

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VERNON LEROY BOLLING,

Defendant-Appellee.

UNPUBLISHED

February 19, 1999

No. 207017

Oakland Circuit Court

LC No. 94-132608 FH

Before: Gribbs, P.J., and Saad and P. H. Chamberlain,* JJ.

MEMORANDUM.

Plaintiff People of the State of Michigan appeals by right the circuit court order granting defendant Vernon Leroy Bolling's motion to dismiss for lack of speedy trial. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On July 22, 1992 a search warrant was executed at a residence owned by Gerald Crouch and at which defendant was living. Cocaine was seized from the residence. Defendant and Crouch were arrested; however, they were released on the same day and no charges were filed.

After a federal investigation yielded no indictments, the Oakland County Prosecutor's office issued a complaint and warrant against defendant and Crouch on April 5, 1994. On June 20, 1994 defendant and Crouch moved to quash for violation of the right to speedy trial and on due process grounds. Defendant alleged that his right to a speedy trial had been violated by the 23-month delay, and that relevant witnesses could no longer be located. On July 24, 1994 the trial court granted the motion. On February 21, 1995 the court denied plaintiff's motion for rehearing. On or about February 22, 1995, Crouch was murdered.

Plaintiff appealed, and on December 4, 1996 the Court reversed the trial court's order. and held that because the right to speedy trial applies only to delay while formal charges are pending, *United States v MacDonald*, 456 US 1, 6-10; 102 S Ct 1497; 71 L Ed 2d 696 (1982), the delay in this case was subject to a due process analysis. US Const, Am XIV; Const 1963, art 1, § 14. The

* Circuit judge, sitting on the Court of Appeals by assignment.

Court held that defendant failed to carry his burden of proving that his right to a fair trial had been substantially prejudiced through loss of evidence or witnesses, and that he offered no evidence to show that the delay was designed to secure a tactical advantage for the prosecution. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994).

In the trial court defendant filed a second motion to dismiss, and sought an evidentiary hearing. Defendant testified that two witnesses, known to him as “Doc” and “Big John,” had died. He acknowledged that he did not know what testimony these persons could have offered. In addition, defendant testified that prior to Crouch’s death, Crouch told him that he would testify that the cocaine belonged to him alone. In granting the motion, the trial court found that defendant established that his defense was prejudiced by the delay because Crouch was no longer available to offer exonerating testimony.

The trial court erred by granting defendant’s motion to dismiss. At the evidentiary hearing defendant readily admitted that he did not know what testimony “Doc” and “Big John” could have offered in his defense. Defendant offered no corroboration of his allegation that Crouch told him that he would take sole responsibility for the narcotics found on the premises. The trial court’s conclusion, implied in its ruling, that the trier of fact would have accepted Crouch’s testimony and acquitted defendant on that basis was speculative. Moreover, at the hearing defendant did not allege, and the trial court did not find, that the delay was engineered by the prosecution to gain a tactical advantage. The unavailability of Crouch could be deemed a tactical advantage for the prosecution in defendant’s case; however, no evidence showed that the prosecution caused the death or delayed proceedings based on a knowledge that Crouch was about to die. Defendant failed to make the required showing to establish that the delay violated his right to due process. *White, supra*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ Paul H. Chamberlain