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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO  
Plaintiff

Case No: CR-15-599262-A

Judge: SHIRLEY STRICKLAND SAFFOLD

FRANK THOMPkins  
Defendant

INDICT: 2907.02 RAPE  
2907.02 RAPE  
2905.01 KIDNAPPING

**JOURNAL ENTRY**

DEFENDANT'S MOTION TO DISMISS INDICTMENT IS HEREBY DENIED.  
OPINION ON DEFENDANT'S MOTION TO DISMISS INDICTMENT SIGNED, ATTACHED AND ORDERED FILED. OSJ.

03/09/2016  
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Judge Signature

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Date

**FILED**

2016 MAR 11 A 10:54  
CLERK OF COURTS  
CUYAHOGA COUNTY

HEAR  
03/09/2016

STATE OF OHIO )  
 )SS:  
CUYAHOGA COUNTY )

IN THE COURT OF COMMON PLEAS

STATE OF OHIO )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
FRANK THOMPCKINS, )  
 )  
Defendant. )

Case No. CR-15-599262-A

OPINION ON DEFENDANT'S  
MOTION TO DISMISS INDICTMENT

**SHIRLEY STRICKLAND SAFFOLD, JUDGE:**

The Defendant's, Frank Thompkins (hereinafter "Defendant"), Motion to Dismiss Indictment, filed 01/27/16, is hereby denied.

**I. FACTUAL BACKGROUND:**

Defendant is charged with violations of Ohio Revised Code §2907.02(A)(2), Rape; and §2905.01(A)(4), Kidnapping. The date that the alleged rape occurred was September 17, 1995. After the alleged rape, the victim immediately contacted the Rape Crisis Hotline and went to University Hospital to be treated and to collect a sexual assault kit. The victim thereafter reported the rape to the Cleveland Police Department (hereinafter "CPD") and gave as many details about her attacker as possible; most notably, she reported the attackers first name as "Frank", the approximate location where he lived, and his telephone number, along with a physical description. Shortly thereafter, the case was assigned to a CPD Sex Crimes detective, at which time the detective noted that the victim signed a "no prosecution" form which indicated that she did not want to pursue the prosecution of this rape at that time. As a result, the investigation was suspended.

As part of the Ohio Attorney General's Sexual Assault Kit Initiative, the victim's sexual assault kit was submitted to the Bureau of Criminal Investigation and Identification (hereinafter "BCI") on November 19, 2012. On October 16, 2013, BCI issued a Combined DNA Index System (hereinafter "CODIS") match letter to the CPD indicating that the Defendant's DNA had matched with the victim's sexual assault kit. Cuyahoga County Prosecutor's Office Cold Case Unit began to re-investigate the case following the CODIS hit, and presented the case to the Grand Jury, who issued a true bill indictment on September 16, 2015. The Defendant has filed a Motion to Dismiss Indictment for preindictment delay.

## II. LAW AND ARGUMENT

In order for Defendant to prevail on the Motion to Dismiss for preindictment delay there is a two-prong test. The defendant must first present evidence "establishing substantial prejudice" and that his defense suffered "actual prejudice due to the delay in indictment." *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, quoting *State v. Walls*, 96 Ohio St.3d 437, 452, 2002-Ohio-5059, 775 N.E.2d 829. If the defendant can prove actual prejudice, the burden shifts to the state to establish a "justifiable reason for the delay." *Id.* Accordingly, to determine whether Defendant's due process rights have been violated because of an alleged preindictment delay, the court "must consider the reasons for the delay as well as the prejudice to the accused." *Walls* 96 Ohio St.3d at 453, quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044 (1977). In order for the court to determine whether "actual prejudice" occurred, there must be a "delicate judgment based on the circumstances of each case." *Walls*, 96 Ohio Sr.3d at 453, quoting *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455 (1971). To determine "actual prejudice" the court is 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." *Walls*, 96 Ohio St.3d at 453, quoting *State v. Luck*, 15 Ohio St.3d 150,154, 472 N.E.2d 1097 (1984), citing *Marion*, 404 U.S. at 326. Prejudice may not be presumed from a lengthy delay. *Copeland* at ¶ 13. The mere possibility that memories will dim, witnesses will become inaccessible, or evidence will be lost is not enough in itself to establish actual prejudice to justify the dismissal of an indictment. *Marion*, 404 U.S. at 325-26.

Although the requirement that Defendant show "actual prejudice" may appear to be a high standard, the Eighth District Court of Appeals explains that the law "requires a defendant to do more than offer mere speculation as to how he was prejudiced by any delay because requiring less would undermine the statute of limitation." *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, ¶5. The concept of preindictment delay is intended to protect a defendant only from "government abuses of the statute of limitation." *Id.* Thus, the two-prong test requiring actual prejudice and a showing that the state purposely delayed prosecution for tactical advantage or for some other "impermissible" reason is required to succeed on a claim for dismissal based on preindictment delay. *Id.*

In both his motion and his arguments at oral hearing on March 7, 2016, the Defendant argues that there is actual, substantial prejudice created through (1) loss of memory of witness, Patricia Thompkins, due to her paranoid schizophrenia, and (2) witness, George Wilbert Merriweather, Jr., dying on June 10, 2015.

Witness, Patricia Thompkins' testimony during the oral hearing indicated that she had been treated for her paranoid schizophrenia since 1967, and that although she did not recall this incident, she was able to recall other very specific details about this time period in her life. She was able to recall the house that she was living in and the condition of a tree

on her property, her children being removed from her custody, and that Mr. Merriweather was living with her in her home at that time period, thus establishing that she does have clear memories from the time of the alleged incident. Additionally, her testimony indicated that she would have been diagnosed with paranoid schizophrenia at the time of the incident as well as the time of the indictment.

During oral hearing, there was no indication that although Mr. Merriweather was living in Patricia Thompkins' home, that he was present during the time of the alleged rape. No police reports noted his presence, nor did the victim's statement mention his presence at the home at the time of the incident; therefore there is no prejudice or any exculpatory value established by Defendant.

The court finds that none of the above arguments meet the burden of "actual" and "substantial" prejudice that would justify the dismissal of this indictment due to preindictment delay. The defendant did not show the exculpatory value of the alleged missing evidence in order to prove substantial prejudice. The Supreme Court of the United States said in *United States v. Marion*, the possibility of prejudice inherent in any extended delay, in this case the fading of Patricia Thompkins memory and the inaccessibility of George Merriweather, is not itself enough to demonstrate that the defendant cannot receive a fair trial and therefore a dismissal of the indictment is justified. Absent actual prejudice demonstrated, these due process claims are merely speculative. *Marion*, 404 U.S. at 325-26. Defendant has failed to meet his burden; therefore, the Motion to dismiss should be denied.

Assuming *arguendo* that Defendant was able to prove some actual prejudice due to the preindictment delay, the second part of the two-prong test would allow the State to

establish a "justifiable reason for the delay." A delay in the indictment of the case would be found unjustified when it is clear that the State purposefully delayed the prosecution to gain a tactical advantage over the defendant, or "when the state, through negligence or error of judgment, effectively ceases the active investigation of a case, but later decides to commence the prosecution upon the same evidence that was available to it at the time that its active investigation was ceased." *Luck*, at 15 Ohio St.3d 158. The State argues that the reason for the delay was not a result of seeking a "tactical advantage," but merely because of the introduction of the DNA evidence that affirmatively identified the victim's attacker as the Defendant. Nor, the State argues, would the delay be considered to have been due to negligence or error in judgment because the DNA evidence that identifies the victim's attacker would be considered "new evidence."

Assuming *arguendo* that the investigation into this rape was ceased through negligence or error in judgment of the investigators, Defendant was not indicted in 2015 with the same evidence that was available in 1995. The DNA analysis was not available to the state until 2013. Further, the oral hearing on March 7, 2015 did not include any evidence that the State delayed Defendant's indictment to intentionally gain a tactical advantage.

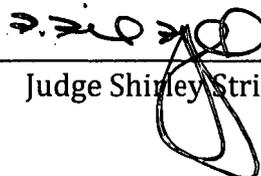
**III. CONCLUSION**

Accordingly, Defendant's Motion to Dismiss Indictment is hereby denied.

IT IS SO ORDER.

5/9/11

\_\_\_\_\_  
Date



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Judge Shirley Strickland Saffold