

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2014-0228

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the
MARLON CLEMONS	:	Cuyahoga County Court
Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 99754

MERIT BRIEF OF APPELLANT MARLON CLEMONS

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FILED
 AUG 22 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 AUG 22 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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Introduction:

The trial court dismissed the indictment in this case due to a violation of Marlon Clemons' constitutional right to a speedy trial. On August 6, 2009, the State charged Marlon Clemons by criminal complaint related to an alleged shooting and issued a warrant for his arrest with the Cleveland Police. The State, however, made no attempt to prosecute this case for over *18 months*. The State made no attempt to serve Clemons with the complaint or execute the arrest warrant. In March 2010, the State arrested Marlon Clemons and prosecuted him for an unrelated charge of escape. Despite having Clemons in Cuyahoga County Jail, the State took no action with respect to the outstanding criminal complaint in this case and Clemons was sent to prison for the escape case. Two months later, the State had Clemons *returned* to Cuyahoga County to stand trial on a third case, which involved an unrelated robbery. Once again, although the State had Clemons in Cuyahoga County jail for almost four months, the State did nothing with respect to this case. Instead, after Clemons was found not guilty of the robbery case, he was returned to state prison to finish his one-year prison sentence for escape. Finally, on the day Clemons was supposed to be released from prison in March 2011, the State arrested him in this case.

When Clemons filed, in March 2013, a motion to dismiss due to a constitutional speedy trial violation, the State made no attempt to explain its prosecutorial inaction and did not request a hearing on Clemons' claim. Rather, it asked the trial court to overrule Clemons' motion on the sole basis that Clemons' constitutional right to a speedy trial did not arise in August 2009, but rather was not implicated until the State indicted him in March 2011. The trial court disagreed and dismissed the case.

The issue before this Court is whether the trial court properly concluded that Clemons' constitutional speedy trial rights were implicated by the filing of a criminal complaint in August 2009. Although the Eighth District held otherwise, it did so in direct contravention of this Court's decision in *State v. Selvage* (1997), 80 Ohio St. 3d 465. In *Selvage*, this Court held that a defendant's constitutional speedy trial rights begin to run with the filing of a criminal complaint. 80 Ohio St. 3d at 468. Because *Selvage* was correctly decided and the State has presented no good reason to overrule it, this Court should apply *Selvage* to the instant case and reverse the decision of the Eighth District. In the alternative, this Court should affirm the trial court's decision on the basis that Clemons' *statutory* speedy trial rights were also violated.

STATEMENT OF THE CASE AND FACTS

A. August 6, 2009: Clemons is charged in the instant case and an arrest warrant is issued.

On July 25, 2009, Marlon Clemons allegedly fired a weapon at Villard Bradley's home. There is no indication that anyone was injured. 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 and was never served with a summons to appear in court.

B. March 12, 2010: Clemons is arrested and then prosecuted for on an unrelated escape charge only.

On March 12, 2010, Clemons was arrested by Cleveland Police and taken into custody. Despite having Clemons in custody and despite there being a pending warrant in the Bradley case, the State took no action at this time to prosecute the Bradley case. Instead, the State simply 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. After Clemons plea to attempted escape, the State still took no steps to prosecute him in the Bradley case. Instead, Clemons was transported to Lorain Correctional on April 5, 2010.

C. May 28, 2010: Clemons is returned from prison for trial in an unrelated robbery case.

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.

D. March 11, 2011: Clemons is returned to Cuyahoga County for the Bradley case.

On March 11, 2011, the day Clemons was to be released from prison in the escape case, he was returned to Cuyahoga County and, for the first time, appeared in court 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 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 approximately four months later, on July 11, 2012. Mr. Clemons remained in custody for the next eight months awaiting trial.

E. March 29, 2013: The trial court dismissed Clemons’ indictment.

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 did not further 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 there was no indication by the trial court that its dismissal was premised on pre-indictment delay, as opposed to speedy trial. The State devoted less than one 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. *State v. Clemons*, 8th Dist. No. 99754, 2013-Ohio-5131 ("Opinion Below"). Although the Eighth District appeared to acknowledge the legal principle that constitutional speedy trial rights arise 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 was returned 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, found there was no pre-indictment delay, and reversed and remanded the case to the trial court.

Because the Eighth District's decision was inconsistent with this Court's decision in *Selvage*, 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).

This Court's prior decision in *Selvage* makes clear that the Eighth District erred in failing to recognize that Marlon Clemons' speedy trial rights began to run when he was charged by criminal complaint on August 6, 2009. For the State to prevail on appeal, this Court would need to overrule its prior decision in *Selvage*. Because there is no compelling reason to depart from principles of stare decisis, this Court should decline any invitation to do so. Moreover, even if this Court were inclined to overrule *Selvage*, it should nonetheless affirm the trial court's dismissal of the indictment on an alternative ground; namely, Clemons' *statutory* right to a speedy trial was violated.

A. *Selvage* provides that a criminal complaint constitutes a formal accusation and triggers a defendant's state and federal constitutional rights to a speedy trial.

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 instant 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 Eighth District reversed that decision, holding 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.

The question presented by this case is whether a criminal complaint constitutes a "formal" accusation for purposes of triggering a defendant's state and federal constitutional rights to a speedy trial? This Court, in *Selvage*, has already answered that question in the affirmative. Applying *Selvage*, this Court should reverse the Eighth District's contrary holding that only an indictment triggers a defendant's state and federal constitutional rights to a speedy trial.

The right to a speedy trial is guaranteed to all criminal defendants by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Ohio Constitution. "[A]lthough the statutory and constitutional speedy trial provisions are coextensive, the constitutional guarantees may be found to be broader than speedy trial statutes in some circumstances." *State v. O'Brien* (1987), 34 Ohio St.3d 7, 9. Accordingly, even if a particular delay does not run afoul the statutory protections of Ohio's speedy trial law, courts must still consider whether the delay constituted a violation of defendant's state and federal constitutional right to a speedy trial. *State v. Wells*, Cuyahoga App. No. 85556, 2006 Ohio 87, ¶ 20 (finding a constitutional speedy trial violation even though the statutory time frame had not been exceeded); *State v. O'Brien*, Ottawa App. No. OT-86-3, 1986 Ohio App. LEXIS 8723, * 13-14 (same).

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. 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); see also *United States v. McDonald* (1982), 456 U.S. 1, 7 (explaining that a defendant's Sixth Amendment right to a speedy trial attaches once "a formal criminal charge is instituted and a criminal prosecution begins.")

As explained by this Court, "one of the major purposes of the [speedy trial] provision is to guard against inordinate delay between public charge and trial." *Selvage*, 80 Ohio St. 3d at 469, n.2. Moreover, "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." *Doggett*, 505 U.S. at 657. "The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." *Id.*

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. The defendant in *Selvage* was charged by criminal complaint with drug trafficking on June 7, 1994, but "[i]n an effort to preserve the anonymity of the officers involved in the investigation, the state did not

pursue the complaint at that time, and [the defendant] was never served.” 80 Ohio St. 3d at 465. The State then indicted the defendant in April 1995 for those same felony drug offenses. *Id.* The defendant filed a motion to dismiss based on a violation of her constitutional speedy trial rights. *Id.* The trial court granted the motion. *Id.* In upholding the trial court’s ruling, this Court explained that the speedy trial clock began to run when the defendant was charged by the criminal complaint ten months before the indictment, that the State failed to demonstrate reasonable diligence in pursuing the prosecution, and that the defendant was prejudiced based on the delay. *Id.* at 469-70.

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*, 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.

B. This Court should not overrule *Selvage*.

In order for the State to prevail on the constitutional question presented in this case, this Court must depart from principles of *stare decisis* and overrule *Selvage*. Because there is no compelling reason to abandon this well-established and correctly decided precedent, this Court should decline any invitation to do so.

“‘*Stare decisis*’ is, of course, shorthand for *stare decisis et non quieta movere*-‘stand by the past decisions and do not disturb settled things.’ *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 4 (Citing Black’s Law Dictionary (5 Ed.Rev.1979) 1261).

This doctrine “serves to remove the capricious element from the law” and “tends to provide the stability necessary for an organized society to deal with its everyday affairs.” *Id.* at 4-5. “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee* (1991), 501 U.S. 808, 827.

“While *stare decisis* is not an inexorable command, particularly when [the Court] is interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that . . . a departure from precedent [must] be supported by some ‘special justification.’” *Dickerson v. United States* (2000), 530 U.S. 428, 443 (internal citations omitted) (declining to overrule *Miranda*). Like the United States Supreme Court, this Court has stated that the doctrine of *stare decisis* “does not apply with the same force and effect when constitutional interpretation is at issue.” *Rocky River*, 43 Ohio St. 3d at 5. However, this Court has recognized that departure from prior precedent, even in the constitutional context, should only be done when experience has demonstrated that the prior decision is unworkable or was “demonstrably . . . wrong.” *Id.* at 5-6 and 10.

In this case, neither the Eighth District nor the State has even suggested that *Selvage* was wrongly decided, let alone demonstrably wrong. *Selvage* provides that, once the State formally accuses an Ohio citizen with a crime, he or she has the right to speedy trial regardless of whether the charge takes the form of a criminal complaint or an indictment. Indeed, if the rule were otherwise, misdemeanants would have no constitutional right to a speedy trial. Moreover, this practical rule of law provides a bright line rule that is easy to follow, that protects the important constitutional right of a speedy trial, and that serves the public’s interest as well. As explained

by the United States Supreme Court in the context of the federal speedy trial statute, the speedy resolution of criminal cases serves the public interest by, among other things, “reducing defendants’ opportunity to commit crimes while on pretrial release and preventing extended delay from impairing the deterrent effect of punishment.” *Zedner v. United States* (2006), 547 U.S. 489, 501. An interpretation of the speedy trial statute that afforded no significance to criminal charges by any means other than indictment would undermine the speedy resolution of criminal cases. And, “justice delayed” would be “justice denied” for individuals and society alike.

In short, this Court should adhere to its prior decision in *Selvage* because it remains correct, logical and workable and because there is no compelling or special justification to overrule it.

C. Clemons’ statutory speedy trial rights were also violated.

Even if this Court were to overrule its prior decision in *Selvage*, this Court should nonetheless affirm the trial court’s ruling on other grounds. *See e.g. Agee v. Russell* (2001), 92 Ohio St. 3d 540, 544 (holding that a correct judgment should not be reversed merely because the court “erred in its specific rationale.”) Specifically, Marlon Clemons’ indictment must also be dismissed because his *statutory* speedy trial rights had been violated.

The Ohio General Assembly enacted R.C. 2945.71, *et seq.* in an attempt to prescribe “reasonable speedy trial periods consistent with these constitutional provisions.” *O’Brien*, 34 Ohio St.3d at 8. The speedy trial provisions “constitute a rational effort to enforce the constitutional right to a speedy trial of accused charged with a felony or a misdemeanor and shall be strictly enforced by the courts,” *State v. Pachay* (1980), 64 Ohio St.2d 218, syllabus, and strictly construed against the State. *State v. Miller*, 113 Ohio App. 3d 606, 608. When an

appellate court discovers an ambiguity on appeal, it construes the record in favor of the accused.

City of Cleveland v. Sheldon, Cuyahoga App. No. 82319, 2003 Ohio 6331, ¶ 18.

R.C. 2945.71(C)(2) provides that a defendant charged with a felony “[s]hall be brought to trial within two hundred and seventy days after the person’s arrest.” Once the defendant has established that the requisite speedy trial time has elapsed without trial, he or she has established his prima facie case and the burden shifts to the State to “demonstrate any tolling or extensions of time permissible under the law.” *State v. McDonald* (2003), 153 Ohio App.3d 679, 682.

As with Clemons’ constitutional speedy trial argument, the critical question here is when did the statutory speedy trial period begin to run in the instant case? Mr. Clemons maintains that his statutory speedy trial clock began to run when he was arrested on *March 12, 2010*. At that time, Mr. Clemons had been charged by criminal complaint for a felony offense in this case. Thus, a “charge” was “pending” within the meaning of the speedy trial statute, R.C. 2945.71. *State v. Azbell* (2006), 112 Ohio St. 3d 300, syllabus. Because the charge was pending in the Bradley case, the State was required to bring him to trial “within two hundred seventy days after the person’s arrest.” R.C. 2945.71(C)(2). Clemons was arrested on March 12, 2010 and thus the State had to bring him to trial by December 7, 2010. Because the State failed to do so, Clemons indictment was properly dismissed.

Clemons anticipates that the State may argue that Clemons speedy trial clock for the Bradley case did not begin with his March 12, 2010 arrest and may contend that he was technically only arrested on the pending escape charge despite an outstanding arrest warrant for the Bradley case. Even if the State could delineate between arrests on multiple outstanding warrants, such an argument must fail because it ignores the plain language of the speedy trial statute. R.C. 2945.71(C)(2) requires the State to bring a defendant to trial on pending felony

charges within 270 days “after the person’s arrest.” This statutory provision does not specify that the arrest be made on the “pending charge.” Applying the plain language of the statute, the State must bring a defendant to trial on a pending felony charge within 270 days after arrest, regardless of the purported reason for that arrest.

The General Assembly wisely established this clear rule in order to avoid gamesmanship on the part of the defense and the State. If the rule were otherwise, a defendant, facing multiple charges, could argue that he was technically only arrested on one charge and so he is still entitled to the triple-count provision of the speedy trial statute. And the State, on other hand, could arrest the defendant on just one warrant, prosecute him on that charge, wait until the defendant serves his entire sentence, and then prosecute him on the second charge to take the question of concurrent or consecutive sentences out of the hands of the trial court. For defendants who are arrested and face multiple charges on multiple arrest warrants, there is simply no good reason to start the speedy trial clock at different times in the multiple cases based on some arbitrary claim that the defendant was only technically arrested in one particular case.

Indeed, the only appellate court to squarely address this issue has interpreted the statutory speedy trial clock as starting on all pending charges once the defendant has been arrested on any charges. In *State v. Bailey*, the defendant was charged by criminal complaint for robbery in Montgomery County in September 1998. (2000), 141 Ohio App. 3d 144, 145. The defendant was then arrested one month later in Hamilton County on unrelated charges. *Id.* After the defendant’s Hamilton County charges were resolved on June 11, 1999, the State waited several months before returning him to Montgomery County. *Id.* The defendant filed a motion to dismiss for a violation of his statutory speedy trial rights, which the trial court granted. *Id.* In rejecting the State’s appeal, the Second District held that the defendant’s speedy trial clock for the

Montgomery County charge “began to run on the day when he was both under arrest for the unrelated charge and the subject of an active arrest warrant on the [Montgomery County] charge.” *Id.* at 147 and 149. Moreover, because the State did not exercise reasonable diligence to secure the defendant’s availability for trial on the Montgomery charges, it did not receive the benefit of any tolling under the speedy trial statute. *Id.* at 148-49.

Applying *Bailey* to the instant case, it is clear that Clemons statutory speedy trial rights were violated. Clemons had two active arrest warrants in Cuyahoga County (one for the instant case and one for the unrelated charge of escape) at the time of his arrest on March 12, 2010. Clemons speedy trial clock thus began to run on that date. And despite the fact that the State did not need to do anything to secure Clemons’ presence for trial in the instant case (he was already in Cuyahoga County jail), it did nothing with respect to its prosecution in the instant case. And then, after Clemons was sent to prison, the State actually sought his return to Cuyahoga County to address a third, unrelated case. However, it still did nothing with respect to the instant case until March 11, 2011. By that time, Clemons statutory speedy trial clock had clearly run.

Accordingly, even if this Court were to conclude that a criminal complaint does not trigger a defendant’s constitutional right to a speedy trial, it does trigger a defendant’s statutory right to a speedy trial once he has been arrested. Because the State violated Marlon Clemons’ statutory right to a speedy trial, this Court should affirm the decision of the trial court dismissing his indictment.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Marlon Clemons respectfully asks this Court to reverse the decision of the Eighth District and affirm the trial court's dismissal of his indictment.

Respectfully Submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was served upon Joseph Ricotta, Assistant County Prosecutor in the office of Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 21 day of August, 2014.


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Counsel for Appellant

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0228

STATE OF OHIO	:	
Plaintiff-Appellee	:	On Appeal from the
vs	:	Cuyahoga County Court of
MARLON CLEMONS	:	Appeals, Eighth Appellate
Defendant-Appellant	:	District CA 99754

NOTICE OF APPEAL OF APPELLANT MARLON CLEMONS

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NOTICE OF APPEAL OF APPELLANT

Appellant Marlon Clemons hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District opinion, entered in Court of Appeals case No. 99754 on November 21, 2013 and reconsideration denied January 9, 2014.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,


CULLEN SWEENEY
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 4 day of February, 2014.


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78718705

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO
Plaintiff

MARLON CLEMONS
Defendant

Case No: CR-11-548254-A

Judge: CASSANDRA COLLIER-WILLIAMS

INDICT: 2923.161 IMPROPER DISCHARGING FIREARM AT
OR INTO HABITATION OR SCHOOL /FRM1 /FRM3
/NPC /RVOS
2903.11 FELONIOUS ASSAULT /FRM1 /FRM3 /NPC
/RVOS
2903.11 FELONIOUS ASSAULT /FRM1 /FRM3 /NPC
/RVOS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT'S MOTION TO DISMISS FOR WANT OF PROSECUTION FILED MARCH 15, 2013 IS GRANTED.
CASE IS DISMISSED WITH PREJUDICE.
FINAL

03/29/2013
CPATP 03/29/2013 14:10:01

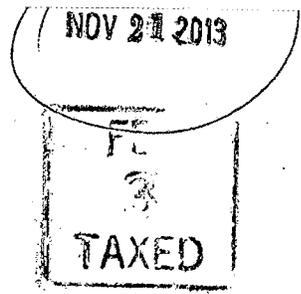
Judge Signature

03/29/2013

HEAR
03/29/2013

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99754

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STATE OF OHIO

NOV 21 2013

PLAINTIFF-APPELLANT

CUYAHOGA COUNTY CLERK OF
THE COURT OF COMMON PLEAS
By _____ Deputy

vs.

MARLON CLEMONS

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

11-21-13
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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NOV 21 2013

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By 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.

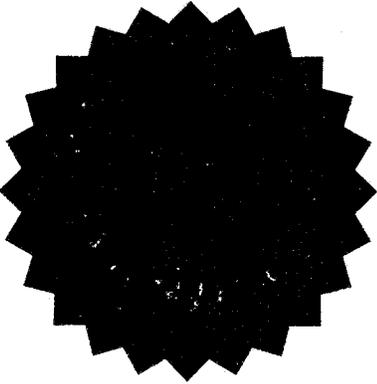
I, ANDREA F. ROCCO, Clerk of the Court of

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 997524
from the Journal 99754

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
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 21
day of November A.D. 20 13

ANDREA F. ROCCO
Clerk of Courts

By [Signature] Deputy Clerk