

[Cite as *State v. Lawrence*, 2016-Ohio-7618.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104316

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRYANT M. LAWRENCE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599263-A

BEFORE: Boyle, J., Jones, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 3, 2016

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Bryant Lawrence, appeals his rape conviction. He raises three assignments of error for our review:

1. Trial court had no jurisdiction to accept guilty plea because R.C. 2151.23(I) is flawed.

2. Trial court [erred] in their interpretation of R.C. 2151.23(I), because legislation was drafted with expedient police work and investigation in mind. Moreover, by the delay, Appellant was placed in a disadvantaged situation. Thereby, subjecting him to cruel and unusual punishment. In addition, Appellant was “taken into custody or apprehended” on unrelated juvenile delinquency complaints in 1999, and police/investigators had the same evidence they relied on 17 years later (2016) but chose not to process.

If they would have processed the evidence collected at the time, the “act” would have been discovered at that point in time, while Appellant was in custody and apprehended. Thus, trial court [erred] when it denied motion to dismiss for lack of jurisdiction.

3. Trial court did not legally obtain jurisdiction, because R.C. 2151.23(I) is flawed.

{¶2} Finding no merit to his appeal, we affirm.

I. Procedural History

{¶3} On April 7, 1999, a 16-year-old female reported to her father and the police that she was raped at gunpoint by a stranger while walking home from her boyfriend’s house. The victim stated that as she walking on Ashwood Road, a male approached her and asked if he could talk to her. He then placed a handgun against her abdomen. The victim became frightened. The male then placed the gun to her back and forced the victim to walk to an area next to a garage, where he proceeded to rape her vaginally at

gunpoint. A rape kit was collected, and the victim's clothes were obtained. Subsequently, the case went cold because (according to the state's sentencing memorandum) the suspect was unknown and the "initial police detectives did not establish contact" with the victim.

{¶4} Fourteen years later, the state sent the rape kit to the Bureau of Criminal Investigation ("BCI") to be tested for DNA. Through a CODIS¹ hit in August 2015, Lawrence's DNA was found on vaginal swabs and pubic hair was taken from the victim, as well as the victim's underwear.

{¶5} Lawrence was indicted in September 2015 on one count of rape in violation of R.C. 2907.02(A)(2) and one count of kidnapping in violation of R.C. 2905.01(A)(4), for the April 7, 1999 incident. Both counts carried one- and three-year firearm specifications, as well as a sexually violent predator specification.

{¶6} In December 2015, Lawrence moved to dismiss for lack of jurisdiction, contending that he should have been tried as a juvenile because he was a juvenile at the time of the offenses.

{¶7} Lawrence also moved to dismiss for preindictment delay. In his motion, he argued that the delay in prosecuting him violated his right to due process because physical evidence was lost or destroyed, key witnesses were no longer available, and witnesses that were available could no longer recall what happened.

¹ Combined DNA Index System.

{¶8} It is not known if the trial court held a hearing on Lawrence’s motion as neither Lawrence nor the state indicate as much, and Lawrence did not supplement the record in this appeal with a transcript from any hearing. The docket in this case states that on February 8, 2016, Lawrence was in court with his defense counsel, and the prosecutor was also present. The docket indicates, “Case set for trial on this day. Hearings held and motions addressed. Defendant wishes to proceed to trial.” The next docket entry, February 9, 2016, states that Lawrence wished to withdraw his former plea of not guilty and enter a plea of guilty to an amended indictment of rape, without any specifications. The trial court nolleed the remaining kidnapping count.

{¶9} The trial court sentenced Lawrence to eight years in prison for the rape conviction, and informed him that he was classified as a sexually oriented offender and would receive five years of mandatory postrelease control upon his release from prison. It is from this judgment that Lawrence appeals.

{¶10} Lawrence does not argue his assignments of error separately. Thus, we address his arguments together where necessary.

II. Jurisdiction

{¶11} Lawrence contends that the trial court lacked jurisdiction over his case because he was a juvenile at the time of the rape. Although Lawrence acknowledges that the trial court had jurisdiction under R.C. 2151.23(I), he argues that this provision is unconstitutional because it violated his due process rights and his right against cruel and unusual punishment.

{¶12} Statutes enjoy a strong presumption of constitutionality and must be afforded a constitutional interpretation if one is reasonably available. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 7; *State v. Thompson*, 92 Ohio St.3d 584, 586, 752 N.E.2d 276 (2001). A statute will be upheld as constitutional “unless proven beyond a reasonable doubt to be clearly unconstitutional.” *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, ¶ 29; *State v. Warner*, 55 Ohio St.3d 31, 43, 564 N.E.2d 18 (1990); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus.

{¶13} R.C. 2151.23(I) first took effect in 1997 as the result of various amendments to R.C. Chapter 2151. See 1996 Am.Sub.H.B. No. 124 (effective March 31, 1997). “These changes to the statutory scheme effectively removed anyone over 21 years of age from juvenile-court jurisdiction, regardless of the date on which the person allegedly committed the offense.” *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 14. R.C. 2152.02(C)(3) excepts from the definition of child “[a]ny person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age[.]” Further, R.C. 2151.23(I), which contains language similar to R.C. 2152.12(J), states the following with regard to the juvenile court’s jurisdiction in such cases:

If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or

determine any portion of the case charging the person with committing that act. In those circumstances, * * * the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court.

{¶14} In *Walls*, the Ohio Supreme Court first addressed the constitutionality of the 1997 amendments to R.C. Chapter 2151, though it did so under the Retroactivity Clause of the Ohio Constitution and the Ex Post Facto Clause of the United States Constitution. The defendant in that case, *Walls*, was indicted for an aggravated murder that occurred in 1985 when he was 15, and he was not indicted until 1998 when he was 29. *Id.* at ¶ 2, 4. *Walls* argued that the court of common pleas, general division, lacked subject matter jurisdiction to hear his case because the amended statutes were unconstitutionally retroactive as they violated his right to a bindover proceeding in juvenile court. *Id.* at ¶ 8. The Ohio Supreme Court rejected *Walls*'s jurisdictional arguments and found that the statutes requiring that he be tried as an adult withstood *Walls*'s constitutional challenges. *Id.* at ¶ 17.

{¶15} Six years later, the Ohio Supreme Court was asked to determine whether R.C. 2151.23(I) (and other related juvenile provisions) violated "due process and fundamental fairness" in a case where the defendant was prosecuted as an adult and sentenced to life in prison for rape when he was 15 at the time of the offense. *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, 887 N.E.2d 1145, ¶ 27. The Supreme Court relied on *Walls*, and determined that the application of R.C. 2152.02(C)(3),

2151.23(I), and 2152.12(J) in that case did not violate “due process and fundamental fairness.” *See id.* at ¶ 27 – 45.

{¶16} Ohio appellate districts have similarly relied on *Walls* in rejecting constitutional challenges nearly identical to those raised by Lawrence in the present case.

In *State v. Schaar*, 5th Dist. Stark No. 2003CA00129, 2004-Ohio-1631, the defendant argued that his adult prosecution for gross sexual imposition violated constitutional guarantees of fundamental fairness, substantive due process, and equal protection because he was 17 at the time the crimes were alleged to have been committed. The Fifth District disagreed. In rejecting the defendant’s claims that R.C. 2151.23(I) violated due process and fundamental fairness, the court relied on *Walls* and held that “changing the jurisdiction from the juvenile to the general division of the common pleas court did not involve any substantive right.” *Schaar* at ¶ 27. The court also found no equal protection violation. *Id.* at ¶ 29. The court determined that there was a rational basis for R.C. 2151.23(I) in that the statute recognizes that persons who commit a crime as a juvenile but are not apprehended until after 21 are not likely to be amenable to the juvenile justice system. *Schaar* at ¶ 29.

{¶17} Similarly, in *State v. Fortson*, 11th Dist. Portage No. 2011-P-0031, 2012-Ohio-3118, the Eleventh District rejected the defendant’s claim that R.C. 2151.23(I) violated his fundamental right to be tried in juvenile court as well as his rights to due process and equal protection. The court found no authority supporting the view that the

defendant had a fundamental right to be tried in juvenile court and stated that such a view would conflict with the holdings in *Walls*, *Schaar*, and *Warren*. *Id.* at ¶ 34, 43.

{¶18} We find the above authority to be particularly instructive in this case and reject Lawrence's claims that R.C. 2151.23(I) violated his right to due process.

{¶19} We further reject Lawrence's claims that trying him in adult court under R.C. 2151.23(I) rather than juvenile court subjected him to cruel and unusual punishment under the Eighth Amendment. In support of this argument, Lawrence cites to United States Supreme Court decisions that dealt with juvenile offenders who had received extreme punishments for crimes they were convicted of after being transferred to adult court as a juvenile. *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (capital punishment unconstitutional for juveniles); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (the constitution prohibits a sentence of life without the possibility of parole for juveniles convicted of a nonhomicide offense).

{¶20} The flaw in Lawrence's argument, however, is that he is trying to equate a death sentence or a life sentence without the possibility of parole with a sentence of eight years in prison. It is illogical to do so and, because of that, we decline to extend the reasoning in the United States Supreme Court cases to the facts present here.

{¶21} Accordingly, we reject Lawrence's arguments that R.C. 2151.23(I) is unconstitutional because applying the statute here did not violate his due process or Eighth Amendment rights.

III. Preindictment Delay

{¶22} Lawrence also argues the trial court erred in denying his motion to dismiss based on preindictment delay. He argues that the state “gained a tactical advantage by waiting to indict” him. He maintains that by waiting to indict him, evidence was lost, witnesses are no longer available, and memories have faded. The statute of limitations governing a particular crime provides the “primary guarantee against bringing overly stale criminal charges.” *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 10, citing *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The statute of limitations for rape is 20 years. R.C. 2901.13(A)(3). Here, Lawrence was indicted well within the statute of limitations for rape.

{¶23} Nonetheless, the delay between the commission of an offense and an indictment, can, under certain circumstances, constitute a violation of due process of law guaranteed by the federal and state constitutions. See *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984); *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *Lovasco*.

{¶24} Courts apply a two-part test to determine whether preindictment delay constitutes a due process violation. The defendant has the initial 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). Unlike a Sixth Amendment speedy-trial claim, no presumption of prejudice arises in the due-process context when a preindictment delay exceeds a particular length of time. *United States v. Schaffer*, 586 F.3d 414, 425 (6th Cir.2009); *Copeland* at ¶ 13.

{¶25} Moreover, “proof of actual prejudice, alone, will not automatically validate a due process claim” because “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 a defendant establishes “actual prejudice,” the burden then shifts 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. *Walls*, 96 Ohio St.3d at ¶ 51, 2002-Ohio-5059, 775 N.E.2d 829. “The determination of ‘actual prejudice’ involves ‘a delicate judgment based on the circumstances of each case.’” *Walls* at ¶ 52, quoting *Marion*. A delay in commencing prosecution is not 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. *Marion* at 324; *Luck* at 158.

{¶26} The burden upon a defendant seeking to prove that preindictment delay violated due process is “‘nearly insurmountable,’” especially because proof of prejudice is almost always speculative. *United States v. Montgomery*, 491 Fed.Appx. 683, 691 (6th Cir.2012), quoting *United States v. Rogers*, 118 F.3d 466 (6th Cir.1997).

{¶27} In this case, Lawrence does not meet his burden of showing that he was actually prejudiced by the 16-year delay in this case. Although he states that evidence was lost, memories faded, and witnesses are no longer available, “the possibility that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice.” *State v. Adams*, 144 Ohio St.3d 429,

2015-Ohio-3954, 45 N.E.3d 127, ¶ 105, citing *Marion*, 404 U.S. at 325-326, 92 S.Ct. 455, 30 L.Ed.2d 468.

{¶28} In his motion to dismiss based on preindictment delay, Lawrence argued that the following witnesses were no longer available: (1) the victim’s boyfriend, who was the last person to see the victim before the attack, (2) the SANE nurse, who conducted the medical exam for the rape kit, and (3) several police officers who had since retired.²

{¶29} Lawrence also argued in his motion that the victim’s memory had faded because she was not able to identify him in a photo array. He further argued that a security guard who had contact with the victim soon after the rape “remembers almost no details regarding the incident.” And he argued that his memory had faded as well, maintaining that he did not recognize the victim in a photo shown to him by police, nor could he “recall specific details of his contact with the alleged victim.”

{¶30} Finally, Lawrence argued in his motion that evidence from the case is missing, including the 911 call, school records, and police reports. He contends that school records are missing that could have proven “a potential defense theory that [the] alleged victim was a truant and unruly child and therefore had bias/motive/interest for her claim to her stepfather that defendant had nonconsensual sexual contact with her.” He also claims that a notation on a police report, which states “No pick 4-8-99 Michelle,”

²In the state’s sentencing memorandum, the prosecutor indicated that she spoke to the victim’s boyfriend before sentencing. He informed the prosecutor that the victim blamed him for the rape because he did not walk her home that night. The boyfriend still wondered if the victim would have been safe if he would have walked her home that night.

indicates that a police officer followed up on the incident, but any report explaining what his notation meant is missing.

{¶31} Lawrence fails to explain, however, how any of this missing evidence or lack of evidence actually prejudiced his case. Thus, he has not met his burden of demonstrating the delay caused him actual prejudice. Moreover, if there was a hearing on this case where he possibly explained how he was actually prejudiced by this missing evidence, he failed to supplement his appeal with a transcript from that hearing. Therefore, we need not get to the state's reasons for the delay. Accordingly, we find no merit to his claim that the trial court erred when it denied his motion to dismiss based on preindictment delay.

{¶32} Lawrence's three assignments of error are overruled.

{¶33} Judgment affirmed.

It is ordered that appellee recover from appellant the 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

LARRY A. JONES, SR., A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR