

[Cite as *State v. Carter*, 2011-Ohio-751.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2010-CA-25
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-741
v.	:	
	:	
WARREN DWAYNE CARTER	:	(Criminal Appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18th day of February, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Warren Carter appeals from his conviction and sentence for Identity Fraud. He contends that because there was such a lengthy time between the alleged actions constituting the offense and the time he was indicted and prosecuted, he suffered substantial prejudice in that he was unable to

provide evidence of a defense. Thus, he claims that the trial court erred by failing to dismiss the charge against him.

{¶ 2} We conclude that Carter failed to produce evidence sufficient to support a finding that he suffered any prejudice to his ability to present a defense. Furthermore, the State's reason for the delay was justifiable, given that the police were unable to locate Carter to effect his arrest.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} In October 2008, National City Bank was contacted with regard to an account belonging to an individual named Michael Tyler. The person making the contact asked the bank to change the address on Tyler's account to an address where Carter was living with his grandparents. The bank was also asked to send a new card to the new address.

{¶ 5} Between October 15 and October 23 of 2008, Carter used the new bank card to purchase items from several merchants. He purchased a total of \$2,740.11 in merchandise. Carter did not have permission to use the card.

{¶ 6} Springfield Police Detective Edward Icenhour was assigned to investigate Tyler's case. During his investigation, Icenhour was able to positively identify Carter, due to pictures captured on video, as the person using the bank card.

{¶ 7} On October 31, 2008, while the investigation was ongoing, Carter opened a new account at Universal 1 Credit Union. On November 24 2008, Carter

went to Universal 1 and cashed what appeared to be a payroll check from United Rehabilitation Services of Greater Dayton in the amount of \$989.34, made payable to Carter. The next day, Carter appeared at Universal 1 with what appeared to be another payroll check from United Rehabilitation in the amount of \$1,223.14, also made payable to Carter. The teller at Universal 1 became suspicious and asked Carter about the check. Carter informed her that the prior check had been his first paycheck and the second one was a bonus. The teller kept the check and informed Carter that she was going to contact United Rehabilitation to verify his employment. At that point, Carter left Universal 1. United Rehabilitation denied having any employee named Warren Carter.

{¶ 8} The matter was reported to the Springfield Police Department and Icenhour was also assigned to investigate what were determined to be two forged checks presented to Universal 1 by Carter. As part of his investigation, Icenhour discovered that the address listed on the two checks was, in actuality, a cemetery. Icenhour spoke to Carter's uncle and grandparents – they did not provide any information regarding his location. On January 8, 2009, Icenhour requested an arrest warrant, which he then posted on the Law Enforcement Automated Data System – LEADS. Icenhour contacted the “U.S. Marshals’ Fugitive Task Force” in order to seek help in apprehending Carter. Icenhour also had information on the case broadcast twice on the “Channel 7 Most Wanted” segment.

{¶ 9} Icenhour was unable to locate Carter until his August 21, 2009 arrest by the U.S. Marshals’ Task Force. On August 31, 2009, he was indicted on two counts of Forgery, in violation of R.C. 2913.31(A)(3), and one count of Identity Fraud, in

violation of R.C. 2913.49(B)(2). Prior to trial, Carter filed a motion to dismiss the charges based upon a claimed violation of his right to a speedy trial and a claimed violation of his state and federal constitutional right to due process, stemming from the delay in indictment or prosecution of the case. A hearing was held, following which the trial court overruled Carter's motion to dismiss. Carter also filed a motion seeking to sever the charge of Identity Fraud from the Forgery charges, which the trial court granted.

{¶ 10} Carter entered a plea of no contest to the charge of Identity Fraud. A jury trial was held on the Forgery charges, following which Carter was found guilty of both counts. The trial court sentenced Carter to a term of imprisonment of two years on the Forgery charges and a term of six months on the charge of Identity Fraud, with both sentences to run concurrently.

{¶ 11} This is Carter's appeal from his conviction and sentence for Identity Fraud. (Carter has separately appealed from his Forgery convictions.)

II

{¶ 12} Carter's sole assignment of error states as follows:

{¶ 13} "THE DELAY IN INDICTMENT VIOLATED DEFENDANT'S 5TH AMENDMENT DUE PROCESS RIGHTS."

{¶ 14} Carter contends that the trial court erred by failing to dismiss the charge of Identity Fraud. He argues that the delay between the date of the alleged offense and the date of indictment caused substantial prejudice to his ability to present a defense.

{¶ 15} “The United States Supreme Court has explained that, ‘to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.’ ” *State v. Stricker*, Franklin App. No 03AP-746, 2004-Ohio-3557, ¶36, quoting *United States v. Lovasco* (1977), 431 U.S. 783, 796. Thus, in order to support a dismissal on the basis of delay in indictment, a defendant must present evidence demonstrating an actual and substantial prejudice. *Id.* If a defendant establishes actual prejudice, the burden shifts to the State to establish a justifiable delay. *Id.* See also, *State v. Conley*, Clark App. No. 01-CA-0013, 2001-Ohio-1474.

{¶ 16} At the hearing on the motion to dismiss, Carter testified that he responded to a “pop-up” advertisement on his computer regarding a “secret shopper” program. Carter provided an address and cellular telephone number to the program. Thereafter, he was contacted by phone and informed that he “had been approved for the secret shopper program.”

{¶ 17} Carter testified that “the program was set up so that I would receive a check, cash it, and I would keep a portion of the proceeds of the check and send them back part of the check and then they sent me gift cards to places I was supposed to do my secret shopper. And there was, like a questionnaire that [I] filled out. * * * After I sent them back their part of the check after I cashed it, they sent me back three gift cards [to three restaurants]. And I was supposed to go judge the service. And there was a questionnaire to check how prompt was the service, and quality of food.” Carter further testified that the first check he received was a “for \$900 something * * * from Rehabilitation Services.” He testified that he cashed the

check, kept one hundred dollars and “sent [the remainder] back Western Union.”

{¶ 18} Carter’s evidence regarding his claim of prejudice is somewhat confusing. Apparently he contends that evidence of the secret shopper program is located on his computer and “probably” on his cell phone. He contends that this evidence would show that he was not acting in a criminal manner, but rather that he was the victim of a scam. He further claims that since he was unaware of the charges against him, he was unable to preserve the evidence. Carter also testified that at the time he was involved with the secret shopper program, he had been living with his grandparents. However, he indicated that he moved out because he had a “falling out” with his grandfather. Apparently, the computer remained at his grandparents’ residence. He also claimed that the computer was dismantled as a condition of a prior community control sanction imposed for a prior forgery offense. Carter admitted on cross-examination that the hard drive of the computer “should still be at [his] grandparents’ house[,]” and should still be available. He testified that he did not know where the phone was located, because he had not been able to take it with him when he was arrested.

{¶ 19} This evidence is expressly related and limited to the two charges of Forgery involving the checks presented to Universal 1. Thus, it is irrelevant to the charge of Identity Fraud, which is premised upon Carter’s use of another’s bank card.

{¶ 20} Further, this evidence of prejudice lacks merit given that Carter admitted that the computer evidence should still be available. Also, the claim that he “probably” had a message from the program on a, now lost, phone is not enough to demonstrate actual prejudice.

{¶ 21} Finally, we conclude that the State's reason for the pre-indictment delay in this case is justifiable and outweighs Carter's conclusory claim that he suffered actual prejudice. Icenhour testified as to the steps he took to apprehend Carter. Further, Carter was indicted within ten days of his apprehension. Thus, the trial court did not err in overruling the motion to dismiss.

{¶ 22} Carter's sole assignment of error is overruled.

III

{¶ 23} Carter's sole assignment of error being overruled, the judgment of the trial court is Affirmed.

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GRADY, P.J., and DONOVAN, J., concur.

Copies mailed to:

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