

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0865

September Term, 2014

STATE OF MARYLAND

v.

MICHAEL RENFRO

Wright,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: May 20, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

By an indictment filed in the Circuit Court for Montgomery County on April 10, 2014, the State charged the appellee, Michael Renfro, with three rapes in the second degree of the same complainant. The rapes were alleged to have occurred on or about January 1, 1988, to January 31, 1988. The court dismissed the indictment for pre-indictment delay and the State has appealed. Because, as we explain below, the court applied the wrong test for determining a violation of due process, we shall reverse the ruling and remand.

After the State had furnished open file discovery, Renfro's motion to dismiss was heard on June 20, 2014. No testimony was taken on the subject motion. Arguments were based upon the application for a statement of charges, filed January 9, 2014, by Detective Gregory Wolff of the Takoma Park police and upon the representations of counsel. The complainant did not appear at the circuit court hearing.

Shortly prior to January 2013, the subject rapes were reported to the Montgomery County Police. Detective Wolff affirmed that on October 15, 2013, he "was contacted by ... the Montgomery County Department of Police ... and advised that [it] was investigating a report of a rape that was originally reported to the United States Air Force. Through investigation, it had been determined that the 1988 rape had occurred within ... the City of Takoma Park[.]"

Detective Wolff's interview of the complainant revealed that the rapes occurred on a Friday evening "around" January 1988, when the complainant, a female, had gone to the basement apartment of her ex-boyfriend in the 8000 block of Flower Avenue to discuss their

breakup. At that time he was age thirty-two and she was age twenty-one or twenty-two. Both parties were "involved in the military at the time," the State told the court, but the military had no jurisdiction to pursue the case because Renfro was not an active member or paid retiree of the United States Air Force.

Three days after the rapes, the complainant reported them to the District of Columbia Rape Crisis Center. Because of continuing pain, she was advised to report to the emergency room at Washington Adventist Hospital. Detective Wolff affirms that he found "archived medical records" from those institutions "which both show diagnosis and treatment [complainant] received for the reported rape." He further affirmed that the complainant "reported the rape to her chain of command in the United States Air Force."

There is no evidence and no contention that the rapes were reported to any State or local police department or agency of Maryland prior to the report to the Montgomery County Police some twenty-five years after the alleged event.

At the hearing on Renfro's motion to dismiss, the defense and the State agreed that this was a "he said, she said" case. The court asked defense counsel, "[A]s an officer of the court do you think there's any specific case law [directly on point] in Maryland that affects this situation?" Counsel replied, "I haven't found any" and suggested the issue presented a case of first impression. Nor did the State assist the court with any authority. Inasmuch as the court should be able to rely on counsel, it proceeded to devise its own test. It concluded

that "there have to be balances as a matter of fairness and fundamental concepts of justice and the court believes that on a case by case basis situations such as this should be evaluated[.]"

The court found that the State had not presented any specific justification for the delay, but noted that it was not the State's delay; it was that of the complainant. Further, and significantly, the court found that there was not "any improper motive by the State."

Turning to the prejudice to the accused side of its balancing test, the court found "legitimate" the prejudice "of what witnesses could be available to aid in the defense."¹ The court pointed to the lack of specificity of the date of the offenses and of the location. It found prejudice to "go back and look at ownership records or perhaps legal documents." The court referred to the problems of memory and distortion of recollection that could develop after twenty-six years.

Based on the totality of the circumstances, the court ruled that the "justification for the delay clearly is outweighed by the prejudice to the defendant."

This appeal by the State followed.

¹Since the concession that this was a "he said, she said" case, the reference must be to other than eyewitnesses to the crime. The record now before us does not indicate who those witnesses might be.

Discussion

There is a controlling decision by the Court of Appeals of Maryland, *Clark v State*, 364 Md. 611, 774 A.2d 1136 (2001). In the course of the attempted robbery of a bar in October 1982, two persons were killed. Fifteen years later, Clark was arrested for felony murder for which he was convicted and sentenced to life imprisonment. The initial investigation developed four suspects, including Clark, against all of whom charging documents were prepared but not filed, due to concern that the proof at that time might not result in a conviction. Fourteen years later, two detectives decided to look into the case again. By that time, two of three eyewitnesses had died, as well as one of the original suspects. Relying on the same information contained in the earlier draft of a statement of charges, the police arrested one of the surviving suspects who had denied any knowledge when originally interviewed. On re-interview that person implicated himself and Clark. Clark claimed prejudice. In addition to the deaths of the three persons present at the crime scene, Clark asserted that a named alibi witness had died and that he had lost evidence incriminating other suspects.

The trial court, applying a balancing test, denied Clark's motion to dismiss. It found that the reason for the delay was the State's belief that it did not have, at the time, sufficient evidence to obtain a conviction. *Id.* at 620, 774 A.2d at 1142. On appeal, Clark argued that prejudice to the defense clearly outweighed the reason for the delay. This Court affirmed

in an unreported opinion that relied on the two element test, hereinafter described, that was applied in *Smallwood v. State*, 51 Md. App. 463, 443 A.2d 1003 (1982). The Court of Appeals granted certiorari and affirmed this Court on the pre-indictment delay issue in a very thorough opinion by Judge Harrell.

The Court of Appeals pointed out that the primary guarantee against bringing overly stale criminal charges is a statute of limitations, but Maryland has no statute of limitations on felonies. *Clark*, 364 Md. at 626 & n.8, 774 A.2d at 1144 & n.8. Nor is the protection embodied in the Sixth Amendment Speedy Trial Clause applicable to pre-indictment delay because that clause does not become engaged until indictment or until "the putative defendant in some way becomes "an accused."" *Id.* at 624, 774 A.2d at 1143 (quoting *United States v. Marion*, 404 U.S. 307, 313, 92 S. Ct. 455, 459 (1971)).²

In *Clark*, the Court of Appeals first reviewed the decisions of the Supreme Court of the United States. That Court's test for determining when pre-indictment delay required dismissal was recommended in *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455 (1971).

The two element test from *Marion*, set forth below, was emphasized in *Clark*.

"[T]he Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to

²The Sixth Amendment Speedy Trial Clause is applicable to the states through the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988 (1967).

appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."

Clark, 364 Md. at 626-27, 774 A.2d at 1145 (quoting *Marion*, 404 U.S. at 324, 92 S. Ct. at 465) (footnote omitted).

United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044 (1977), reiterated the two element test of *Marion*.

The *Clark* court next fully reviewed the decisions of the lower federal courts and concluded that the "majority of U.S. Courts of Appeals have embraced the two part test." 364 Md. at 638, 774 A.2d at 1152. Turning to Maryland law, the Court in *Clark* noted this Court's prior decision in *Smallwood*, 51 Md. App. 463, 443 A.2d 1003, and determined that, in its *Clark*, this Court "correctly chose and applied the two element test of *Marion* and *Lovasco*." 364 Md. at 643, 774 A.2d at 1155.

In the case now before us, we shall assume, without deciding, that Renfro was prejudiced by the pre-indictment delay. In *Clark*, "there was no showing that the delay was an intentional, calculated tactic utilized by the State to obtain an advantage over appellant at trial." *Id.* at 646, 774 A.2d at 1157 (quoting this Court's unreported opinion in *Clark*). There is no such showing here. The present record is clear that the delay resulted from the complainant's not having reported the rapes to any Maryland law enforcement agency.

Renfro asks us to presume, absent any expressed justification for the delay, that it was a deliberate act to obtain a tactical advantage. Under these circumstances, appellee submits

that the complainant's failure to alert the police should be imputed to the State. This argument ignores that due process, under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights, is a limitation on state action. There ordinarily is no due process violation in the absence of state action or, when there is a duty to act, state inaction. Police exercising the sovereignty of Maryland have no duty to act on a complaint that has not been presented.

For the foregoing reasons, we hold that the circuit court erred by applying a balancing test. On the present record, there is no need to remand for a reconsideration of the ruling by applying the two element test, because there is no evidence that the delay was an intentional device to gain tactical advantage over the accused.

**JUDGMENT OF DISMISSAL
REVERSED AND CASE
REMANDED.**

**COSTS TO BE PAID BY THE
APPELLEE.**