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

STATE OF OHIO	)	**CASE NO. 606732**
	)	
Plaintiff,	)	**JUDGE PAMELA A. BARKER**
	)	
v.	)	**OPINION AND JOURNAL ENTRY ON DEFENDANT'S MOTION FOR DISMISSAL BASED ON PRE-INDICTMENT DELAY**
	)	
RICHARD VEAL	)	
	)	
Defendant	)	
	)	

Defendant Richard Veal ("Defendant") is the subject of an eight (8) count indictment filed on June 1, 2016. In Counts One through Four, Defendant is charged with the Rapes of Jane Doe I, on or about March 1, 1997, March 2, 1997, March 3, 1997, and March 4, 1997, respectively, in violation of R.C. 2907.02(A)(2) and in Count Five, Defendant is charged with Kidnapping Jane Doe I, on or about March 1, 1997 to March 4, 1997, in violation of R.C. 2905.01(A)(4). In Counts Six and Seven, Defendant is charged with the Rapes of Jane Doe II, on or about February 19, 1998, in violation of R.C. 2907.02(A)(2), and in Count Eight, Defendant is charged with the Kidnapping of Jane Doe II, on or about February 19, 1998 in violation of R.C. 2905.01(A)(4).

This matter is before the Court on Defendant's Motion For Dismissal Based On Pre-Indictment Delay filed on December 1, 2016 ("Defendant's Motion"), and the State's Brief in Response To Defendant's Motion To Dismiss filed on or about December 8, 2016 ("State's Response"). Two hearings were held on Defendant's Motion, the first on January 11, 2017, and the second on February 14, 2017. At the hearings, Jane Doe I was identified by name and her initials are N.S., and Jane Doe II was identified by name and her initials are K.C. At the first hearing, State's Exhibits 1 through 5 and Defendant's Exhibits A through C were admitted into evidence, and at the second hearing, Joint Exhibit

1 was admitted into evidence.

State's Exhibit 1 includes a Felony Review Form completed by the City of Cleveland Prosecutor's Office, a Cleveland Police Department Offense/Incident Report, a Cleveland Police Department Supplemental Report and a Supplementary Report that demonstrate the following. Complainant N.S. identified Defendant as the man who allegedly raped her or forced her to have non-consensual sex over the course of several days, specifically between the morning of Saturday, February 28, 1997 and Tuesday, March 4, 1997 at the home that he shared with his mother, located at 13818 Melzer in Cleveland. N.S. reported that she had met Defendant at the Cotton Club where he worked on Friday night and left with him to go to his home. When she asked him to take her home, he refused, saying he was not finished with her yet. According to N.S., Defendant's mother was home during the time she was allegedly kept there by Defendant and Defendant left her in the basement when he went outside to wash his car. N.S. reported that on Tuesday morning, Defendant agreed to take her home and did take her home after he dropped off his mother at Murtis-Taylor. N.S. was taken to St. Luke's by a C.P.D. Zone car where a rape kit was prepared. She described the "suspect vehicle" as a dark blue, 2-door Cadillac with rust on both sides. N.S.'s address was listed as 3470 E. 98th St., Cleveland and her phone number was listed ad 341-3821. Ultimately, N.S. signed a form verifying that she did not wish to prosecute and no papers were issued by the prosecutor's office.

State's Exhibit 2 consists of a Felony Review Form completed by the Cleveland Prosecutor's Office, a Cleveland Police Department Offense/Incident Report, and a Cleveland Police Department Forensic Laboratory Report regarding K.C.'s rape kit, and provides the following information. K.C. reported that her boyfriend, Defendant, had slapped her across the face and forced her to have sex with him and perform fellatio on him at his apartment on February 19, 1998, and then had locked the door and would not let her leave his apartment that night or early the next morning. After being allowed to leave the apartment later that day, she went to the 4th District to make a police report. K.C. had slight swelling to the left side of her face and a small laceration to her lower lip. A rape kit was prepared at St.

Luke's Hospital. The vaginal smear slides and swabs were positive for spermatozoa and semen and the panties were positive for seminal fluid. No papers were filed by the prosecutor because K.C. was deemed "uncooperative".

State's Exhibits 3, 4 and 5 are copies of correspondence from the Bureau of Criminal Investigation directed to the Cleveland Police Department dated February 11, 2014, September 2, 2016 and September 27, 2016, advising, respectively, of a CODIS hit for Defendant associated with the rape kit of K.C., and Defendant's DNA matches to the materials on the vaginal slides and/or swabs taken from N.S. and K.C.

Defendant's Exhibit A is a copy of a letter dated 1/9/2017 from Martin J. Ryan, MD advising that Mamie J. Veal is his patient, suffers from various medical problems and memory loss, and providing his opinion and belief that it would be detrimental for her health to serve as a witness due to added stress and that her memory loss would make any testimony subject to doubt. Defendant's Exhibit B consists of five (5) documents generated from the website of the Cuyahoga County Auditor's Office and constituting Transfer Histories for five properties on Melzer Ave. in Cleveland or the same street where Defendant lived at the time of the alleged kidnapping and rapes of N.S. These documents demonstrate that the five properties were sold or transferred after the dates of the alleged offenses, but do list the names of the grantors. Defendant's Exhibit C is a copy of a January 31, 2008 Blog the subject of which is the tearing down of the Cotton Club location, where N.S. alleged she met Defendant and where he worked at the time of her alleged rapes and kidnapping.

Joint Exhibit 1 is an audio recording of a telephone interview that Special Investigator Lindsey Musser conducted of N.S. on January 17, 2017. N.S. relayed the following relevant information during this interview. In 1997, she was living with her brother, Colin [Steffa], on the third floor of the Van Aken apartments on Van Aken Blvd. He now lives in Oregon, but she does not have an address or telephone number for him. He called her at Christmas time. During the time she was kept at Defendant's house in 1997, if anyone had been looking for her, it would not have been Colin, but

[redacted] Gail and [redacted] live in Cleveland but N.S. does not know where they live. She has been in touch with [redacted], who she believes lives on a street the name of which begins with "Blue". At the time of the alleged offenses, she did not have a cell phone or a pager. She cannot remember if she had a home phone.

Investigator Musser was the only witness that testified at the hearings. During the first hearing, Investigator Musser testified in relevant part as follows. She interviewed Defendant and with regard to both N.S. and K.C., she showed him a photograph and asked if him if he knew them. Defendant replied that he did not know N.S., recall or remember her, and confirmed this even after he was advised of the DNA match. Defendant replied that he was familiar with K.C., had dated her and had had a sexual relationship with her, and that any restrictive behavior he exhibited was to ensure that she did not go out seeking drugs. Investigator Musser took a buccal swab from Defendant to verify the CODIS hit; she did not have Defendant's contribution for DNA with regard to N.S. and she did not have a confirmation swab for Defendant with regard to K.C. Defendant asked Investigator Musser why he was in jail. She confirmed his address on Melzer and that he had worked at the Cotton Club. She did not try to contact Defendant's mother and did not attempt to get any cell phone records.[1] According to Investigator Musser, her investigation revealed that although currently CMHA maintains visitors' logs for its properties including the Union Square building where Defendant lived at the time of the alleged rape of K.C., no such logs were kept in 1998. Moreover, there are no CMHA surveillance tapes from 1998.

During the second hearing, and in addition to authenticating the audio tape containing her telephone interview with N.S. on January 17, 2017, Investigator Musser testified in relevant part as follows. N.S. was a foster child and had adoptive parents. The Cummings family "took her in" and she considered [redacted] a sister and Gail Cummings, a.k.a. Florence Adams, her mother.

[1]At the first hearing on January 19, 2017, Investigator Musser testified that the shirt that N.S. was wearing during the alleged ordeal could not be located; however, at the February 14, 2017, she testified that it had been found.

Gail was married to Don Adams. Investigator Musser located a date of birth, SSN and phone number for a [redacted], and an address of 3970 Bluestone Road in Cleveland. She also located an address of 4012 Bluestone in Cleveland for Gail Cummings, but no phone number for her. She also believes she has located N.S.'s brother, Colin, in Oregon, but believes that he is beyond the subpoena power of this Court. She has tried calling the number she believes is that of [redacted], but it just rings and rings. She started trying to reach [redacted] and Gail after the first hearing, when it was learned that K.S. was with them when she reported the incident to the police after Defendant dropped her off at home. N.S. reported that they told her they do not have a recollection of the incident or her calling the police at that time.

The Ohio Supreme Court has established a burden-shifting framework for analyzing a due-process claim based on pre-indictment delay. Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay. *State v. Jones*, 2016-Ohio-5105, 2016 Ohio LEXIS 1907, *P13, citing *State v. Whiting*, 84 Ohio St.3d 215, 217, 1998 Ohio 575, 702 N.E.2d 1199 (1998); and *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶99. In *Jones*, the Court referred to the actual prejudice standard set forth in *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984). *Jones* at ¶ 24-25. Determining actual prejudice involves "a delicate judgment" and a case-by-case consideration of the particular circumstances. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 52, quoting *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed2d 468 (1971) "A court must 'consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay.'" *Jones* at ¶ 20, citing *Walls*, at ¶ 52. Speculative prejudice does not satisfy the defendant's burden. Jones at ¶20, citing *Walls* at ¶ 56.

In *Jones*, the Court recognized that "the possibility of faded memories, inaccessible witnesses, and lost evidence is insufficient to demonstrate actual prejudice," but nevertheless, "reject[ed] the state's suggestion that any claim of actual prejudice based on the death of a potential witness is too

speculative to succeed unless the defendant can establish precisely what that witness would testify to and that the testimony would be directly exculpatory." *Jones*, at ¶27. Relying on Luck, at ¶ 157-158, the Court in *Jones* stated that "a defendant may establish actual prejudice where he or she is unable to seek verification of his or her story from a deceased witness," "a defendant need not know what the exact substance of an unavailable witness's testimony would have been in order to establish actual prejudice based on the witness's unavailability," and "[a]ctual prejudice exists when missing evidence or unavailable testimony identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense."

Jane Doe II, K.C.

Defendant has failed to establish actual prejudice warranting the dismissal of Counts Six, Seven and Eight, involving the alleged kidnapping and rapes of Jane Doe II, or K.C.. He has not pointed to any missing evidence or identified any unavailable testimony relevant to the defense that would minimize or eliminate the impact of the state's evidence and bolster the defense. CMHA did not keep visitors' logs in 1998 and did not maintain surveillance of its properties then. So, evidence that never existed cannot be lost. Any argument about the lack of preservation of any evidence at the crime scene is purely speculative. With DNA testing demonstrating Defendant as the source of the semen recovered from K.C., Defendant no longer has a plausible defense of alibi. *See State v. Jackson* (8th Dist. No. 102394), 2015-Ohio-4274, 2015 Ohio App. LEXIS 4164, at ¶¶ 6, 8. Indeed, both K.C. and Defendant told investigators that they were in a boyfriend/girlfriend relationship at the time of the alleged offenses and therefore, Defendant can be expected to argue that the sexual acts were consensual, meaning that any fluids at the scene could be explained. *Id.* Any possible blood at the scene from Defendant allegedly slapping K.C. and causing her lip laceration would only hurt, not help Defendant's case, and is explainable by Defendant relaying to Investigator Musser that "any restrictive behavior" by Defendant towards K.C. would have been or was associated with Defendant trying to prevent her from seeking drugs. Moreover, Defendant has not claimed that there was anyone else present who might

corroborate a claim of consensual sex. *Id.* Accordingly, as to Counts Five, Six and Seven, Defendant's Motion to Dismiss for pre-indictment delay is **DENIED**.

Jane Doe I, N.S.

With regard to Counts One through Five involving N.S., Defendant argues that he has sustained actual prejudice because of: the "unavailability" of witnesses, specifically his mother, neighbors who lived on his street, his boss and fellow employees at the Cotton Club, and N.S.'s brother, Colin, and her "sister", [redacted] and "mother", Gail; the lack of investigation and preservation of the crime scene or Defendant's home, and specifically the basement, for perhaps fingerprints and body fluids, and potential tangible items, such as bedding or sheets, located therein; and the lack of telephone records for any cell phone that N.S. might have had at the time she was allegedly kept by Defendant for four days at his home.[2]

According Defendant, because his mother – the sole witness identified by N.S. as being present in the home during the four days she alleges she was held there by Defendant, and the person she also alleges was present in Defendant's car when he finally agreed to take her home – suffers from memory loss and health problems, she is unavailable to testify.[3] And, therefore, Defendant "is prejudiced by not being able to seek verification of his story from his mother and establish mitigating factors or a defense to the charges".[4] Per Defendant, his mother is a "key witness" who was never questioned or interviewed by the state.[5]

Defendant also asserts that since the Cotton Club has been demolished, any witnesses present on the evening that N.S. alleges she met Defendant there "are unable to be identified and questioned to

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[2]At the first hearing, Defendant's counsel asserted that Verizon, Sprint, AT&T and T-Mobile do not maintain or have records dating back to 1997. However, during her telephone interview by Investigator Musser on 1/17/17, N.S. stated that she did not have a cell phone in 1997. Although she stated she did not remember if she had a phone at her home, the police report (State's Exhibit 1) does contain a home telephone number. Also, previously she advised that she called the police from that home with her "sister" [redacted] and mother "Gail" present.

[3]In Defendant's Motion, Defendant asserted that his mother was deceased; however, at the hearings Defendant represented that his mother was alive, just "unavailable" due to her health and memory problems.

[4]Defendant's Motion, at p. 6.

[5]*Id.*

corroborate, or contradict, the State's evidence."[6] And, according to Defendant, the owner of the Cotton Club and Defendant's boss at the time Defendant allegedly kidnapped and raped N.S. is now deceased and "cannot be questioned with regards to Mr. Veal's attendance or absence from work during the 4 consecutive days that [N.S.] reported she was assaulted after leaving the Cotton Club with Mr. Veal..."[7] Further, Defendant argues that N.S.'s brother, Colin, lives beyond the subpoena power of the Court and as someone who was living with N.S. at the time of the alleged crimes, could or would know if his sister was absent from the home they shared for the four days that N.S. alleges she was held by Defendant. And, finally, Defendant argues that [redacted] and Gail are most likely not available because their contact information has not been confirmed and no contact with them has actually been made. Per Defendant, their testimonies are important since N.S. has reported that they were present when she made the call to the police to report the alleged kidnapping and rapes.

Before analyzing each of Defendant's arguments, it is important to note that the DNA evidence has established that Defendant was the source of the semen recovered from N.S., and therefore, he does not have a plausible defense of alibi. *See State v. Jackson* (8th Dist. No. 102394), 2015-Ohio-4274, 2015 Ohio App. LEXIS 4164, at ¶8. That leaves Defendant with a theory of consensual sexual conduct, although he denied knowing, recalling or remembering N.S. when shown a picture of her and questioned by Investigator Musser and maintained that he did not know her after Investigator Musser advised him of the DNA results.

Defendant's argument that because five homes on Melzer near the 1997 alleged crime scene have been sold since 1997, and therefore, the individuals who lived there cannot now be located to provide information or testimony about what they might have seen or not seen in terms of N.S. going into or out of the house, and/or about what they heard or did not hear relative to her allegedly being kept in Defendant's home for four days, is nothing more than speculation. Moreover, the names of the

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[6]Defendant's Motion, at p. 7.
[7]Id.

former owners/grantors are included on the Transfer Histories that comprise Defendant's Exhibit B. *See State v. Jackson, id.*

Defendant's argument that [redacted] and Gail are unavailable because the State has not yet been able to speak with either of them is without merit because the State appears to have located addresses for them and subpoenas can be issued for their appearance at trial. Defendant's argument that Colin's unavailability is prejudicial to his defense is without merit because [redacted] stated that if anyone had been looking for her during the four days that she was at Defendant's home it would have been [redacted] and not Colin. Indeed, Defendant does not allege that Colin witnessed anything associated with the actual alleged crimes or the immediate aftermath.

Defendant's claims that he has sustained actual prejudice because the Cotton Club is no longer in existence, fellow employees, then, are unable to be located, and his boss is now deceased, do not rise to the level of actual prejudice because they rely on speculation as to what the evidence or testimonies would have shown. And, even if the testimonies of his boss and/or fellow employees would have established that he worked during some of the four days during which he allegedly kept N.S. at his home, N.S. has stated that she was locked in the basement when Defendant went out to wash his car, or Defendant was not present the entire time she was allegedly locked in the basement. Whether or not he went to work, then, would not minimize or eliminate the impact of the state's evidence and bolster his defense. Also, even if he could have called as witnesses his fellow employees or boss at the Cotton Club who saw him and N.S. at the Club where N.S. says they met, they cannot say what happened later at his home.

As far as the loss of any evidence at the scene, or in Defendant's basement, there is no reason to think that it would have yielded evidence in support of what must be his theory of consensual sexual conduct given the DNA evidence. *See State v. Jackson, id.*

However, N.S. herself has claimed that Defendant's mother was present in the home during the time that she was kept there and during their ride to Murtis Taylor. Therefore, she could corroborate

that Defendant and N.S. engaged in consensual sex during the four days that N.S. alleges she was kept at her home, or testify to what she heard and saw, or did not hear and see, during the four days that N.S. was allegedly kept in the basement at her home she shared with Defendant. The State seems to have conceded that because Mamie Veal's doctor has advised that she has significant health problems that would be exacerbated by testifying and that she has "memory loss", she is unavailable to testify in this matter. This is the fact that distinguishes this matter from the cases cited by the State of Ohio in opposition to Defendant's Motion.

It is for the reason that Mrs. Veal is unable to testify at trial that the Court finds that Defendant has sustained "actual prejudice" from the pre-indictment delay. Therefore, the State has the burden of proving that the delay was justified. In *Luck*, *supra*, at ¶21, the Ohio Supreme Court explained:

> "[A] delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant..., or when the state, through negligence of 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. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable."

The State has argued that the delay in filing an indictment against Defendant was justified in that it has come into possession of new evidence, specifically the DNA evidence, and the original investigation stopped because N.S. chose not to prosecute. According to the State, this cannot be construed as an attempt to gain a tactical advantage over the Defendant or to demonstrate negligence or an error of judgment.

As Defendant argues, Defendant's identity was never at issue, nor were his whereabouts unknown to the police at the time that N.S. reported him as a suspect. In the initial police report, she identified him and gave a description of his car, and the police report contains his address, date of birth and physical description. And, according to Defendant, although the prosecution commenced following the CODIS hit, the State could have, at any time after N.S. made her initial report, obtained the same DNA sample by consent or warrant from Defendant in 1997.

And, with regard to N.S., the State waited 19 years and 4 months before filing the indictment against Defendant. Accordingly, although Defendant has not demonstrated that the State attempted to gain a tactical advantage by waiting this long, the length of delay – combined with what the Court construes as negligence or an error in judgment – demonstrates that the delay was not justified.

Accordingly, and for the reasons stated herein, Defendant's Motion To Dismiss Counts One through Five for Pre-Indictment Delay, is hereby **GRANTED**.

IT IS SO ORDERED.

Pamela A. Barker 3-1-12

Judge Pamela A. Barker **Dated**