

[Cite as *State v. Cassell*, 2011-Ohio-23.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 09CA0064
vs.	:	T.C. CASE NO. 02CR0929
VERNON L. CASSELL	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . .

O P I N I O N

Rendered on the 7<sup>th</sup> day of January, 2011.

. . . . .

Stephen Schumaker, Pros. Attorney; Amy M. Smith, Asst. Pros. Attorney, Atty. Reg. No. 0081712, 50 E. Columbia Street, P.O. Box 1608, Springfield, OH 45501  
Attorneys for Plaintiff-Appellee

C. Douglas Copley, Atty. Reg. No.0066825, P.O. Box 13212, Dayton, OH 45413  
Attorney for Defendant-Appellant

. . . . .

GRADY, J.:

{¶ 1} Defendant, Vernon Cassell, appeals from his conviction and sentence for rape and sexual battery.

{¶ 2} In the early morning hours of April 18, 2002, Defendant forced his seventeen year old daughter, D.J., to engage in vaginal

intercourse with him in their home in Springfield. When D.J. went to school later that morning, she told a school counselor what had happened and police and Clark County Children's Services were then notified. D.J. told police that Defendant sexually assaulted her. Bedding and items of clothing were removed from Defendant's home for scientific analysis, pursuant to a search warrant. The following day, April 19, 2002, Defendant attempted to commit suicide. Shortly thereafter, in May of 2002, Defendant left Ohio and went to Texas and New Mexico.

{¶3} On December 9, 2002, Defendant was indicted on one count of rape, R.C. 2907.02(A)(2), and one count of sexual battery, R.C. 2907.03(A)(5). Defendant was arrested and returned to Ohio in April 2008.

{¶4} Defendant filed a motion to dismiss based on a violation of his constitutional speedy trial rights due to the length of the delay between the indictment and his subsequent arrest. The trial court overruled Defendant's motion to dismiss after a hearing. Following a jury trial in May 2009, Defendant was found guilty of both charges. The trial court merged the two convictions and sentenced Defendant to a single term of ten years in prison. The court also classified Defendant as a Tier III sexual offender.

{¶5} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE STATE OF OHIO VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL UNDER THE U.S. AND OHIO CONSTITUTIONS."

{¶ 7} Defendant argues that the trial court erred in overruling his motion to dismiss the indictment because the more than seven year delay between his indictment and his trial on those charges violated his constitutional rights to a speedy trial under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Defendant did not raise a statutory speedy trial claim pursuant to R.C. 2945.71 - 2945.73.

As a result, he has waived that aspect of his claim and we need not address it. *State v. Bailey*, Montgomery App. No. 20764, 2005-Ohio-5506.

{¶ 8} Defendant's particular challenge concerns the over five year delay between his December 9, 2002 indictment and his April 8, 2008 arrest on those charges. In order to determine whether this delay violated Defendant's constitutional speedy trial rights, it is necessary to balance and weigh the conduct of the prosecution and the defendant by examining four factors: (1) the length of the delay; (2) the reason for the delay; (3) Defendant's assertion of his speedy trial right; and (4) the prejudice to Defendant as a result of the delay. *Barker v. Wingo* (1972), 407

U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101; *Doggett v. United States* (1992), 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520; *State v. O'Brien* (1987), 34 Ohio St.3d 7.

{¶ 9} The first factor, the length of the delay, serves a gate-keeping function. A delay of approximately one year typically is required to establish "presumed prejudice," the existence of which is necessary to trigger an inquiry into the other three factors. *State v. Triplett*, 78 Ohio St.3d 566, 1997-Ohio-182; *Barker*, 407 U.S. at 530; *Bailey*.

{¶ 10} The evidence adduced at the hearing on Defendant's motion to dismiss reveals that Defendant was indicted on rape and sexual battery charges on December 9, 2002, some eight months after he left Ohio. The next day, December 10, 2002, assistant county prosecutor Douglas Rastatter sent a note to Mike Vaughn, a prosecutor's office employee who handled extraditions, requesting that he place Defendant's name into the national database for warrants, LEADS. Rastatter had information from Springfield police that Defendant fled to Texas. On December 13, 2002, Mike Vaughn asked Springfield Police Detective John Keys to enter Defendant's name into the LEADS system, which was done.

{¶ 11} On May 2, 2003, Springfield Police and Mike Vaughn received a fax from Albuquerque, New Mexico authorities indicating that Defendant had been arrested, had waived extradition, and would

be held and available for Clark County authorities to pick up until May 21, 2003. As a cost saving measure, the Clark County Prosecutor's Office routinely used a private company, Transportation Corp., to pick up fugitives that are extradited and returned to Ohio. On May 5, 2003, Mike Vaughn made arrangements with Transportation Corp. to pick up Defendant in New Mexico by the May 21, 2003 deadline and return him to Clark County. Transportation Corp. gave Mike Vaughn a confirmation number and a price indicating that they agreed to pick up Defendant before the May 21, 2003 deadline. Transportation Corp. failed to pick up Defendant by that deadline, and he was released from custody.

Subsequently, on June 27, 2003, Defendant's name was re-entered into LEADS. Nothing more happened until Defendant was arrested in Austin, Texas in April 2008. He waived extradition and was returned to Clark County.

{¶ 12} The trial court's decision overruling Defendant's motion to dismiss based upon constitutional speedy trial grounds is reviewed under an abuse of discretion standard. *Bailey*.

{¶ 13} An "abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions

that are unconscionable or arbitrary. *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157.

{¶ 14} With respect to the *Barker v. Wingo* first factor, the length of the delay, we conclude that the over five year delay between Defendant's indictment on December 9, 2002, and his arrest on those charges in April 2008 is very significant and more than adequate to trigger a review of the other three factors. *Triplett*.

Furthermore, not only does this factor weigh in Defendant's favor, its weight is more than just slight.

{¶ 15} Unlike in *Triplett*, the defendant in this case was well aware at the time he left Ohio that a police investigation into his alleged rape of his daughter was ongoing. Furthermore, Defendant became aware of the sexual assault charges against him when he was arrested by New Mexico authorities in May 2003. The interests which the Sixth Amendment protects, including freedom from the disruption caused by unresolved charges, *Bailey*, was an issue in this case, and the delay between Defendant's indictment and arrest resulted in an infringement on Defendant's freedom. In addition to anxiety and concern over the unresolved charges, which is one form of prejudice that results from a lengthy delay between indictment and arrest, *Barker, Doggett*, Defendant was held for three weeks in a New Mexico jail on the arrest warrant issued on these charges before being released after Ohio authorities

failed to pick him up. The first factor, the length of the delay in this case, weighs in Defendant's favor.

{¶ 16} With respect to the second factor, the reason for the delay, the record demonstrates that the delay resulted from the State's negligence in failing to pick-up Defendant from New Mexico authorities who were holding Defendant on the warrant issued on his indictment. Springfield police and the Clark County Prosecutor's office were notified on May 2, 2003, that Defendant had been arrested in Albuquerque, New Mexico, had waived extradition, and would be held for Ohio authorities to pick him up until May 21, 2003. Despite having nearly three weeks to pick Defendant up, the private company hired by the Clark County Prosecutor to pick Defendant up failed to do so by the May 21, 2003 deadline, and Defendant was released from custody.

{¶ 17} The State offers no explanation for the failure of its agent, Transportation Corp. to pick up Defendant in New Mexico before the May 21, 2003 deadline. Instead of alerting New Mexico authorities, the State again placed his name in LEADS, where it remained until he was arrested in Texas in 2008. The resulting delay, which is chargeable to the State, added nearly five years to the delay in this case, from May 21, 2003 to April 8, 2008. This conduct falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal

prosecution once it has begun. *Doggett*. The second factor, the reason for the delay, weighs in Defendant's favor.

