

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RANDALL GENE VEIHL,

Defendant-Appellee.

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UNPUBLISHED

January 29, 2008

No. 270812

Jackson Circuit Court

LC No. 05-007223-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

The prosecutor appeals as of right from a circuit court order dismissing a charge of prison escape, MCL 750.193, on defendant's motion. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Despite the manner in which the issue was presented below, the parties agree that the issue is one of prearrest delay. The issue of prearrest delay implicates constitutional due process and thus is reviewed de novo, although the trial court's factual findings are reviewed for clear error. *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003).

"A delay between an offense and the arrest of the defendant may violate the defendant's federal and state due process rights." *People v Walker*, 276 Mich App 528, 545-546; \_\_\_ NW2d \_\_\_ (2007) (footnote omitted). "Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process." *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979) (citations omitted). "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charges "in such a manner that the outcome of the proceedings will likely be affected," *id.*, e.g., the loss of exculpatory evidence that could not be obtained by other means. *People v Adams*, 232 Mich App 128, 136; 591 NW2d 44 (1998). "Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence." *Tanner, supra* at 414. Once the defendant

meets the initial burden of demonstrating prejudice, the burden then shifts to the prosecutor to explain the delay. *Id.*

The parties agree that defendant escaped in 1983. There is nothing in the record to suggest that the prosecutor had any information concerning his whereabouts until defendant was returned to the custody of the Department of Corrections in 2001, and thus there is no evidence that the prosecutor intended to gain a tactical advantage by not charging defendant during that 18-year period. Further, defendant failed to meet his initial burden of proof with evidence of actual and substantial prejudice. In his motion, he cited only the inability to locate unnamed witnesses. In his notice of duress, he identified three witnesses for the defense, only one of whom had not been located, and there is nothing in the record to suggest what testimony this witness could offer and why it could not be obtained by other means. Because a general allegation of missing witnesses is insufficient to warrant dismissal, *Tanner, supra*, the trial court erred in granting defendant's motion.

Reversed and remanded for reinstatement of the charge. We do not retain jurisdiction.

/s/ Jane M. Beckering  
/s/ David H. Sawyer  
/s/ Karen M. Fort Hood