

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIC LEE HOPKINSON,

Defendant-Appellee.

UNPUBLISHED

February 12, 2008

No. 276115

Cheboygan Circuit Court

LC No. 06-003485-FH

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

The prosecutor appeals as of right from the order dismissing this case for undue prearrest delay. We reverse and remand. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor's theory of the case is that defendant was one of three individuals responsible for a series of local motor vehicle break-ins, and had twice used a credit card stolen during the break-ins. Defendant was charged with breaking and entering a vehicle to steal property worth \$1,000 or more but less than \$20,000, MCL 750.356a(2)(c)(i), conspiracy to commit that offense, MCL 750.157a, three counts of larceny from a motor vehicle, MCL 750.356a(1), and two counts of stealing or retaining a financial transaction device, MCL 750.157n(1).

The following comprises a general timeline of the events resulting in defendant's arrest. On August 21, 2005, police initiated an investigation following complaints of several break-ins to motor vehicles occurring the previous evening. It was determined that following these break-ins a credit card, stolen from one of the vehicles, had been used at two stores in Mackinaw City. Police conducted a photographic lineup with store clerks on September 2, 2005. Two of the store clerks identified defendant as the person using the stolen credit card. At that time, police also identified defendant's roommate, Christopher McGovern, as being with defendant at the time the stolen credit card was used.

Police interviewed McGovern on September 6, 2005. McGovern indicated to police that he, defendant and a third individual, Tim White, were involved in the motor vehicle break-ins and use of the stolen credit card. White was contacted by police but failed to appear for a scheduled interview. Police were initially informed that defendant was no longer residing in the immediate area.

Criminal proceedings were initiated against McGovern on December 19, 2005, charging him with both breaking and entering of the motor vehicles and use of the stolen credit card. McGovern was arrested on January 16, 2006, and on April 6, 2006, he entered into a plea agreement, which was accepted by the court. One of the conditions of McGovern's plea agreement was that he would be required to testify against defendant and White. McGovern was sentenced on May 9, 2006.

Police submitted a warrant request to the local prosecutor for defendant on June 9, 2006. On August 3, 2006, the prosecutor authorized criminal proceedings against defendant for both the motor vehicle break-ins and for use of the stolen credit card. The warrant was signed on August 11, 2006, and defendant was arrested on August 15, 2006.

Defendant filed a motion for dismissal of the charges based on unreasonable delay between the time of the alleged offenses and his arrest and the resulting prejudice. Defendant specifically contended that the delay had resulted in his and his potential alibi witnesses, comprised of friends and family members, inability to recall and verify defendant's whereabouts at the time of the alleged crimes. Initially, the trial court denied defendant's motion without prejudice and permitted the scheduling of an evidentiary hearing on the matter. Following the conclusion of the evidentiary hearing, the trial court granted defendant's motion, ruling in relevant part:

There is nothing on this record that indicates the Defendant was made aware that he was a suspect in this case until he was arrested. Consequently, it would be a denial of due process to allow for a one year delay based on the reasons given. While the prosecution must be allowed a reasonable amount of time to complete an investigation, it appears from this record that the investigation was completed within three weeks of the offense The People had ample information to issue well before Mr. McGovern was sentenced; consequently when the reasons for the delay are balanced against the prejudice under these facts, Defendant's due process rights were violated by this unreasonable pre-arrest delay.

The prosecutor filed a motion for reconsideration, which was denied by the trial court indicating it did not accept the prosecutor's explanation for the delay that it was awaiting the sentencing of McGovern to assure his testimony before proceeding with charges against defendant. The trial court reiterated the significance it attributed to the lack of "evidence that Defendant was ever notified that he was a possible suspect in this matter until his arrest," and opining that if defendant "had been put on notice earlier, he could have invented any possible alibi defense at that time and negated any prejudice." Notably, the trial court indicated that defendant "did establish some prejudice . . . due to the delay" but "that the prejudice was not overwhelming."

On appeal, the prosecutor contends the trial court erred in dismissing the charges against defendant based on prearrest delay. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1999). The factual determinations of the trial court are reviewed for clear error, with the application of law to the facts reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

The right to due process affords “limited protection to those persons who have not been arrested.” *Adams, supra* at 133 (citation omitted). Charges may be dismissed against a defendant based on undue prearrest delay if there exists “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); see also *People v Walker*, 276 Mich App 528, 545-546; 741 NW2d 843 (2007); *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982). Initially, a defendant must demonstrate some actual and substantial prejudice. *Id.* “Substantial prejudice is prejudice of a kind or sort that the defendant’s ability to defend against the charges was so impaired that it likely affected the outcome of the trial. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence.” *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746 (citations omitted), rev’d on other grounds 469 Mich 437 (2003).

In this instance, defendant merely asserts that he consulted with family members and friends he typically associates with on a regular basis and that “they had no idea where I was at the time, so I have no idea.” Defendant has failed to demonstrate that the loss of the testimony of these individuals resulted in any meaningful impairment to his defense. The fact that these potential witnesses could not recall defendant’s whereabouts at the time the crimes occurred, standing alone, is insufficient to show defendant suffered actual and substantial prejudice from the prearrest delay, because defendant has failed to demonstrate any of the indicated witnesses would have testified in a manner that would be helpful to his defense. The mere assertion that the witnesses *might* have provided exculpatory testimony is much too speculative to meet the threshold requirement of actual and substantial prejudice.

In addition, we note an inconsistency between the trial court’s determination that there was a lack of “evidence that Defendant was ever notified that he was a possible suspect in this matter until his arrest,” and that if defendant “had been put on notice earlier, he could have invented any possible alibi defense at that time and negated any prejudice.” Contrary to this statement, at the evidentiary hearing, the trial court elicited testimony from defendant acknowledging that, within weeks of the alleged crimes, he had contact with police suggesting his involvement. Although defendant denied that the police provided any specifics regarding the crimes other than they involved local break-ins, the trial court implied that “a reasonable person if they were put on notice that there is allegations that you were involved in criminal activity on a particular date and time, and it’s very close in time to that event, you would tend to figure out where you were, so that if the events unfolded unfavorably for you, you could have a defense.” In addition, defendant acknowledged that he communicated with White and was told, “that there was a matter going down involving my name. I wanted to find out information. In fact, I had spoken with Officer Frazier on the matter.” These admissions by defendant belie his assertion, and the trial court’s finding, that he had no knowledge of his implication as a suspect in the crimes until his arrest and precludes a determination of “actual and substantial prejudice.”

Finally, even if we were to determine that defendant presented sufficient evidence of delay to satisfy the first prong of the test establishing prejudice; it must also be shown that the prosecution intended to gain a tactical advantage by delaying charges. *Tanner, supra* at 414. The prosecutor explained the delay in proceeding against defendant as being based solely due to wanting to assure testimony by McGovern to support charges against defendant for both the break-ins and the use of the stolen credit cards. The prosecutor did not deny it had sufficient

evidence earlier to proceed solely on the stolen credit cards but was completely reliant on McGovern's testimony to tie defendant to the vehicle break-ins. The prosecutor denied any intent to "gain some tactical advantage." Later, defendant's counsel indicated he would accept "the prosecutor at her word" regarding the issue of "tactical advantage" and argued primarily regarding the resultant prejudice to his client by the delay to justify dismissal of the charges.

We find that defendant has not shown actual and substantial prejudice sufficient to warrant dismissal of the charges. Consequently, no due process violation occurred. We reverse and remand to the trial court for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra