[Cite as *State v. Danley* , 2006-Ohio-3585.]

In The Common Pleas Court of Montgomery County, Ohio

The STATE OF OHIO,	**:**	**Case No. 03-CR-1596**
	:	
	:	**Judge Jeffrey E. Froelich**
	:	
v.	**:**	**DECISION AND ENTRY DENYING**
	:	**IN PART AND GRANTING IN PART**
DANLEY.	**:**	**DEFENDANT'S MOTION TO**
	:	**DISMISS**
	:	Date of Decision: 6/09/06

FROELICH, Judge**.**

I. FACTS

{¶1} On January 27, 2006, the defendant was indicted for aggravated robbery (two counts), rape, kidnapping, attempt to commit safecracking, disrupting public service, felonious assault, breaking and entering, and gross sexual imposition; there are also firearm specifications to most of the charges. According to the indictment, these offenses occurred on October 25, 1998. The defendant has moved to dismiss the charges based on the expiration of the statute of limitations.

II. LAW

A. Enumerated felonies

{¶2} In October 1998, R.C. 2901.13 provided a six-year statute of limitations for all the listed felonies. However, effective March 9, 1999, R.C. 2901.13 was amended to state that for certain offenses, including aggravated robbery, rape, kidnapping, breaking and entering, and gross sexual imposition, prosecution is barred unless it is commenced within 20 years after the offense is committed.

{¶3} If the statute of limitations had not expired on March 8, 1999, an offender charged with these offenses is subject to prosecution under the amended version. Because at the time of the effective date of amended R.C. 2901.13(A), the former statute of limitations had not expired, the defendant was still subject to prosecution. *State v. Dycus*, Franklin App. No. 04AP-751, 2005-Ohio-3990; *State v. Bentley*, Ashtabula No. 2005-A-0026, 2006-Ohio-2503; *State v. Massey*, Stark App. No. 2004-CA-291, 2005-Ohio-5819.

{¶4} *Stogner v. California* (2003), 539 U.S. 607, cited by the defendant, is not controlling, since that case involved a statute of limitations that permitted prosecution for sex-related child abuse, although the prior limitations period had expired, if the prosecution were begun within one year of the victim's report to police. Because the six-year statute of limitations had not expired at the time the 20-year statute of limitations became effective, there is no violation of the Ex Post Facto Clause.

B. Other charges

{¶5} The charges of attempted safecracking, disrupting public services, and felonious assault are not specified in R.C. 2901.13(A) as having their statutes of

limitations extended. The state argues that they still survive because (1) they were "committed at or about or contemporaneous with the other charges" and (2) a prosecution of these charges was actually commenced on May 9, 2003.

1. Offenses committed at same time

{¶6} R.C. 2945.71(D), which governs speedy trial from arrest to trial, provides that when offenses of different degrees arise out of the same transaction, all the charges must be brought to trial within the time required for the highest degree of offense charged. *State v. Fields* (April 3, 2000), Clermont App. No. CA99-07-077. However, there is no similar provision in R.C. 2901.13, which deals with the time from the offense to the charge and which controls the issue before the court..

2. John Doe warrant

a. Statutory issues

{¶7} On May 9, 2003, a complaint was filed in the Vandalia Municipal Court and a warrant to arrest was issued against a "John Doe" for the charges of rape and aggravated robbery. Although John Doe was not further identified by name, age, date of birth, Social Security number, or physical description, his gender and a detailed DNA profile were listed. The state argues that pursuant to R.C. 2901.13(E), a prosecution is commenced on the day the warrant, summons, citation, or other process is issued. The state contends that because this profile was later determined to be that of the defendant, the statute of limitations was tolled on May 9, 2003, the day the warrant was issued for John Doe, who later was later identified as the defendant, Hayward Lee Danley.

{¶8} On December 7, 1994, an unknown male sexually assaulted a minor in Milwaukee, Wisconsin. The Wisconsin statute of limitations for this offense is six years. Soon thereafter, the state crime lab found semen and developed a DNA profile for the unknown male suspect. On December 4, 2000, the state charged "John Doe" with kidnapping and sexual assault. The DNA profile was included in the caption of the complaint. On March 14, 2001, the state filed an amended complaint substituting the defendant's name, Bobby Dabney, for John Doe; the defendant filed a motion to dismiss, arguing that the statute of limitations had expired on December 7, 2000.

{¶9} In *State v. Dabney* (2003), 264 Wis.2d 843, 663 N.W.2d 366, the court of appeals affirmed the defendant's conviction. Similar to Ohio law, Wisconsin's law provides that an action is "commenced" "when a warrant or summons is issued, an indictment is found, or an information is filed." Wis. Stat. 939.74(1); cf. R.C. 2901.13 (E). Further, the "warrant shall contain the name of the defendant or, if that is unknown, any name or description by which the defendant can be identified with reasonable certainty." Crim.R.4(C)(1).

{¶10} The Wisconsin court found that "the particularity or reasonable certainty requirements do not absolutely require that a person's name appear in the complaint or warrant" and that "[w]hen the name is unknown, the person may be identified with 'the best description' available." 264 Wis.2d at 853, 663 N.W.2d 366, citing *Scheer v. Keown* (1872), 29 Wis. 586, 588. "[A]n indictment is an accusation against a person, and not against a name. A name is not the substance of an indictment. And a person may well be

indicted without the mention of any name, and designating him as a person whose name is to the grand jurors unknown. Or a person may be indicted by a name wholly imaginary and fictitious, as John Doe or Richard Roe* * *." *Lasure v. State* (1869), 19 Ohio St. 43, 50, citing 4 Blackstone, Commentaries *302. A Montgomery County Common Pleas case dealing with a search warrant, while acknowledging the special dangers of a 'general warrant,' held, "A name is only one form of description and is not indispensable." *Kovacs v. State* (1921), 24 Ohio N.P. (N.S.) 1.

{¶11} The Wisconsin court found that when a complaint identifies the suspect as "John Doe" and sets forth a specific DNA profile, for the purposes of identifying "a particular person" as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible. "A genetic code describes a person with far greater precision than a physical description or a name." *Dabney*, 264 Wis.2d 843, at ¶5, citing Bieber, Comment, Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations, 150 U.Pa.L.Rev. (2002) 1079, 1085. See, also, Note: Seeking John Doe: The Provision and Propriety of DNA-Based Warrants in the Wake of *Wisconsin v. Dabney*, 33 Hofstra L.Rev. (2005) 1091, and Note: The Role Genetic Information Plays in the Criminal Justice System, 47 Ariz.L.Rev. (2005) 519.

{¶12} There is a concern that because a DNA profile is not apparent to the naked eye, a warrant cannot readily be executed. For example, one state has held that a criminal complaint that names and describes the defendant only as "John Doe 'Steve,' a

white male, in his thirties, address unknown" is insufficient to toll the statute of limitations. *Commonwealth v. Laventure* (Pa. Supreme Ct., 2006), 894 A.2d 109. " '[T]he intent of R.C. 2901.13 is to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct.' *Quoting State v. Climaco, Climaco, Seminatore, Lefkowitz & Garafoli Co., L.P.A.* (1999), 850 Ohio St.3d 582, 586, 709 N.E.2d 1192," *State v. Swartz* (2000), 88 Ohio St.3d 131, 132-133, citing *State v. Hensley* (1991), 59 Ohio St.3d 136, 138. While it would have been helpful for the complaint and warrant filed in May 2003 to have included additional identifiers such as race, approximate age, and physical description, the absence of that information, with the facts before the court, is not fatal to the state's argument.

b. Constitutional issues

{¶13} There are constitutional concerns that the use of such John Doe charges and warrants to toll the statute of limitations could abridge a defendant's right to a fair and speedy trial. Once filed, the complaint and warrant could remain active indefinitely until serendipity (or unserendipity) uncovered a match with the DNA profile. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges where the basic facts have become obscured by the passage of time and to minimize the dangers of official punishment because of acts in the

far-distant past." *State v. Swartz,* 88 Ohio St.3d 131, 132, citing *Toussie v. United States* (1970), 397 U.S. 112, 114-115. Especially in cases whose issues include not only identity but also, for example, consent, the delayed arrest and trial using the DNA match raise numerous issues of fairness that the statute of limitations was designed to address.

{¶14} One safeguard against such possible prejudice to a defendant is R.C. 2901.13(E), which provides that "a prosecution is not commenced upon issuance of a warrant, summons, citation, or other process, unless reasonable diligence is exercised to execute the same." There is nothing before the court indicating that the state did not use reasonable diligence in executing the warrant. *State v. Stevens* (Dec. 22, 1994), Cuyahoga App. No. 67400.

{¶15} Safeguards against such dangers are also contained in the speedy-trial requirements of Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. Statutory periods of limitations are not relevant to a determination of whether an individual's constitutional right to a speedy trial has been violated by an unjustified delay in prosecution. *State v. Selvage* (1997), 80 Ohio St.3d 465. In order to determine whether the delay from the charge until the arrest violated a defendant's 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 delay, (2) the reason for the delay, (3) the defendant's assertion of speedy-trial rights, and (4) the prejudice to the defendant as a result of the delay. *Barker v. Wingo* (1972), 407 U.S. 514; *Doggett v. United States* (1992), 505 U.S. 647.

{¶16} The court considers these factors as follows: (1) The time between the arrest warrant and the indictment was approximately 32 months, which is not inconsiderable, but there is no indication that the defendant's life was at all disrupted or that he was even aware of the charge before his indictment and detention. The Sixth Amendment was designed to protect freedom from extended pretrial incarceration and the disruption caused by unresolved charges. *State v. Triplett* (1997), 78 Ohio St. 3d 566. Therefore, under *Triplett*, the length of the delay weighs only negligibly in the defendant's favor. (2) The reason for the delay was that the only way to locate and identify the defendant was the DNA profile, which could be matched only as the information became available from the incarcerated defendant. (3) The defendant makes no assertion of any specific prejudice but only raises the statute-of-limitations defense.

{¶17} Concerning the fourth factor, there are 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. There is no indication or even an allegation that the state was negligent in not finding the DNA match earlier. The mere possibility of prejudice inherent in any delay does not justify the dismissal of the indictment. *United States v. Marion* (1971), 404 U.S. 307, 325. The defendant has not made any allegation of substantial and actual prejudice. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059. For example, a 17-month delay was found not to violate the defendant's right in *State v.*

Bailey, 2005-Ohio-5506, Montgomery App. No. CA20764; see, also, *State v. Stamper*, 4th Dist. No. 05CA21, 2006-Ohio-722, Fourth District No. 05CA21, finding no prejudice in a 41-month delay.

{¶18} Regardless, the 2003 John Doe complaint and warrant charged only the offenses of rape and aggravated robbery, both of which are within the statute of limitations because they are included in the amendment to R.C. 2901.13; this filing has no effect on the charges that are not within the amendment.

III. CONCLUSION

{¶19} The motion to dismiss is denied as to the charges of aggravated robbery, rape, kidnapping, breaking and entering, and gross sexual imposition and is granted for the charges of attempted safecracking, disrupting public services, and felonious sssault.

So ordered.

COPIES:

James M. Connell, Assistant Montgomery County Prosecuting Attorney, for the tate of Ohio.
Michael D. Matlock, for defendant.