

NO. 2014-0228

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99754

STATE OF OHIO,
Plaintiff-Appellee

-vs-

MARLON CLEMONS,
Defendant-Appellant

APPELLEE'S MOTION TO DISMISS

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Now comes Timothy J. McGinty, the Cuyahoga County Prosecuting Attorney, on behalf of the State of Ohio, and through his undersigned assistant, and respectfully requests that this Court dismiss Appellant's appeal as improvidently granted. Appellant raises issues that were not raised to the lower courts below.

Appellant, Marlon Clemons, was charged by complaint for a felony. He was arrested on unrelated charges seven months later. One year after that arrest, Appellant was indicted for felonies in this case. Appellant then posted a bond and fled. Appellant eluded police for more than a year, until he was captured. Appellant moved to dismiss due to pre-indictment delay and the trial court granted his motion. The Eighth District Court of Appeals reversed, holding that there was no pre-indictment delay. Now Appellant argues for the first time that the filing of the complaint in municipal court started the speedy trial clock and that his *post-accusation rights* were violated.

This Court accepted jurisdiction in this case over three dissenting votes by granting reconsideration of its earlier denial of jurisdiction. *See State v. Clemons*, 139 Ohio St.3d 1474, 2014-Ohio-3012, 11 N.E.3d 1195. Now Appellant has explained that he is arguing that the filing of a complaint commenced his speedy trial time such that he suffered post-accusation delay. Therefore, it is clear that Appellant has raised an argument with this Court that was not raised to or considered by the lower courts below.

Appellant made no argument in the lower courts that the filing of a complaint commenced his speedy trial time. According to his trial counsel, “Mr. Clemons was not charged and/or prosecuted for the instant matter until March 11, 2011”, the date of the indictment. Appellant’s Mot. to Dismiss for Want of Prosecution at p. 4. Appellant argued to the trial court that his constitutional right to speedy trial was violated because he was incarcerated for a period of time during which the State could have commenced prosecution, *i.e.* pre-indictment delay.

When the State appealed the trial court’s dismissal, Appellant continued to argue that there was pre-indictment delay and attacked the State’s “failure to bring the CR-11-548254 indictment from July 25, 2009 until March 21, 2011, while Defendant was in the state’s custody”. Appellee’s Answer Brief at p. 7. The Eighth District never addressed the issue Appellant now asserts because, based upon the arguments made to the Eight District, “Clemons was not prosecuted for, or accused of, the crimes now under review prior to his indictment”. *Clemons*, 2013-Ohio-5131, at ¶ 11.

Appellant’s failure to raise this argument in the lower courts is critical because it will require this Court to apply a different legal standard. The lower courts, which were asked to address an issue of pre-indictment delay, applied a test in which there was no presumption of prejudice merely from the passage of time. *See State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 14 (“prejudice is not presumed from a lengthy [pre-indictment] delay”). By

contrast, a court addressing an issue of post-accusation delay may presume prejudice based solely on the length of delay. See *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, fn.1 (1992) (noting that courts generally treat post-accusation delays of one year as presumptively prejudicial). By recasting his claim as one of post-accusation delay, Appellant attempts to prevail on a mere presumption of prejudice which was never argued below. Without a trial court opinion or hearing transcript, Appellant cannot point to facts to establish prejudice other than the passage of time. But the State is also denied the opportunity to develop facts that might have justified delay.

Additionally, Appellant has forfeited the argument that his speedy trial rights commenced upon the filing of a complaint. Forfeiture is “the failure to make a timely assertion of a right”. *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770 (1993). “‘No procedural principle is more familiar to this Court than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *Olano*, 507 U.S. at 731 (citing *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660 (1944)). This Court has stated that “justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination.” *Sizemore v. Smith*, 6 Ohio St.3d 330, 453 N.E.2d 632, fn.2 (Ohio 1983).

Appellant forfeited his right to argue that the filing of a compliant in order to obtain an arrest warrant commences speedy trial rights. He failed to make this argument at the trial court or Eighth District Court of Appeals. Were this Court to remand this case, the State would be forced to bear further delay to its prosecution and Appellant would only be given a chance to develop additional grounds of prejudice.

For these reasons, the State respectfully requests that this Court dismiss Appellant’s appeal as improvidently granted.

Respectfully submitted,

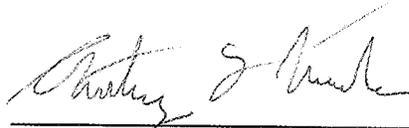
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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee was provided by U.S. mail this 14th day of October, 2014 to ROBERT L. TOBIK, ESQ., CHIEF PUBLIC DEFENDER, and CULLEN SWEENEY, ESQ., ASSISTANT PUBLIC DEFENDER at 310 Lakeside Avenue, Suite 200, Cleveland Ohio.



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