

[Cite as *State v. Richardson*, 2016-Ohio-5843.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103925

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**DERRISH DEMON RICHARDSON**

DEFENDANT-APPELLEE

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-595965-A

**BEFORE:** S. Gallagher, J., Jones, A.J., and McCormack, J.

**RELEASED AND JOURNALIZED:** September 15, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Appellant, the state of Ohio, appeals the decision of the trial court to dismiss the indictment against appellee, Derrish Demon Richardson, for preindictment delay. Upon review, we reverse the decision and remand the case to the trial court for application of the appropriate legal standard in the first instance.

{¶2} On May 20, 2015, appellee was indicted on charges of rape and kidnapping, arising from an incident that occurred nearly 20 years earlier on May 28, 1995. In this case, the indictment was filed after DNA evidence was obtained, yet the identity of the alleged perpetrator has always been known. Appellee filed a motion to dismiss the indictment for preindictment delay. The trial court conducted a hearing on the motion.

{¶3} The record reflects that on May 28, 1995, the alleged victim was 16 years old and appellee was 20 years old. She reported that appellee called her and asked her to a party. She went to the party with the appellee, and then went across the street to his house where the alleged rape and kidnapping occurred. The alleged incident is detailed in the incident report and supplementary report. The alleged victim left the house and went to a nearby pay phone and called her mother. The alleged victim reported that appellee approached in his vehicle, and after she refused a ride, appellee forced her into his vehicle and drove her home. The alleged victim told her mother what occurred and was taken to a hospital where a rape kit was collected. The alleged victim and her mother provided statements to the police. The incident report included the appellee's name, address, and phone number.

{¶4} Appellee testified at the hearing that he remembered meeting with the alleged victim's mother and that there was a decision not to prosecute. He stated that he was never questioned by the police and that he was never contacted by the police. He claimed that he did not recall who was at the party he attended with the alleged victim.

{¶5} The incident report indicates that the alleged victim's mother "stated she nor her daughter wanted to pursue this matter." There was no further investigation at that time, and the police closed the case within days of the alleged incident. In 2013, a match was obtained after DNA testing was performed on the victim's rape kit. The police contacted and interviewed the victim, who was cooperative and remained consistent with her report of the incident.

{¶6} Following the hearing, the trial court granted the motion to dismiss for preindictment delay. The trial court focused on the inactivity of the police and the state's failure to take action for nearly 20 years. The trial court applied the "basic concepts of due process and fundamental justice" standard articulated by the majority en banc decision of this court in *State v. Jones*, 2015-Ohio-2853, 35 N.E.3d 606 (8th Dist.), which was recently reversed by the Ohio Supreme Court in *State v. Jones*, Slip Opinion No. 2016-Ohio-5105 (finding the majority en banc decision invoked an improper standard to determine the existence of actual prejudice).<sup>1</sup>

{¶7} On appeal, the state raises one assignment of error claiming appellee failed to present evidence to establish that he suffered actual prejudice due to preindictment delay.

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<sup>1</sup> Further citation to *Jones* herein shall refer to the Supreme Court decision.

A trial court's decision on a motion to dismiss for preindictment delay is reviewed de novo as to the legal issues, but the court's findings of fact are afforded great deference. *State v. Dixon*, 2015-Ohio-3144, 40 N.E.3d 601, ¶ 24 (8th Dist.).

{¶8} The statute of limitations for a criminal offense is a defendant's primary protection against overly stale criminal charges. *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). However, both the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Ohio Constitution Article I, Section 16, afford limited protection against preindictment delay. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 97. "[P]reindictment delay violates due process only when it is unjustifiable and causes actual prejudice." *Jones* at ¶ 12.

{¶9} The Ohio Supreme Court has "firmly established a burden-shifting framework for analyzing a due-process claim based on preindictment 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." *Jones*, Slip Opinion No. 2016-Ohio-5105, at ¶ 13. A court must determine whether the defendant has established actual prejudice to his ability to defend himself before independently determining whether the state met its burden of establishing a justifiable reason for the delay in bringing charges. *See id.* at ¶16-18, 29. When a defendant fails to establish prejudice, it is unnecessary to consider the reasons for the delay. *See Adams* at ¶ 107.

{¶10} In *Jones*, the Ohio Supreme Court set forth the appropriate standard for gauging actual prejudice, which involves a "delicate judgment" and a "case-by-case

consideration” of the particular circumstances. *Id.* at ¶ 20. In determining actual prejudice, “[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.’” *Id.*, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 52. A claim of actual prejudice should be scrutinized “vis-à-vis the particular evidence that was lost or unavailable as a result of the delay” and “the relevance of the lost evidence and its purported effect on the defense.” *Jones* at ¶ 23.

{¶11} Actual prejudice is not demonstrated by the “possibility” of faded memories, inaccessible witnesses, and lost evidence, which are inherent in any extended delay and are sufficiently protected against by the statute of limitations. *Id.* at ¶ 21. Moreover, the loss of a potential witness will not always constitute actual prejudice. *Id.* at ¶ 26. In *Adams*, the Ohio Supreme Court found the defendant had not established actual prejudice from the preindictment delay where his inability to recall the names of potential alibi witnesses had become irrelevant, he failed to explain what exculpatory evidence a deceased witness might have offered, and the deceased witness had actually implicated the defendant in the murder before he died. *Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, at ¶ 103.

{¶12} Nevertheless, even when a defendant does not know what the exact substance of an unavailable witness’s testimony would have been, actual prejudice may still be shown. *Jones*, Slip Opinion No. 2016-Ohio-5105, at ¶ 28, citing *State v. Luck*, 15 Ohio St.3d 150, 157, 472 N.E.2d 1097 (1984). “Actual 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.” *Jones* at ¶ 28, citing *Luck* at 157-158. In *Luck*, the Ohio Supreme Court found the prejudicial factors enumerated by the defendant, when balanced against the other admissible evidence, showed that the defendant suffered actual prejudice from the preindictment delay where the claim of actual prejudice was based on the deaths of two key witnesses, one of whom was purportedly with the defendant at the time of the alleged murder; the fading memories and changing appearances, which resulted in one witness's inability to identify the defendant; and the loss of evidence, including recorded police interviews of potential witnesses and suspects. *Luck* at 157-159.

{¶13} It is apparent from the above cases, that a defendant cannot rely upon broad assertions of missing evidence or an unavailable witness to establish prejudice. A defendant must demonstrate a viable, tangible connection between the missing evidence or the unavailable witness to the defense of the case. As the Ohio Supreme Court recognized in *Jones*, the due-process requirement of actual prejudice may be shown upon “the proven unavailability of specific evidence or testimony that would attack the credibility or weight of the state's evidence against a defendant, and thereby aid in establishing a defense.” *Jones* at ¶ 25. Thus, there must be some indication in the record of what the missing evidence or unavailable witness might have offered.

{¶14} Further, the court must engage in a balancing test to determine if actual prejudice exists. The unavailable evidence must be considered in light of the other

evidence available at the time of the indictment and in light of its relevance to the defense. *See id.* at ¶ 26.

{¶15} When a defendant makes a preliminary showing of substantial prejudice, the burden shifts to the state to present evidence of a justifiable reason for the delay. *Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, at ¶ 99. A delay in commencing prosecution will not be justified when the state uses the delay to gain a tactical advantage or through negligence or error ceases its investigation and then later, without new evidence, decides to prosecute. *Id.* at ¶ 97, citing *Marion*, 404 U.S. at 324, 92 S.Ct. 455, 30 L.Ed.2d 468; *Luck*, 15 Ohio St.3d at 158, 472 N.E.2d 1097.

{¶16} In this case, appellee claims that he suffered actual prejudice and points to his faded memory and the loss of evidence that he claims has impaired his ability to create a defense. He argues that the telephone records are no longer available to show whether the phone calls actually occurred as the alleged victim described. The medical reports, the incident report, and the victim's clothing are all still available. Appellee also argues that he is unable to recall the details of the party, including who was there who could testify to the fact that the alleged victim's behavior suggested that the ensuing sex was consensual. The record reflects that the alleged victim went to the party with appellee and went across the street to his home where the alleged rape and kidnapping occurred. There is nothing in the record to suggest that any other person was present in appellee's home at the time of the alleged rape.

{¶17} Because the trial court applied the wrong legal standard to the evidence before it, this court must reverse and remand for the trial court to apply the appropriate legal standard in the first instance, applying the burden-shifting analysis and the actual-prejudice standard set forth above. Accordingly, we reverse and remand this matter to the trial court for application of the correct legal standard.

{¶18} Judgment reversed; case remanded to the trial court.

It is ordered that appellant recover from 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.

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and  
TIM McCORMACK, J., CONCUR