

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID RILEY DANIEL, II, a/k/a DAVID RILEY
DANIEL,

Defendant-Appellee.

UNPUBLISHED

December 13, 1996

No. 187459

Detroit Recorder's Court

LC No. 94-013345

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order dismissing the charges against defendant. We reverse and remand.

In February 1992, the victim was shot several times in the head. He survived and identified defendant as the assailant to a police officer on the day of the incident. He also told the officer where defendant lived. However, the officer took no action. When the officer retired in October 1994, the case was assigned to another officer, who promptly investigated the matter and sought and obtained an arrest warrant for defendant in November 1994. Defendant was thereafter arrested and charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant moved to dismiss the charges on the basis of prearrest delay.

In determining whether dismissal is warranted by a 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). Defendant failed to meet either prong of this test. Although defense counsel stated at the evidentiary hearing that the prearrest delay of almost two years prevented defendant from establishing an alibi or assisting in his defense, the statement is not evidence and will not support a finding of prejudice. *People v Williams*, 114 Mich App 186, 202-

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

203; 318 NW2d 671 (1982); *People v Rhymes*, 62 Mich App 27, 29; 233 NW2d 171 (1975). In addition, defendant offered no evidence showing that the delay was intended to secure a tactical advantage on the part of the prosecution. The testimony as to the reason for the delay simply showed neglect on the part of the original officer in charge of the case and did not establish an intent to disadvantage defendant. Moreover, the delay harmed the prosecution's case by dimming the memory of the victim, who was able to identify defendant as the assailant after the incident. The trial court erred in granting defendant's motion to dismiss.

Reversed and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Henry William Saad

/s/ Michael D. Schwartz