



IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

FILED

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| STATE OF OHIO |) | CASE NO. CR-15-595788 |
| |) | |
| Plaintiff |) | JUDGE PAMELA A. BARKER |
| |) | |
| v. |) | <u>OPINION AND JOURNAL ENTRY</u> |
| |) | <u>ON DEFENDANT'S MOTION TO</u> |
| CORY D. KOUNS |) | <u>DISMISS INDICTMENT</u> |
| |) | |
| Defendant |) | |
| |) | |

CLERK OF COURTS
CUYAHOGA COUNTY

Defendant Cory D. Kouns ("Defendant") is charged with Rape in violation of R.C. 2907.02(A)(2) and Kidnapping in violation of R.C. 2905.01(A)(4), in an indictment filed on May 13, 2015, arising from an incident which is alleged to have occurred on May 16, 1995. This matter is now before the Court on Defendant's Motion To Dismiss Indictment filed on 7/13/2015, the State's Brief In Response To Defendant's Motion For Dismissal Based On Pre-Indictment Delay filed on 8/17/2015, and Defendant's Supplemental Brief filed on September 15, 2015.

At the hearing held on Defendant's Motion on September 18, 2015, the parties placed on the record several stipulations of fact and submitted three (3) joint exhibits that were admitted into evidence, establishing the following:

- As part of the investigation, two (2) items were taken from the home where the offenses allegedly occurred, the victim's underwear and a bed sheet¹, but these items cannot be found.

¹ Although the parties stipulated that "a" bed sheet was taken as evidence by the CPD, the Incident Report admitted as Joint Exhibit "2" indicates that two (2) bed sheets were taken.

- As part of the investigation, photographs of the victim were taken at the hospital, but the original color photographs cannot be found; only black and white photocopies of the original photos are available.
- The defendant and the victim knew each other and were in a relationship at the time of the alleged offenses.
- Detective Essie Borders of the Cleveland Police Department investigated the matter but she is now deceased.
- During the original investigation into the matter, the victim reported that the defendant had penetrated her orally, vaginally and anally against her will; but when questioned on December 12, 2014, she reported that the oral and vaginal penetration was consensual, but the anal penetration was not. On that same date, the victim also reported that she maintained a consensual sexual relationship with the defendant on and off for approximately two years following the incident and last had consensual sex with him in 1997.
- The victim declined to pursue charges both in 1995 when the offense allegedly occurred and then again when questioned on December 12, 2014. When questioned on December 12, 2014, the victim refused to sign a HIPPA release form to obtain medical records; but a copy of the victim's medical records from Euclid Hospital, certified on July 14, 2015, was admitted as Joint Exhibit "1" at the hearing.
- Along with a certified copy of the victim's medical records, two other documents were admitted as Joint Exhibits at the time of the hearing: the Cleveland Police Department Offense/Incident Report (marked and hereinafter referred to as Joint Exhibit "2"); and

the Cuyahoga County Prosecutor's Office Incident Report Matter ID 511-8929 (marked and hereinafter referred to as Joint Exhibit "3").

- Joint Exhibit "2" indicates that on the date the alleged offenses were reported, 5/18/1995, or two days after the alleged offenses date of 5/16/199, the defendant was identified as the suspect of the alleged offenses. His address and telephone number were included on Joint Exhibit 2.
- Joint Exhibit "2" includes the name of the victim's neighbor, Willie Lockett, who lived downstairs from the victim, and reportedly heard the victim's screams and ultimately called police; however, no evidence was presented at the time of the hearing as to whether or not this witness is available to testify.
- Joint Exhibit 2 also includes the following statement: "At time of report victim was seen to have bruises on her arms and scratches on her neck and hands.² Accompanied victim to her apartment and recovered two sheets from her bed and a pair of victim's underwear. Evidence marked, tagged, and entered in 6th district prop book."
- Joint Exhibit 2 also indicates that Lt. Lavelle from the Sex Crimes Unit consulted with the prosecutor after the victim called and stated that she did not want to pursue the criminal prosecution, and the prosecutor, after reviewing all the facts, issued no papers and the case was to be held in abeyance.

² Although not raised by the parties in their briefs or at the hearing, presumably or arguably, if alive, Detective Borden could/would use Joint Exhibit "2" to refresh her recollection so as to testify consistently with what her report indicates she witnessed or saw. i.e., bruising and scratching on the victim, which testimony arguably would support the State's case. This is consistent with the State's argument that the lost evidence and death of Detective Borden actually works to prejudice the State, and not the Defendant.

- Joint Exhibit "3" sets forth the results of the investigation after the Prosecutor's Office received information, on August 16, 2013, from the State of Ohio Bureau of Criminal Identification and Investigation, that during a search of the Ohio State DNA Index System, an association was made between the BCI Richard Office and Defendant, as relates to the May 16, 1995 incident that is the subject of the indictment. On July 16, 2015 or after the Defendant had been indicted and buccal swabs obtained from him, BCI analysis confirmed that the Defendant's DNA was found on the genital swabbins submitted in the rape kit. Joint Exhibit "3" also includes a summary of an April 21, 2015 interview with the owner of the victim's residence who reported that she is unsure if the victim was sexually assaulted and that on a different day than the incident she witnessed the two engage in sexual intercourse but the witness was unable to state whether this was before or after the incident.

The Defendant argues that the missing evidence, the loss of the original colored photographs, and the death of Detective Borges and therefore, her inability to testify and be cross-examined, substantially prejudices his ability to receive a fair trial. Specifically, according to the Defendant, perhaps the victim's underwear, if available for inspection, would reveal that it was not torn, thereby arguably demonstrating that there was no force used or struggle had; the absence of any blood on the bed sheet(s) may serve to undermine the victim's allegations since reportedly she had been scratched, and had bitten the defendant, and arguably if that was the case, there should be some blood evidence. And, the black and white copies of the original colored photographs are difficult to see and accurately determine what they depict. Defendant submits that the facts of this case align most closely with those before the Eighth

District Court of Appeals in *State v. Jones* (8th Dist. Cuyahoga No. 101258), 2015-Ohio-2853, where the Court, *en banc*, affirmed the trial court's decision dismissing the indictment on the basis of pre-indictment delay.

The State counters that the arguments made by the Defendant concerning the missing evidence are purely speculative and that ultimately, it is the State which is prejudiced by the loss of this evidence, and not the Defendant. And, per the State, the nurse who helped treat the victim is available to testify concerning the subject matter of the original colored photographs. Whereas the Defendant relies on *State v. Jones* to support his position, the State submits that this case is distinguishable from *Jones*, to the extent that in *Jones* a witness present in the home at the time of the alleged kidnapping and rape, had died and presumably could have testified concerning the appearance and demeanor of the victim immediately after the alleged rape and kidnapping.

In *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), at paragraph two of the syllabus, the Ohio Supreme Court held that an "unjustifiable delay between the commission of an offense and a defendant's indictment therefore, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." To warrant dismissal on the basis of pre-indictment delay, a defendant must present evidence establishing substantial prejudice. Once the defendant fulfills that burden, the State has the burden of producing evidence of a justifiable reason for the delay.

Thus, the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. Whether or not there has been "actual prejudice" involves a delicate

judgment based on the circumstances of each case. In making this determination, courts are to consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay. *State v. McClutchen*, 2003 Ohio 4802, ¶¶10, 11, 2003 Ohio App. LEXIS 4326 (Ohio Ct. App., Cuyahoga County, Sept. 11, 2003).

In *State v. Jones, supra*, at ¶¶36-40, the Court found that in order to determine what standard – the "exculpatory evidence standard" or the "conceptions of due process and fundamental justice standard" – should be used in a case to determine whether the defendant suffered actual prejudice due to the pre-indictment delay, a court should be guided by three considerations: 1.) the stage of the proceedings at which the matter is being reviewed; 2.) the nature of the state's case against the defendant and the effect of the lost or missing evidence on the pertinent issues; and 3.) the question of whose problem it should be when it is unknown what the lost or missing evidence would have shown.

The defendant is asking this Court to dispose of this case pretrial and accordingly, the only proceeding that this Court has to rely upon is the hearing on the motion to dismiss. Similar to the situation in *State v. Jones*, the evidence at the hearing demonstrated that the Defendant and the victim were in a relationship and it was the Defendant's position that they had engaged in consensual sex. At the time of the hearing, the physical and forensic evidence was scant: it consisted of the match of the Defendant's DNA to the sample taken from the victim as part of the rape kit administration. But, from the beginning, the victim identified the Defendant as her rapist. There was no evidence presented at the hearing that the Defendant was even interviewed in 1995 but when interviewed on March 11, 2015, the Defendant stated that he and the victim had only ever had consensual sex. Therefore, the identity of the Defendant was

not an issue in this case, and the forensic evidence does not advance the case. Moreover, as of the time of the hearing the physical evidence, or actual lack thereof - the lost underwear, bed sheets and original photographs, as well as the unavailability of the investigative police officer - does not advance the case.

As for the nature of this case, and again, similar to the situation in *State v. Jones*, with identity not being an issue, and with the lack of physical evidence, the case is bound to be a credibility determination. Although evidence, specifically the victim's underwear and two bed sheets were collected, and colored photographs of the victim were taken at the hospital (as distinguished from the crime scene), that evidence is gone. Thus, to require the Defendant to demonstrate that that missing or unavailable evidence will be exculpatory is a "near impossibility."

As the Court in *State v. Jones*, at ¶145, asked, "how did it come to be that there is an alleged rape in [1995], currently scant physical or forensic evidence, deceased and possibly unidentified witnesses but an identified perpetrator, and an indictment in [2015]?" It came to be because within nine days of the alleged rape and kidnapping, after two attempts to meet and confer with the victim, the police, after consultation with the prosecutor, "issued no papers case to be held in abeyance." The evidence presented at the hearing demonstrates that the state merely failed to take action for a substantial period and after this inaction of the state, requiring the Defendant to demonstrate that any missing evidence or unavailable witness testimony would have been exculpatory is simply violative of his due process rights.

Like the Court did in *State v. Jones*, then, this Court must evaluate the Defendant's claim of actual prejudice in terms of basic concepts of due process and fundamental justice and in so

doing, this Court finds that the Defendant suffered actual prejudice in the near twenty-year delay in prosecuting him. Accordingly, the Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

Pamela A. Barker 9-21-15
JUDGE PAMELA A. BARKER DATED