{¶ 18} With respect to the third factor, Defendant's assertion of his speedy trial right, the record demonstrates that, despite knowing that he was wanted by Ohio authorities on charges that he raped his daughter, Defendant never contacted law enforcement or the Clark County Prosecutor's Office and never asserted his right to a speedy trial during the five year delay at issue in this case. To the contrary, Defendant left Ohio and remained in Texas and New Mexico and thereby avoided prosecution. A failure to assert his right to a speedy trial ordinarily makes it difficult for a defendant to establish a constitutional speedy trial violation. *Bailey; Barker*, 407 U.S. at 532. The third factor, Defendant's assertion of his speedy trial right, weighs against Defendant.

{¶ 19} With respect to the final *Barker* factor, the prejudice to Defendant as a result of the over five year delay between his indictment and arrest in April 2008, the Supreme Court has identified three types of prejudice that may arise from a lengthy delay: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and (3) the possibility that the accused's defense will be impaired by dimming memories and the loss of exculpatory evidence. *Barker*, 407 U.S. at 532; *Doggett*, 505 U.S.

at 654. All three are at least implicated in this case.

{¶ 20} Defendant was held in jail by New Mexico authorities for three weeks in May 2003 on the warrant issued on the indictment, but was released from custody after Ohio authorities failed to pick him up. Anxiety and concern over unresolved charges would seem apparent given Defendant's knowledge of the pending charges, particularly after his arrest by New Mexico authorities in May 2003 on the warrant issued on his indictment. Finally, Defendant asserts in a conclusory fashion that the delay prejudiced his ability to defend against the charges by impairing his ability to call witnesses and because evidence may have been lost or destroyed. Defendant gives no specific examples that demonstrate actual prejudice.

{¶ 21} In *State v. Bailey*, 2005-Ohio-5506, at ¶19, we stated:

{¶ 22} "Although we concur in the trial court's conclusion that Bailey did not demonstrate any actual prejudice, this does not end our inquiry. '[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim.' *Doggett*, supra, at 655. When considered as 'part of the mix of relevant facts,' the presumptive prejudice that arises from a lengthy delay may be sufficient to support a finding of a speedy trial violation. *Id.* at 656. We note, however, that 'to warrant granting relief, [governmental] negligence unaccompanied by particularized trial

prejudice must have lasted longer than negligence demonstrably causing prejudice.’ *Id.* at 657. Thus, where delay attributable to the negligence of the State is more than one year (i.e., ‘presumptively prejudicial’ under the first *Barker* factor) but not exceedingly long like the eight-and-one-half years at issue in *Doggett*, courts sometimes decline to find a speedy trial violation absent actual prejudice to the defendant.”

{¶ 23} While we recognize that the significance of presumptive prejudice which arises with the passage of time increases with the length of the delay, *Triplett*, 78 Ohio St.3d at 566; *Doggett*, 505 U.S. at 656, and though the over five year delay here between indictment and arrest was extraordinary and presents a close question, *Barker*, in view of Defendant’s failure to assert his speedy trial right during that period of delay, despite knowing about the pending charges, the extent of the delay was not so extreme as to warrant relief absent some particularized trial prejudice.

*Id.* The fourth and final factor, prejudice to the accused as a result of the delay, weighs minimally in Defendant’s favor, but was not sufficiently weighty to warrant dismissal of this case.

Our review of the *Barker* factors leads us to conclude that the trial court did not abuse its discretion in overruling Defendant’s motion to dismiss the indictment based upon a violation of his constitutional speedy trial rights.

{¶ 24} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE TRIAL COURT ERRED IN CLASSIFYING THE APPELLANT AS A TIER III SEX OFFENDER BECAUSE CHAPTER 2950 OF THE OHIO REVISED CODE IS UNCONSTITUTIONAL AND SPECIFICALLY R.C. 2950.031 AND 2950.032 HAVE BEEN RULED UNCONSTITUTIONAL BY THE OHIO SUPREME COURT IN *STATE V. BODYKE*, SLIP OPINION NO. 2010-OHIO-2424."

{¶ 26} Defendant argues that the trial court erred in classifying him as a Tier III sexual offender under Ohio's Adam Walsh Act, S.B. 10, because Chapter 2950 of the Revised Code, specifically R.C. 2950.031 and 2950.032, have been declared unconstitutional because they violate the separation of powers doctrine. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.

{¶ 27} Defendant was not reclassified by the Ohio Attorney General under R.C. 2950.031 and R.C. 2950.032. Rather, Defendant was sentenced in this case on June 11, 2009, after the enactment of S.B. 10, which became effective on January 1, 2008, and was originally classified by the sentencing judge as a Tier III sexual offender. Accordingly, *Bodyke* has no application in this case. *State v. Dudley*, Montgomery App. No. 22931, 2010-Ohio-3240.

{¶ 28} Furthermore, we have on numerous occasions rejected claims that retroactive application of S.B. 10 violates the prohibition against ex post facto laws and retroactive laws

contained in the federal and Ohio Constitutions. *Dudley* and the cases cited therein.

{¶ 29} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 30} "THE CONVICTION IS BASED ON INSUFFICIENT EVIDENCE."

{¶ 31} Defendant argues that the trial court erred in overruling his Crim.R. 29 motions for acquittal inasmuch as his convictions for rape and sexual battery are not supported by legally sufficient evidence, because the only evidence against him was the testimony of his daughter, D.J., the victim, testimony which he contends was contradictory and not credible.

{¶ 32} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 33} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element

of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 34} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 35} Defendant was found guilty of rape in violation of R.C. 2907.02(A)(2), which at the time of Defendant's offense provided:

{¶ 36} "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Sexual conduct includes vaginal intercourse. R.C. 2907.01(A).

{¶ 37} Defendant was also convicted of sexual battery in violation of R.C. 2907.03(A)(5), which at the time of Defendant's offense provided:

{¶ 38} "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶ 39} \* \* \*

{¶ 40} "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

{¶ 41} D.J. testified in considerable detail about how her father, Defendant, forced her to repeatedly engage in vaginal intercourse over a period of two hours. That evidence, if believed, is sufficient to prove all of the essential elements of rape and sexual battery. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury here, to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. Additionally, a mixture of DNA from D.J. and Defendant was found on both a blanket and the inside crotch area of the shorts Defendant wore immediately after this sexual assault occurred, and these items contained semen from Defendant.

{¶ 42} Viewing the totality of this evidence in a light most favorable to the State, as we must, a rational trier of facts could find beyond a reasonable doubt all of the essential elements of rape and sexual battery. Defendant's conviction is supported by legally sufficient evidence and the trial court properly overruled Defendant's Crim.R. 29 motions for acquittal.

{¶ 43} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 44} "THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 45} Defendant argues that his conviction for rape is against the manifest weight of the evidence because the only evidence against him was the testimony by his daughter, D.J., the victim, who is not credible or worthy of belief.

{¶ 46} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 47} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 48} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to

resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 49} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 50} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 51} Defendant argues that the trial testimony by his daughter, D.J., the victim, is not credible due to its inconsistency with pretrial statements that she made about the time period involved and the clothing she wore at the time. The jury was made aware of the inconsistencies in D.J.'s testimony during her cross-examination, and yet they chose to believe her version of the events, which they had a right to do. The jury did not lose

its way simply because they chose to believe the State's witnesses.

{¶ 52} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury. *DeHass*. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred.

Defendant's conviction is not against the manifest weight of the evidence.

{¶ 53} Defendant's fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:

Amy M. Smith, Esq.  
C. Douglas Copley, Esq.  
Hon. Richard J. O'Neill