

[Cite as *State v. Kehoe*, 2018-Ohio-3589.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106385

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

FRANK KEHOE

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-613517-A

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

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MARY J. BOYLE, P.J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals from a trial court judgment dismissing two counts of an indictment against defendant-appellee, Frank Kehoe, for preindictment delay. The state raises one assignment of error for our review:

The trial court erred in dismissing part of the indictment for pre-indictment delay under the due process clause of the United States and Ohio Constitution[s].

{¶2} We find merit to the state’s assigned error and reverse and remand for further proceedings.

I. Procedural History and Factual Background

{¶3} In April 2017, Kehoe was indicted on ten counts of rape and kidnapping. The first two counts involved allegations of rape and kidnapping of a four-year-old boy, John Doe, that occurred “on or about January 1, 2001 to March 8, 2001.” The remaining eight counts involved the alleged rape and kidnapping of a five-year-old girl, Jane Doe, that occurred in 2016.

{¶4} Kehoe pleaded not guilty to the indictment and moved to dismiss the first two counts involving the alleged rape and kidnapping of the four-year-old boy due to preindictment delay. The state opposed Kehoe’s motion. Kehoe presented the following evidence at a hearing on his motion.

{¶5} Thomas Lucey (“Lucey”), an investigator for the Cuyahoga County Public Defender’s Office, testified that in 2001, Detective Sherilyn Howard (“Detective Howard”) worked in the Cleveland Police Department’s Sex Crimes Unit and was

assigned to investigate the allegations of sexual abuse against Kehoe. Lucey learned from Officer Quinn, who works in the Cleveland Police Department's Personnel Unit, that Detective Howard retired in 2011 and moved to Atlanta.

{¶6} Lucey also searched for a social worker, Scott Kennedy ("Kennedy"), who worked for Children and Family Services in 2001 and took part in interviewing John Doe in March 2001. The agency told Lucey that Kennedy no longer worked there and that it did not have a forwarding address for him.

{¶7} Lucey testified to Detective Howard's March 12, 2001 report. In the report, Detective Howard stated that she and Kennedy were present when John Doe was interviewed. Detective Howard wrote in her report:

John Doe stated that his babysitter, Mr. Frank Keyhole [sic] had raped him. When asked what he meant, John Doe stated, Frank touched his buttock and penis with his hand on top of his clothes. According to John Doe, Frank never placed his hand inside his pants or pulled his pants down. John Doe was asked about the incident several different ways without leading him, but he continued to say it was only on top of his clothes. John Doe was unable to explain what type of atmosphere this occurred in. There were no witnesses to this incident. John Doe has a two-year-old brother * * *, and both children were seen at Rainbow Babies and Children's Hospital.

On March 9, 2001, I conferred with Asst. Prosecutor Jose Torres who reviewed same and ruled No Papers Issued. Male was released on rape charges.

{¶8} On cross-examination, Lucey agreed that the report indicates that Detective Carl Lessman ("Detective Lessman") was working with Detective Howard on the 2001 investigation. Lucey further agreed that Detective Lessman was "still on the job" and that he did not try to contact Detective Lessman. Lucey stated, however, that Detective

Howard was the only detective who signed the 2001 report and there was no indication on the report that Detective Lessman was present during John Doe's interview.

{¶9} In closing arguments, Kehoe maintained that he established actual prejudice, which shifted the burden to the state to give a "justifiable reason for the delay."

Kehoe further argued that the state did not meet its burden.

{¶10} In its response, the state set forth its reasons as to why the delay was justified. The state told the court that in 2016, a friend of Kehoe's found him on the ground with her five-year-old granddaughter, Jane Doe, the alleged victim in the other eight counts of the indictment against him. Kehoe reportedly ran out of the house. The alleged victim was taken to the hospital where a rape kit was collected. Kehoe's DNA was found on the alleged victim. The state explained that after the DNA match, it began to look "into the defendant and his past, and in doing so," found the 2001 case. The state interviewed John Doe, who is now an adult. John Doe gave a statement to police and "still to this day recalls what happened with the defendant." The state argued that the new evidence against the defendant allowed it to prosecute the case where it was not able to in 2001.

{¶11} The trial court agreed with Kehoe that he established actual prejudice, granted his motion regarding Counts 1 and 2, and subsequently dismissed them. It is from this judgment that the state now appeals.

II. Preindictment Delay

{¶12} An unjustifiable delay between the commission of an offense and a defendant's indictment for that offense, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I, of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

{¶13} The statute of limitations governing a 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, it is undisputed that Kehoe was indicted within the statute of limitations for rape.

