



The police then spoke with Denise Davis, the acting supervisor of Job Corps. Ms. Davis indicated that Ms. McAninch told her that she was sexually assaulted, and that it was Ms. Davis who actually called the police. Ms. Davis told the police that Ms. McAninch indicated that she was out with Denise Stewart, the Defendant, and Ms. Stewart's male companion. They drove to a house in the vicinity of E. 105 and Superior with the understanding that Ms. Stewart and her companion would come back for Ms. McAninch and the Defendant. Ms. Davis further stated that Ms. McAninch indicated that she began kissing the Defendant. Her clothes were off. The defendant asked for sex. Ms. McAninch said no because she had to get back to Job Corps before curfew. Ms. Davis stated that the Defendant forced Ms. McAninch onto her stomach and began to engage in anal intercourse with her. Ms. McAninch protested and screamed. The Defendant covered the alleged victim's mouth with his hand. The Defendant was intoxicated and passed out. Ms. McAninch got dressed, left the house, then called the police for assistance in getting back to Job Corps. This version of the facts was given to the police by Denise Davis, not the alleged victim.

The police next spoke with Denise Stewart, Ms. McAninch's friend. Ms. Stewart stated that her friend's name is Warren Elder. She described his vehicle and the area he lives in. She described the man only known to her as "Kimbo", and gave the time that she and Mr. Elder dropped Ms. McAninch and Kimbo off at Kimbo's uncle's home. She was unable to provide the address of the home. She rode with the police, but still could not locate the home where she dropped off Ms. McAninch. Ms. Stewart was told to contact the police if she obtained any further information.

The alleged victim was taken to Mt. Sinai Hospital by Job Corps staff. She was examined and the police picked up the completed rape kit from the hospital.

On November 28, 1993, the police received a phone call from Mr. Johnson of Job Corps. Mr. Johnson indicated that the suspect was identified as the Defendant, Kimbo O'Neal. He provided to the police Mr. O'Neal's address and phone number. He also provided the address where the alleged rape occurred.

On November 29, 1993, the police report indicated Defendant Kimbo O'Neal as the named suspect.

On December 2, 1993, the case was assigned to the Sex Crimes Unit for follow-up and investigation.

On December 6, 1993, the police, **for the first time**, spoke with the alleged victim. Ms. McAninch indicated to the police that she did not want to prosecute the named suspect.

On December 29, 1993, the police consulted with the Prosecutor's Office, and no papers were issued. The named suspect was cancelled. The matter was closed.

On April 24, 2013, Bureau of Identification and Investigation indicated that they had received a "hit" from the Combined DNA Index System. The "hit" linked Defendant O'Neal's DNA with the DNA found in the rape kit submitted by the alleged victim on November 27, 1993. Upon receiving this evidence/information, the State proceeded to indict the Defendant prior to the expiration of the 20-year statute of limitations.

On December 11, 2013, the State investigator interviewed Defendant O'Neal regarding the charges pending against him. The Defendant admitted to having sex with the alleged victim but indicated that the sex was consensual. He indicated that after sex, he fell asleep because he was intoxicated, and the alleged victim left the home, on her own, without knowing where she was going. Defendant states that the next day, he was advised by a friend that the alleged victim had accused him of rape. He went to the Job Corps and spoke with a security guard. Defendant states that the guard told him that the alleged victim had accused him of rape, but she later recanted. The guard told him that the alleged victim was upset that the Defendant had not brought her back to Job Corps.

On February 3, 2014, Defendant O'Neal filed his Motion To Dismiss Indictment. On March 10, 2014, this Court denied Defendant's Motion to Dismiss without hearing. On November 12, 2014, Defendant O'Neal filed a Supplemental Motion to Dismiss. A hearing on Defendant's Supplemental Motion to Dismiss was held on March 18, 2015. Based upon that hearing and the evidence presented, the Court hereby grants Defendant's Motion to Dismiss.

## **II. Law and Analysis:**

When determining whether to dismiss an indictment based upon pre-indictment delay, the Court must determine if the delay resulted in actual prejudice to the Defendant. "Pre-indictment delay resulting in actual prejudice to a Defendant 'makes a due process claim concrete and ripe for adjudication.'" *State v. Luck*, 15 Ohio St.3d 150, citing *United States v. Marion*, 404 U.S. 307, at 324, and *United States v. Lovasco* (1977), 431 U.S. 783 at 789. If it is established that the Defendant suffered actual prejudice, the Court is to turn to the second part of the test set forth in *United States v. Lovasco, supra*.

Specifically, the state must produce evidence of a justifiable reason for the delay. The prejudice suffered by the defendant must be viewed in light of the state's reason for the delay. *State v. Whiting, 84 Ohio St. 3d 215 (1998)*.

Whenever there is a twenty-year delay in bringing an indictment, numerous issues may arise. The most common being the inability to find certain witnesses as well as the diminished memories of the parties involved. In the instant case, Job Corps was the focal point of this investigation. The alleged victim was a student at Job Corps. Reggie Johnson was the security officer at Job Corps who spoke with the Defendant, the alleged victim, and who picked up the alleged victim on the night of the incident. Denise Davis was the acting supervisor at Job Corps who spoke with the alleged victim, called the police, and spoke with the police regarding the incident.

The State of Ohio and defense investigators were unable to locate Mr. Johnson. Mr. Johnson's testimony would be vital to the defense because he is the person who spoke with the Defendant. He is also the person who picked up and spoke with the alleged victim after the alleged rape. He is also the person who spoke with the Cleveland police officers. Finally, Mr. Johnson allegedly told the Defendant that the alleged victim had claimed she was raped by him, but then recanted. She told Mr. Johnson that she was angry that the Defendant did not take her back to Job Corps. Mr. Johnson is a critical witness for the defense. Mr. Johnson cannot be located. The Defendant is prejudiced by Mr. Johnson's absence.

Ms. Denise Davis of Job Corps was located and interviewed by the investigator for the State of Ohio. She did not recall any details surrounding this incident, nor did she remember the alleged victim. However, she did indicate what the procedures would be **IF** an incident had occurred on her shift. She indicated that the incident would have been noted in a log book at Job Corps. The twenty-year delay has erased this incident from her memory. Ms. Davis would have been an important witness for the defense because she spoke with the alleged victim. The Defendant is prejudiced by her memory lapse.

A subpoena duces tecum was issued by the Prosecutor's Office to Job Corps on December 16, 2013, seeking any records regarding this November 27, 1993 incident. Job Corps issued a Declaration on July 1, 2014, that no records involving the November 27, 1993 alleged rape were found. That includes no notation in a log book. The information from Job Corps would have been important information for the Defendant. That information is not available. The Defendant is prejudiced by this missing information.

This court finds that the Defendant has demonstrated actual prejudice resulting from the delay in prosecuting him. The burden now shifts to the State of Ohio to produce evidence of the justifiable reasons for the delay.

The first reason for the delay argued by the State is that the alleged victim did not want to prosecute in 1993. This court does not consider the fact that a victim refuses to cooperate and/or does not want to prosecute, as a justifiable reason for pre-indictment delay. That argument is even weaker in this instance because the alleged victim has indicated to Sergeant Harrick of the Shiawassee County, Michigan Sheriff's Office that she will not return the phone calls made by the prosecutor, and that she has no intention of participating in the prosecution of this matter. The alleged victim still does not want to prosecute.

The second reason for the delay argued by the State is that they had no supporting evidence of the rape. Now they have a CODIS hit that matches the Defendant's DNA with the rape kit provided by the alleged victim. The court is not persuaded by this argument. The facts of this incident, as provided by the alleged victim and the defendant, are that they engaged in sexual intercourse. The issue to be determined is whether the sexual intercourse was by force, or consensual. The determination of the DNA match does not necessarily support the allegation of rape. It does support the agreed upon fact that there was sexual intercourse on or about November 27, 1993 between the alleged victim and the Defendant. Furthermore, even if the DNA was matched back in 1993, the State has not indicated that they would have indicted the Defendant, because they still did not have a cooperative victim.

Any delay in the commencement of prosecution by the State would be found to be unjustified if it is done in an attempt to gain a tactical advantage over the Defendant. *State v. Luck*, 15 Ohio St.3d 150 (1984). There is no allegation that the State was attempting to gain a tactical advantage over the Defendant in this case.

The second basis for a finding of an unjustified delay would be if the State, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. *Id.*

At the time that the State ceased its investigation and closed this case, they had the following information available to it: the Defendant's name, address and phone number (even though they NEVER interviewed him); they had the alleged victim's information (even though they NEVER interviewed her); they had the contacts from Job Corps (who they had interviewed); they had the Denise Stewart's information and statement because they did interview her;

and they had Warren Elder's information (even though they NEVER interviewed him).

Twenty-years later the State actually has less evidence then it did in 1993. While there is the CODIS hit and the link of the Defendant's DNA to the DNA taken in the rape kit, the State does not have Reggie Johnson from the Job Corps, he was not located. They do not have Denise Davis from the Job Corps, she cannot remember. They do not have any Job Corps records, they could not be found. They do not have Warren Elder, he could not be found. And finally, they still do not have a victim who wants to prosecute.

The purpose of a CODIS hit is to identify the person who left their DNA or semen on or inside the victim. In this case, the identity of the person was already known. The police had the Defendant's information, but chose not to interview him. So the fact that 20 years later a CODIS hit indicated that the Defendant was the person who had intercourse with the alleged victim is not new relevant evidence. It is evidence of facts that were already known on or about November 27, 1993.

In addition to the fact that the State has not sustained their burden, this case provides a number of troubling facts:

1. The Defendant was never questioned by the police even though he was identified, his information was provided to the police by Job Corps, and he was the named suspect;
2. The police never attempted to speak with the alleged victim until nine (9) days after the incident, at which time she indicated that she did not want to prosecute;
3. Defendant indicated that he spoke with a guard at Job Corps (this person could be Reggie Johnson) the day after the incident and gave his version of events. The guard told the Defendant that the alleged victim was upset that the Defendant did not bring her back to Job Corps, and that she recanted the rape;
4. Reggie Johnson could not be located;
5. No records exist at Job Corps regarding this incident;
6. The statements of Denise Stewart given 20 years ago, and her statement now, have a number of critical inconsistencies;
7. Warren Elder who accompanied Denise Stewart, the alleged victim and the Defendant, on November 27, 1993, could not be located;
8. Denise Davis cannot remember anything about the incident; and
9. The alleged victim cannot identify the Defendant, and is not willing to travel back to Ohio to cooperate with the prosecution of the Defendant.

The Cleveland Police Department stopped investigating or pursuing this case when the alleged victim indicated that she did not want to prosecute. The case was closed. There was no work to be done. The alleged victim still does not want to prosecute. This court finds this pre-indictment delay unjustifiable. Therefore, Defendant's Supplemental Motion to Dismiss, is GRANTED.

**Conclusion and Order:**

This Court finds that the pre-indictment delay in this case of 20 years has caused actual and substantial prejudice to the Defendant, and that there was no justifiable reason for the delay. Defendant's due process rights were violated.

Consequently, Defendant's Supplemental Motion to Dismiss is GRANTED and this case is hereby DISMISSED.

**IT IS SO ORDERED.**

May 14, 2015  
DATE

  
JUDGE CASSANDRA COLLIER-WILLIAMS