[Cite as *State v. Jenkins*, 2010-Ohio-2719.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00150
KENDLE A. JENKINS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 1995-CR-0271
JUDGMENT:	Vacated and Remanded
DATE OF JUDGMENT ENTRY:	June 14, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
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Gwin, P.J.

{¶1} Defendant-appellant Kendle A. Jenkins appeals from his conviction and sentence in the Stark County Court of Common Pleas on one count of attempted aggravated trafficking in violation of R.C. 2925.03(A)(9). The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In July 1994, Federal Drug Enforcement (DEA) Agent James Hummel was notified that a large-scale drug trafficking operation was taking place in the Los Angeles area known as the "Troy Brown Distribution Organization." Hummel learned that a large amount of cocaine - 100 times the bulk amount - was being shipped to eight cities located in the United States. One of those cities was Massillon, Ohio.

{¶3} Agent Hummel gathered a team of federal and local agents including Maureen McCabe and Charles Stirling of the DEA, Canton Police Officer Kevin Clary, and Marvin Wilmoth and his drug dog, Doc.

{¶4} The team visited the Federal Express office by the Akron-Canton Airport on Strausser Road and assembled an assortment of packages, 10 to 15, that had arrived for delivery in the area. Doc, the DEA drug dog, and Taz, the Stark Metro drug dog were assigned to investigate the unopened packages and "alerted" on a package to be delivered to "M. Gaines, 660 Fries St. Southeast, Massillon [sic], Ohio 44646." from "G. Gaines in Ontario, California." The address happened to be the home of Appellants' mother whose name at the time was Myra Jenkins.

{¶5} Based on the drug dogs' "alert," a search warrant was obtained to open the package to be delivered to Ellis Avenue. The package was opened from the bottom

to preserve it and upon its opening, the team found Styrofoam packaging, Gerber baby cereal boxes and a large box of Tide laundry detergent. The Tide box was opened and lodged in the middle of the laundry detergent was a brick shaped block of a white substance that later tested positive for cocaine. Specifically, 822.4 grams of pure cocaine hydrochloride, derived from a naturally occurring cocaine plant mostly grown in South America. It was the first kilo of cocaine Canton Officer Clary had seen in the Stark Metro area and estimated to be worth $250,000 on the street when processed.

{¶6} The team began making plans to make a controlled delivery to the Ellis Avenue address. First, the kilo of cocaine was removed from the package and secured for analysis and safekeeping. Next, the 12" by 17" package, with its baby food, laundry detergent and packaging was reassembled for the delivery. Detective Bobby Grizzard of the Massillon Police Department was called in to assist the team in the delivery. Officer Clary donned a Fed Ex shirt and a body wire[1]. He used an unmarked white Chevrolet Astro van for the controlled delivery:

{¶7} "[CLARY]: Once I got the signal, when they all met up in Massillon, the DEA Metro and Massillon Police, they took up their positions, I was notified over my walkie-talkie radio to go ahead and attempt to make delivery. So I drove over to Fries Street, parked in front of 660. It's got a porch on it, it's July 12th, it's hot out, the interior door was open, but it didn't have a screen door.

{¶8} "I went up, rang the doorbell and I could hear some voices, one male, one female inside. And then a black lady came to the door. I said, hi, FedEx, I have a delivery for M. Gaines, and I had – actually it looks like this one, a copy of the delivery

[1] No tape-recording was introduced at trial from Officer Clary's body microphone.

label, I had it on a clipboard, and the lady signed M. Gaines. I have her possession of the box, the door went shut, I walked off the porch and drove away."

{¶9} About five minutes later, the assembled law enforcement team knocked on the Ellis Avenue door to execute the search warrant they obtained for the residence. Grizzard observed Appellant bent down with the Fed Ex package looking in the box.

{¶10} Besides Appellant, Appellant's mother, Appellant's' wife, Appellant's four-year-old son and two friends of Myra Jenkins occupied the home. A warrant check was done on the individuals and the home was searched. No money, guns or drugs were found in the search. The label to the Fed Ex package was found floating in the toilet.

{¶11} Appellant was asked by the team if he wanted to cooperate and he agreed. Appellant was asked to take some calls that were coming in so the DEA could get more information on the person in California who had sent the kilo of cocaine. Appellant attempted to take two phone calls that came in, but was unsuccessful in obtaining any names for the DEA.

{¶12} Appellant agreed to visit the team the next day at the Massillon Police Department for an interview. Appellant arrived at the interview with his mother and gave a five page detailed written statement to DEA Agents Stirling and McCabe.

{¶13} In sum, Appellant told the agents that on July 5, 1994, he met a high school friend named "Damon" at MoJack's bar in Cleveland. Damon asked Appellant if he would take delivery of some "weed" for $200.00. Jenkins agreed and told Damon to deliver it to his mother's address on Fries Street in Massillon, Ohio.

{¶14} On Tuesday, July 12, 1994, Appellant received a call from "Pooky" in California to ask if the package arrived. It was 11:30 am and the package had not

arrived. So “Pooky” called again about 2:00 pm and gave Appellant a FedEx tracking number. Appellant then called FedEx three times to find out why the package had not been delivered. It was delivered about 6:45 pm. Appellant admitted to opening the package to take out some marijuana for himself. He tore off the label and threw it in the toilet.

{¶15} At the end, Appellant signed and dated the statement admitting that he read it, initialed each page and that it was given freely and voluntarily “without any threats, coercion or promises.”

{¶16} Appellant agreed to assist law enforcement in the cocaine distribution and provided the team with his address in the Cleveland area. After the police obtained his statement, the Metro team went looking for him. They went to his mother’s residence and learned that he was out of state.

{¶17} Appellant presented testimony from himself and his wife that he lived in Cleveland Heights until July 1994 when he and his wife lost their jobs and he decided to move their family to Houston, Texas, where each found employment. The family sold their furnishings, gave away the dog and lived with his mother in Massillon from July 13 to the end of July. Appellant admitted that he thought he was going to be arrested, claiming [I] don’t know anybody that walks away from a kilo of cocaine, if it was cocaine.” Appellant testified that he told the DEA agents that he was moving to Houston and they approved the move telling him to have a good life. Appellant admits that he never provided them with an address.

{¶18} On March 30, 1995, the Stark County Grand Jury secretly indicted Appellant on one count of aggravated trafficking - knowing possession of cocaine in an

amount equal to or exceeding a hundred times the bulk amount, a violation of R.C. 2925.03(A)(9). That same day, a capias was issued for Appellants' arrest showing his last known address as 3760 Lowell Road, Cleveland Heights, Ohio.

{¶19} Appellant was arrested some thirteen years later on December 11, 2008. Prior to trial, Appellant filed a motion to dismiss arguing that proceeding with the case some thirteen years after the indictment violated his rights to speedy trial and the statute of limitations. Without conducting a hearing, and after considering the motion and the response of the state, the trial court overruled the motion finding that the delay was caused solely by Appellants' own actions in leaving the State of Ohio to live in Texas after becoming aware of the ongoing investigation:

{¶20} "R. C. 2901.13 states that leaving the state is prima facie evidence of the accused's purpose to avoid prosecution. In the present action, the defendant left the state of Ohio and went to Texas, making himself unavailable. Further, the defendant has not asserted that he would or has been prejudiced by the delay. Therefore, this Court finds that the delay between the defendant being indicted and his arrest was caused by the defendant's own actions and thus the statute of limitations has been tolled. Further, in balancing the factors laid out in *Barker,* this Court finds that the long time frame between the defendant's indictment and his arrest is outweighed by the defendant's own actions, the reasonable diligence of the State, and the complete lack of an assertion that the defense was or will be prejudiced by the delay."

{¶21} Appellants' case proceeded to jury trial on March 31, 2009. On the day of trial, Appellant filed a motion to suppress the statement he gave to law enforcement in April 2004 arguing that it was coerced. That motion was overruled because it was not

timely filed. However, Appellant was allowed to testify that he was coerced into making the statement. Denouncing his written statement at trial, Appellant claimed it was a lie - only made after the DEA told him to take the fall for his mama, saying "....He told me if I don't – he said, you know, you should take this case. If you don't take this case, you mama will lose everything. Back then, I was willing to take the case because I wasn't working anyway and I was young. I wouldn't let her get in trouble anyway."

{¶22} The State presented six witnesses including the law enforcement agents who participated in the initial investigation. The State, however, was unable to produce the brick shaped white substance containing 822.4 grams of pure cocaine because it had been destroyed by mistake by drug enforcement agents.

{¶23} Appellant presented three witnesses including his wife and mother and testified in his own behalf.

{¶24} The jury was given both oral and written jury instructions including an instruction on the lesser-included offense of attempted aggravated trafficking in cocaine. The jury returned with a verdict of not guilty to the charge of aggravated trafficking but guilty of the lesser charge of attempted aggravated trafficking. Jenkins returned to the trial court for sentencing on April 8, 2009 and received a sentence of six to fifteen years. Appellant was placed on shock probation on October 19, 2009.

{¶25} Appellant timely appeals his conviction and sentence raising four assignments of error:

{¶26} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING APPELLANT'S MOTION TO DISMISS BECAUSE APPELLANT'S SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION RIGHT TO A SPEEDY

TRIAL WAS VIOLATED PURSUANT TO THE BALANCING TEST ESTABLISHED IN *BARKER V. WINGO*, 407 U.S. 514 (1972).

{¶27} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO DISMISS BECAUSE THE STATE OF OHIO FAILED TO ACT WITH REASONABLE DILIGENCE IN THE COMMENCEMENT OF PROSECUTION AGAINST APPELLANT AS REQUIRED BY R.C. §2901.13(E).

{¶28} "III. THE TRIAL COURT FAILED TO GRANT APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS STATEMENTS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§10 AND 16 OF THE OHIO CONSTITUTION."

{¶29} "IV. APPELLANT WAS DENIED A FAIR TRIAL UNDER THE UNITED STATES CONSTITUTION OHIO CONSTITUTION BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL."

I & II

{¶30} In his first assignment of error, appellant argues that his right to a speedy trial was violated by the fourteen-year delay between his initial indictment and his eventual trial and that his due process rights were violated by the pre-indictment delay of eight and one half months between the alleged crime and the issuance of the indictment.[2] In his second assignment of error, Appellant argues that the state failed to

[2] Appellant is not arguing that his statutory right pursuant to R.C. 2945.71 was violated. See, n. 3, infra. Rather, appellant argues his constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and, although not specifically cited in his brief, we believe appellant to be arguing further that his right to due process under the Fifth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution have been abrogated.

exercise reasonable diligence in locating him to serve him with the March 30, 1995 indictment within the statutory time period. For the reasons that follow, we agree.

{¶31} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin,* Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo standard of review and thus freely review the trial court's application of the law to the facts. Id.

{¶32} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

{¶33} The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." This provision is applicable to state courts through the Fourteenth Amendment. *Klopfer v. North Carolina* (1967), 386 U.S. 213. The Ohio Constitution provides similar protection.

{¶34} "Section 10, Article I of the Ohio Constitution guarantees to the party accused in any court 'a speedy public trial by an impartial jury.' 'Throughout the long history of litigation involving application of the speedy trial statutes, this court has repeatedly announced that the trial courts are to strictly enforce the legislative mandates evident in these statutes. This court's announced position of strict enforcement has been grounded in the conclusion that the speedy trial statutes

implement the constitutional guarantee of a public speedy trial.'" (Citations omitted.). *State v. Pachay* (1980), 64 Ohio St.2d 218, 221, 416 N.E.2d 589, 591.

{¶35} In *State v. Meeker* (1971), 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus, the Ohio Supreme Court held that "[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment." Subsequent to the Ohio Supreme Court's decision in *Meeker,* the United States Supreme Court ruled that the speedy trial guarantee under the Sixth Amendment has no applicability to pre-indictment delays. *United States v. Marion* (1971), 404 U.S. 307. In light of the *Marion* decision and its progeny, the Ohio Supreme Court held in *State v. Luck* (1984), 15 Ohio St.3d 150, 153, 472 N.E.2d 1097, that the Court's "holding in *Meeker* is viable only insofar as its application is limited to cases that are factually similar to it."

{¶36} In *State v. Selvage* (1997), 80 Ohio St.3d 465, 687 N.E.2d 433, 1997-Ohio-287, the Ohio Supreme Court revisited the issue of whether an individual's constitutional right to a speedy trial has been violated by a delay in prosecution. In *Selvage,* the Ohio Supreme Court reaffirmed its holding in *Meeker,* and noted that the speedy trial guarantee does not apply prior to indictment when the defendant has not been the subject of "official accusation." Id. at 466.

{¶37} In the case at bar, Appellant was indicted for aggravated trafficking in cocaine in an amount exceeding one hundred times the bulk amount on March 30, 1995, some 8-1/2 months after the suspected cocaine packaging was found during the search of his mother’s home. Appellant was not incarcerated or arrested during this 8-

1/2 month delay and his daily activities were not impaired by the State. Thus, Appellant's speedy trial rights were not implicated.

{¶38} However, as the second syllabus in *Luck* states, "[a]n unjustified 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 Amendment to the United States Constitution." *Luck,* 15 Ohio St.3d at 154, 472 N.E.2d at 1102. See also, *United States v. Lovasco (*1977), 431 U.S. 783, 789-790, 97 S.Ct. 2044, 2049, 752; *Marion,* 404 U.S. at 324, 92 S.Ct. at 465, Furthermore, any claim of prejudice, such as the death of a key witness, lost evidence, or faded memories, must be balanced against the other evidence in the case in order to determine whether the defendant will suffer actual prejudice at trial. *Luck*, supra.

{¶39} When a defendant asserts a pre-indictment delay violated his due process rights, prejudice may not be presumed. *United States v. Crouch* (C.A.5, 1996), 84 F.3d 1497, 1514-1515. The notion that prejudice may be presumed from a lengthy delay arises in the context of the four-part balancing test used in determining whether a post-indictment or post-accusation delay has deprived a defendant of his Sixth Amendment right to a speedy trial. *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. The *Barker* four-part test, and the concept of presumptive prejudice, applies only to post-indictment or post-accusation delays that implicate the Sixth Amendment right to a speedy trial, and has no application to pre-indictment delays. *See, State v. Metz* (1998), Washington App. No. 96CA48, (Citation omitted); *State v. Harrell* (Dec. 29, 1998), Delaware App. No. 98CAA06029.

{¶40} The Ohio Supreme Court held that a delay in the commencement of prosecution by the state would be found unjustified when it is done in an attempt to gain a tactical advantage over the defendant, or when 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." *Luck,* 15 Ohio St.3d at 158. The Court also held that the length of delay would normally be a key factor in this determination. Id.

{¶41} The defendant has the burden of demonstrating prejudice. E.g., *United States v. Lawson* (6th Cir 1985), 780 F.2d 535, 541-42. A lengthy delay in prosecuting the defendant, by itself, does not constitute actual prejudice. The defendant must demonstrate how the length of the delay has prejudiced his ability to have a fair trial. *United States v. Norris* (SD OH 2007), 501 F.Supp.2d 1092, 1096. In *United States v. Wright* (6th Cir 2003), 343 F.3d 849, 860, the Court held that loss of memory is insufficient to establish prejudice as a matter of law.

{¶42} In the case at bar, Appellant makes no specific argument to establish actual prejudice resulting from the 8-1/2 month delay between the alleged crime and the issuance of the indictment.

{¶43} As the court stated in *State v. Glasper* (Feb. 2, 1997), Montgomery App. No. 15740, "The defendant will not satisfy his or her burden of proof by merely generally alleging the possible prejudice inherent in any delay, for example, that memories have faded, witnesses may be inaccessible, and evidence may be lost. The defendant must identify the specific prejudice suffered, and that prejudice must be

substantial, for instance, that important taped witness interviews were destroyed or that key witnesses have died." In *State v. Flickinger*, supra the court noted, “a defendant must provide concrete proof that he will suffer actual prejudice at trial as a result of the government's delay in indicting the defendant. See, e.g., *Crouch,* 84 F.3d at 1515 (stating that vague assertions of faded memories are insufficient to establish actual prejudice; the defendant must state which witness is unable to fully recount the details of the crime and how the witness' lapsed memory will prejudice the defense); *United States v. Beszborn* (C.A.5, 1994) 21 F.3d 62, 67, certiorari denied *sub nom, Westmoreland v. United States,* 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288 (stating that vague assertions of faded memories are insufficient to establish actual prejudice); *United States v. Stierwalt* (C.A.8, 1994), 16 F.3d 282, 285 (stating that assertions of faded memories are insufficient to establish actual prejudice when the defendant fails to specify how witness' lapsed memory will harm his defense); *United States v. Harrison* (S.D.N.Y.1991), 764 F.Supp. 29, 32 (stating that assertion of faded memories is insufficient to establish actual prejudice); *United States v. Greer* (D.Vt.1997), 956 F.Supp. 525, 528 (stating that a defendant must present concrete proof of actual prejudice and not mere speculation of actual prejudice)”. *State v. Flickinger* (Jan. 19, 1999), Athens App. No. 98 CA 09A.

{¶44} Assuming, *arguendo,* that appellant had established the existence of actual prejudice, we believe that the state presented justifiable reasons for the delay that outweigh any prejudice appellant may have suffered. Appellant has made no showing that the delay between the alleged incident and the indictment was an intentional device on the part of the Government to gain a decided tactical advantage

in its prosecution. *United States v. Marion,* 404 U.S. at 324, 92 S.Ct. at 465. The lapse between the alleged incidents and the actual indictment was the result of the laboratory testing of the kilo of cocaine which took place in August, 1994, and further that Appellant volunteered and the state intended to use him to investigate the bigger fish - the California connection who was sending large amounts of cocaine to various parts of the country. Delaying an indictment for 8-1/2 months in the hopes of gaining a defendant's assistance in catching other drug traffickers is not only reasonable, but benefits a defendant who chooses to cooperate to avoid more serious charges. See, *United States v. Lovasco* (1977)*,* 431 U.S. 783, 792-793 97 S.Ct. 2044, 2049-2050.

{¶45} While the speedy trial clause of the Sixth Amendment does not apply to the period before Appellant was indicted, arrested or otherwise officially accused, it does apply once the secret indictment was filed in March 1995.[3] Sixth Amendment analysis, therefore, attaches to Appellants' claim that the fourteen-year delay between the indictment in 1995 and subsequent arrest in 2008 prejudiced his defense and impaired his Sixth Amendment rights.

{¶46} As noted by the United States Supreme Court in *Barker v. Wingo* (1972), 407 U.S. 531, 92 S.Ct. 2182, the speedy trial guarantee is designed to: 1) minimize lengthy incarceration prior to trial, 2) restrain the impairment of liberty while defendant is on bail 3) to generally shorten the disruption of life caused by arrest and unresolved criminal charges and 4) to preclude significant prejudice to the defense cause by the passage of time. See also *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455.

[3] We note that the indictment in the case at bar was never dismissed by the state during the fourteen year period before appellant's arrest. See, e.g. *United States v. MacDonald* (1982)*,* 456 U.S. 1, 102 S.Ct. 1497; *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541; *State v. Azbell,* 112 Ohio St.3d 300, 859 N.E.2d 532, 2006-Ohio-6552 at ¶ 17.

{¶47} In *Barker v. Wingo,* supra, the United States Supreme Court identified four factors that are relevant in assessing a claim under the Speedy Trial Clause that a defendant was prejudiced: the length of the delay, the reason for the delay, the defendant's assertion of his rights and prejudice to the defendant.

{¶48} 1). Length of Delay.

{¶49} Under the *Barker* balancing test, the length of the delay "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id. at 530, 92 S.Ct. at 2192. The state concedes in the case at bar, that a fourteen-year delay was "presumptively prejudicial." This conclusion, however, does not establish a constitutional violation; it merely begins an inquiry into balancing the other *Barker* factors. In *Doggett v. United States* (1992), 505 U.S. 647, 651, 112 S.Ct. 2686, 2690, the Court explained that a finding that the delay is presumptively prejudicial merely triggers the *Barker* balancing test.

{¶50} 2). Meaningful demand for a speedy trial.

{¶51} Appellant filed a motion to dismiss on speedy trial grounds on December 24, 2008, the same month his indictment was returned and he was arrested. The state therefore concedes that, based on Appellant's claim he did not know about the indictment that he met his *Barker* burden as it relates to this factor.

{¶52} 3). Reason for the Delay.

{¶53} In *United States v. Schreane* the United States Court of Appeals for the Sixth Circuit explained,

{¶54} "The second *Barker* factor focuses on the reason for the delay. Not all delays are susceptible to equal blame. See *Barker*, 407 U.S. at 531, 92 S.Ct. 2182 (explaining that "different weights should be assigned to different reasons"). A governmental delay motivated by bad faith, harassment or attempts to seek a tactical advantage weigh heavily against the government. See id.; see also *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) (harassment is an improper reason for delay); *United States v. White*, 985 F.2d 271, 275 (6th Cir.1993) ("Delays intended to secure a tactical advantage weigh heavily against the government."). "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531, 92 S.Ct. 2182; see also *Strunk v. United States*, 412 U.S. 434, 436, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973) (understaffed prosecutor's office is a neutral reason for delay). A "valid reason" for a delay, such as an unavailable witness, weighs in favor of the government. See *Barker*, 407 U.S. at 531, 92 S.Ct. 2182; see also *United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir.) ("Valid reasons for delaying a trial are weighted in favor of the Government."), cert. denied, 525 U.S. 850, 119 S.Ct. 124, 142 L.Ed.2d 100 (1998); *Takacs v. Engle*, 768 F.2d 122, 128 (6th Cir.1985) (explaining that a valid delay "weighs in favor of the government"). Finally, it should be noted that the second *Barker* factor "is not a search for a blameless party," *Wilson v. Mitchell*, 250 F.3d 388, 395 (6th Cir.2001); instead, the concern is with "whether the government or the criminal defendant is more to

blame for [the] delay." *Doggett*, 505 U.S. at 651, 112 S.Ct. 2686." *United States v. Schreane* (6th Cir 2003), 331 F.3d 548, 553-554.

{¶55} In the case at bar, nothing in the record suggests-and Appellant does not argue-that the delay that occurred in the prosecution of this case was motivated by bad faith, harassment, or a governmental desire to seek a tactical advantage. Rather, the trial court found that the entire fourteen-year delay was attributable to appellant leaving the State and moving to Texas. However, appellant argues that the state failed to use reasonable diligence to locate him. Interestingly, "[w]hat *Doggett* does not answer…is the extent to which a defendant's attempt to evade discovery affects the Sixth Amendment analysis." *United States v. Wilson* (6th Cir 2001), 250 F.3d 388, 395.

{¶56} In *Wilson*, the court employed a tort law analogy, viewing the state's failure to exercise reasonable diligence in pursuit and detection as passive wrongdoing, and the defendant's intentional evasion attempts--consisting of frequent changes of name, identity, appearance and location for twenty-two years--as active wrongdoing. See *Wilson*, 250 F.3d at 395. The court concluded: "because Wilson actively evaded discovery, and the state was, at worst, passive in its pursuit of him, we cannot attribute the primary responsibility for the delay to the state. Indeed, even if the police made mistakes in their search for Wilson, he is not entitled to relief on this ground so long as his active evasion is more to blame for that delay." Id. (internal quotes omitted).

{¶57} In the case at bar, Appellant presented evidence that he left the state of Ohio in July 1994. The Stark County Grand Jury did not issue the indictment until March 30, 1995. Accordingly, at the time he left Ohio no charges were pending against Appellant. In fact, no charges were pending for the eight and one-half month period

after appellant had left the State. The only testimony presented by the state concerning its attempts to locate appellant came *before* the issuance of the indictment. Specifically, Detective Grizzard testified that he and another agent went to the home of appellant's mother "within days" of the search of her home on July 13, 1994. (1T. at 253). She told the agents that appellant "was not in the area anymore, he was out of state…" (Id. at 254).

{¶58} In *State v. McNichols* (Sept. 5, 2000), Stark App. No. 2000CA00058, this Court noted,

{¶59} "There must be some indication of attempts to serve the warrant by arrest or summons. *State v. Morris* (1984), 20 Ohio App.3d 321. Other than the single attempt by the Stark County Sheriff's Department to serve the secret indictment while appellant was temporarily out of town in the Navy, no other attempts at service were made. No return was filed indicating any additional attempts. This issue becomes whether appellee used reasonable diligence in execution of the warrant. The burden is upon appellee to show prosecution was timely commenced. *State v. Young* (1981), 2 Ohio App.3d 155. Once a defendant demonstrated more than six years have elapsed after the indictment was filed, the burden shifts to the prosecution to show reasonable diligence was exercised to execute the warrant in order to show the prosecution was commenced within the applicable time. The Supreme Court of Ohio, in adopting Black's Law Dictionary's definition, has defined reasonable diligence as '[the] fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity.' *Sizemore v. Smith* (1983), 6 Ohio St.3d 330, 332.

Therefore, what constitutes reasonable diligence must be determined by the facts and circumstances of each particular case. Id."

{¶60} In the case at bar, the record is devoid of evidence that the state attempted to serve the secret indictment, or to locate appellant to serve him. The lone attempt to locate him by contacting his mother occurring over eight months before the indictment was issued does not demonstrate due diligence. *State v. McNichols*, supra; *State v. Mahoney* (Oct. 4, 1993), Stark App. No. CA-9316; *State v. Parsons* (Oct. 31, 2005), Putnam App. No. 12-05-06 at ¶ 13.

{¶61} We are also trouble by the fact that the fourteen year delay in commencing prosecution in the case at bar is more than twice the applicable limitation period.

{¶62} R.C. 2901.13(A) (1) states that a prosecution for a felony other than aggravated murder or murder shall be barred unless it is commenced within six years after the offense is committed. The offense in the case at bar occurred July 12, 1994. The applicable period of limitations therefore expired on July 12, 2000. Appellant was not tried until March 31, 2009.

{¶63} The period of limitations, however, is tolled when the accused "purposely avoids prosecution." R.C. 2901.13(G). "Proof that the accused absented himself from this state or concealed the accused's identity or whereabouts is prima-facie evidence of the accused's purpose to avoid prosecution." *Id.* The state bears the burden of proving an offense was committed within the appropriate statute of limitations. *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.,* 85 Ohio St.3d 582, 587, 709 N.E.2d 1192, 1999-Ohio-408.

{¶64} After reviewing the facts of the instant case, it is our conclusion that the evidence is not sufficient to sustain the presumption that the statute of limitations must toll. To support this, we first highlight the following facts supported by the record.

{¶65} For fourteen years, the Government's investigators made no serious effort to locate appellant. It introduced no evidence challenging the testimony of Appellant that he had been stopped for traffic violations in Cleveland, Ohio and in Houston Texas well before 2009. (2T. at 426-428; 438). Further Appellant's wife testified that the reason for the move related to her lay off from her job and the probable foreclosure on their home in Cleveland. (Id. at 395; 409-410). The State presented no evidence from the DEA to refute Appellant's testimony that he had informed the federal agents that he was moving to Houston, (Id. at 426; 432-433). The Appellant lived in the Houston area the entire fourteen-year period, having purchased a home in his wife's name. (Id. at 406). The couple's son attended the University of Texas. (Id. at 409). Appellant was employed while residing in Texas. (Id. at 410; 412). The couple traveled to Santo Domingo, the Dominican Republic, San Juan, Puerto Rico, St. Thomas and Cancun, Mexico. (Id. at 390-391; 411). The State presented no evidence that they attempted to locate appellant by contacting Appellant's grandfather, his wife's former employer, his mother-in-law or any friend or other relative that might have information concerning Appellant's whereabouts. The record contains no evidence that Appellant used and alias, changed his appearance or frequently relocated. "The mere lack of additional efforts to locate [Appellant] to serve him with the summons for [fourteen] years is indicative of the state's failure to exercise any diligence, much less the requisite 'reasonable diligence'." *State v. Jackson,* Cuyahoga App. No. 86755, 2006-Ohio-2468;

Accord *State v. King* (1995), 103 Ohio App.3d 210, 658 N.E.2d 1138, (reasonable diligence was not found where the state made only one attempt to serve a summons); *State v. Myers*, Cuyahoga App. No. 1-25-07, 2007-Ohio-279 at ¶ 14.

{¶66} In sum, based on the facts of this case, we cannot conclude that the record contains sufficient evidence to establish that Appellant "purposely" avoided prosecution in order to trigger the tolling provisions in R.C. 2901.13(G). Nor can we conclude that the State met its burden in this case. Specifically, we cannot say that contacting his mother on one occasion *prior to the issuance of the indictment* is alone sufficient to establish that the State exercised due diligence in executing the warrant.

{¶67} Accordingly, we conclude that the trial court did err in denying Appellant's Motion to Dismiss. We also conclude that the trial court erred in concluding that the statute of limitations was tolled.

{¶68} Appellant's first and second assignments of error are sustained.

{¶69} In light of our disposition of Appellant's first and second assignments of error, appellant's third and fourth assignments of error are moot.

{¶70} The judgment of the Stark County Court of Common Pleas is reversed. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence is vacated, and this case is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

WSG:clw 0601

[Cite as *State v. Jenkins*, 2010-Ohio-2719.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KENDLE A. JENKINS	:	
Defendant-Appellant	:	CASE NO. 2009-CA-00150

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is reversed. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence is vacated, and this case is remanded for proceedings in accordance with our opinion and the law. Costs to appellee.

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HON. W. SCOTT GWIN

_____

HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY