

[Cite as *State v. Banks*, 2015-Ohio-5418.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102576

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

KYLE L. BANKS

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588698-A

BEFORE: Jones, P.J., Boyle, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 24, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant the state of Ohio appeals from the trial court's January 29, 2015 judgment granting the motion to dismiss of defendant-appellee Kyle Banks. We reverse and remand.

I. Factual and Procedural History

{¶2} In September 2014, Banks was charged with one count each of rape and kidnapping. The charges were the result of an alleged rape that occurred in September 1994, when Banks was 17 years old. Banks filed a motion to dismiss on the ground of preindictment delay. After a hearing, the trial court granted the motion.

{¶3} According to the police report and testimony at the hearing, the alleged victim was walking on W. 65th Street near Franklin Boulevard in Cleveland, which is in the vicinity of a school. The alleged victim reported that she was approached by an unknown male who told her that he knew her from school. She stated, however, that she did not know the male. She attempted to walk away from him, but he grabbed her and forced her into a doorway of the school.

{¶4} The alleged victim reported that, once in the doorway, the male forcibly kissed her several times, then knocked her to the ground and covered her mouth. The male told her not to scream; he told her that he had a gun and would use it. The alleged victim stated that the male then forcibly raped her. When he was finished, she escaped and ran to her sister's house, which was nearby.

{¶5} When the alleged victim arrived at her sister's house, she told her sister what

had happened and her sister called 911. Emergency medical personnel responded to the sister's house and transported the alleged victim to the hospital where she was administered a rape kit. The alleged victim also informed her father of what had happened, and reported that he was "very irate" with her because of a previous claim she had made two years earlier.

{¶6} Investigation of the matter was assigned to Detective Nathan Pursley who, after "several" unsuccessful attempts to secure the cooperation of the alleged victim, stopped the investigation due to "no further investigate leads."

{¶7} In 2012, the alleged victim's rape kit was sent to the Bureau of Criminal Investigations as part of the attorney general's sexual assault kit testing initiative. In July 2013, the Cleveland Police Department was notified that a preliminary match was made between Banks's DNA and the DNA recovered from the alleged victim's rape kit. The department reopened the case in July 2013. The DNA match was confirmed in October 2013.

{¶8} At the time the case was reopened, Detective Pursley was no longer with the Cleveland Police Department, and his whereabouts were unknown. The case was reassigned to Detective Karl Lessmann, who located and interviewed the alleged victim; she still maintained that she had not known her assailant. The 911 call and the alleged victim's medical records from her hospital visit on the day of the incident were not available by the time of indictment. Further, the physician who had examined her was deceased.

{¶9} On this evidence, the trial court granted Banks’s motion to dismiss due to preindictment delay. The state now contends that the trial court erred in granting Banks’ motion to dismiss, assigning the following error: “The trial court erred in dismissing the indictment as appellee failed to present evidence establishing that he suffered substantial and actual prejudice due to preindictment delay.”

II. Law and Analysis

{¶10} Under some circumstances, the delay between the commission of an offense and an indictment can constitute a violation of due process of law guaranteed by the federal and state constitutions. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

{¶11} Courts apply a two-part test in considering whether preindictment delay constitutes a due process violation. First, the defendant has the burden to show that he was substantially and actually prejudiced due to the delay. *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 1199 (1998). However, “proof of actual prejudice, alone, will not automatically validate a due process claim” as “the prejudice suffered by the defendant must be viewed in light of the state’s reason for the delay.” *Luck* at 154, citing *Marion*. Thus, once the defendant establishes “actual prejudice,” the second part of the test shifts the burden to the state to produce evidence of a justifiable reason for the delay. *Id.* Thereafter, the due process inquiry involves a balancing test by the court,

weighing the reasons for the delay against the prejudice to the defendant, in light of the length of the delay. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51.

{¶12} “The determination of ‘actual prejudice’ involves ‘a delicate judgment based on the circumstances of each case.’” *Id.* at ¶ 52, quoting *Marion* at 325. Thus, prejudice is not presumed solely because of a lengthy delay. *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 13. In determining whether a defendant suffered actual prejudice based on preindictment delay, courts have generally required a defendant to demonstrate that any missing evidence or lost witnesses were nonspeculative and exculpatory. *See, e.g., State v. McFeeture*, 2014-Ohio-5271, 24 N.E.3d 724, ¶ 119 (8th Dist.); *State v. Clemons*, 2013-Ohio-5131, 2 N.E.3d 930, ¶ 17 (8th Dist.); *State v. Stricker*, 10th Dist. Franklin No. 03AP-746, 2004-Ohio-3557, ¶ 36.

{¶13} However, in a recent en banc decision, *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, this court, analyzing the case under the “concepts of due process and fundamental justice,” found that under the circumstances presented in that case, the defendant suffered actual prejudice due to a nearly 20-year preindictment delay. *Id.* at ¶ 47. Banks contends that, under the authority of *Jones*, the trial court’s decision should be affirmed. We disagree.

{¶14} *Jones* is distinguishable from this case. Specifically, in *Jones*, identity was not an issue. From the beginning of the investigation, the alleged victim in *Jones* identified her alleged rapist to both the police and medical personnel. Thus, the testing

of the DNA evidence years later did nothing to “advance the case.” *Id.* at ¶ 42. In contrast, in this case, Banks’s identity was not known until the DNA test was done. Further, Jones claimed that a key witness, whom he contended was present in the house when the alleged rape occurred, was deceased at the time of indictment and had not previously been interviewed by the police. Banks does not contend that such a key possible eyewitness to the events is now unavailable in this case.

{¶15} We are also not persuaded by Banks’s contention that *State v. Winkle*, 7th Dist. Mahoning No. 12 MA 162, 2014-Ohio-895, is on point with this case. In *Winkle*, the Seventh Appellate District upheld the trial court’s dismissal of the indictment against the defendant on the ground of preindictment delay.

{¶16} In 2002, the alleged victim in *Winkle*, the defendant’s daughter, contended that the defendant had sexually assaulted her between 1994 and 1996, starting when she was about five years old. She alleged that the assaults occurred at night when her mother was away from the home at work. There was no scientific or physical evidence, or witnesses corroborating the daughter’s allegation. The defendant was briefly investigated in 2002, but after the daughter stopped cooperating, the case was closed in 2003. At that time, however, there was another suspect who had never been investigated.

{¶17} In 2012, the case was reopened after the alleged victim said she remembered her father talking to his son about the assault. The son was interviewed and told the police of alleged admissions his father had made about the assaults in 2003. The police

arranged a “cold call” between the alleged victim and defendant, whereby the call was recorded unbeknownst to the defendant, and the defendant allegedly discussed the assaults during the call. No recording of the call existed, however. The defendant was indicted in April 2012. He attempted to obtain various records related to sleep studies he had participated in during the time of the alleged assaults to prove his alibi defense. The defendant also sought records related to his wife’s work schedule in order to impeach the alleged victim about when the alleged assaults occurred. The majority of the records that the defendant sought were unavailable, however. The defendant filed a motion to dismiss based on preindictment delay. The state opposed the motion, contending that it had indicted after the discovery of “new evidence.” The trial court granted the defendant’s motion.

{¶18} The Seventh Appellate District upheld the trial court’s dismissal of the indictment against the defendant, finding that the “new evidence,” which the state contended justified reopening the case, was really not new evidence. The court noted that the supposed admissions made by the defendant to his son occurred in 2003, and that at the very beginning of the case there was another suspect who the state failed to investigate, even though it had a suspect’s name.

{¶19} The within case is distinguishable from *Winkle*. First, the identity of the defendant here was not known until after the DNA testing. Second, Banks has not contended that specific missing or unavailable evidence would have proven an asserted defense, as was the case in *Winkle* with the defendant’s alibi defense. We note that

Banks has asserted that he “specifically alleges that he may have alibi witnesses who would have been able to verify that he was elsewhere at the time the crime occurred, but, without specific times and dates of the alleged activity, he is unable to locate any witnesses.” We are not persuaded by this allegation, however. Banks filed a motion for a bill of particulars, to which the state responded and set forth the date and location of the alleged crime. Further, the police report provided a specific time that the alleged attacked occurred. For these reasons, we find *Winkle* not on point with this case.

{¶20} Finally, we are not persuaded by Banks’s reliance on this court’s decision in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817, *appeal not accepted*, 143 Ohio St.3d 1480, 2015-Ohio-3958, 38 N.E.3d 901. In *Mack*, this court upheld the trial court’s dismissal of an indictment against the defendant who was prosecuted nearly 20 years after an alleged rape, when he would have been a juvenile, despite his identity being known. Again, the fact that the defendant’s identity in *Mack* was known sets that case apart from this case.

{¶21} In light of the above, we find that the trial court erred in granting Banks’s motion to dismiss on the ground of preindictment delay. The state’s sole assignment of error is therefore sustained.

{¶22} Judgment reversed; case remanded.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common

pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS;
PATRICIA ANN BLACKMON, J., CONCURS
IN JUDGMENT ONLY