.

{¶15} The determination of “actual prejudice” that results from preindictment delay, “involves ‘a delicate judgment based on the circumstances of each case.’” *Walls* at ¶ 52, quoting *Marion*, 404 U.S. at 325, 92 S.Ct. 455, 30 L.Ed.2d 468. 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.” *Id.* The defendant must show the exculpatory value of the alleged missing evidence. *Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, at ¶ 13, citing *State v. Gulley*, 12th Dist. Clinton No. CA99-02-004, 1999 Ohio App. LEXIS 6091, * 8 (Dec. 20, 1999). The defendant, in other words, “must show how lost witnesses and physical evidence would have proven the defendant’s asserted defense.” *Wade* at ¶ 48, quoting *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498, ¶ 121. 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. *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, ¶ 25. Moreover, when asserting preindictment delay, prejudice may not be presumed from a lengthy delay. *Copeland*, citing *Gulley* at *7.

{¶16} In this case, the state issued an arrest warrant for Clemons on August 6, 2009, for an incident that allegedly occurred on July 25, 2009. The state arrested Clemons on the outstanding warrant on March 11, 2011, and indicted him on March 21, 2011, 20 months after the date of the alleged offense. Clemons claims that he was prejudiced by the state's delay in charging him. In support of this claim, Clemons provides the following: (1) the passage of "almost three years" has prejudiced his ability to prepare an adequate defense; (2) any physical evidence "that might have been discoverable" around the time of the alleged criminal conduct would no longer be available; (3) the memories of any potential witnesses have surely faded with such extreme passage of time; and (4) he "might have benefitted from" a possible plea bargain or concurrent sentences, had he been prosecuted while serving his one-year prison term.

{¶17} We find Clemons's claims of prejudice concerning physical evidence that "might have been discoverable" or memories of "any potential witnesses" that "have surely faded" vague and speculative. Clemons fails to provide any concrete proof that a particular piece of physical evidence contained exculpatory

value. *Wade* at ¶ 48. He also fails to identify any potential witness who can no longer testify or how a witness's faded memory or recollection of the events would have affected the preparation of his defense or changed the outcome at trial. Speculation as to "potential witnesses" and their "faded" memories is insufficient evidence of prejudice. *Leonard* at ¶ 27.

{¶18} Furthermore, Clemons's assertion that he "might have benefitted" from a possible plea bargain or concurrent sentences, which would have reduced his total period of confinement, is not evidence of actual prejudice. Discussions of a plea bargain or the possibility that a court may have ordered his sentence to be served concurrently is not something that would affect Clemons's ability to defend himself at trial or provide any exculpatory value. Such possibilities, therefore, do not support Clemons's claim of prejudice allegedly resulting from preindictment delay. *See State v. Bolton*, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, ¶ 30 (finding defendant's argument that he could have already served a substantial portion of his sentence had he been indicted and convicted earlier insufficient evidence of actual prejudice because this evidence is not something that adversely affects his ability to defend himself at trial).

{¶19} Moreover, even if this court were to consider this claim, we find the assertion that Clemons may have received a lighter sentence is speculative. "Losing [the] opportunity to bargain for concurrent sentences is not sufficient to show prejudice. There is no case law supporting [this] position, nor is it a

constitutional or statutory right to be given concurrent sentences.” *State v. Remy*, 4th Dist. Ross No. 96CA2245, 1997 Ohio App. LEXIS 2960, * 14, 15 (June 27, 1997), quoting *State v. Jones*, 4th Dist. Ross No. 95CA2128, 1996 Ohio App. LEXIS 2386, * 7, 8 (June 4, 1996); *State v. Harrel*, 5th Dist. Delaware No. 98CAA06029, 1998 Ohio App. LEXIS 6466, * 11 (Dec. 29, 1998). Further, there is nothing in the record to support Clemons’s hopeful assertion.

{¶20} Finally, Clemons provides that the passage of “almost three years” has prejudiced his ability to prepare an adequate defense. First, it is not clear upon what basis Clemons makes the assertion that “almost three years” had passed. The record reflects that the alleged preindictment delay concerns the period between the indictment of March 21, 2011, and the alleged offense of July 25, 2009, which is approximately 20 months. Secondly, there is no general presumption of prejudice based upon the length of delay with respect to preindictment delay. *Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234 (finding a ten-year delay between the crime and the indictment did not warrant dismissal of the charges where defendant did not present evidence of substantial prejudice); *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167 (finding no prejudice in an eight-and-a-half year delay between the crime and the indictment). The mere assertion that the 20-month delay has prejudiced his ability to prepare an adequate defense, without more, is not evidence of actual prejudice sufficient to warrant dismissal of the indictment.

{¶21} Clemons also alleges that the state's delay in bringing the charges in this case was for "tactical reasons," in an effort to gain an advantage over him. The crux of Clemons's argument is that in both of Clemons's cases (the case that is before us on appeal and Case No. CR-530392, for which he was serving the one-year prison term), he was arrested by the Cleveland police for crimes allegedly occurring in the same district, he was held in the same jail, and he was prosecuted by the same county. Therefore, as Clemons alleges, the state knew, or should have known, of his whereabouts and should have prosecuted this matter while Clemons was serving his one-year term. Clemons contends that the delay in arresting and indicting him was, therefore, intentional. The state submitted that the Cleveland police were not aware of the outstanding warrant in this case when they apprehended and arrested Clemons in Case No. CR-530392.

{¶22} Arguably, the state mishandled Clemons's case in failing to discover the outstanding warrant when they arrested him in the unrelated charges in Case No. CR-530392. However, because Clemons failed to present evidence of substantial prejudice, the state has no burden of producing evidence of a justifiable reason for the 20-month preindictment delay. *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 51. As such, we find no due process violation in Clemons's preindictment delay.

{¶23} The trial court, therefore, erred as a matter of law when it granted Clemons's motion to dismiss. The state's sole assignment of error is sustained.

{¶24} This cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



TIM McCORMACK, JUDGE

MELODY J. STEWART, A.J., and
MARY J. BOYLE, J., CONCUR

The State of Ohio, }
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are

required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied
entry dated on 11/21/13 CA 99754
from the Journal _____

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing

copy has been compared by me with the original entry on said Journal entry dated on 11/21/13
CA 99754
_____ and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially,
and affix the seal of said court, at the Court House in the City of
Cleveland, in said County, this _____

day of November A.D. 20 13

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk

