

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-2043

STATE OF OHIO,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	On Appeal from Cuyahoga
)	County Court of Appeals
MICHAEL JENKINS)	Eighth Appellate District
)	
Defendant-Appellee.)	C.A. Case No. 102462

BRIEF IN OPPOSITION TO MOTION FOR LIMITED REMAND

Timothy J. McGinty (#0024626)
Cuyahoga County Prosecutor

DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR APPELLANT

Stephen P. Hardwick (#0062932)
Assistant Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
stephen.hardwick@opd.ohio.gov

COUNSEL FOR APPELLEE

BRIEF IN OPPOSITION TO MOTION FOR LIMITED REMAND

Michael Jenkins is the co-defendant of Oscar Dickerson. Jenkins did not avail himself of a direct appeal of his conviction. He now seeks to capitalize off of his co-defendant's successful appeal in which a split panel of the Eighth District vacated the co-defendant's conviction. The panel that decided the State's appeal in *State v. Jenkins*, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583 is the same panel that vacated his co-defendant's conviction in *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807.

However, the Eighth District's ruling was erroneously based upon nothing more than speculation as to what could have happened had a timely motion to dismiss on pre-indictment delay grounds been filed. Moreover, a motion for reconsideration and a motion for en banc reconsideration is pending in Oscar Dickerson's case, and the State has filed for to stay the execution of judgment in Dickerson's case. In the case below, the State timely appealed Jenkins sentence and it never occurred to Jenkins to file a cross-appeal or a separate appeal in order to perfect an appeal of his conviction. The Eighth District affirmed the sentence, and the State appealed to this Court. On March 23, 2016, Jenkins filed a motion for a limited remand; however as of March 23, 2016 this Court granted jurisdiction on the State's proposition of law.

The Eighth District in *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807, found that trial counsel was ineffective for failing to file a timely motion for pre-indictment delay, and remanded the case to the trial court with instructions to vacate the convictions. *Dickerson*, at ¶55. The Eighth District did not give the trial court the option to litigate the pre-indictment delay issue. The Eighth District's determination that under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), paragraph two of the syllabus, that there was a "reasonable probability of a different outcome" based upon its own speculation as to what the trial court would

have done had a timely motion for pre-indictment delay been filed. The majority also appeared to be influenced by its own en banc decision in *State v. Demetrius Jones*, 2015-Ohio-2853, 35 N.E.3d 606 (8th Dist. Cuyahoga), accepted for review, 143 Ohio St. 3d 1542, 2015-Ohio-4633, 40 N.E.3d 1179, a case the majority acknowledged hadn't even been decided when Oscar Dickerson was prosecuted. *Dickerson* at ¶53. The majority essentially held that any motion to dismiss would have been granted and would have been affirmed on appeal. As a result the Eighth District ordered that Dickerson's convictions be vacated, without an opportunity for the trial court to even consider a motion to dismiss on pre-indictment delay grounds. *Id* at ¶55. The State submits that Jenkins should not be allowed at this time to avail himself of an opportunity to evade his conviction. The important issues of pre-indictment delay are currently being litigated before this Court. Jenkins convictions, like Dickerson's, must stand. The State notes that its opposition to the motion for limited remand does not preclude Jenkins from seeking a delayed appeal once this matter has been disposed of in due course. Accordingly, Jenkins does have a remedy of requesting a delayed appeal – the State submits that Jenkins cannot do so at this time given this Court's acceptance of this case.

SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

Although not discussed in the opinion in *State v. Jenkins*, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583, the State cites the facts as discussed in the appellate decision from Oscar Dickerson's direct appeal.

Oscar Dickerson and his co-defendant Michael Jenkins for the rape of J.R., which occurred on July 2, 1994 when J.R. was 16 years old. J.R. admitted she was drinking and smoking marijuana that day and that at some point during that night she left her boyfriend's house to take an approximately 40-minute walk to her home. *Dickerson*, ¶6. J.R. testified that at some point, a car with three males inside approached her. The car drove past her, circled back a few times and

finally approached her after she tried to wave them off. *Id.* at ¶7-8. J.R. testified that the car had two younger black males and one older white male who was driving the car. She did not know any of them. She kept walking to avoid the men, but one of them approached her and offered her a ride. She declined but when he persisted, J.R. got into the car without thinking. *Id.* at ¶9-10. J.R. told the men where she lived, but they ignored her and they eventually took her to a hotel. The men parked the car in a way that the clerk would not see her. The driver, eventually identified as Jerry Polivka, rented the room. The two black male walked J.R. to the room, using a back entrance to the hotel, and meanwhile Jerry Polivka drove off. *Id.* at ¶10-11. Despite her attempts to get out of the situation, she could not, and the two black males known then only as “O” and “Mike” raped J.R. *Id.* at ¶12-13. Eventually J.R. made her escape and made her way home. J.R. testified that her mother was angry and demanded to know where she had been. J.R. told her mother what had happened. *Id.* at ¶16. The policer were called. A Cleveland Police Department officer responded to the home and received a description of “O” and “Mike” and went to the hotel where “O” and “Mike” were arrested. *Id.* at ¶20.

J.R. went to the hospital where a rape kit was collected. Afterwards J.R. went to the justice where she met with a female detective. J.R. testified that the original detective was “very rude”. *Id.* at ¶24. When asked in what way was the detective rude to J.R., J.R. testified as follows:

She took my entire statement. And then she told me she would give it to the prosecutor if I wanted her to, but what should I expect, I shouldn't have been walking that late at night alone.

(Tr. 416).

J.R. felt humiliated and told the detective to “forget it if she wasn't going to help.” *Dickerson*, ¶24. A few days after the rape, J.R. was walking to her boyfriend's home, Michael Jenkins pulled up alongside of her, was angry, threatened J.R. and forced J.R. to sign a note

recanting the incident. *Id.* at ¶25. J.R. reported the incident, but did not follow up because she wanted to get on with her life. *Id.* In 2012, J.R.’s rape kit was sent out for testing as part of the rape kit testing initiative and the case was reopened. *Id.* at ¶26. Dickerson was indicted and was convicted. Dickerson did not testify at trial and did not provide an explanation to the presence of his DNA in J.R.’s rape kit. He was sentenced to a five-year prison term under H.B. 86. The State appealed the sentence and Dickerson cross-appealed his conviction.

On appeal, the majority in *Dickerson* held that trial counsel was ineffective for failing to file a timely motion to dismiss, and vacated the convictions. At the center of the majority’s concern was a discrepancy between the victim’s testimony that she was picked up by the defendants at around 1:30 a.m. until 4:42 a.m. when the hotel room was rented. The victim could not recall what happened in between. *Id.* at ¶11, 32

ARGUMENT

This case comes following the court of appeals’ en banc opinion in *State v. Demetrius Jones*, 2015-Ohio-2853, 35 N.E.3d 606 (8th Dist. Cuyahoga), accepted for review, 143 Ohio St. 3d 1542, 2015-Ohio-4633, 40 N.E.3d 1179. However, unlike in *Jones*, the issue was not whether the trial court erred in granting a motion to dismiss on pre-indictment delay grounds but was whether trial counsel was ineffective for failing to file a timely motion to dismiss on pre-indictment delay grounds. A majority in *Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807 found that the trial attorney was ineffective for not filing a timely motion to dismiss for pre-indictment delay. The court found that Dickerson satisfied the ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), finding that there was a reasonable probability of a different outcome. *Dickerson*, ¶42.

However, the Eighth District’s finding of a “reasonable probability of a different outcome” was in and of itself based upon speculation as to the success of a timely motion to dismiss on pre-indictment grounds. The Eighth District held that Dickerson established “actual prejudice” because the driver of the vehicle Jerry Polivka was dead and that he was a “key witness who was with the victim for a number of hours was unavailable, and the victim herself was unable to account for the time.” *Dickerson* at ¶46. The dissent summarized the effect of Polivka’s unavailability best when it determined that, “it is difficult to conclude anything other than that Polivka’s testimony would have been completely irrelevant to the findings of guilt on the rape charges...” and that anything “Polivka might have said [with respect to the Kidnapping charges] and therefore any exculpatory testimony he might have given is completely speculative.” *Id.* at ¶56-57 (Stewart, J. dissenting). Speculation does not show actual prejudice. Accord *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, ¶8.

Also problematic is the majority’s determination that there were no reasons justifying the delay based upon its own testimony that, “it is common knowledge that [DNA] testing was available at the time [in 1994] and thus, if the case had not been closed, the police department would have sent the evidence to an outside source for testing...” *Id.* at ¶49. There is no evidence in the record to support that claim. The records reflect that a Cleveland Police Department lab technician testified at the rape occurred, a rape kit would have been examined for the presence of semen and blood. (Tr. 726). The technician testified that in 1994, Cleveland Police Department did not do DNA testing and she was unaware of BCI did DNA testing. (Tr. 735). One decisions from this Court noted that BCI did not perform DNA typing in 1996. *State v. Craig*, 110 Ohio St.3d 306, 309, 2006-Ohio-4571, 852 N.E.2d 621.

In vacating Oscar Dickerson’s convictions for Rape and Kidnapping in which a five year prison sentence was imposed, the Eighth District found that reversible ineffective assistance of counsel can be based upon pure speculation. It is pure conjecture what would have happened in this case had a motion for pre-indictment, including what the trial court would have done had it conducted a full hearing on a motion to dismiss indictment. However, the majority sealed the fate of this case when it foreclosed the State from presenting any evidence that would justify the delay. The Eighth District made its own judgment as to whether the delay was justified based upon its own (and possibly mistaken) “common knowledge” as to what type of DNA testing would have been available in this case. The Eighth District vacated Oscar Dickerson’s convictions without any remand or instruction that the trial court conduct a hearing on pre-indictment delay and vacated the convictions based upon its own judgment. The United States Supreme Court has noted that “the remedies for ineffective assistance of counsel should be tailored to the injury suffered from the constitutional violation and should not infringe on competing interests. Thus, a remedy must neutralize the taint of a constitutional violation, while at the same time not grant a windfall to a defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution.” *Lafler v. Cooper*, 132 S.Ct. 1376, 1389 (2012). Thus, *assuming arguendo* that there was a “reasonable probability” that had trial counsel filed a timely motion for pre-indictment delay a different result would have occurred and that counsel was ineffective for failing to do so, perhaps a more appropriate remedy would have been to remand this case to the trial court to conduct a hearing on pre-indictment delay. In failing to remand the case for such a hearing, the majority in *Dickerson* gave the defendant a windfall based on speculation and what could only amount to irrelevant evidence.

The flaws in the *Dickerson* case compels the State to oppose Jenkins motion as the State submits that Jenkins convictions should be affirmed on the basis of any claim Jenkins may have on pre-indictment delay.

The State submits that Jenkins should not be allowed at this time to avail himself of an opportunity to evade his conviction. The important issues of pre-indictment delay are currently being litigated before this Court. Jenkins convictions, like Dickerson's, must stand and the State believes that the *Dickerson* opinion if not reconsidered by the panel or by the en banc court should be accepted by this Court once the State's memorandum in support of jurisdiction is filed. The State notes that its opposition to the motion for limited remand does not preclude Jenkins from seeking a delayed appeal once this matter has been disposed of in due course. Jenkins does have a remedy of requesting a delayed appeal – the State submits that Jenkins cannot do so at this time; therefore, a motion for a limited remand should be denied at this time.

CONCLUSION

Jenkins does have a remedy of requesting a delayed appeal – the State submits that Jenkins cannot do so at this time; therefore, a motion for a limited remand should be denied at this time.

Respectfully submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

/S/ Daniel T. Van

DANIEL T. VAN (#0084614)

Assistant County Prosecutor

The Justice Center, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Email: dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR STATE OF OHIO

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition of Motion for Limited Remand has been sent this 4th day of April, 2016 to: Stephen P. Hardwick, Esq., Assistant Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215.

/s/ Daniel T. Van
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney