Supreme Court of Ohio Clerk of Court - Filed April 06, 2015 - Case No. 2014-2149

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	Case No. 2014-2149
Plaintiff-Appellant,	)	
	)	On Appeal from Cuyahoga
vs.	)	County Court of Appeals
	)	Eighth Appellate District
MICHAEL MACK,	)	
	)	C.A. Case No. 100965
Defendant-Appellee.	)	

NOTICE OF SERVICE BY APPELLANT STATE OF OHIO

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NOTICE OF SERVICE BY APPELLANT STATE OF OHIO

On March 24, 2015, the Office of the Ohio Public Defender served Appellant with a motion that notified the State of Ohio of its failure to comply with S.Ct.Prac.R. 3.11(B)(3). Appellant State of Ohio hereby serves the Ohio Public Defender with a notice of appeal and accompanying memorandum in support of jurisdiction in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817. Furthermore, the State of Ohio provides the Supreme Court of Ohio with notice of its service to the Ohio Public Defender of these filings. Both documents have been provided as attachments to this notice of service.

Furthermore, the State of Ohio does not object to this Court staying proceedings in this case for the purpose of granting leave for the Ohio Public Defender or the Cuyahoga County Public Defender to file a jurisdictional memorandum in response. It is clear that pursuant to S.Ct.Prac.R. 3.11(B)(3) that the Ohio Public Defender and Cuyahoga County Public Defender are entitled to have a period of time to respond. Therefore, the State of Ohio would support any grant of leave of additional time by this Court to allow for the Ohio Public Defender or Cuyahoga County Public Defender to be awarded time to prepare and file a jurisdiction memorandum in response.

Respectfully submitted,

OFFICE OF THE CUYAHOGA COUNTY PROSECUTOR

/ s / Brett Hammond

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF SERVICE BY APPELLANT STATE OF OHIO was forwarded by regular U.S. mail, on this 6th day of April 2015, to the following parties:

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Supreme Court of Ohio Clerk of Court - Filed December 15, 2014 - Case No. 2014-2149

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	Case No.
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	)	On Appeal from Cuyahoga
vs.	)	County Court of Appeals
	)	Eighth Appellate District
MICHAEL MACK,	)	
	)	C.A. Case No. 100965
Defendant-Appellee.	)	

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817, and journalized on October 30, 2014.

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

Respectfully submitted,

OFFICE OF THE CUYAHOGA COUNTY PROSECUTOR

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL OF APPELLANT STATE OF OHIO was forwarded by regular U.S. mail, on this 15th day of December 2014, to Attorney John Spellacy at John J. Spellacy & Associates, 526 Superior Avenue, N.E., 1540 Leader Building, Cleveland, Ohio 44114.

BY:

/ s / Brett Hammond
Denise Salerno (#0075896)
Brett Hammond (#0091757)

Supreme Court of Ohio Clerk of Court - Filed December 15, 2014 - Case No. 2014-2149

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 100965

STATE OF OHIO,

Plaintiff-Appellee

-vs-

MICHAEL MACK

Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION, INVOLVES A FELONY, AND CONCERNS MATTERS OF GREAT GENERAL INTEREST.

Victims of rape in Cuyahoga County may now find their legal claims arbitrarily dismissed due to a defendant's claim of preindictment delay. A claim of preindictment delay allows for a defendant to protect his due process rights by dismissing the indictment if he can show substantial and actual prejudice due to the State's delay in filing charges. *State v. Luck* (1984), 15 Ohio St.3d 150, 472 N.E.2d 1079. The Eighth District Court of Appeals held that Defendant-Appellee Michael Mack had suffered substantial and actual prejudice due to the fact that "the responding officers and two of the three investigating detectives were unavailable and other evidence (the 911 call) was unavailable."[1] *State v. Mack*, 8th Dist. No. 100965, 2014-Ohio-4817, ¶ 10. The dismissal of this case was quite frankly, arbitrary — Appellee failed to present any legal precedent that would support his claim that he had been substantially prejudiced due to lost evidence of speculative exculpatory value. Prior to *Mack*, neither this Court nor any Ohio appellate court has (1) recognized lost evidence with speculative exculpatory value as a valid basis for establishing pre-indictment delay prejudice or (2) recognized the prosecution of a defendant as an adult for a crime he committed as a juvenile as grounds for pre-indictment delay prejudice.

