

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-11-042

Appellant

Trial Court No. 11CR122

v.

Thomas Brock

DECISION AND JUDGMENT

Appellee

Decided: December 21, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellant.

Howard C. Whitcomb, III, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a November 30, 2011 judgment of the Ottawa County Court of Common Pleas, which dismissed one count of trafficking in drugs against appellee, in violation of R.C. 2925.11, a felony of the fifth degree. The dismissal was based upon alleged prejudice from a pre-indictment delay. For the reasons set forth below, this court reverses the judgment of the trial court.

{¶ 2} Appellant, the state of Ohio, sets forth the following sole assignment of error:

1. THE TRIAL COURT ERRONEOUSLY DISMISSED THE
INDICTMENT AGAINST THOMAS BROCK FOR PRE-INDICTMENT
DELAY.

{¶ 3} The following undisputed facts are relevant to this appeal. On October 10, 2011, appellee was indicted on one count of trafficking in drugs, in violation of R.C. 2925.11, a felony of the fifth degree, in connection to an illegal drug transaction occurring on or about November 14, 2006. On November 9, 2011, appellee filed a motion to dismiss due to alleged prejudice from the pre-indictment delay.

{¶ 4} On November 30, 2011, the trial court conducted an evidentiary hearing on appellee's motion to dismiss. While appellee conceded during his testimony to selling marijuana on prior occasions, he denied specific recollection of selling marijuana from his parents' home on the date enumerated in the indictment. At this juncture, the trial court concluded in relevant part, "I will find that there is prejudice in this matter and that the witness testified he doesn't have any independent recollection of this occurring." Given this finding, the court next entertained evidence of a justifiable reason for the delay in indictment. The court determined that appellant failed to establish a justifiable reason for the delay. The matter was dismissed. This appeal ensued.

{¶ 5} The two-part evidentiary test in connection to a motion for pre-indictment delay is well-established by Ohio courts. As affirmed in *State v. Whiting*, 84 Ohio St.3d

215, 702 N.E.2d 1199 (1998), a defendant bears the initial burden to establish actual, substantial prejudice caused by the pre-indictment delay. Only upon a demonstrable showing of substantial prejudice to the defendant from the delay is a reciprocal burden triggered upon the state to demonstrate a justifiable reason for a pre-indictment delay. *Id.* In conjunction with this controlling legal standard, the trial court is not entitled to presume prejudice prefaced upon conjecture and speculation. On the contrary, the defendant must demonstrate through objective evidence actual prejudice, such as the exculpatory value of evidence that is missing or unavailable due to the delay. *State v. Zimbeck*, 6th Dist. No. F-10-001, 2011-Ohio-2171.

{¶ 6} We have carefully reviewed the record of evidence in this matter, paying determinative attention to the transcript of proceedings of the motion to dismiss hearing. We find that appellee's mere subjective denial of any recollection of selling drugs from his parents' home on the date enumerated in the indictment does not constitute valuable exculpatory evidence so as to satisfy the requisite showing of actual prejudice. Notably, appellee did not deny past involvement in illegal drug transactions, but simply failed to recall engaging in such activity on the date and at the location delineated in the indictment.

{¶ 7} The record reflects that the chief evidence presented by appellee in support of his claim of actual prejudice from pre-indictment delay was his own claimed lack of a specific recollection of the underlying drug transaction enumerated in the indictment. As such, the trial court's conclusion that appellee satisfied his burden of proof in showing

substantial prejudice so as to ultimately warrant dismissal of the case was flawed.

Appellee failed to demonstrate actual prejudice. As such, we find that the burden of proof never shifted to appellant to demonstrate a justifiable reason for delay.

{¶ 8} Wherefore, we find appellant's sole assignment of error well-taken. The judgment of the Ottawa County Court of Common Pleas is hereby reversed. The matter is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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