Supreme Court of Ohio Clerk of Court - Filed March 29, 2016 - Case No. 2015-1427

IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE DEMETRIUS JONES

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STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Defendant-Appellee Demetrius Jones.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency charged with the task of representing defendants in criminal cases throughout the State of Ohio. In addition to trial and appellate advocacy, OPD also focuses its efforts on positively influencing Ohio statutory law and procedural rules. When necessary, OPD is determined to change laws, rules, and practices in order to provide a more effective and efficient defense system.

OPD's interest in the instant case is the clarification and resolution as to what constitutes a prejudicial pre-indictment delay. More specifically, this Court should decide which standard—the "exculpatory evidence standard" or the "conceptions of due process and fundamental justice standard"—applies in determining whether prejudicial pre-indictment delay has occurred. To leave this question unresolved could potentially expose defendants throughout Ohio to criminal prosecution long after the time an offense is alleged to have occurred. Most would agree that the "[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive a defendant of witnesses, and otherwise interfere with his ability to defend himself." *United States v. Marion*, 404 U.S. 307, 321, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). The clarification of this issue is one of great importance to defendants in Ohio and of great importance to OPD.

Additionally, in its amicus brief, the Ohio Attorney General (AG) argues that pre-indictment delay claims can only be raised after the defendant's trial has concluded. It is an assertion that, if adopted by this Court, would violate a defendant's due process rights. As such,

if this Court were to adopt the AG's position, defendants throughout Ohio would be subjected to the expense of a trial before they could advance even the most obvious prejudicial pre-indictment delay claims.

ARGUMENT

PROPOSITION OF LAW

Pre-indictment delay claims may be raised through a pre-trial motion to dismiss the indictment.

A. The AG's reliance on *MacDonald* is misplaced, as it is not relevant to this case.

In its amicus brief, the AG quotes the Supreme Court of the United States in *United States v. MacDonald*, 435 U.S. 850, 858, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) ("Before trial, 'an estimate of the degree to which delay has impaired an adequate defense tends to be speculative…'"). Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Appellant, p. 9. However, the AG's reliance on *MacDonald* is misplaced. Contrary to the AG's assertions, *MacDonald* does not support its argument for prohibiting pre-trial motions regarding pre-indictment delay. *MacDonald* presented a very different question: whether a criminal defendant in federal court may take an interlocutory appeal from the denial of a pre-trial motion to dismiss based on a constitutional speedy-trial violation. *MacDonald* at 863. In that context, the Court held that an interlocutory appeal would not be appropriate, in part because the facts adduced at trial may be helpful to the appellate court. *Id.* at 861. Toward that end, the Supreme Court noted that it was entirely possible for a defendant to "successfully establish a speedy trial claim before trial." *Id.* at 861, fn. 8. Thus, while the AG wants *MacDonald* to stand for the proposition that delay-related motions cannot be reviewed before trial, *MacDonald* says quite the opposite.

B. This Court's pre-indictment delay cases involved pre-trial motions to dismiss the indictment, a procedure this Court has approved.

In *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), the defendant filed a pre-trial motion to dismiss the indictment based on a 15-year delay. The trial court held a hearing on the motion, during which defense counsel enumerated various prejudicial factors resulting from the delay, and the State presented other evidence against the defendant. *Id.* at 157. The trial court granted the motion and the State appealed. *Id.* Based on the evidence presented at the pre-trial hearing, this Court, rather forcefully, concluded that the defendant was "obviously prejudiced" by the lost evidence. *Id.* at 158. After finding that there was no justifiable reason for the delay, this Court held that the delay would "effectively deprive the defendant of her right to due process of law under Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution *should this case proceed to trial*." (Emphasis added). *Id.* at 159.

Luck thus undermines both of the AG's arguments against pre-trial review of pre-indictment delay claims. First, the AG asserts that evaluating the prejudicial effect of missing evidence "is difficult before trial." Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Appellant, p. 9. But this Court had no such difficulty in *Luck*, concluding that the defendant was "obviously prejudiced." *Luck* at 158. And second, the AG argues that subjecting a defendant with an obviously winning pre-indictment delay claim to the delay and expense of a trial does not violate his due process rights because "the deprivation of that right will normally occur only by conviction, and not simply by trial itself." Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Appellant, p. 9. This Court reached precisely the opposite conclusion in *Luck*, holding that the defendant's due process rights would be violated "should this case proceed to trial." *Luck* at 159.

This Court reiterated that conclusion in *State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998). In that case, the defendant filed a pre-trial motion to dismiss the indictment based on a 14-year pre-indictment delay. *Id.* The trial court held a hearing on the motion and concluded that the defendant had demonstrated actual prejudice as a result of the delay, but incorrectly concluded that he also had the burden of proving that the delay was unjustified. *Id.* at 217. After trial, defense counsel asked the trial court to reconsider the motion. *Id.* The court did so, applying the correct burden-shifting test, and granted the motion. *Id.* The State appealed, arguing that it should get a second chance at justifying the delay. The Second District Court of Appeals accepted that argument and remanded the case for a new hearing. *Id.*

This Court reversed the Second District and affirmed the trial court's dismissal of the indictment. *Id.* at 215, 218. This Court held that the defendant's pre-trial motion to dismiss should have been granted after the first motion hearing. *Id.* at 218 The State's reliance on the trial court's incorrect standard upon reconsideration was irrelevant. *Id.*

Thus, *Whiting* is not simply a case where this Court reviewed a pre-indictment delay claim without consideration of the proper trial-court procedure. Because the defendant raised his due process claim both before and after trial, this Court had the opportunity to adopt the AG's position that pre-indictment delay claims may only be reviewed post-trial. Instead, this Court expressly ruled that the defendant's motion should have been granted *before the trial*. *Id.* at 218.

C. The cases cited in the AG's amicus brief demonstrate that a pre-trial motion to dismiss is the proper procedure to challenge pre-indictment delay.

The AG cites 26 pre-indictment delay cases to support its proposed standard for evaluating prejudice, one from each federal circuit and at least one from each Ohio appellate district other than the Eighth District. Brief of Amicus Curiae Ohio Attorney General Michael

DeWine in Support of Appellant, at p. 7-8. In nearly all of those cases, the defendants raised the pre-indictment delay claim through a pre-trial motion. None of the Ohio or federal courts objected to that procedure. As in *Luck*, many cases reached the courts of appeals after the trial court granted the pre-trial motions to dismiss, leaving the courts with no trial record to review when evaluating prejudice. *E.g.*, *State v. Collins*, 118 Ohio App.3d 73, 691 N.E.2d 1109 (2d Dist.1997); *State v. Zimbeck*, 6th Dist. Fulton No. F-10-001, 2011-Ohio-2171; *State v. Cochenour*, No. 98CA2440, 1999 WL 152127 (4th Dist. March 8, 1999); *United States v. Jackson*, 446 F.3d 847 (8th Cir.2006). That procedural posture posed no problems for those courts. Several federal cases involved appeals from the denial of a motion to dismiss following a conditional guilty plea, again leaving the appellate court with no trial record. *United States v. Ismaili*, 828 F.2d 153 (3d Cir.1987); *United States v. Butz*, 982 F.2d 1378 (9th Cir.1993). And again, the courts had no difficulty evaluating the pre-indictment delay claims.

The AG's amicus brief asks this Court to mandate a procedure for raising pre-indictment delay claims that this Court rejected in *Luck* and *Whiting* and that the overwhelming majority of Ohio and federal courts do not follow. This Court should reject that invitation.

CONCLUSION

A pre-indictment delay claim may be raised through a pre-trial motion to dismiss the indictment. To adopt the AG's argument would mandate a procedure that this Court has rejected in *Luck* and *Whiting*. Accordingly, the Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE DEMETRIUS JONES was sent by ordinary U.S. mail, postage prepaid, to Brett Hammond and Daniel Van, Attorneys for Appellant State of Ohio, 1200 Ontario Street, 9th Floor, Cleveland, OH 44113; Eric E. Murphy and Samuel C. Peterson, Attorneys for Amicus Curiae Ohio Attorney General Michael DeWine, 30 East Broad Street, 17th Floor, Columbus, OH 43215; Rachel Lippman Curran, Attorney for Amicus Curiae Ohio State Prosecutor's Association and Hamilton County Prosecutor Joseph T. Deters, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202; Robert L. Tobik, Erika B. Cunliff, Cullen Sweeney, and Jeffrey Gamso, Attorneys for Amicus Curiae Cuyahoga County Public Defender and Cuyahoga County Criminal Defense Lawyers Association; Georgia E. Yanchar and Alexander B. Reich, 1405 East Sixth Street, Cleveland, OH 44114, Kevin P. Martin, 53 State Street, Boston, MA 02109, and Alexandra D. Valenti and Brigid M. Morris, 62 Eighth Avenue, New York, NY 10019, all attorneys for Amicus Curiae Joyful Heart Foundation, Aequitas: The Prosecutors' Resource on Violence Against Women, Rape Abuse Incest National Network, Ohio Alliance to End Sexual Violence, and National Alliance to End Sexual Violence, this 29th day of March, 2016.

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