This case presents a clear opportunity for this Court to consider the issue of whether a defendant suffers pre-indictment delay prejudice based upon the loss of speculative evidence. Additionally, this matter affords this Court with an opportunity to consider whether prosecuting a defendant as an adult for a crime committed as a juvenile constitutes pre-indictment delay prejudice. As such, this case involves substantial constitutional issues that will allow this Court to clarify the scope of defendants' due process rights with respect to pre-indictment delay prejudice.

[1] The Eighth District Court of Appeals also found that Appellee was prejudiced because he was being prosecuted as an adult for crimes that he committed as a juvenile.

This case also raises matters of great general interest because it will tremendously impact the litigation of rape cases in Cuyahoga County and all of Ohio. The victim in this case was initially unwilling to speak with police officers and eventually the investigation of the case went cold. The defendant was indicted many years later after (1) the DNA in the victim's rape kit was matched to the defendant's DNA in CODIS and (2) the victim indicated her willingness to prosecute. Undoubtedly, this case presents a series of facts that will be frequently encountered by trial courts and appellate courts. As of November 16, 2014, more than 4,800 rape kits have been submitted for testing. The submission of these rape kits developed more than 1,300 leads and resulted in 230 indictments of defendants. Beyond this, *Mack* affects the [x number] of pending CODIS cases indicted in Cuyahoga County, approximately [x number] of cases pending on appeal, and the countless number of unsolved or unknown rape crimes. Many cases in which the State indicts based upon a CODIS hit to a defendant's DNA profile will have some amount of evidence that has been lost due to the passage of time. The State asks for this Court to accept jurisdiction of this case in order to clarify when a defendant establishes substantial and actual prejudice in anticipation of the hundreds of future CODIS rape cases.

As a final point, this case presents this Court with an opportunity to clarify when the State has met its burden of producing sufficient evidence to justify a delay in indicting a defendant. In *Luck*, this Court held that even when a defendant establishes actual prejudice, the State may still indict the defendant if it can produce evidence of a justifiable reason for the delay. *State v. Luck*, 15 Ohio St.3d at 158, 472 N.E.2d 1097. The State submits to this Court that in cases such as this, where the victim refuses to cooperate with the police, the State is justified in delaying prosecution of the case. The victim's hesitance in this case to pursue charges against her attacker is not uncommon. Specifically, "victims often do not report the[ir] rape, largely because they fear

overbearing, hostile police, and — should a trial ensue — vicious attacks on their character." Minneosta Law. Rev., 87 J. Crim. L. & Criminology 1194: Criminal Law: Rape in the Criminal Justice System. In cases such as this matter, where the victim is an acquaintance of her attacker, the victim is more likely to be met with skepticism by the justice system. *Id.* Despite these social pressures, rape victims who delay in pursuing criminal charges may find their claims subject to dismissal in the event that the delay results in any "loss of witness testimony, lost memory or spoiled or destroyed evidence." *Mack, supra* at ¶ 10. Given the effect this opinion has upon the prosecution of rape cases, the State asks for this Court to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

In this matter, the Eighth District Court of Appeals found that a defendant had suffered prejudice from pre-indictment delay due to the unavailability of two of three investigating officers, the unavailability of the responding officers, and a lost 911 tape recording. *State v. Mack*, 8th Dist. No. 100965, 2014-Ohio-4817, ¶ 10. Although the Eighth District Court of Appeals found that Defendant-Appellee Michael Mack had been substantially prejudiced by the loss of evidence and testimony, the record was devoid of any indication as to whether this evidence would have supported his defense.

The indictment in this case arose from an incident that took place between Appellee and the victim on June 28, 1993. The victim admitted that prior to this incident she had engaged in a consensual sexual relationship with Appellee. (*Id.* at 13). On June 28, 1993, Defendant-Appellee Michael Mack went to her residence, and the victim allowed him to enter her home. Mack then took the victim into an upstairs bathroom and forced her to have sex with him. He then moved her into a bedroom and raped her a second time. After raping the victim, he urinated on her.

The victim contacted police after Mack left the residence. She went to the hospital and a rape kit was collected. On or about June 29, 1993, the rape kit was tested by the Cleveland Police Department's Special Investigation Unit. The vaginal smear slide was found to be positive for spermatozoa. Several appointments were made for the victim to meet with Cleveland Police Sex Crimes Unit detectives to give a statement and formally identify the perpetrator, but she failed to show. The case went cold due to the fact that the victim was initially uncooperative and the State lacked any further investigative leads.

As previously mentioned, it was the work of the Ohio Attorney General's Sexual Assault Kit Testing Initiative that reinvigorated the case. As part of the initiative, the victim's rape kit was submitted to BCI for testing. On February 5, 2013, BCI notified the Cuyahoga County Prosecutor's Office of a CODIS hit to the DNA profile of Appellee Michael Mack. Based upon this new evidence, investigation was reopened and Mack was indicted four months later on June 27, 2013. The indictment charged Mack with two counts of rape, in violation of R.C. 2907.02(A)(2) and one count of kidnapping, in violation of R.C. 2905.01(A)(4), felonies of the first degree. (Cuyahoga Docket No. CR-13-575712, Indictment).

Mack was arrested on October 16, 2013 and met with an investigator from the Cuyahoga County Prosecutor's Office the next day. After signing an advice of rights waiver, Mack spoke with the investigator and stated that he had sex with her on June 28, 1993. Following the interview, buccal swabs were taken from Mack that confirmed that DNA from the victim's rape kit matched Mack's DNA profile. On January 17, 2014, Mack filed a Motion to Dismiss for Pre-Indictment Delay. The trial court held a hearing on Mack's motion on January 30, 2014.

At the hearing, Mack summarized his preindictment delay claims. He claimed that he suffered actual prejudice because the "witnesses [are] either dead or cannot be located." (Tr. 17).

Specifically, the "initial responding officers, as well as the follow-up detectives, who have exculpatory information with respect to this case." (Tr. 17). Mack also alleged prejudice based on the unavailability of a 911 tape that had been lost. Mack further asserted that he was prejudiced because the statute of limitations for rape was amended, that he was not being prosecuted as a juvenile, and that he was being prosecuted in order to cover up the victim's relationship with Appellee.[2] (Tr. 17- 20). Mack also claimed that he was prejudiced because "photos are gone. Memories have faded. The scene is not available for inspection." (Tr. 18).

The State responded at the hearing by arguing that speculative evidence is insufficient to demonstrate preindictment delay prejudice (Tr. 5). The Prosecutor informed the trial court that she spoke with the victim and the reason she did not pursue prosecution of the case sooner was because "women who were victims were the ones who were put on as the defendants" in these types of cases. (Tr. 12). The State also pointed out the fact that a presumption of prejudice should not result from the delay in bringing a prosecution in this case. Instead, "[a]s long as the cases are brought within the statutory time frame, there is not an automatic presumption" of prejudice." (Tr. 23 – 24). In addition, the stated noted on the record that one of the investigating officers in the case was still available to testify. (Tr. 24 – 25). Despite the State's arguments, the indictment was dismissed. The trial court's dismissal of the matter was affirmed on appeal.

[2] Appellee was 16 years old at the time of the offense. Although Appellee argued at the hearing that the victim should have been prosecuted for statutory rape or unlawful sexual conduct, she could not have been prosecuted because defendant had reached the age of consent. *See* R.C. 2907.02 ("No person who is eighteen years of age or older shall engage in sexual conduct with another * * * when the offender knows the other person is thirteen years of age or older but less than sixteen years of age * * *) (emphasis added); *see also* R.C. 2907.02 (A)(1)(b) ("No person shall engage in sexual conduct with another ** * * [when] [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person").

The exculpatory value of the evidence and its prejudice to Defendant was speculative at best. The State urges that this Court to accept jurisdiction in order to clarify this matter.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: In order to prevail on a claim of pre-indictment delay, a defendant must present evidence establishing that he was substantially and actually prejudiced. Substantial and actual prejudice requires the defendant to demonstrate the exculpatory value of lost evidence or testimony with proof that is specific and non-speculative.

Defendant-Appellee Michael Mack argued that he was substantially prejudiced by the unavailability of two of three investigating officers and a lost 911 taped recording. The trial court dismissed the indictment due to the prejudice that Appellee alleged. On appeal, the Eighth District Court of Appeals affirmed the dismissal of the case. Appellee has not provided any clear and non-speculative indication as to how his defense has been prejudiced by the unavailability of the officers and the missing 911 tape. The State asks this Court to accept jurisdiction of this appeal in order to clarify when loss of evidence and the unavailability of witnesses constitutes pre-indictment delay prejudice.

In a rape case such as the instant matter, the statute of limitations, "which provides predictable, legislatively enacted limits on prosecutorial delay, provides the primary guarantee against bringing overly stale criminal charges; however, statute of limitations does not fully define defendants' rights with respect to events occurring prior to indictment and due process clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco* (1977), 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (citations omitted).

Legal precedent has firmly established that substantial prejudice must be demonstrated with proof of non-speculative evidence. The United States Supreme Court first articulated this principle in *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468. In

Marion, the United States Supreme Court found that Appellee's claim of preindictment delay prejudice was not substantial due to the loss of speculative evidence. In *Marion*, the Court noted that Appellees relied "solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost." *Id.*, 404 U.S. at 325-26. The Court further reasoned that "[i]n light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment." The Court then held "[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id.*

Similarly, Ohio jurisprudence has conclusively indicated the importance of non-speculative evidence in claims of pre-indictment delay. In Cuyahoga County, legal precedent clearly requires proof of preindictment delay prejudice to be non-speculative and exculpatory. *State v. Leonard*, 8th Dist. No. 98626, 2013-Ohio-1446, ¶ 25 ("The mere possibility that memories will dim, witnesses will become inaccessible, or evidence will be lost is not enough in itself to establish prejudice to justify the dismissal of an indictment); *State v. Ennist*, 8th Dist. No. 90076, 2008-Ohio-5100, ¶ 27 ("To prove actual prejudice, a defendant must show, by concrete proof, the exculpatory value of any alleged missing evidence.") (citations omitted); *State v. McFeature*, 8th Dist. No. 100434, 2014-Ohio-5271, ¶ 119 ("the defendant may not rely on speculation or vague assertions of prejudice * * * rather, proof of actual prejudice must be specific, particularized and non-speculative." (citations omitted). Despite the fact that in Cuyahoga County a defendant has the burden of submitting concrete and non-speculative evidence in claims of pre-indictment delay, the opinion by the Eighth District Court of Appeals did not even reference this legal standard.

More importantly, the requirement that preindictment delay must be proved through non-speculative evidence extends beyond Cuyahoga County to most of the Ohio appellate jurisdictions:

Appellate District	**Case That Requires Proof of Pre-Indictment Delay Prejudice through Non-Speculative Evidence**
2nd District	*State v. Kaminsky* (August 21, 1991), 2d Dist. No. 12447 at *4 ("Thus, any contention that the identity of the informant was made impossible by the pre-indictment delay is entirely speculative").
3rd District	*State v. Mapp*, 3d Dist. No. 14-10-34, 2011-Ohio-4468 ("Proof of actual prejudice to the defendant must be specific and non-speculative; the defendant bears the burden of demonstrating the exculpatory value of the evidence of which he was deprived due to the delay." (citations omitted)).
4th District	*State v. Flickinger* (January 19, 1999), 4th Dist. No. 98 CA 09, 1999 WL 34854, * 6 ("we believe that appellant's assertion that witnesses' memories have faded is much too speculative and fails to rise to the level of concrete proof.").
5th District	*State v. Bruce*, 5th Dist. No. 02 CA 40, 2003-Ohio-1714, ¶ 27 (finding that the "bulk of appellant's arguments as to the effect of the delay rise only to the level of speculation" and therefore appellant had not demonstrated preindictment delay prejudice).
6th District	*State v. Robinson*, 6th Dist. No. L-06-1182, 2008-Ohio-3498, ¶ 121 (a defendant must show how "lost witnesses and physical evidence would have proven the defendant's asserted defense.").
7th District	*State v. Christman* (May 28, 1999), 7th Dist. No. 786, * 4 ("Appellant's second factor, that his mother is dead, is also not substantially prejudicial * * * Speculation as to the contents of lost testimony does not meet the defense's burden.").
8th District	*State v. McFeature*, 8th Dist. No. 100434, 2014-Ohio-5271, ¶ 119 ("the defendant may not rely on speculation or vague assertions of prejudice * * * rather, proof of actual prejudice must be specific, particularized and non-speculative." (citations omitted)
9th District	*State v. Malone*, 9th Dist. No. 10CA009754, 2011-Ohio-2445, ¶ 9 ("The substance of her potential testimony, either before or after time had passed, was not established, and so Mr. Malone could only speculate about how his defense might have been prejudiced.").

10th District	*State v. Tullis,* 10th Dist. No. 04AP–333, 2005-Ohio-2205, citing *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680 ("Proof of actual prejudice to the defendant must be specific and non-speculative; the defendant bears the burden of demonstrating the exculpatory value of the evidence of which he was deprived due to the delay.").
11th District	*State v. Ware*, 11th Dist. No. 2007-L-154, 2008-Ohio-3992, ¶ 19 ("To demonstrate prejudice, appellant must point quite specifically to how [he] was prejudiced, and the defendant's showing must be concrete, and not speculative.") (citations and internal quotation marks omitted).

Even though it is well-established that preindictment delay prejudice must be shown through a demonstration of non-speculative evidence, this Court has never squarely addressed the matter. In the case of *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 56, this Court did conclude that the defendant had alleged speculative claims of prejudice. However, this Court never held in *Walls* that a defendant must demonstrate actual prejudice through concrete and non-speculative evidence. Instead, this Court has primarily encountered factual circumstances in which the defendant had made a showing of prejudice based on concrete and non-speculative evidence. For example, in *Luck, supra*, the defendant demonstrated prejudice based on the deaths of two key witnesses and the loss of all the tape recorded interviews from potential witnesses. *State v. Luck* (1984), 15 Ohio St.3d 150, 154, 472 N.E.2d 1079, 1102. Similarly, in *State v. Whiting*, 84 Ohio St.3d 215, 215, 702 N.E.2d 1199, 1200, this Court found prejudice based on loss of crucial exculpatory physical evidence and the death of a key defense witness.

By contrast in this case, Appellee did not offer any concrete proof of exculpatory evidence. Mack's claim of a prejudiced defense is limited to his statement that two of the three investigating detectives are unavailable and the initial 911 phone call has been lost. Absent from the record is any specific proof as to how this loss of evidence prejudiced his defense. Any explanation of the

importance of the testimony of the investigating detectives or 911 phone call would be speculation. The facts surrounding this appeal will undoubtedly occur again in future rape cases based on CODIS hits. Accordingly, the State asks this Court to accept jurisdiction of this appeal to clarify this matter.

PROPOSITION OF LAW NO. 2: In determining whether an indictment should be dismissed due to preindictment delay, a defendant must demonstrate that the delay caused actual prejudice to his or defense. Issues related to the credibility of witnesses are not relevant considerations for claims of preindictment delay prejudice when they do not demonstrate how a defendant would be prejudiced at trial due to the passage of time.

Appellee also argues that he was prejudiced due to the fact that he was a juvenile at the time of the crime yet now he would be charged as an adult if prosecuted. The Eighth District Court of Appeals agreed with Appellee and concluded that he was prejudiced. *Mack, supra*, at ¶ 10 ("Mack was being prosecuted for a crime that he allegedly committed as a juvenile, despite his identity always being known."). The State submits that this fact should not have been considered in determining whether Appellee was prejudiced due to pre-indictment delay.

As an initial matter, even if there was no delay in prosecuting this case, the trial court would have had the discretionary authority to prosecute Appellee as an adult. If a juvenile is charged for an offense that would constitute a felony for an adult offender, then the juvenile may be prosecuted as an adult if: (1) the juvenile was fifteen years of age or older at the time of the offense; (2) there is probable cause to believe the juvenile committed the act; (3) after an investigation, the court determines that the juvenile is not amenable to care or rehabilitation; and (4) the safety of the community may require restraint of juvenile for a period extending into his adult years. *See* former R.C. 2151.26. More importantly, R.C. 2151.26 would have favored prosecuting Appellee as an adult due to the fact that the alleged crimes were offenses of violence. *See* former R.C. 2151.26 ("if the court determines that the act alleged * * * would be an act of violence, as defined in section

2901.01 * * * that fact shall be considered by the court in favor of transfer, but shall not control the decision").

Furthermore, statutory law allows a defendant who allegedly commits a crime as a juvenile to be prosecuted as an adult. Pursuant to R.C. 2151.23 (I), if "a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult," the juvenile court lacks the jurisdiction to charge that same individual if charges are brought after he or she attains twenty-one years of age. R.C. 2151.23(I). Furthermore, this statute provides that an offender who commits an act as a juvenile yet now is over the age of 21 should be tried in an adult court. This Court has already held that the "General Assembly expressly intended that statutory amendments that effectively removed anyone over 21 years of age at time of apprehension from the jurisdiction of the juvenile court, regardless of the date on which the person allegedly committed the offense * * *." *Walls, supra.* Here, Appellee committed the offense when he was 16 years old and therefore the juvenile court no longer had jurisdiction of his case 5 years after the offense. This Court has held that this statute is constitutional and expressly allows for prosecution of adults for offenses they committed as juveniles. *Id.* Therefore, Appellee cannot demonstrate his due process rights have been violated due to prosecution as an adult.

As a final point, the trial court erred in considering this factor because it was not relevant to his pre-indictment delay claim. This issue goes directly to the credibility of the victim and should have been resolved by the ruling on the motion in *limine* filed by the State on January 27, 2014. A victim's credibility is a question for the finder of fact. In assessing the credibility of witnesses, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). In this case, the trial court

relied almost exclusively on factors that reflect more on the credibility of the victim than the prejudice to the defendant. These factors included the age of the defendant at the time of the offense and the prior sexual relationship between the defendant and the victim. The State submits that these factors were not relevant considerations for dismissing the case. Therefore, this Court should accept jurisdiction of the State's second proposition of law because review of this matter will allow this Court to better outline the scope of defendants' due process rights in claims of pre-indictment delay prejudice.

CONCLUSION

The State respectfully asks this Court to accept this appeal to clarify defendants' due process rights when exercised in the context of preindictment delay claims. If Appellee opposes jurisdiction by claiming that he was in fact prejudiced by the loss of evidence or testimony, the State encourages this Court to carefully review the record, which is devoid of any concrete, particularized and specific proof that demonstrates prejudice to Appellee due to lost evidence. The dismissal of this case was error. However, it is important to point out that the issues inherent in this case extend far beyond a mere claim of error correction. This Court should accept jurisdiction of this appeal given the impact *Mack* will have upon the litigation of hundreds of CODIS rape cases in Cuyahoga County and Ohio.

Respectfully Submitted,

TIMOTHY J. McGINTY (#0024626)
Cuyahoga County Prosecutor

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SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent via regular U.S. mail or electronic service this 15th day of December, 2014 to John Spellacy, 526 Superior Ave., N.E., 1540 Leader Building, Cleveland, Ohio 44114.

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Supreme Court of Ohio Clerk of Court - Filed December 15, 2014 - Case No. 2014-2149

Court of Appeals of Ohio

OCT 30 2014

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100965

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MICHAEL MACK

DEFENDANT-APPELLEE

CA14100965
86540839

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575712-A

BEFORE: Jones, J., Boyle, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 30, 2014

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Cleveland, Ohio 44114

FILED AND JOURNALIZED
PER APP.R. 22(C)

OCT 30 2014

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OF THE COURT OF APPEALS
By _____ Deputy

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LARRY A. JONES, SR., J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's January 2014 judgment granting defendant-appellee's, Michael Mack, motion to dismiss the indictment due to preindictment delay. We affirm.

{¶2} In June 2013, Mack was charged with the alleged June 1993 rape of the alleged victim.[1] Mack filed a motion to dismiss the indictment, and the trial court held a hearing. At the hearing, the trial court read the statement of facts from Mack's brief, and asked the assistant prosecuting attorney if she agreed with the statement. Taking into account the state's objections, the record establishes the following:

- At the time of the alleged offense, the alleged victim was 27 years old and Mack was 16 years old.
- The alleged victim and Mack knew each other; the alleged victim and Mack's mother were neighbors and friendly with each other.
- The alleged victim immediately reported the alleged crime; she went to the hospital where a rape kit was administered. She also initially identified Mack as her rapist.
- Three detectives were assigned to investigate the case. As of the time of the hearing, the whereabouts of the three detectives were unknown.[2]

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[1]In March 1999, the Ohio General Assembly amended the statute of limitations for rape (and other crimes, including other sexually-oriented offenses) from 6 years to 20 years, and made it retroactive so long as the 6-year limitation had not expired at the time of the amendment.

[2]There were also initial responding officers. The state informed the court that it had found one officer and the officer would be available to testify.

- The case went "cold" because the alleged victim did not cooperate.
- A 911 call allegedly made by the victim was no longer available.
- In 2013, the state received notification from the Bureau of Criminal Investigations (BCI) that it matched Mack's DNA to the hospital specimen the alleged victim provided. The notification was provided as part of the Ohio Attorney General's Sexual Assault Kit Initiative.

{¶3} In his motion, Mack also alleged that in November 2013, the alleged victim admitted that she and Mack had had "consensual" sexual relations on multiple occasions prior to the time he allegedly raped her. This alleged admission, however, was not initially reported by the alleged victim.

{¶4} When asked by the court about the alleged November 2013 admission of the alleged victim, the assistant prosecuting attorney refused to confirm or deny it, citing Ohio's rape shield law.

{¶5} At the hearing, Mack contended that one of the many injustices in this case was that the alleged victim was not being prosecuted for the crimes she allegedly committed against him (statutory rape of a minor and/or unlawful sexual conduct with a minor),[3] but he was now being charged as an adult with a crime that he allegedly committed when he was a juvenile, in a situation where his identity had always been known.

{¶6} The trial court granted Mack's motion to dismiss, finding the indictment against him "very alarming" and "absolutely outrageous."

