

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-1427

STATE OF OHIO,	}	
	}	
Appellant,	}	On Appeal from the Cuyahoga County Court
	}	of Appeals, 8th Judicial District
v.	}	
	}	
DEMETRIUS JONES,	}	Court of Appeals
	}	Case No. 101258
	}	
Appellee.	}	

**APPELLEE'S MEMORANDUM
IN OPPOSITION TO JURISDICTION**

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**EXPLANATION OF WHY THE STATE’S APPEAL DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION
OR AN ISSUE OF GREAT PUBLIC INTEREST**

The State presents two propositions of law for this Court, and amicus Attorney General proffers a third. According to their rather apoplectic account, the 8th District’s decision in *State v. Jones*, 8th Dist. No. 101258, 2015-Ohio-2853, *Jones* marks an unprecedented departure from the entire body of case law on pre-indictment delay.

A more measured analysis of the court’s opinion here shows that the State argument is based on a misreading of both the opinion and the case law. As will be seen, *Jones* is not a radical re-ordering of the law on pre-indictment delay, it simply reflects the principles which lie at the core of that doctrine.

The seminal case on pre-indictment delay is *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), where the Court held that “the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” That test – that dismissal of the indictment would be warranted if the defendant showed “substantial prejudice,” and that the State’s delay in prosecution was unreasonable – was adopted by this Court in *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984).

Resolution of this case boils down to a single issue: was Jones prejudiced by the 19-year, 364-day delay in prosecuting him? (As will be seen, there is no real question as to the unreasonableness of the delay; as the prosecutor admitted before the trial court, "My understanding is [the police] made two attempts to locate [the victim]. And that is all they did.") Under the standards enunciated by the United States Supreme Court and this Court, he was.

Indeed, the prejudice to Jones is virtually identical to the prejudice to the defendant this Court found in its landmark decision on the issue of pre-indictment delay, *State v. Luck, supra*. The only reason for this Court to accept jurisdiction in this case would be to reiterate the holding of *Luck* and reject the State's exceedingly narrow reading of the prejudice prong of *Marion*.

STATEMENT OF THE CASE AND FACTS

On August 30, 2013, one day before the statute of limitations was to expire, a Cuyahoga County grand jury returned an indictment against Demetrius Jones, charging him with rape and kidnapping for an incident which allegedly occurred on September 1, 1993. Jones filed a motion to dismiss for pre-indictment delay. The court conducted a hearing and granted the motion.

No testimony was submitted at the hearing; instead, both parties relied on various documents. According to a 20-year-old, 5-page police report, S.W. claimed that Jones raped her in a bedroom of his mother's apartment on September 1, 1993. There was no dispute as to the identity of her alleged assailant: she identified him by name, both to the police and at the hospital. Other aspects of her story indicated a relationship between the two: the reason that she was in Jones' mother's apartment is that Jones had told her to meet him there. According to what S.W. told the police, Jones' mother was also in the apartment.

The investigating detective stopped by S.W.'s home twice in the next week. His knocks on the door went unanswered, and so he marked it "wrong address" and closed the file. The police made no further efforts to contact S.W., and never attempted to locate Jones or his mother, or even went to their address.

A rape kit was obtained at the hospital, and turned over to the police. On September 20, 1993, the kit was placed in the property room at the police department's forensic lab. There it

remained for eighteen years. It was finally tested, and a CODIS match was made with Jones, thus telling the police what they had known all along: that there had been sexual activity between Jones and S.W. on September 1, 1993.

As noted, Jones was indicted on September 19, 2013. His mother, whom S.W. had identified as a witness, had passed away two and a half years earlier.

The State appealed the trial court's ruling. On July 16, 2015, the 8th District in an *en banc* decision affirmed that ruling. *State v. Jones*, 8th Dist. No. 101258, 2015-Ohio-2853.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW NO. 1: The reasons for the delay in bringing a prosecution are never evidence of actual prejudice to the defendant where the prosecution is commenced within the statute of limitations.

The State argues here that *Jones* conflates the two prongs of the *Luck* test, allowing evidence of unreasonable delay, the second prong, as proof of the first prong, prejudice. This misconstrues the *Jones* decision, as explained by the 8th District's most recent decision on pre-indictment delay, *State v. Owens*, 8th Dist. No. 102276, 2015-Ohio-3881.¹ As the court noted there, "[o]ur decision in *Jones* does not supplant the existing standard for determining preindictment delay in favor of a new standard where we apply our own undefined concept of what is fair."

It would be a misreading of *Jones* to conclude that it abandoned the actual prejudice standard set forth in decisions by both the United States Supreme Court and the Ohio Supreme Court. The court's statement that claims of actual prejudice would be evaluated in terms of basic concepts of due process and fundamental justice was unremarkable because due process, upon which all claims of preindictment delay are based, is concerned with fundamental conceptions of justice which lie at the base of our civil and political institutions. In other words,

¹ The author of the opinion was one of the members of the majority in *Jones*.

the state's right to bring a criminal prosecution at any time during the statute of limitations period is balanced by fundamental due process conceptions of liberty that prohibit the state from exercising that right in a manner that would be so unfair as to deprive the defendant of due process of law. [¶¶8-9; internal quotation marks and citations omitted.]²

In short, the State's proposition of law is correct. Its contention that *Jones* is contrary to that proposition is not.

APPELLANT'S PROPOSITION OF LAW NO. 2: In order to prevail on a claim of pre-indictment delay, a defendant must first 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.

AMICUS ATTORNEY GENERAL'S PROPOSITION OF LAW: To prevail under a theory that pre-indictment delay violated due process, a defendant must first show actual prejudice with specific, concrete allegations supported by the evidence; vague, speculative, or conclusory allegations do not suffice.

Had this case been tried, the key issue would have been whether the sexual activity between Mr. Jones and S.W. was consensual; in other words, whether the State had proved beyond a reasonable that S.W. had acquiesced due to Mr. Jones' use of force. This was not a "stranger rape," where a defendant's claim that the victim consented is incredulous; there is no question that there was relationship between the two. There was no forensic or medical evidence corroborating the element of force. No pictures had been taken of the apartment, which might have indicated the presence – or absence – of a struggle. Whatever clothes Ms. Jones had been wearing that night, which also might have been provided evidence or lack of evidence of force, were long gone. This was the classic "he said/she said" case.

² In *Owens*, the court affirmed the trial court's denial of the motion to dismiss for pre-indictment delay.

For that reason, people who were present at the time of the incident, or people who could provide evidence about the extent of the relationship between the two, would be critical witnesses. Patricia Watkins, Mr. Jones' mother, satisfied both of those criteria. She died two and a half years before Mr. Watkins first became aware that he was even being charged with a crime, and well before the police undertook a second investigation – for all intents and purposes, what was actually the first investigation – into the incident.

The arguments of appellant and amicus can be distilled to a single assertion: In order to prove actual prejudice, Jones was required to prove what his mother would have testified to had she not died two years earlier. This view is premised on the belief that the prejudice test requires “specific, particularized, and non-speculate” proof that the defendant has been prejudiced. Appellant favors the Court with a two-page table purporting to show that every appellate district in Ohio, including the 8th, has articulated such a test.

There are two problems with this argument. First, the table shows no such thing. To be sure, a defendant seeking dismissal of an indictment on account of the delay in bringing it must show how the delay prejudiced him; the courts have consistently rejected such claims where the defendant alleged nothing more than the fact of the delay as a basis for seeking dismissal. See, e.g., *State v. Copeland*, 8th Dist. No. 89455, 2008-Ohio-234, ¶14 (“Copeland did not allege any prejudice other than arguing a general presumption of prejudice based on the length of the delay”); *State v. Wade*, 8th Dist. No. 90029, 2008-Ohio-4574, ¶47 (“Wade is not able to allege any prejudice other than arguing a general presumption of prejudice based on no more than a 14-month delay”); *State v. Bolton*, 8th Dist. No. 96385, 2012-Ohio-169, ¶30 (defendant’s only claim of prejudice was that “he could have already served a substantial portion of his sentence had he been indicted and convicted earlier”).

A closer examination of the cases cited by appellant show that many were based on similar contentions by defendants. For example, in *State v. Willis*, 7th Dist. No. 95 C.A. 237, 1997 Ohio App. LEXIS 3153, the defendant relied “solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost.” Similarly, in *State v. Flickinger*, 4th Dist. No. 98 CA 09, 1999 Ohio App. LEXIS 225, the only prejudice claimed by the defendant was that “his memory as to the events surrounding the alleged offense has faded, and. . . he could not remember any witnesses present at the scene of the alleged offense.” In *State v. Tullis*, 10th Dist. No. 04-AP-333, 2005-Ohio-2205, the court rejected defendant’s claim where the only prejudice he could show was the “the delay made it difficult for him to locate and present relevant witnesses.”

In some of the cited cases, the defendant did indeed argue more than the possible prejudice inherent in every delayed prosecution, but the court examined the supposedly missing evidence and concluded that it was not exculpatory at all. In *State v. Walls*, 12th Dist. No. CA99-10-174, 2000 Ohio App. LEXIS 5779, the defendant claimed that the coroner’s investigator, who took the decedent’s body temperature, had died, resulting in the defendant’s inability to question the investigator regarding that, in order to hopefully establish an alternate time of death. The court noted that the investigator’s report on that issue had been introduced in evidence, and was used by the coroner in his testimony. In *State v. Malone*, 9th Dist. No. 10CA009754, 2011-Ohio-2445, the defendant claimed that he was prejudiced by the death of his uncle and the disappearance of one of the laborers supposedly at the scene of the crime; the court noted that other family members presented the same testimony the uncle would have, and the other laborer testified.

In *State v. Christman*, 7th Dist. No. 786, 1999 Ohio App. LEXIS 2486, the defendant

argued that he was prejudiced by the death of his mother. While this might seem similar to the situation in the case at bar, it is not. Christman was accused of killing his wife, and claimed that she had disappeared at a mall. The court noted that Christman didn't even contend that his mother was at the mall; how her testimony would have helped him was a mystery. Here, of course, Jones' mother is placed at the scene of the supposed crime not by Jones, but by the alleged victim herself.

The State relies heavily on decision in *State v. McFeeture*, 8th Dist. No. 100434, 2015-Ohio-1814, and its assertion that "proof of actual prejudice must be specific, particularized, and non-speculative." Again, though, the attempt to fit that into the framework of this case fails. McFeeture claimed first that the two medical examiners, Dr. Balraj and Dr. Miller, were no longer employed by the County Coroner's office and did not testify at trial. But another doctor had performed the autopsy, "and was personally involved in the homicide investigation of the coroner's office. He provided lengthy testimony regarding both the change and manner of death and was subject to extensive cross-examination." The opinion's statement that "McFeeture claims prejudice but does not offer specific or particularized proof of actual prejudice resulting from the absence of Balraj and Miller from trial" is substantially broader than necessary; a statement more fitting to the facts would be that McFeeture did not offer *any* proof of actual prejudice.

The same can be said of McFeeture's argument that the initial investigator, Detective Moore, had retired by the time of trial and didn't testify. The court found that "McFeeture does not demonstrate how any potential testimony would have been exculpatory or how his absence otherwise prejudiced her."

Finally, it should be noted that in several cases cited by the State, any statements

regarding prejudice are *dicta* because the court found there was a justifiable reason for the delay. See *State v. Robinson*, 6th Dist. No. L-06-1182, 2008-Ohio-3498 (fact that more than half the evidence was unknown until a year before indictment justifiable reason for delay); *State v. Malone, supra*, 2011-Ohio-2445 (delay was caused by defendant's basically going into hiding to avoid arrest.

The second problem with this argument is that, rather than breaking new ground, the *Jones* opinion is in line with this Court's decision in *State v. Luck, supra*. The analysis of prejudice in *Luck* focused on a witness named Cassano, who died in the 15-year interim between the crime and the indictment. Luck, accused of murder, told the police that Cassano was in the apartment at the time of the killing, and was "the one person who could have helped her." The court found that this, and the loss of all the witness interviews and statements, demonstrated actual prejudice.

The similarities between *Luck* and this case are striking. In fact, the court's observation in *Luck* could just as easily be applied to this case:

In the instant case, the state delayed prosecuting the defendant because of an alleged "error in judgment," which led to a halt in the Lakewood Police Department's active investigation of Tietjen's death. This investigation remained at a stand-still for approximately fifteen years. During that time, witnesses died, memories faded, and evidence was lost. When the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence – its case being substantially the same as it had been since 1968. For these reasons, we find that the pre-indictment delay in the instant case is unjustifiable.

15 Ohio St.3d at 158-159.

The State contends here that we don't know whether Jones' apartment would have indeed shown signs of disarray, had the police bothered to go there to investigate the alleged crime, and that we don't know whether the clothes would have been ripped, as the alleged victim claimed,

had the police retained them. It also contends that we don't know what the mother would have testified to; in its brief to the court below, it noted that "when defense counsel was asked by the trial court what the mother would have testified to[,] defense counsel was unable to provide even one detail of the mother's testimony and in fact admitted that he did not really know what the witness would have testified to."

The same could've been said in *Luck*: the opinion offers no indication of what Cassano would've testified to, and what was contained in the missing witness interviews and statements is a subject only for conjecture. This Court nonetheless found that this was sufficient to establish prejudice.

And the 8th District's finding of prejudice in similar circumstances here is unassailable. Of course defense counsel could not provide any details of the mother's testimony, and admitted that he didn't know what she would have testified to; she didn't give any testimony, she was never asked about the incident because nobody knew Mr. Jones was going to be charged with the crime until 20 years later, and we don't know what she would have testified to because she was dead. We know that she was at the scene of the crime; the alleged victim places her there. We know that she would have been able to give relevant evidence regarding the relationship between Jones and S.W.; after all, S.W. went to the mother's apartment. We know that she would have been able to give relevant evidence about the alleged victim's supposed screams for help; S.W. claims that the mother ignored them.

Obviously, a defendant cannot be expected to tell a court what a dead person would have said in response to questions the person was never asked. Here, Mr. Jones presented the court with the name of a witness who was at the scene when the incident occurred, a witness who would have given clearly relevant evidence as to whether it was indeed rape. That witness had

died, solely due to the State's sloth in prosecuting this case. If that is not sufficient to establish specific prejudice, it is difficult to imagine what might be.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest or a substantial constitutional question. Appellee submits that this Court should deny jurisdiction.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to Jurisdiction was hand-delivered to offices of the Attorney for Appellant/Cross-Appellee, Brett S. Hammond and Daniel T. Van, Assistant Prosecuting Attorneys, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113, and by ordinary U.S. Mail, postage prepaid, to the Attorneys for Amici Curiae Joseph T. Deters and Ohio Prosecuting Attorneys Association, Joseph T. Dieters, Hamilton County Prosecutor, and Rachel Lipman Curran, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, and the Attorneys for Amicus Curiae Ohio Attorney General Mike Dewine, Eric E. Murphy and Samuel C. Peterson, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 30th day of September, 2015.

/s/Russell S. Bensing
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