{¶14} 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 — even when the defendant is indicted within the statute of limitations. *Lovasco* at 789; *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). For instance, 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.

{¶15} Courts apply a two-part test to determine whether preindictment delay constitutes a due process violation. Defendants have the initial burden to show that they were substantially and actually prejudiced due to the delay. *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 1199 (1998). But “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*, 15 Ohio St.3d at 154, 472 N.E.2d 1097, 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. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51. “The determination of ‘actual prejudice’ involves ‘a delicate judgment based on the circumstances of each case.’” *Id.* at ¶ 52, quoting *Marion*.

{¶16} “[T]he 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*. “Those are ‘the real possibilit[ies] of prejudice inherent in any extended delay,’ and statutes of limitations sufficiently protect against them.” *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 21, quoting *Marion* at 326. “That does not mean, however, that demonstrably faded memories and actually unavailable witnesses or lost evidence cannot satisfy the actual-prejudice requirement.” *Id.* 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. *Id.* at ¶ 28, citing *Luck*.

{¶17} We review a trial court's decision on a motion to dismiss an indictment pursuant to a de novo standard of review. *State v. Knox*, 8th Dist. Cuyahoga Nos. 103662 and 103664, 2016-Ohio-5519, ¶ 12, citing *State v. Gaines*, 193 Ohio App.3d 260, 2011-Ohio-1475, 951 N.E.2d 814 (12th Dist.). "De novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Clay*, 2d Dist. Miami No. 2015-CA-17, 2016-Ohio-424, ¶ 5.

III. Analysis

A. Unavailability of Witnesses

{¶18} The state first argues that under the circumstances of this case, it would be "entirely unjust to allow [Kehoe] to claim actual prejudice due to the preindictment delay period." These "circumstances" include the state's claim that Kehoe did not establish that the witnesses were unavailable for purposes of trial. The state maintains that Kehoe did not exhaust "all efforts" to secure the detective or the social worker. The state further claims that Kehoe did not contact another detective who was assigned to the case and still works at the Cleveland Police Department. We agree.

{¶19} In this case, Kehoe's investigator attempted to locate the retired detective and the social worker who were present when John Doe was interviewed. The investigator found that the detective had moved to Atlanta, Georgia when she retired in

2011. The investigator further found that the social worker no longer worked at Children and Family Services and that the agency did not have a forwarding address for the social worker. Based upon these attempts to locate the witnesses, the trial court found that Kehoe established that the detective and social worker were not available to testify. We agree with the state, however, that the trial court's decision to grant Kehoe's motion to dismiss for preindictment delay was premature.

{¶20} The Ohio Rules of Evidence sets forth the definition of unavailability of a witness. *See* Evid.R. 804(A). Although this rule deals with hearsay exceptions when a declarant is unavailable, the rule still provides some guidance.

{¶21} Evid.R. 804 provides:

(A) * * * "Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

{¶22} At this point in the proceedings, the only relevant subsection would be (A)(5). To establish that a witness is unavailable for purposes of Evid.R. 804(A)(5) (modified for our analysis and again, to provide guidance), the proponent must show that he or she has been “unable to procure” the witness’s attendance “by process or other reasonable means.” The Ohio Supreme Court has held that in order for the witness to be “shown to be unavailable,” there “must also be shown a good faith effort to secure the witness[.]” *State v. Jester*, 32 Ohio St.3d 147, 154, 512 N.E.2d 962 (1987). “[M]ere statements that a search has been made lack sufficient particularity to allow the court to determine what steps have been taken and whether they were reasonable.” *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012-Ohio-2335, ¶ 50, citing *State v. Smith*, 2d Dist. Montgomery No. 22926, 2010-Ohio-745.

{¶23} In this case, Kehoe’s investigator, Lucey, stated that he learned from the Cleveland Police Department that the detective moved to Georgia after her retirement and that he learned from children services that the social worker no longer worked there. Lucey did not testify that he attempted to locate either the detective or the social worker by any other means. We conclude that on the facts before us, Lucey’s investigation efforts were not sufficient for the trial court to find that the detective and the social worker were unavailable for purposes of granting Kehoe’s motion to dismiss for preindictment delay. The trial court’s actions in dismissing the counts were premature.

{¶24} The state further argues that Kehoe was “willfully ignorant” of the fact that another detective who was assigned to Kehoe’s case, Detective Lessman, still works at

the Cleveland Police Department. We agree. Although there is nothing to indicate that Detective Lessman was present during John Doe's interview, he still may have been able to comment on Detective Howard's report. Regardless of whether Detective Lessman can recall anything about the case, the fact remains that the trial court dismissed the two counts in the indictment relating to John Doe without any knowledge as to whether Detective Lessman could provide any insight into the matter. Again, the trial court's actions in dismissing the counts were premature.

B. Actual Prejudice

{¶25} The state further argues that the record fails to establish actual prejudice. Because we have determined that Kehoe did not establish that Detective Howard and the social worker were "unavailable," however, Kehoe could not show that he suffered "actual prejudice" by their missing testimony. In essence, there is no missing testimony yet. Thus, this argument is moot.

C. Unjustifiable Delay

{¶26} In this case, the trial court found that Kehoe established actual prejudice due to the unavailability of the detective and the social worker who interviewed John Doe in March 2001. The state argues that even if Kehoe has shown actual prejudice, this case should be reversed and remanded because the trial court failed to find that the delay was unjustified. We agree that the trial court should have applied the second part of the burden-shifting test and balanced Kehoe's purported actual prejudice against the state's reasons for the delay. Nonetheless, because we find that the trial court erred in

determining that Kehoe's witnesses were unavailable, the state's argument that the trial court failed to apply the burden-shifting test is moot.

{¶27} Accordingly, the state's sole assignment of error is sustained.

{¶28} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

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

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
LARRY A. JONES, SR., J., DISSENTS WITH SEPARATE OPINION

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

{¶29} Respectfully, I dissent. I would affirm the trial court's judgment dismissing the 2001 rape and kidnapping charges.

{¶30} While we review the legal issues that surround a motion to dismiss for preindictment delay de novo, we are to afford the trial court's findings of fact "great deference." *State v. Powell*, 2016-Ohio-1220, 61 N.E.3d 789, ¶ 11 (8th Dist.). As such, I would defer to the trial court's factual finding that two key witnesses for the

defense, retired Detective Howard and social worker Kennedy, were unavailable witnesses. The court found that Kehoe's investigator, Lucey, was able to ascertain that Howard moved to the Atlanta, Georgia area, Kennedy's location was unknown, and their testimony was "necessary." The court then made the legal conclusion that Howard and Kennedy's unavailability as witnesses constituted "actual prejudice" under *Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688.

{¶31} As to Detective Lessman, who was still employed at the Cleveland Police Department and who was assigned to Kehoe's case, there was nothing to indicate that he was present during the alleged victim's interview. Thus, whether he might have been able to comment on the case would not have overcome the fact that the two key disclosure witnesses were unavailable.

{¶32} I agree with the trial court's legal finding that the witnesses' unavailability constitutes actual prejudice under *Jones*. The alleged victim's 2001 interview indicated that Kehoe touched him outside of his clothing. But Kehoe, as charged in the indictment, was charged with a count of rape (fellatio) and a charge of kidnapping. Charges were not brought against Kehoe in 2001 based on lack of evidence. The only "new" evidence now is the alleged victim's recent allegations. Thus, Howard and Kennedy's testimonies are crucial.

{¶33} Finally, I would find that the state has failed to produce evidence of a justifiable reason for the delay in prosecution. During the hearing on the motion to

dismiss, the prosecutor discussed the 2016 incident and how that led to an investigation into Kehoe's past conduct:

So that caused the detective, with respect to the 2016 incident, to start looking into the defendant and his past, and in doing so, the detective found this 2001 case, went back and interviewed John Doe, who is now an adult male in his 20's. And defense, of course, has those reports. John Doe gave a statement to the detective, clearly recalled the incident, recalled disclosing it to his parents, and still to this day recalls what happened with the defendant.

So we would argue that even if there is — the burden shifts to the State, that the State is justified in its delay, and now new evidence had come to light that would allow us to prosecute this case where we weren't able to in 2001.

At that time the victim was only four years old. He shut down when police and social workers tried to talk to him, and arguably very likely would not have been competent to even come into court to testify.

{¶34} I would find that the state's argument is insufficient to justify the delay.

The case was investigated in 2001; the 2001 investigation included the Cleveland Police Department, social services, and the prosecutor's office. The result of the investigation was that no charges were filed against Kehoe. The alleged victim's decision to change his story should not be viewed as new evidence sufficient to justify the delay in prosecution.

{¶35} Therefore, I would affirm the trial court's ruling.