

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	CRIMINAL ACTION NUMBERS
)	
v.)	IN-12-08-1796W
)	IN-12-08-1797W
HIAKEEM SUMMERS)	
)	
Defendant)	ID No. 1208017481

Submitted: February 18, 2013

Decided: March 7, 2013

MEMORANDUM OPINION

Upon Defendant's Appeal from Commissioner's Findings of Fact and Recommendations
AFFIRMED

Appearances:

Matthew Frawley, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State of Delaware

John S. Edinger, Jr., Esquire, Assistant Public Defender, Office of the Public Defender,
Wilmington, Delaware, Attorney for Hiakeem Summers

HERLIHY, Judge

This is an appeal from a Commissioner's finding denying defendant, Hiakeem Summers' motion to dismiss under Superior Court Criminal Rule 48(b) based on pre-arrest delay. As the factors set forth in *Preston v. State*¹ weigh in the State's favor, the Commissioner's decision denying defendant's motion to dismiss the indictment is AFFIRMED.

Facts

On February 29, 2008, defendant Summers was involved in a domestic dispute with his girlfriend. This dispute prompted the Wilmington Police Department ("WPD") to obtain and execute a search warrant for a residence located in Wilmington which belonged to Summers' father. When the WPD executed the search warrant on March 5, 2008, Summers was present when officers arrived. During the search, officers located a .38 caliber handgun in the living room. At the time the gun was located, police were aware that Summers was a person prohibited from possessing, owning, or controlling a firearm. He was arrested on outstanding charges related to the domestic dispute, but not on a firearm charge, that allegedly occurred on February 29, 2008; however, the charges were later dismissed on September 16, 2008. On March 10, 2008, the gun located during the search was swabbed for DNA, but his DNA was not obtained at that time.

Then, on October 28, 2009, police obtained and executed a search warrant to retrieve a sample of Summers' DNA for purposes of comparing it to evidence at a homicide crime scene (unrelated to the domestic incident). On April 26, 2010, that DNA sample, evidence from the crime scene and the swab obtained from the handgun were

¹ 338 A.2d 562 (Del. 1975).

sent to the medical examiner's office. The medical examiner's final DNA analysis report, which the police received on June 3, 2011, revealed that his DNA did not match the sample retrieved from the crime scene, but it did match the sample taken from the handgun.

Over a year later, on August 27, 2012, Summers was indicted on charges of possession of a firearm by a person prohibited and possession of ammunition by a person prohibited. He was arrested on October 8, 2012, and has been in custody at James T. Vaughn Correctional Center since November 21, 2012. Trial is scheduled for April 30, 2013.

Parties' Contentions

On December 27, 2012, Summers moved to dismiss the indictment. He alleged a violation of his due process rights to a fair trial guaranteed by the Fifth Amendment to the United States Constitution based on the pre-arrest delay in bringing the indictment. In support of his motion, he cites to the factors set forth by the Supreme Court of Delaware in *Preston v. State*. He first argues that there is nearly a 4.5 year delay between the date of the DNA swab of the gun and the indictment date. Summers alleges that the State has neither explained, nor justified the delays. He asserts these delays have caused substantial prejudice to his right to a fair trial. He also suggests that the charges were filed to harass him, or for another improper purpose. Specifically, Summers notes that it was not until after the domestic dispute charges were dismissed and there was no DNA match from the homicide crime scene that the current charges were filed against him.

In opposition, the State claims that Summers has neither established an intentional delay by the State, or that the delay caused actual and substantial prejudice to his right to a fair trial. The State contends that instead of the police immediately arresting him for possession of a firearm by a person prohibited, as the gun was not found on or about his person, they waited to ensure that the DNA sample from the gun matched his DNA. The State argues that, while four years elapsed from the date of the alleged offense and the indictment, it filed the charges within the 5 year statute of limitations enumerated in 11 *Del. C.* § 205(b)(1).²

The State analyzes the *Preston* factors and concludes that his due process claim must fail. It first contends that Summers has failed to establish that the State intentionally delayed his arrest or how the State gained a tactical advantage between the offense and the arrest. The State concedes that, while there was a delay in the investigation, part of the delay was attributable to the time it takes to collect, submit and receive the DNA results.³ It next claims that even if the Court finds the delay unreasonable and inexplicable, Summers still must establish actual and substantial prejudice which, it claims, has not been articulated in this case. Instead of the defense indicating that the passage of time resulted in the absence of witnesses or that the defense is otherwise

² 11 *Del. C.* § 205(b)(1) states: “A prosecution for any felony except murder or any class A felony . . . must be commenced within 5 years after it is committed.”

³ This Court excluded DNA test results, potentially very incriminating, from a murder first degree case in 2009, due to the delay in testing and overly late production of the results to the defense. Various state officials reacted and promised to rectify the problems – primarily underpayment of DNA analysts in the Office of the Chief Medical Examiner, but it appears nothing happened.

impaired, the defendant references the domestic violence matter and a homicide investigation that are unrelated to these current charges. Further, the State contends that this case rests on the testimony of the police officer who located the firearm and the DNA analyst who compared the DNA sample on the gun with the defendant's DNA. Thus, it is the State's position that Summers is not entitled to a dismissal of indictment for pre-arrest delay.

Commissioner's Ruling

On January 14, 2013, a hearing on defendant's motion to dismiss the indictment was heard before a Commissioner of this Court. During the hearing, Summers' main argument was that that State had no justifiable explanation for delaying in bringing the charges. He did not allege any articulable prejudice he suffered. The State argued that while there was a delay here, the police waited to arrest him until it was confirmed that the DNA obtained from the handgun matched the DNA obtained from him. After argument, the Commissioner issued a bench ruling and denied the motion. He applied the factors set forth in *Preston* and concluded that those factors weighed in favor of the State. Specifically, as to the first factor, length of the delay, the Commissioner noted that there was a significant delay between the offense and the indictment. Second, the reasons for the delay were partly attributable to the delay in testing the DNA samples. Third, as to the prejudice to Summers, the Commissioner reasoned that this case is about whether Summers had possession of the weapon, which simply comes down to the DNA evidence. Thus, the (lack of) prejudice factor weighed in favor of the State. Fourth, Summers did not argue, or show, that defense witnesses would be unavailable by reason

of the delay. Fifth, the delay was not purposeful and intended to prejudice him and lastly, the State's case rests on the DNA results linking the defendant's DNA to that found on the handgun.

Summers filed an appeal from the Commissioner's finding pursuant to Super. Ct. Crim. R. 62. The State has not filed a response.⁴ The review is *de novo*.⁵

Discussion

A.

Summers has appealed the Commissioner's order denying his motion to dismiss the indictment under Super. Ct. Crim. R. 62(5)(a). Super. Ct. Crim. R. 62(5) grants Commissioners of this Court the power to conduct case-dispositive hearings including, but not limited to, motions to dismiss or quash an indictment or information in a criminal case. According to Rule 62(5)(i), the Commissioner shall file proposed findings of fact and recommendations and shall mail copies to all parties.⁶ Any party taking objection to the proposed findings of fact and recommendations may serve and file written objections to the Commissioner's order within 10 days after the filing of the Commissioner's

⁴ The Court would have preferred a response as the Rules require, but it will treat the State's response to the motion before the Commissioner as the response to Summers' appeal to the Court.

⁵ Super. Ct. Crim. R. 62(a)(5)(iv).

⁶ The Commissioner has not filed proposed findings of fact and recommendations. Instead, a hearing was held and an order denying the motion to dismiss the indictment was signed by the Commissioner on January 14, 2013. For purposes of this motion, the Court will refer to the transcript hearing as the findings of fact and recommendations.

proposed findings of fact and recommendation.⁷ The objections must set forth, with particularity, the basis for the objections.⁸ The non-moving party then has 10 days from service to respond to the written objections.⁹

Additionally, the party filing the written objections “shall cause a transcript of the proceedings before the commissioner to be prepared, served, and filed unless, subject to approval of a judge, all parties agree to a statement of the fact.”¹⁰ If the moving party fails to comply with the above provisions, this Court is warranted in dismissing the motion for reconsideration or appeal.¹¹ This Court shall make a *de novo* determination of those portions of the recommendations to which an objection is made and may “accept, reject, or modify, in whole or in part, the findings of fact or recommendations made by the Commissioner.”¹²

B.

⁷ Super. Ct. Crim. R. 62(5)(ii).

⁸ *Id.*

⁹ *Id.* The State has not filed a response to the written objections.

¹⁰ Super. Ct. Crim. R. 62(5)(iii).

¹¹ Super. Ct. Crim. R. 62(5)(b). The Court notes that, while Summers’ written objections are properly entitled, “Appeal from Commissioner’s Findings of Fact and Recommendations,” the motion does not list with particularity, the basis for the objections. The motion merely lists the procedural history of the case and requests this Court to review the Commissioner’s order. Additionally, Summers did not comply with Super. Ct. Crim. R. 62(5)(iii), as a transcript of the proceedings before the Commissioner was not filed with the appeal. Despite the deficiencies present in this appeal, the Court will, nonetheless, consider the merits.

¹² Super. Ct. Crim. R. 62(5)(iv).

Super. Ct. Crim. R. 48(b) provides, “[i]f there is unnecessary delay in presenting a charge to a grand jury or in filing an information or in bringing a defendant to trial, the Court may dismiss the indictment, information or complaint.” Rule 48(b) is a “codification of the inherent power of a court to dismiss for want of prosecution.”¹³ The Rule, however, has been recognized by the Supreme Court of Delaware as serving a broader purpose than merely guaranteeing a defendant’s constitutional rights to a speedy trial.¹⁴ In construing Rule 48(b), the Supreme Court of Delaware in *McElroy* has stated that:

[F]or a criminal indictment to be dismissed under Rule 48 for “unnecessary delay,” the delay, unless extraordinary, i.e., of constitutional dimensions, must, as a general rule, first be attributable to the prosecution and second, such delay must be established to have had “a prejudicial effect upon defendant” beyond that normally associated with a criminal justice system necessarily strained by a burgeoning caseload.¹⁵

The *McElroy* Court additionally held that, “[w]hile Rule 48(b) does not condition a dismissal of an indictment on any finding other than unnecessary delay and makes no reference to a need of a defendant to show prejudice to have resulted from the delay, some showing of prejudice has been consistently required for relief to be granted.”¹⁶ Thus, “[t]he due process clause requires the dismissal or an indictment, even if it is

¹³ *State v. McElroy*, 561 A.2d 154, 156 (Del. 1989) (quoting *State v. Fischer*, 285 A.2d 417, 418-19 (Del. 1971)).

¹⁴ *Id.*

¹⁵ *McElroy*, 561 A.2d at 155-56.

¹⁶ *Id.* (citing *State v. Fischer*, 285 A.2d 517, 419 (Del. 1971)) (internal quotations omitted).

brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was the deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."¹⁷

With regard to pre-arrest delay, the Supreme Court of Delaware in *Preston v. State*¹⁸ adopted the interpretation of the United States Supreme Court in *United States v. Marion*.¹⁹ In *Preston*, there was a pre-arrest delay of 19 months between the offense and the arrest, including a lapse of approximately 18 months between the issuance of the arrest warrant and the execution.²⁰ The Court held that while the Sixth Amendment was inapplicable, defendant was entitled to consideration of whether the pre-arrest delay substantially prejudiced his right to a fair trial.²¹ Further, the Court stated:

Under *Marion*, as we understand it, in order to prevail upon the contention that a pre-arrest delay violated due process, a defendant must prove actual and substantial prejudice to his right to a fair trial because of the delay, [o]r that the State intentionally delayed to gain some tactical advantage.²²

The Court also held that, as stated in *Marion*, that the possibility that memories will fade, witnesses are unavailable and evidence is misplaced, is not enough to

¹⁷ *Watts v. State*, 574 A.2d 264, 1990 WL 38279, at *2 (Del. 1990).

¹⁸ 338 A.2d 562 (Del. 1975).

¹⁹ 404 U.S. 307 (1971).

²⁰ *Preston*, 338 A.2d at 564.

²¹ *Id.* at 565.

²² *Id.* at 567.

demonstrate prejudice justifying a dismissal of the indictment.²³ The Court reasoned that defendant was entitled to an evidentiary hearing for the purpose of determining “whether the delay complained of resulted in such actual and substantial prejudice to the defendant that he was deprived of a fair trial and that, therefore, dismissal [was] necessary in the interest of due process.”²⁴ At the hearing, the burden of proof was on the defendant and was entitled to the consideration of these six factors:

(1) the length of the delay; (2) the reason for the delay; (3) the prejudicial effect of the delay; (4) whether defense witnesses have become unavailable by reason of the delay; (5) whether the delay was purposeful and intended to prejudice the defendant; and (6) the kind of evidence and the quantum which is available to prove the State’s case.²⁵

Similarly, in *Watts*, the Supreme Court of Delaware affirmed this Court and held that there was not error of law or abuse of discretion warranting reversal.²⁶ In *Watts*, the pre-arrest delay was for a period of five months to permit an area-wide drug investigation to continue. The Court held the pre-arrest delay was not a result of prosecutorial maneuvering and defendant’s contention that his memory faded was an insufficient showing of prejudice for dismissal. Additionally, the State’s case was “very strong” and the charges were of a serious nature. The Court held that, based on the above factors and the factors in *Preston*, dismissal of the indictment was not warranted.

²³ *Id.* at 566.

²⁴ *Id.*

²⁵ *Id.* at 567 (citing *Coca v. District Court*, 530 P.2d 958 (Colo. 1975)) (citations omitted).

²⁶ *Watts v. State*, 574 A.2d 264, 1990 WL 38279, at *2 (Del. 1990).

As a preliminary matter, the Court notes that this case does not present a speedy trial issue and thus, the extraordinary delay referred to in *McElroy* is inapplicable to the pre-arrest delay between the date the police received the medical examiner's report and the date of the indictment. The Sixth Amendment right to a speedy trial is triggered once a defendant is accused of a crime via arrest or indictment, whichever date occurs first.²⁷ "Although it is not codified in Delaware law, the Superior Court speedy trial guidelines set the standard that 90% of criminal trials should be held, or the cases otherwise disposed of, within 120 days of indictment, 98% within 180 days, and *all* cases within one year."²⁸ Here, the defendant was indicted on August 27, 2012, and arrested on October 8, 2012. Trial in this case is scheduled for April 30, 2013 and thus, a speedy trial analysis is inapplicable because the trial is within the time limitations set forth Administrative Directive 130.

In this case, dismissal of the indictment is not warranted under Rule 48(b), as the defendant has not met his burden of proof in establishing that the State's delay in bringing the indictment was a deliberate device to gain a tactical advantage. There were 14 months between the State knowing there was no DNA match to the murder evidence and Summers' arrest for these weapons charges. Just as, if not more importantly, Summers has not alleged *any* prejudice in this delay.

²⁷ *Middlebrook v. State*, 802 A2d 268, 273 (Del. 2002).

²⁸ *Dabney v. State*, 953 A.2d 159, 165 (Del. 2008) (citing Supreme Court of Delaware Administrative Directive 130 (July 11, 2001): "At least 90% of all criminal cases shall be adjudicated as to guilt or innocence or otherwise disposed of within 120 days from the date of indictment/information, 98% within 180 days, and 100% within one year").

An application of the *Preston* factors weigh in the State's favor. First, there was a significant delay between when the police received the Medical Examiner's final DNA analysis report on June 3, 2011, the date of the indictment on August 27, 2012. Second, the State indicated at the hearing and in its response to defendant's motion to dismiss that the reason for the delay was attributable in part to the time necessary to process DNA samples. Third, defendant has not established any prejudice associated with this delay. Fourth, there has been no showing that defense witnesses have become unavailable by reason of the delay. Fifth, while the defendant suggests the delay was purposeful based on a dismissal of charges unrelated to this case, and a negative match of defendant's DNA sample at a homicide crime scene, there is no indication that the delay was a result of prosecutorial maneuvering. The delay, as bad as it was, was probably due more to poor oversight and lack of focus, not maneuvering. Lastly, the State has DNA evidence in this case to prove that the defendant's DNA matched that found on the firearm recovered during the execution of a search warrant on March 5, 2008. This is a strong case for the State, and these are serious charges resulting in minimum mandatory incarceration time. Nevertheless, the Court must say that as a non-constitutional matter, this kind of delay is unacceptable.

Therefore, as the charges were brought within the five year statute of limitations period and defendant has not met his burden of proving that dismissal of the indictment is warranted under Rule 48(b), the Commissioner's order denying defendant's motion to dismiss is AFFIRMED.

Conclusion

Based on the foregoing, the Commissioner's order entered on January 14, 2013, denying defendant's motion to dismiss the indictment is hereby AFFIRMED.

IT IS SO ORDERED.

J.