

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DENNIS JEROME LITTLEJOHN,

Defendant-Appellee.

UNPUBLISHED
October 21, 1997

No. 202393
Chippewa Circuit Court
LC No. 96-006282-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was charged with assaulting a prison employee, MCL 750.197c; MSA 28.394(3), and had been served with notice that the prosecutor would seek to enhance his sentence based on his status as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court granted defendant's motion to dismiss after a hearing regarding the failure to arrest in a timely manner after a delay of almost twenty-three months between the incident and the arrest of defendant. On appeal as of right, the prosecutor now challenges the dismissal. We reverse and remand for reinstatement of the charges.

Defendant was allegedly involved in a May 4, 1994 fight among many corrections officers and prisoners at Kinross Correctional Facility, where one of the officers identified defendant as having struck him in the jaw during the fight. Although defendant was identified immediately, the incident was followed by twenty-three months of investigation regarding other perpetrators, and defendant was not arrested or arraigned until April 1, 1996.

The prosecutor argues that the trial court erred in dismissing the charge on the basis of denial of the right to a speedy trial. While it is not completely clear on what law the trial court based the dismissal, this is not a speedy trial issue. The speedy trial clause applies only to delays between arrest and trial. *United States v Marion*, 404 US 307, 320-321; 92 S Ct 455; 30 L Ed 2d 468 (1971). The due process clause protects against delays prior to arrest or arraignment that violate "fundamental conceptions of justice" . . . which define 'the community's sense of fair play and decency.'" *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977); see, also, *People v*

Nuss, 405 Mich 437, 452-453; 276 NW2d 448 (1979). To prove a due process violation by delay, a defendant “must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage.” *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994).

The trial court erred both in applying the law of due process and in finding prejudice to defendant caused by the delay. Defendant did not make a showing of actual prejudice because of the delay. He did not identify any witnesses who could not be located and subpoenaed due to the delay and did not establish that their testimony would be anything but cumulative. *Id.* at 134-135. Moreover, defendant did not even claim that the prosecutor’s intent was to gain a tactical advantage by the delay, while the prosecutor adequately explained the delay as due to investigation. Accordingly, there was no due process violation as the result of the delay.

We reverse and remand for reinstatement of the charges against defendant. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra