

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DESMOND RAYMOND JOHNSON,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 219358
Oakland Circuit Court
LC No. 97-156119-FH

Before: Griffin, P.J., and Cavanagh and Gage, JJ.

MEMORANDUM.

Plaintiff appeals by delayed leave granted the order dismissing charges against defendant based on pre-arrest delay. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In September 1994 defendant was initially charged with possession with intent to deliver between 50 and 225 grams of cocaine. MCL 333.7401(2)(a)(3); MSA 14.15(7401)(2)(a)(3), and conspiracy to deliver a controlled substance. These charges were dismissed after a preliminary examination, but three co-defendants were bound over for trial. After the co-defendants were convicted, one of them indicated that he would testify against defendant. The prosecutor again brought the charges against defendant. The district court denied defendant's motion to dismiss, and bound over defendant for trial. The circuit court granted defendant's motion to dismiss based on pre-arrest delay.

This Court will review 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 (1998). To merit dismissal for prejudicial delay, a defendant must initially demonstrate actual and substantial prejudice to his right to a fair trial. *Id.* The absence of a witness alone is not sufficient to establish actual and substantial prejudice. Defendant must show that exculpatory evidence was lost and could not be obtained by other means. *Id.*, 136. Once the defendant has shown prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. *Id.*, 134.

Defendant did not present evidence that would establish actual and substantial prejudice to his right to a fair trial. The absence of an unknown witness is insufficient to establish actual prejudice where there is no indication that the missing testimony would be exculpatory. *Id.*, 136. In addition to the lack of prejudice, there is no showing that the proffered reason for the delay, the unavailability of the co-defendant's testimony, did not justify any prejudice that resulted.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage