

THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 478 CR 2019
	:	
DAVID ROBERT JONES,	:	
Defendant	:	

Criminal Law - Pre-Arrest Delay in Filing Charges - Whether Prosecution Barred -
Two-Part Due Process Test - Prejudice to the Accused - Cause of the
Delay

1. The due process protections afforded by Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution protect criminal defendants from having to defend stale charges where the delay prejudices the defendant's right to a fair trial.
2. Due process bars the criminal prosecution of an accused for undue pre-arrest delay where (1) the delay causes actual prejudice to the accused, and (2) the prosecution lacks sufficient and proper reasons for the delay.
3. The burden of establishing actual prejudice attributable to pre-arrest delay is upon the accused. To meet this standard, the accused must show that he was "meaningfully impaired in his . . . ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected."
4. Where an accused claims pre-arrest delay has resulted in the loss or absence of witnesses and resulting prejudice, to meet the standard of actual prejudice requires a showing in what specific manner missing witnesses would have aided the defense and further, that the lost testimony or information is not available through other means.
5. If the accused's threshold burden of establishing actual prejudice attributable to pre-arrest delay is met, and only then, does the burden of production shift to the Commonwealth to establish constitutionally sufficient and proper reasons for the delay. Pre-arrest delay, by itself, is not *per se* prejudicial.
6. If pre-arrest delay is intentionally undertaken by the prosecution to gain a tactical advantage over the defendant or is a product of bad faith, the delay will not be countenanced. If the delay is attributable to the prosecution's need to reasonably investigate, or to neglect or even reckless inattentiveness by the Commonwealth, due process will not be offended.
7. A due process challenge to the period of delay between the occurrence of a crime and the defendant's arrest is different and distinct from a defendant's right to a speedy trial under the Sixth Amendment, which is not implicated until the

filing of either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. Whereas, the primary concern in a delayed prosecution case is whether the defendant was meaningfully impaired in his ability to defend against the state's charges to such an extent that his right to a fair disposition of the criminal charges has been compromised, the primary concern of a speedy trial case is the duration of incarceration of a defendant after charges have been filed.

8. Where a defendant fails to establish actual prejudice attributable to pre-arrest delay and that the prosecution lacks sufficient and proper reasons for the delay, due process will not act to bar prosecution, notwithstanding a 10 1/2 year delay between when the Commonwealth became aware of the crime and defendant's involvement and when criminal charges were filed.

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Michael S. Greek, Esquire		Counsel for Commonwealth
Michael P. Gough, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 22, 2020

Does due process and the right to a fair trial bar criminal prosecution for a crime when the Commonwealth knew of the crime and of the accused's involvement more than a decade before charges were filed? This, essentially, is the question before us, and requires review of two critical factors: (1) the existence of prejudice to the accused and (2) the cause of the delay.

PROCEDURAL AND FACTUAL BACKGROUND

On July 5, 2008, David Robert Jones ("Defendant") was charged with the rape and sexual assault of two sisters, then seven and eleven years of age, the children of his girlfriend. (N.T., 8/25/20, p.30). Defendant pled guilty on September 17, 2009, to a charge of Aggravated Indecent Assault,¹ a felony of the second degree, with respect to the older sister ("A.M.") and was sentenced on February 1, 2010, to a period of imprisonment of no less than 29 months nor more than 10 years in a state correctional institution. Defendant served the full term of this sentence in prison.

The charges involving the younger sister ("W.M.") were dismissed by the

Commonwealth after the Commonwealth concluded W.M. was not competent to testify. (N.T., 8/25/20, pp.34-35). This decision was made without any judicial determination of W.M.'s competency. Nothing further was done in the case until June 22, 2018, when W.M., then seventeen years of age, appeared at the Lansford police station and requested Defendant be charged for the offenses committed against her. (N.T., 8/25/20, pp.35, 50-51). Charges were filed on April 26, 2019. By this time, Defendant had fully completed his sentence of February 1, 2010, with respect to A.M.

The charges filed on April 26, 2019, involve the same underlying conduct with which Defendant was charged in 2008 relating to W.M. On June 4, 2020, Defendant filed the instant Petition for Extraordinary Relief requesting the charges be dismissed premised on the belief that the length of time - more than ten and a half years - between when the offense took place and when he was arrested on the new charges has deprived him of the right to a fair trial as a matter of due process guaranteed by both the federal and state constitutions. A hearing on this Petition was held on August 25, 2020.

At the hearing held on Defendant's Petition, Defendant testified he was at his mother's home in Philadelphia on the date of the offense, July 3, 2008, for the Fourth of July holiday. (N.T., 8/25/20, pp.24-25). Defendant identified his mother, younger brother and six-year-old nephew as potential alibi witnesses who were also at his mother's home for the holiday, but who were no longer available to testify on his behalf because of the passage of time: (1) his mother died on November 14, 2008 (N.T., 8/25/20, p.13); (2) he has not had contact with his brother in more than ten years and does not know how to find him (N.T., 8/25/20, p.29); and (3) he does not know where

¹ 18 Pa.C.S.A. § 3125(a)(7).

his nephew is or whether his nephew recalls anything given his young age at the time. (N.T., 8/25/20, p.15).

At the time of the July 3, 2008, assaults against A.M. and W.M., the Commonwealth claims Defendant ejaculated onto the carpet of the home where the assaults occurred. (N.T., 8/25/20, p.15; see *a/so* Affidavit of Probable Cause attached to the criminal complaint filed against Defendant). Based on this assertion and the Commonwealth's failure to conduct any DNA testing, or to preserve the carpet for DNA testing at a future date,² Defendant contends the delay in filing charges has deprived him of the opportunity to do DNA testing, the results of which could have exonerated him from the charges.

DISCUSSION

Due process as guaranteed by Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution "protects defendants from having to defend state charges, and criminal charges should be dismissed if improper pre-arrest delay causes prejudice to the defendant's right to a fair trial." Commonwealth v. Snyder, 713 A.2d 596, 599-600 (Pa. 1998).³ A two-part due

² Defendant testified that his belief as to the failure of the Commonwealth to conduct DNA testing or to preserve the carpet is based on the responses he received from the Commonwealth to his discovery requests. (N.T., 8/25/20, pp.15-16, 29). The Commonwealth has not disputed Defendant's belief in this regard.

³ The due process protections afforded under Article I, Section 9 of the Pennsylvania Constitution are coextensive with those provided under the United States Constitution with respect to pre-arrest delay. Commonwealth v. Scher, 803 A.2d 1204, 1215 (Pa. 2002) (plurality opinion). In examining a claim of violation of due process caused by pre-arrest delay, the analysis is the same under both the state and federal constitutions, with decisions of the United States Supreme Court being binding on the issue. Scher, 803 A.2d at 1215.

A due process challenge to the period of delay between the occurrence of a crime and the defendant's arrest is different and distinct from a defendant's right to a speedy trial under the Sixth Amendment, which is not implicated until the filing of "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." Scher, 803 A.2d at 1216. In contrast to a delayed prosecution case where the primary concern is with whether the defendant "was meaningfully impaired in his . . . ability to defend against the state's charges to such an extent that the disposition of

process test is used to determine whether delay in the filing of criminal charges after a crime has been committed violates a defendant's right to due process under the United States and Pennsylvania Constitutions. Commonwealth v. Loudon, 803 A.2d 1181, 1184 (Pa. 2002). First, the defendant must show that he was prejudiced by the delay which requires a showing that he was "meaningfully impaired in his . . . ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected." Commonwealth v. Scher, 803 A.2d 1215, 1222 (Pa. 2002) (plurality opinion). The prejudice claimed by the defendant must be actual, concrete, and non-speculative. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). A finding of prejudice, while a threshold inquiry, is not alone sufficient to show a violation of due process. Lovasco, 431 U.S. at 790 ("Marion makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.>").

"To establish a due process violation resulting from a delay in prosecution, a defendant must prove that the passage of time caused actual prejudice and that the prosecution lacked sufficient and proper reasons for the delay." Commonwealth v. Weiss, 81 A.3d 767, 808 (Pa. 2013) (citing Commonwealth v. Snyder, 713 A.2d 596, 601 (Pa. 1998)). Under this second prong of the due process test, if the defendant proves actual prejudice, the burden of production shifts to the Commonwealth to

the criminal proceedings was likely affected," Commonwealth v. Loudon, 803 A.2d 1181, 1184 (Pa. 2002) (quoting Commonwealth v. Scher, 803 A.2d 1204, 1222 (Pa. 2002) (plurality opinion)), the primary concern of a speedy trial case is the duration of incarceration of a defendant after charges have been filed.

establish constitutionally proper reasons for the delay in prosecution. Commonwealth v. Wright, 865 A.2d 894, 901-902 (Pa.Super. 2004) (per curiam), *appeal denied*, 885 A.2d 533 (Pa. 2005). Only if the defendant meets the initial burden of proving actual prejudice does the burden shift to the Commonwealth to explain a reasonable basis for the delay. Louden, 803 A.2d at 1186.

The standard applicable to the Commonwealth for determining what are “sufficient and proper reasons” for the delay has not been decided by a majority of the Pennsylvania Supreme Court. Wright, 865 A.2d at 900. *In dicta* in the lead opinion in Scher, Justice Newman found that “insufficient or improper reasons for delay exist whenever consideration of the totality of the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution.” Scher, 803 A.2d at 1232-33 (Castille, J., concurring). In contrast, Justice Castille believed that “a proper assessment of the reasons for the delay in initiating prosecution must be confined to the question of the prosecution’s bad faith - *i.e.*, whether the delay was intentionally undertaken by the prosecution to gain a tactical advantage over the defendant.” *Id.* at 1233.

Neither view was supported by a majority of the Scher Court, is not precedential, and, as found in Wright, necessitates an examination of the standards set out by the Supreme Court in Commonwealth v. Snyder, 713 A.2d 596 (Pa. 1998), as subsequently applied by the Pennsylvania Superior Court in Commonwealth v. Snyder, 761 A.2d 584 (Pa.Super. 2000) (*en banc*), *appeal denied*, 813 A.2d 841 (Pa. 2002). Wright, 865 A.2d at 901. Under this standard, judicial evaluation of the reasons for delay does not encompass the court’s second guessing the day-to-day decisions made by the

Commonwealth under a due diligence or negligence standard. Snyder, 761 A.2d at 589-590.⁴ As to delay resulting from the Commonwealth's investigation of a crime, the Superior Court stated that "even in the face of prejudice, delay is excusable if it is a derivation of a reasonable investigation." Snyder, 761 A.2d at 587 (citing Commonwealth v. Sneed, 526 A.2d 749, 752-53 (Pa. 1987)).

Standard of Actual Prejudice

As regards the death of Defendant's mother, the offense occurred on July 3, 2008; Defendant was arrested on July 5, 2008; and Defendant's mother died on November 14, 2008, within four months of the offense and after Defendant was first arrested. Defendant entered his plea for assaulting A.M. on September 17, 2009. From this timeline, it is evident that even if the ten-and-a-half-year delay in the filing of the second set of charges had not occurred, Defendant's mother would not have been available as a witness. Stated differently, because Defendant's mother died before any period of delay in prosecution could be considered unreasonable, Defendant was not prejudiced for this reason by the delay in the filing of the second set of charges.

As to Defendant's younger brother and nephew,

⁴ The Supreme Court in Snyder held that to sustain a due process claim the defendant must establish as a threshold matter that he suffered actual prejudice from the delay and that the Commonwealth's reasons for the delay were not proper. 713 A.2d at 603, 605. In further explanation of this holding, the Supreme Court in Scher stated that "in requiring, as we did in Snyder, an examination of the reasons for the delay, we did not intend to create an obligation on the Commonwealth to conduct all criminal investigations pursuant to a due diligence or negligence standard, measured from the moment when criminal charges are filed and the defendant raises his due process claim." 803 A.2d at 1220 (Newman, J., lead opinion).

Having determined Snyder met his burden of establishing actual prejudice, the Pennsylvania Supreme Court remanded the case to the trial court to provide the Commonwealth with an opportunity to present the reasons for the delay. On appeal from the trial court's finding that valid reasons existed for the delay, the Superior Court in an *en banc* decision held judicial evaluation of the Commonwealth's reasons for the delay should not incorporate due diligence or negligence standards in assessing the validity of the delay. 761 A.2d at 589-590.

[w]hen a defendant claims prejudice through the absence of witnesses, he or she must show in what specific manner missing witnesses would have aided the defense. Furthermore, it is the defendant's burden to show that the lost testimony or information is not available through other means.

Commonwealth v. Loudon, 803 A.2d at 1184 (internal quotation marks and citations omitted) (quoting Commonwealth v. Scher, 803 A.2d at 1222).

Defendant testified he believed, but was not certain his younger brother was at his mother's home for the Fourth of July holiday and that he never spoke to his brother at any time after he was charged to learn whether his brother was there and, if he was, whether his brother could recall Defendant being there. (N.T., 8/25/20, pp.26-27). Similarly, Defendant was unsure if his nephew was at his mother's home; he never spoke with his nephew to confirm if he was there; and he did not know if his nephew had any memory of Defendant being there. (N.T., 8/25/20, pp.15, 27-28). With respect to these two witnesses, Defendant has not met his burden of establishing actual, concrete and non-speculative prejudice, that either would have qualified as an alibi witness but for the passage of time. See Sneed, 526 A.2d at 752. Moreover, as is also the case with respect to Defendant's mother, any prejudice is due, at least in part, to Defendant's own actions during the investigation: After Defendant's arrest on July 5, 2008, Defendant never mentioned to the police or to his counsel the existence of an alibi defense which, if he had, could have been investigated and documented at the time. See Weiss, 81 A.3d at 809.⁵

⁵ Defendant's credibility as to this defense is also suspect. If this defense was available and Defendant was at his mother's on the date of the offense, two days before he was arrested on July 5, 2008, why wouldn't he raise it immediately, or at least tell his attorney where he was. (N.T., 8/25/20, p.25). And why did he plead guilty to a crime he didn't commit. (N.T., 8/25/20, p.20). Defendant's claim that he pled guilty on September 17, 2009, because he was depressed over his mother's death eleven months earlier does not ring true given the significant amount of time which passed between his mother's death and

Finally, Defendant claims prejudice from the loss or destruction of evidence, namely the ability to conduct DNA testing of the ejaculate on the carpeting. This is a two-edged sword. If given the opportunity and choice would Defendant have requested DNA testing. While a negative test would clearly assist his defense, so does no test, from which the shoddiness of the police investigation could be argued. On the other hand, a positive test might bury him. The question then is whether he was prejudiced by being unable to make this choice.

The second question is whether any loss or destruction of evidence can be attributed to the delay in filing the second set of charges. We do not know, and no evidence has been presented as to whether the carpet was ever replaced and, if so, when; what cleaning, if any, was done, when, and how this would affect the ability to recover reliable samples for DNA testing; or for what period of time DNA found in ejaculate on a carpeted floor, subject to wear and tear to an extent not disclosed in the record, can be recovered and accurately tested. For all we know, the evidence may have been lost within days of the offense, or may still be there today. Because Defendant has failed to answer these questions, he has not met his burden of proving actual prejudice caused by delay for which the prosecution can be held responsible.

Basis for Delay

Delay, by itself, is not *per se* prejudicial. Absent a showing of actual prejudice, delay alone - even that, as here, in excess of ten and a half years - is insufficient to establish a defendant has been denied due process of law. Commonwealth v. Daniels, 390 A.2d 172 (Pa. 1978) (finding six and three-quarter years delay not *per se*

Defendant's plea and the opportunity he had during this period of time to discuss the matter with counsel and to have his alibi investigated. (N.T., 8/25/20, pp.19-20).

prejudicial, where the delay was not manufactured to gain an unfair advantage and no actual prejudice was demonstrated). Nevertheless, some discussion of the pre-arrest delay in filing charges against Defendant is appropriate.

At the hearing held on August 25, 2020, the ten-and-a-half-year period - between July 3, 2008 (*i.e.*, date of the offense) until April 26, 2019 (*i.e.*, date new charges were filed against Defendant) – of delay before Defendant was re-charged was never explained. Certainly, not because the Commonwealth needed this time to investigate or because of new evidence suddenly coming to light. The victims' mother reported the abuse to the police within a day or two of the assaults, and by July 5, 2008, charges were filed and Defendant was arrested. (N.T., 8/25/20, pp.33, 41).

A.M. and W.M. reported they were both raped at least twice by the Defendant, between the hours of 12:00 Noon and 5:00 P.M. on July 3, 2008. (Affidavit of Probable Cause). During these assaults, Defendant ejaculated at least once onto the carpet of the home where the victims were living and at least once inside of A.M. (Affidavit of Probable Cause). It was unclear whether Defendant ejaculated inside of W.M. (Affidavit of Probable Cause). The affidavit further notes that a physical examination of the two sisters at St. Luke's Hospital in Coaldale conducted on July 4, 2008, by Dr. R. Britton revealed trauma to the victims' vagina and semen found inside of A.M. (N.T., 8/25/20, p.34). Additionally, as part of the 2008 investigation both victims were interviewed by the Children's Advocacy Center (CAC) in Scranton. (N.T., 8/25/20, p.34). Following W.M.'s appearance at the police station in 2018, a second CAC interview of W.M. was conducted on July 23, 2018, and found consistent with her 2008 interview. On the record before us, with the possible exception of the second CAC interview –

which appears to have simply confirmed W.M.'s recollection of what occurred and what she told the police in 2008 – no additional investigation or evidence surfaced beyond the information known to the Commonwealth by the end of 2008.

The record does not support a finding that the delay after 2008, was for further investigation. Nor was any additional investigation or evidence apparently needed. The Commonwealth had sufficient evidence to convict Defendant of the sexual assault of A.M. and Defendant pled guilty to this offense on September 17, 2009. Given the physical evidence available to the Commonwealth and the eyewitness testimony of A.M. as to what occurred on July 3, 2008, it is unclear why the charges against Defendant involving W.M. could not proceed. But if, as the Commonwealth appears to argue, W.M.'s competency was the reason for the delay, then why didn't the Commonwealth periodically follow up on W.M.'s status in this regard. For instance, by comparison, it appears the Commonwealth found W.M.'s older sister, A.M., to be competent to testify at the time of the assaults, even though she was then only eleven years of age. See *also*, Commonwealth v. Harvey, 812 A.2d 1190, 1199 (Pa. 2002) (holding that while the common law presumption of a witness's competency to testify does not apply to a child under the age of fourteen, the competency of a minor less than fourteen years of age to testify may be independently established by a searching judicial inquiry). Instead, the Commonwealth apparently did nothing and nothing would have happened but for W.M. one day walking into the police station on her own ten years later and requesting the police do something. This period of delay following the conclusion of the Commonwealth's investigation in 2008 until the filing of charges on April 26, 2019, is attributable to the Commonwealth.

While the evidence does not support a finding that the Commonwealth intentionally delayed prosecution to gain a tactical advantage, acted in bad faith, or was reckless in prosecuting the case against Defendant for the assault of W.M., the complete absence of any explanation for taking any action for more than ten years after its investigation was concluded evidences on its face an inexplicable neglect. This level of culpability even if properly attributable to the Commonwealth for the delay in prosecution is not, however, sufficient to establish a due process claim based on pre-arrest delay. Commonwealth v. Scher, 803 A.2d 1204, 1220-1222 (Pa. 2002).

CONCLUSION

Finding that Defendant has not met his burden of showing actual prejudice caused by pre-arrest delay for which the Commonwealth is responsible and that the Commonwealth did not delay filing criminal charges against Defendant to gain a tactical advantage or was otherwise in bad faith, Defendant's Petition for Extraordinary Relief will be denied.

BY THE COURT:

P.J.

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ORDER OF COURT

AND NOW, this 22nd day of December, 2020, upon consideration of Defendant's Petition for Extraordinary Relief and Dismissal of Charges filed on June 4, 2020, after hearing thereon, review of Defendant's Memorandum of law in support of the Petition - no memorandum of law having been filed by the Commonwealth - and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's Petition is denied.

BY THE COURT:

P.J.