

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : Case No. 2014-2149
 :
 vs. : On Appeal from the Cuyahoga
 : County Court of Appeals
 MICHAEL MACK, : Eighth Appellate District
 : Case No. CR 13-575712-A
 :
 Defendant-Appellee. :

MEMORANDUM IN OPPOSITION TO JURISDICTION

TIMOTHY J. MCGINTY, ESQ.
Cuyahoga County Prosecutor

BRETT HAMMOND (0091757)
DENISE SALERNO (0075896)

Assistant Prosecuting Attorneys
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800
(216)-698-2270 - Fax

COUNSEL FOR APPELLANT,
STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

Francisco E. Lüttecke (0082866)
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 644.1551
(614) 752.5167 - Fax
francisco.luttecke@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLEE,
MICHAEL MACK

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State’s Proposed *Proposition of Law I:*

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.6

State’s Proposed *Proposition of Law II:*

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.6

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**WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

Michael Mack's accuser misled the police in 1993 and claimed that Mack was a mere neighborhood acquaintance who forced his way into her home and raped her. When this case was indicted 20 years later, the complainant acknowledged that she was having consensual sex with Mack in 1993 despite the fact that he was then 15 and 16 years old, while she was 27. In a fair trial, the jury would have the benefit of assessing her current version of the case in light of the false statements she provided in 1993. The passage of time has made that impossible, though, because the witnesses to her 1993 deceit are no longer available. So if the state has its way and this case is allowed to go forward, the jury that decides Mack's fate will never know the whole story.

The trial court found that the delay in initiating this prosecution was fundamentally unfair and dismissed the case. The court also noted that, unlike many of the other recent CODIS hit prosecutions, the identity and location of the accused was never in doubt. In a straight-forward application of *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), the Eighth District Court of Appeals unanimously agreed. There is no need for this Court to exercise jurisdiction over this case.

Before this Court, the State of Ohio complains that the courts below erroneously concluded that Mr. Mack was substantially prejudiced by the delay, because "the record is devoid of any indication as to whether [the lost evidence] would have supported his defense." (State MSJ, p. 3) Throughout its memorandum asking this Court to accept jurisdiction over the case, the State of Ohio implies that the courts below simply presumed that Mack was prejudiced because nearly 20 years had elapsed. This implication is false.

The State's presentation of the case's underlying facts pretends that the investigation simply started after the rape kit was tested in February of 2013. Everything the State tells this Court about the case stems from interviews undertaken 20 years after the incident occurred. That narrative, however, forgets that the complainant made statements contemporaneously with the event that are inconsistent with the ones she has offered recently. Those 1993 statements were made to police and medical personnel who are not available today. That information not only undermines the credibility of the accusations themselves, but it also supports Mr. Mack's defense, that his sexual contact with the complainant was consensual. If he can't present that evidence due to the passage of time, then it is hardly speculative that he is substantially prejudiced by the delay. It is a fact.

Nevertheless, the State of Ohio has asked this Court to accept jurisdiction over this case so that it can depart from *Luck* and create a new rule for measuring pre-indictment delay prejudice (a rule that also departs from the prejudice analysis for any other claimed due process violation). Specifically, in cases where the accused is claiming a violation of his right to due process because of such delay, the State is asking this Court for a rule that would limit pre-indictment delay dismissals to that handful of cases where a jury would certainly have found that the lost evidence was exonerating. Simply put, such a requirement puts the bar too high and effectively requires a defendant to prove his innocence.

Even if this Court were inclined to contemplate such a rule, however, this would not be the case for it. As noted above, police reports and medical records prepared at the time the complainant first accused Mr. Mack of rape, document a fundamentally different account from the one she offered 20 years later. Accordingly, Mr. Mack did demonstrate the exculpatory

nature of the evidence lost, and the court's decision to dismiss this prosecution was the proper one.

STATEMENT OF CASE AND FACTS

On June 27, 2013, one day before the 20-year statute of limitations would have barred this prosecution, a Cuyahoga County grand jury issued an indictment charging Defendant-Appellee Michael Mack with two counts of rape and one count of kidnapping in connection with an incident that allegedly occurred on June 28, 1993. Mr. Mack pleaded not guilty and moved to dismiss the charges, arguing that the near 20-year delay between the State's discovery of the alleged offense and the indictment's return violated his right to due process under the State and Federal Constitutions.

On January 30, 2014, the matter proceeded to a hearing on Mr. Mack's motion. During that proceeding it became clear that, within hours of the events that ultimately spawned this prosecution, Cleveland Police knew the identity of the alleged perpetrator as well as his address. The complainant, L.R., was treated at Saint Vincent Hospital, where she submitted to a rape kit. L.R. was interviewed by police and medical personnel at the hospital. At that time, she identified Mack as her attacker. She told them that she knew Mack; he was a neighbor and she and his mother had been good friends. According to medical records, L.R. told hospital personnel that she had no prior relationship with Mack. She also claimed that she had called 911 when Mack was trying to break into her house. When he managed to get inside, he forced her to end the emergency call.

