Supreme Court of Ohio Clerk of Court - Filed February 08, 2016 - Case No. 2015-1427

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2015-1427
Plaintiff-Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
vs.	:	
DEMETRIUS JONES	:	Court of Appeals Case Number 101258
Defendant-Appellee	:	

BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF STATE OF OHIO'S MERIT BRIEF

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STATE OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") offers this amicus memorandum in support of the State of Ohio's Memorandum in Support of Jurisdiction on Propositions of Law 1 and 2 in its appeal of the Eighth District Court of Appeals' decision in *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: "To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members."

Amicus has a great interest that the proper standard of review for dismissal as a result of prejudicial preindictment delay be consistently and uniformly interpreted and enforced in all districts of the State of Ohio. This Court and other Ohio courts require defendants to first show that they have suffered actual prejudice resulting in a violation of their right to due process of law, and only then consider the cause of any delay. This is true even if the State delayed indictment for a significant period of time. Without this long-standing rule, the State's power to enforce the criminal code will be severely hampered. The decision of the Eighth District to the contrary in *Jones* is properly reversed.

STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of case and facts contained in the State of Ohio's Merit Brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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.

Even though the State waited 20 years to indict him, the defendant must show that he suffered prejudice as a result of the delay before a court may even consider its cause, let alone dismiss the indictment on due process grounds.

In *State v. Luck,* this Court explained that "pre-indictment delay resulting in actual prejudice to a defendant 'makes a due process claim concrete and ripe for adjudication.'" But, "proof of actual prejudice, alone, will not automatically validate a due process claim, and the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." *State v. Luck,* 15 Ohio St.3d 150, at 154, 472 N.E.2d 1097, at 1102 (1984), *citing United States v. Lovasco,* 431 U.S. 783, at 789, 97 S.Ct. 2044, at 2048, 52 L.Ed.2d 752 (1977). The defendant bears the burden of first establishing actual prejudice from the delay; only then must the State show evidence of a justifiable reason for the delay. *State v. Whiting,* 84 Ohio St.3d 215, at 217, 702 N.E.2d 1199, at 1201 (1998), *citing Luck,* at 158. The court then engages in a balancing test, evaluating the prejudice in light of the state's reason for delay. *Id*. at 154. There is no reason to alter this long-standing rule.

Even with such clear direction, the Eighth District Court of Appeals failed to apply the balancing test required for allegedly unjustifiable delay. This Court has said: "It would be unwise to adopt a rule requiring the commencement of prosecution whenever there is 'sufficient evidence to prove guilt beyond a reasonable doubt.'" *Luck,* at 158. But that is exactly what the Eighth District has done in this case. Even if the court had properly considered the second prong, this Court has at least implied that a delay is prejudicial only if the State uses it to gain a tactical advantage or if the State fails to timely proceed through negligence or error. *Id*. at ¶ 98.

In *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, the Eighth District acknowledged that the defendant must show that the State delayed prosecution for some "impermissible reason." *Owens*, at ¶ 2. Such reason would be a "government abuse of the statute of limitations." *Id*. at ¶ 5. The court said, "*Lovasco* makes clear that 'judges are not free, in defining due process, to impose on law enforcement officials out personal and private notions of fairness and to disregard time limits that bind judges in our judicial function.'" *Id*. at ¶ 9.

Still, when the court considered *Jones*, it ignored the legislative intent to provide a long period of time within which the State could indict a defendant for rape. The court clearly erred.

> **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.**

A court examining a defendant's preindictment delay claim cannot ignore the evidentiary value of DNA simply because the victim knew her attacker. Here, the delay in commencement of prosecution against the defendant does not "violate those 'fundamental concepts 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.'" *See Luck*, at 159.

This Court recently reiterated *Luck*'s two-step analysis in *State v. Adams*, ___ N.E.3d ___, 2015-Ohio-3954. The Court recognized that the "Due Process Clause of the Fifth Amendment provides *limited* protection against preindictment delay." *Id*. at ¶ 97 (emphasis added). The defendant "must present evidence establishing a substantial prejudice to his right to a fair trial." *Id*. at ¶ 98. The Court went on to say that "[t]he burden upon a defendant seeking to prove that preindictment delay violated due process is 'nearly insurmountable.'" *Id*. at ¶ 100.

In *Adams*, this Court found that the death of a potential witness "can constitute prejudice, but only if the defendant can identify exculpatory evidence that was lost and show that the

exculpatory evidence could not be obtained by other means." *Adams*, at ¶ 103, citing *Rogers*, 118 F.3d at 475. The *Adams* Court also said that "the possibility that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice." *Id*. at ¶ 105, citing *U.S. v. Marion*, 404 U.S. at 325-326, 92 S.Ct. 455, 30 L.Ed.2d 468. In *Adams*, because the defendant failed to meet his burden to show prejudice, the Court said, "it is unnecessary for us to consider the reasons for the preindictment delay." *Id*. at ¶ 107.

In this case, the Eighth District first focused on the cause of the delay in charging Jones instead of whether he suffered prejudice. The court noted that the rape kit, which was created in 1993, was not sent for testing until 2011. *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶ 10. The court also noted that the kit was returned to the Cleveland Police Department nearly one year later, and Jones was still not indicted for another year, one day before the statute of limitations had run. *Id*.

The Eighth District explicitly held that it was not applying the two-step test this Court has laid out, instead creating its own vague test of "conceptions of due process and fundamental justice standard." *Id*. at ¶ 36. Under this "standard," the court asked "whose problem should it be when we really do not know what the lost or missing evidence would have shown?" *Id*. at ¶ 40. And then, the court went on to question the rule requiring defendants to prove prejudice.

The court never required Jones to prove that he had suffered actual prejudice. And here, he failed to do so. Jones claimed that he had been interviewed by police and had said he had engaged in consensual sex with the victim; but there was no record of this alleged interview, and the State could find no evidence that the police had interviewed Jones. *Id*. at ¶ 11. That the court considered Jones' purported statement as proof of prejudice was, in itself, an abuse of discretion. Jones also claimed that his dead mother could have testified that he and the victim

were more than friends, and that she did not hear anything unusual in her home on the night of the alleged rape. *Id*. at ¶ 12. But Jones' brother, who was also in the home that night, could likely testify to the same evidence; the record is silent as to his availability as a witness. *Id*. at ¶ 41. The defendant failed to support his claim of prejudice. App. R. 4. And lastly, that the victim's clothing is missing also does not prove prejudice – if it was torn (as she indicated it was), it may have corroborated her claim of violence. *Id*. at ¶ 4. All of Jones' claims of prejudice are speculative. *See State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 56.

Instead of evaluating the cause of the delay in prosecution, the Eighth District went on to attack the evidentiary value of the State's evidence. Although this Court has held that reviewing courts should not second-guess the prosecutor's judgment of when enough evidence has been collected to charge an individual, the Eighth District said "the identity of the defendant was not an issue in this case, and the [DNA] evidence did not advance the case." *Jones*, at ¶ 42. The court went on to attack the lack of evidence that "was never collected." *Id*. at ¶ 43. Eventually, the court concluded that "the state merely failed to take action for a substantial period." *Id*. at ¶ 46.

That the Eighth District ignored the evidentiary value of DNA evidence – even when a defendant's identity is known – shows that its decision was arbitrary. This Court need only look at cases of "he said / she said," that lack the added weight of DNA evidence, and understand the significance of Jones' DNA in the likelihood of a rape conviction. And here, the court noted the criminal history of the victim (thereby impugning her credibility). *Id*. at ¶ 9. The testing of the victim's rape kit was new evidence.

The Eighth District's decision in this case veers far from this Court's previous standard of review. The Court should reaffirm the two-step evaluation of *Luck*, *Whiting* and *Walls*.

The impact of the decision in *Jones* is significant.

The reach of the *Jones* decision has already been commented on by some in Cuyahoga County. In fact, Russ Bensing, Jones' own defense attorney, has noted:

> [T]he DNA evidence added nothing to the State's case: Jones had been identified by the victim from the outset.
>
> *Jones* certainly isn't a get-out-of-jail-free card for any defendant in a cold case rape. Most of those cases involve "stranger rapes," and there the DNA evidence is virtually dispositive: it not only proves identity, it confirms that sexual activity took place. If your DNA is found in someone you didn't know, you got some 'splainin' to do. Here, though, there was a valid basis for a claim that the sex was consensual.
>
> In fact, it's tempting to suggest that *Jones* is too fact-driven to be of broad application. I don't think so. First, it's an *en banc* determination: this is now unquestionably the law in the 8th District. Second, its rejection of the "exculpatory evidence" standard is huge: for that reason alone, *Jones* is the most defendant-friendly Ohio decision on pre-indictment delay. What you're able to make of it in a particular cases depends on the facts, but when isn't that true in appeals? The bottom line is that the law in this area is a whole lot better than it was two weeks ago.
>
> Russ Bensing, *Pre-indictment delay* (July 24, 2015), http://briefcase8.com/2015/07/pre-indictment-delay.html (accessed August 28, 2015).

As Bensing notes, the fact that the Eighth District has abandoned the long-standing rule set out by this Court is important. Not only did the court wholly discount the value of the State's evidence, it also was done through an *en banc* opinion – typically a persuasive source when considered by other appellate courts.

The Eighth District has, in some ways, retreated from its decision in *Jones*. In both *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, and *State v. Banks*, 8th Dist.

Cuyahoga No. 102576, 2015-Ohio-5418, the court required the defendants to prove actual prejudice. But in *Owens*, the court claimed "[i]t 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." *Owens*, at ¶ 8. The court went on to say that the State cannot exercise its right to bring a criminal prosecution at any time during the statute of limitations that would be unfair. *Id*. In *Jones*, the court differentiated its applied standard from the "exculpatory evidence standard." *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶ 36. This Court must explicitly state that there is only one standard to be applied.

CONCLUSION

The appropriate test to determine whether a defendant's due process rights have been violated by preindictment delay is to first evaluate whether the defendant has suffered prejudice, and to then balance that prejudice against the cause of the delay. The Eighth District wrongly applied a more stringent and vague standard of review. The OPAA urges this Court to reverse the decision of the Eighth District below.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Brief of Amicus Curiae in Support of State of Ohio's Merit Brief, by United States mail, addressed to Russell S. Bensing, 1350 Standard Building, 1370 Ontario Street, Cleveland, OH 44113, counsel of record, this 8th day of February, 2016.

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