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[3]At the time of the hearing, which was held in January 2014, the 20-year statute of limitations for rape and unlawful sexual conduct with a minor had expired.

{¶7} In reviewing a decision on a motion to dismiss for preindictment delay, we accord deference to the trial court's findings of fact but engage in a de novo review of the trial court's application of those facts to the law. *State v. Copeland,* 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 10, citing *State v. Henley,* 8th Dist. Cuyahoga No. 86591, 2006-Ohio-2728.

{¶8} The Due Process Clause provides, in part, that "no person shall * * * be deprived of life, liberty or property without due process of law." "An unjustifiable delay between the commission of an offense and a defendant's indictment * * * which results in actual prejudice to the defendant, is a violation of the right to due process of law * * * ." *State v. Luck,* 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

{¶9} "To warrant dismissal on the basis of preindictment delay, a defendant must present evidence establishing substantial prejudice. Once the defendant fulfills that burden, the state has the burden of producing evidence of a justifiable reason for the delay.'" *Copeland* at ¶ 13, quoting *State v. Walls,* 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51.

> This court has previously stated that preindictment delay constitutes a violation of the constitutional guarantees of due process of law where the delay 'violates those "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* (1977), 431 U.S. 783, 790, 52 L.Ed.2d 752, 97 S.Ct. 2044 (citations omitted). This determination first requires the defendant to demonstrate that a lengthy pre-indictment delay resulted in actual prejudice to him. *Id.*, at 789. Secondly, the reason for the delay must be weighed against the prejudice arising out of it. *Id.*, at 790. *See, also, State v. Luck,*

supra, syllabus.

State v. Doksa, 113 Ohio App.3d 277, 280, 680 N.E.2d 1043 (8th Dist.1996).

{¶10} Prejudice may be established where the defendant contends that the delay resulted in the loss of witness testimony, lost memory or spoiled or destroyed evidence. *Id.* at 281. Here, the responding officers and two of the three investigating detectives were unavailable and other evidence (the 911 call) was unavailable. Further, Mack was being prosecuted for a crime that he allegedly committed as a juvenile, despite his identity always being known. We agree with Mack that he demonstrated actual prejudice.

{¶11} Thus, we must next consider the state's reason for the delay: the lack of cooperation by the alleged victim. We do not find this reason to outweigh the prejudice to Mack. As this court has held, "the delay may be found unjustifiable * * * when the state 'effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation ceased.'" *Id.*, quoting *Luck* at 158. "Moreover, length of delay is normally the key factor in determining whether a delay is justifiable." *Id.*, citing *Luck* at *id.*

{¶12} In light of the above, the state's sole assignment of error is overruled.

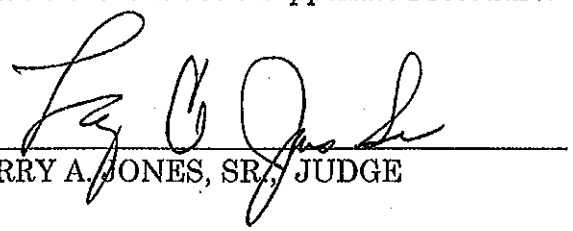
{¶13} Judgment affirmed.

It is ordered that appellee recover of appellant his 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.



LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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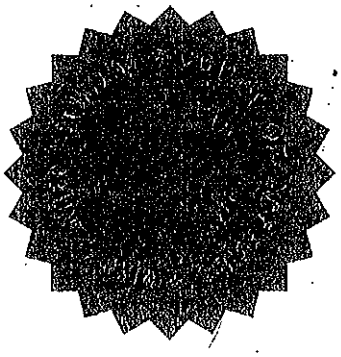
The State of Ohio, Cuyahoga County. } ss.

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 from the Journal entry dated on 10/30/14 CA 100965 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 10/30/14 CA 100965 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 30th day of October A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By R Reiman Deputy Clerk

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