When detectives attempted to follow up on the investigation later the next day, L.R. was unavailable. Repeated attempts to meet with her failed, and ultimately police removed Mack as a suspect and closed the case. The rape kit evidence sat untested in some Cleveland Police

Department evidence locker until the spring of 2013. By the time that testing took place and the DNA matched to Mr. Mack, the police officers who investigated L.R.'s allegations had disappeared. The medical personnel from Saint Vincent's were also unavailable to be witnesses. Any recording reflecting L.R.'s 911 call and Mack's purported disruption of it had been destroyed.

In the wake of the DNA match, investigators located and interviewed L.R. She acknowledged that she had had consensual sexual relations with Mack during the same time frame that the alleged rape occurred. At the time of the incident, Mack was only 16 years old. L.R., on the other hand was 27 years old in 1993. At the motion to dismiss hearing, Mack argued that in 1993, when he was 15 and 16 years old, he had been involved in a consensual sexual relationship with L.R. In addition to the loss of evidence and witnesses the delay caused, Mack argued that it foreclosed his ability to press criminal charges against L.R. for undertaking sexual misconduct with a minor – because the statute of limitations had run.

The state opposed dismissal. Initially, it maintained that L.R. and Mack's contemporaneous consensual sexual contact was irrelevant to the 1993 rape charges; and that in any event, the rape shield statute would bar a jury from receiving this information. In addition, the State argued that since this prosecution was initiated within the statute of limitations period, the defendant needed to first demonstrate actual prejudice stemming from the delay to justify dismissal.

When it granted the motion to dismiss, the court first took issue with the prosecutor's construction of the rape shield statute, noting that it likely would not bar evidence of consensual encounters between L.R. and Mack. The court then went on to note that the circumstances surrounding this case were unique, since the police always knew the identity of the alleged

offender. “This was not a stranger rape identified through modern science. . . .Whether it’s due to the lack of motivation by the police at the time or the lack of cooperation by the victim, whatever the reason, there is no follow-up investigation.” As for prejudice, the court wondered how the defense was supposed to proceed at trial when there were no officers to cross-examine about their investigation. Ultimately, this discussion culminated in the following exchange:

THE COURT: This case is – I have to agree with defense counsel – absolutely outrageous. This is not a law school exercise where one side is told to make their best argument in favor of the side that you are supposed to be advocating. Who is the supervisor that reviewed this case? Who is in charge of reviewing this case?

MS SOLERNO: Tim McGinty.

THE COURT: He is the supervisor.

MS. SOLERNO: Tim McGinty is the head of all the CODIS unit.

THE COURT: There is no in-between? Mr. McGinty is aware of the nature of this case and has ordered you to pursue it?

MS. SOLERNO: Yes.....

The court then dismissed this prosecution.

The State appealed the dismissal and, on October 30, 2014, the Eighth District issued a unanimous decision affirming that judgment.

Specifically, the court concluded that Mr. Mack’s defense was actually prejudiced due to the loss of evidence, including most, if not all, of the witnesses to whom L.R. first reported the crime. The court also agreed with the trial court that the delay was inexcusable. That decision should remain undisturbed.

LAW AND ARGUMENT

State's Proposed *Proposition of Law I*: *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.*

State's Proposed *Proposition of Law II*: *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.*

The State's two propositions are really two different ways of stating the same issue and are best addressed in a single discussion.

There is nothing speculative about what the passage of time caused Mr. Mack to lose here. If he can't question the officers and medical personnel who spoke with L.R. in the wake of the June 28, 1993 incident, then he will not be able to demonstrate that she was not candid with them about her actual relationship with Mr. Mack. From there, his whole consent defense falters. Currently, this witness claims that she was involved in a consensual relationship with Mr. Mack in 1993; and that on the night of the incident, she had allowed Mack inside her house. At some point during that visit, he forced her to have sex in an upstairs bedroom and bathroom.

By contrast, when she reported this matter to police back in 1993, L.R. told them that Mack and another man had broken into her house at four or five o'clock in the morning. L.R. claimed that Mack dragged her upstairs and raped her, while an unidentified male held two household members "at bay." L.R. also told authorities that she had called 911 seeking emergency assistance, but Mack managed to break in and disrupt the call. According to police reports two witnesses watched as Mack beat L.R. At the hospital, an examining nurse noted no signs of bruising. L.R. told medical personnel who treated her that she knew who the attacker

was but denied any prior relationship with him. According to L.R., the attacker told her “he had been watching her.”

Those two accounts are very different.

Exposing that difference for the fact finder, however, could only happen if those individuals who witnessed and/or recorded L.R.’s statements on June 28, 1993 were available to testify. In this case, the record reflects that they were not. This created a huge problem for the defense. Mack was planning to prove that in 1993, when he was 15 and 16 years old, he was sexually involved with L.R., who was more than a decade older. When Mack’s family found out about the relationship, they threatened L.R. with prosecution for statutory rape. Mack intended to show that L.R. fabricated the June 28, 1993 rape allegation to head off her own prosecution for statutory rape. In the absence of the 1993 witnesses, Mack would have almost insurmountable difficulty presenting such a theory.

