

[Cite as *State v. Ricosky*, 2004-Ohio-2091.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William Hoffman, P.J.
Plaintiff-Appellee	:	Julie Edwards, J.
	:	John Boggins, J.
-vs-	:	
	:	Case No. 2003CA00174
JEFFREY L. RICOSKY, JR.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Stark County Court of Common Pleas Case 2002CR1724

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 19, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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{¶1} Defendant-appellant Jeffrey L. Ricosky, Jr. appeals from his conviction and sentence in the Stark County Court of Common Pleas on one count of trafficking in

cocaine, in violation of R.C. 2925.03(A)(C)(4)(c), and one count of trafficking in cocaine, in violation of R. C. 2925.03(A)(C)(4)(a). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was secretly indicted by the Stark County Grand Jury on December 11, 2002, on two counts of trafficking in cocaine. The indictment arose from two alleged sales of cocaine on or about April 21, 1999, and April 22, 1999. The indictment was served on appellant on December 12, 2002. On January 15, 2003, appellant moved to dismiss the indictment due to the pre-indictment delay.

{¶3} A hearing was held on the motion to dismiss on February 6, 2003. At the hearing, the State presented evidence that the case against appellant was part of a long-term multi-jurisdictional investigation by local police departments and the FBI. A witness, Detective Pamela Denczak of the Jackson Township Police Department, testified that this investigation of large-scale narcotics trafficking in Stark County began in the Fall of 1998, and concluded with federal and state indictments, including appellant's indictment, in December, 2002. The investigation included information from confidential informants, surveillance and the collection of intelligence from other police departments.

{¶4} Detective Denczak stated that seeking the indictment of appellant any earlier than December, 2002, would have compromised the multi-layered investigation. Detective Denczak acknowledged that appellant was a small-scale dealer and that the targets of the investigation were large-scale dealers but explained that an early arrest of appellant could have led appellant to contact his suppliers and alert them of the ongoing investigation.

{¶5} Upon questioning by the Court, Detective Denczak testified that both alleged cocaine buys from appellant, which formed the basis of the indictment, involved confidential informants. The link between appellant and a large-scale dealer was discovered through information provided by confidential informants. Although the police had enough information to indict appellant in April of 1999, the identity of the confidential informants would have been at risk if appellant had been indicted then. Detective Denczak emphasized that an early indictment of appellant would have revealed the investigation.

{¶6} Appellant was the only witness called by the defense. Appellant stated that he had no idea where he was or with whom he was with on the dates of the alleged cocaine sales. He stated that he recalled where he was working during this time period, but nothing else.

{¶7} Appellant's counsel argued that he suffered actual prejudice from the pre-indictment delay because he could not recall his whereabouts or identify potential witnesses on his behalf. The State responded that a recording of the alleged sales existed, which was made during the commission of the cocaine sales, and was provided to the defense in discovery.

{¶8} The trial court overruled appellant's motion to dismiss, finding that appellant did not establish substantial actual prejudice from the pre-indictment delay of over three years. The trial court acknowledged that after a period of three years there had been prejudice to appellant because it was more difficult for appellant to defend himself, but found no substantial actual prejudice because the recording was available and the defense would have the opportunity to cross examine the confidential

informants at trial. Further, the trial court based its ruling upon the testimony of Detective Denczak, stating that the government's basis for the delay had been stated and was accepted by the court. The trial court noted that appellant did not show that any prejudice to his defense outweighed the legitimate government interest in an investigation into serious trafficking offenses which gave rise to serious felony charges in federal and state courts.

{¶9} Subsequently, on February 26, 2003, appellant pled no contest to the charges in the indictment. The trial court sentenced appellant to a sentence of three years of community control, six month driver's license suspensions on each count to be applied concurrently, and a fine of \$500. The trial court further ordered that appellant pay restitution in the amount of \$710.

{¶10} It is from this conviction and sentence that appellant appeals, raising the following assignment of error:

{¶11} "THE TRIAL COURT ERRED BY NOT FINDING THAT THE DELAY WAS UNJUSTIFIABLE WHICH RESULTED IN ACTUAL PREJUDICE TO THE APPELLANT AND WILL EFFECTIVELY DEPRIVE HIM OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [SIC] AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION HAD THE CASE PROCEEDED TO TRIAL."

{¶12} In his sole assignment of error, appellant contends that the pre-indictment delay was unjustifiable and resulted in actual prejudice and effectively denied appellant his right to due process. Accordingly, appellant alleges that the trial court erred when it

found that the delay was justifiable and caused prejudice but not substantial, actual prejudice.

{¶13} Statutes of limitations provide the primary guarantee against bringing overly stale criminal charges. *United States v. Marion* (1971), 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468. However, statutes of limitations do not fully define a defendant's rights with respect to events occurring prior to indictment. *Marion* at 324. The Due Process Clause plays a limited role in protecting against oppressive pre-indictment delay. *State v. Luck* (1984), 15 Ohio St.3d 150, 154, 472 N.E.2d 1097. See, also, *United States v. Lovasco* (1977), 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752. In *Luck* and *Lovasco*, a two-part test was established to determine whether a defendant has been denied due process as a result of pre-indictment delay. First, a defendant has the burden of establishing that the delay resulted in substantial, actual prejudice to the defendant. Once the defendant has established substantial, actual prejudice, the burden shifts to the State to justify the delay. See, also, *State v. Whitting* (1998), 84 Ohio St.3d 215, 702 N.E.2d 1199. Should a defendant not be able to establish substantial, actual prejudice, a court need not consider the reasons for the delay. *State v. Dawson* (Nov. 18, 1993), Cuyahoga App. No. 63122. When reviewing a trial court's decision regarding a motion to dismiss an indictment based upon a pre-indictment delay, a reviewing court must accord due deference to the trial court's findings of fact, but may freely review the trial court's application of the law to the facts. *State v. Cochenour* (March 8, 1999), Ross App. No. 98CA2440, (citing *State v. Metz* (Apr. 21, 1998), Washington App. No. 96CA48).

{¶14} In this case, appellant testified that he has no recollection of where he was, with whom he was with or what he was doing on April 21, 1999, and April 22, 1999. Appellant asserts that because an alibi is almost the only defense available in these type cases, the State's delay effectively deprived appellant of any possibility of presenting a defense.

{¶15} General assertions of prejudice are insufficient to overcome a justifiable reason for delay. *State v. Davis* (Apr. 15, 1997), Richland App. No. 96-CA-78, (citing *State v. Tillman* [1990], 66 Ohio App.3d 464, 467, 585 N.E.2d 550). Specifically, a general assertion that the defendant's memory has faded does not demonstrate actual prejudice. *State v. Glasper* (Feb. 21, 1997), Montgomery App. No. 15740. Further, any claim of prejudice, such as lost evidence or faded memories, must be balanced against the evidence in the case in order to determine whether the defendant will suffer actual prejudice at trial. *Id.* (citing *State v. Whiting* [1998], 84 Ohio St.3d 215, 217, 702 N.E.2d 1199).

{¶16} In this case, the trial court noted that although a prejudice may result from a delay of three years, appellant failed to prove substantial actual prejudice. The trial court noted that appellant could listen to the tape recording made during the alleged cocaine sales and would have the opportunity to cross examine the confidential informants at trial. We agree.

{¶17} Appellant presented only general assertions of faded memories. On the other hand, the State presented a justifiable reason for the pre-indictment delay. The state presented evidence that the delay was caused because the offenses were part of a long-term, multi-jurisdictional investigation by local police departments and the FBI.

The investigation was targeted against large-scale narcotics trafficking in Stark County. It began in the fall of 1998 and concluded with federal and state indictments, including appellant's indictment, in December, 2002. Testimony showed that indicting appellant any sooner would have compromised the multi-layered investigation and endangered the confidential informants.

{¶18} Appellant's general assertions of his faded memory are not enough to overcome the justifiable delay.

{¶19} Accordingly, appellant's sole assignment of error is overruled.

{¶20} The judgment of the Stark County Court of Common Pleas is affirmed.

Judgment affirmed

Hoffman, P.J., and Boggins, J., concur.