In June of 1993, when L.R. reported that Mack had raped her, the statute of limitations was six years. On March 9, 1999, the General Assembly extended it to 20 years for any case in which the six year period had not already expired. Because the six years had not yet passed when the statute of limitations was extended, the indictment in this case is technically timely – though only just.

As this case underscores, while this prosecution technically fell inside the 20-year limitations window (by one day), it hardly met the goals for creating such time limitations in the first instance. In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the U.S. Supreme Court noted that the statute of limitations is ““the primary guarantee against bringing overly stale criminal charges.”” *Marion, supra*, at 322, 92 S.Ct. 455, 30 L.Ed.2d 468, quoting *United States v. Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966). But it

went on to “acknowledge that the ‘statute of limitations does not fully define (defendants’) rights with respect to the events occurring prior to indictment,’ 404 U.S., at 324, 92 S.Ct., at 465, and that the Due Process Clause has a limited role to play in protecting against oppressive delay.” *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

In addition to clarifying *Marion*’s holding, the Court decided *Lovasco* to amplify on the case-by-case approach to pre-indictment delay claims it foreshadowed in *Marion*. When examining the particular facts of each case to determine whether a defendant should stand trial, courts are to conduct their inquiry from the perspective of the community’s standard of justice and fairness. *Lovasco*, 431 U.S. 783 at 790, 97 S.Ct. 2044, 52 L.Ed.2d 752. Using this community standard approach, and the individual facts of each case, the question becomes whether the delay departed from society’s “fundamental conceptions of justice,” and, thereby, warrants dismissal of the indictment under due process principles. *Lovasco*, 431 U.S. 783 at 791, 796, 97 S.Ct. 2044, 52 L.Ed.2d 752.

This Court found similar principles embodied in the Ohio Constitution as well as the Due Process Clause in *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984).

An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Id. at paragraph two of the syllabus. Actual prejudice is established where the defendant claims the delay resulted in the loss of witness testimony, lost memory, and/or spoiled or destroyed evidence. See, accord, *State v. Doksa*, 113 Ohio App.3d 277, 280-281, 680 N.E.2d 1043 (Cuyahoga 1996).¹

¹ Nevertheless, this Court has acknowledged that damage to the defendant’s ability to present a defense or counter the prosecution’s case incurred by delay is the most difficult “because time’s

Despite the State’s protestations to the contrary, the Eighth District did not conclude that Mr. Mack was entitled to a presumption of prejudice simply because it took 20-years for the Cuyahoga County Prosecutor’s Office to issue an indictment in a case where they knew precisely who and where the accused was. When it affirmed the dismissal in this case, the Eighth District explicitly applied the actual prejudice standard before it went on to list a few of the ways the delay had actually prejudiced Mack.

The court noted that the passage of time requires Mack to stand trial as an adult, yet allows his accuser to evade prosecution for having had sex with a minor in 1993. But more importantly, the court noted that Mack’s ability to defend himself was irreparably damaged by the unavailability of several witnesses. In *Walls, infra*, this Court noted “the determination of ‘actual prejudice’ involves ‘a delicate judgment based on the circumstances of each case.’” *State v. Walls*, 96 Ohio St.3d 437, 775 N.E.2d 829, 2002-Ohio-5059 at ¶ 52, quoting *Marion*, 404 U.S. 307 at 325, 92 S.Ct. 455, 30 L.Ed.2d 468. Importantly, the trial court must consider “the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay.” *Id.*

Construing what constitutes prejudice in a different context, this Court has recently noted that an error is sufficiently prejudicial to justify a new trial where it impacted the verdict. See, *State v. Morris*, 141Ohio St.3d 399, 2014-Ohio-5052, and *State v. Harris*, 2015-Ohio-166; 2015 Ohio LEXIS 44 (concluding that an error was prejudicial if it impacted the verdict). Because the delay in the instant case caused the loss of evidence that would have supported the defense’s theory while undercutting the prosecution’s case, the prejudice was sufficient to warrant the

erosion of exculpatory evidence and testimony can rarely be shown.” *State v. Selvage*, 80 Ohio St.3d 465, 469, 687 N.E.2d 433 (1997); quoting from *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528, fn. 1 (1992) (referring to delay in the constitutional speedy trial context).

cases dismissal. This Court should adhere to its own well settled jurisprudence and decline the State's invitation to deviate from it.

CONCLUSION

A thorough review of this record demonstrates that the Eighth District got it right when it affirmed the trial court's dismissal of this 20 year old rape prosecution because its pursuit would violate Mr. Mack's right to due process and a fair trial. For the foregoing reasons, Appellee Michael Mack asks this Court to decline jurisdiction over this matter because it does not present a substantial constitutional or public policy question for review.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

/s/ Francisco E. Lüttecke

Francisco E. Lüttecke (0082866)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 644-1551
(614) 752-5167 - Fax
francisco.luttecke@opd.ohio.gov

Counsel for Defendant-Appellee Michael Mack

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon Brett Hammond and Denise Salerno, Assistant Cuyahoga County Prosecutors, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 8th day of May, 2015.

/s/ Francisco E. Lüttecke

Francisco E. Lüttecke (0082866)
Assistant State Public Defender

Counsel for Defendant-Appellee Michael Mack

#441621