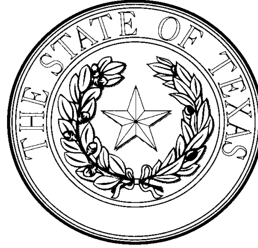
Opinion issued December 4, 2018



In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00790-CR

FRANK GILL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1451894

MEMORANDUM OPINION

Appellant, Frank Gill, was found guilty of the offense of aggravated sexual assault by a jury. Appellant elected to have the trial court assess his punishment. After finding the allegations in two enhancement paragraphs true, the trial court sentenced Appellant to 60 years in prison.

On appeal, Appellant raises two issues. He contends that he was denied due process of law under the federal constitution and due course of law under the state constitution because, as a result of a delay in testing DNA evidence, the State did not indict him until almost 10 years after the commission of the offense.

We affirm.

Background

On August 14, 2005, S.P. went to a late-night party to celebrate her friend's birthday. She decided to leave the party but did not have a ride home. She walked to a nearby gas station where she met Appellant, who offered to give her a ride. After they started driving, S.P. noticed that Appellant was not going in the direction of her home. She told Appellant that he had made a wrong turn. Appellant responded by hitting S.P. in the face. He then pulled out a knife and told S.P. that he would kill her. Appellant drove to an isolated area, where he forcibly inserted his penis in her vagina and then in her anus. Appellant indicated to S.P. that he would kill her if she did not comply. After the assault, Appellant drove away, leaving S.P. at the location.

Another motorist aided S.P. She was taken to the hospital, where a sexual-assault examination was performed by a nurse. During the exam, the nurse took samples, including vaginal and anal swabs, for inclusion in the sexual-assault kit. The kit was secured at the hospital until it was picked up by the police.

In July 2014, Houston Police Officer M. Fortson, who works in the special victims' unit, was assigned to what she testified at trial was a "special project." The project was created to clear a backlog of sexual-assault cases. Officer Fortson testified that the project arose because "there was a lot of the untested sexual assault kits. When they started processing them and testing them, they needed officers to work the investigation if there [were] new leads made."

Officer Fortson was assigned to S.P.'s case after testing of S.P.'s sexual-assault kit linked Appellant's DNA to the offense. The police called Appellant in for an interview. The police showed Appellant a photograph of S.P., but he said that he did not recognize her.

Appellant provided a saliva sample to the police for DNA analysis. Comparing the DNA profile obtained from the vaginal and anal swabs from S.P.'s sexual-assault kit to the DNA profile obtained from Appellant's saliva showed that he could not be excluded as a possible contributor to the major component of the DNA mixture found on the vaginal and anal swabs. Appellant was indicted for the aggravated sexual assault of S.P. in 2015.

A jury found Appellant guilty of the offense of aggravated sexual assault. After finding two enhancement allegations to be true, the trial court sentenced Appellant to 60 years in prison. Appellant now appeals the judgment of conviction.

Preindictment Delay

On appeal, Appellant contends in two issues that the State was negligent because it waited until 2014 to test the DNA evidence from S.P.'s 2005 sexual-assault kit, leading to Appellant's 2015 indictment. In his first issue, Appellant asserts that "the State's gross negligence in failing to make timely testing of the relevant DNA samples violated the [federal] due process clause." *See* U.S. CONST. amend. XIV. In his second issue, Appellant contends that "the delay denied [him] the due course of the law, which is protected by Article I, §19 of the Texas Constitution." *See* TEX. CONST. art. I, § 19.

To support his assertion, Appellant contends, "It was primarily due to this negligence that no DNA comparison was made and no indictment was returned until 2014.[1] By then [Appellant's] recorded statement, indicating that he did not recognize [S.P.'s] picture, could have been impaired by a failure to remember a sexual encounter from many years earlier." However, as the State points out, Appellant never raised either of these issues in the trial court; that is, Appellant never claimed in the trial court that the delay in his indictment denied him due process or due course of law.

"Most appellate complaints must be preserved by a timely request for relief at the trial level." *Unkart v. State*, 400 S.W.3d 94, 98 (Tex. Crim. App. 2013).

---

[1] The record shows that the complaint was filed against Appellant in December 2014, and the grand jury indicted him in March 2015.

Even constitutional rights—including the right of due process under the federal constitution and the right of due course of law under the state constitution—may be forfeited if the proper request, objection, or motion is not asserted in the trial court. *See Pena v. State*, 285 S.W.3d 459, 464–65 (Tex. Crim. App. 2009); *Hull v. State*, 67 S.W.3d 215, 218 (Tex. Crim. App. 2002). Regarding the specific complaint raised here, we previously rejected, in *Vernege v. State*, an attempt to raise for the first time on appeal a claim by the appellant that her due-process rights had been violated by a 10-year preindictment delay. No. 01-05-01156-CR, 2007 WL 79237, at *2 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication).

In his brief, Appellant claims that he should be permitted to raise his complaint for the first time here. He asserts that raising his complaint before the start of trial would have been difficult because "the requisite claim of prejudice generally will be too speculative at that stage." He also asserts that, raising the complaint during trial after the evidence was presented could not have been accomplished without delaying the jury trial. And he contends that it would have been "awkward to ask defense counsel to shift gears and argue why a defendant has been defeated unfairly at the time when counsel's job is to argue that the defendant has not been defeated at all."

In the seminal Texas case on the issue of preindictment delay, *State v. Krizan–Wilson*, the defendant raised his due process and due course of law challenges in a motion to dismiss the indictment. 354 S.W.3d 808, 810 (Tex. Crim. App. 2011). The trial court in *Krizan-Wilson* then conducted an evidentiary hearing on the motion. *Id.* at 811. Appellant does not explain why a similar process would not have worked here. In addition, we note that Appellant did not file a motion for new trial in this case.

Appellant's arguments do not persuade us to deviate from our decision in *Vernege* that complaints of preindictment delay cannot be raised for the first time on appeal. *See Vernege*, 2007 WL 79237, at *2. Consistent with *Vernege*, we conclude that Appellant's claim that the State's preindictment delay denied him due process and due course of law has not been preserved for our consideration.[2] *See id.*; *see also* TEX. R. APP. P. 33.1(a) (providing that, to preserve error for appeal, record must show that complaint was made to trial court and that trial court ruled on request or refused to rule and that "complaining party objected to the refusal").

Even if we were to assume that we can reach his constitutional complaints on appeal, Appellant has not shown that he is entitled to relief.

---

[2] In certain circumstances, an issue can be preserved even when the complaining party fails to object. *See Proenza v. State*, 541 S.W.3d 786, 796 (Tex. Crim. App. 2017). However, other than the reasons discussed, Appellant does not argue that he was excused from the requirement of objecting to preserve error.

Statutes of limitations are the primary guarantee used to protect citizens from stale criminal charges that impair those citizens' abilities to defend themselves, but they are not the only redress because the Due Process Clause provides additional protection from "oppressive delay." *Krizan–Wilson*, 354 S.W.3d at 14. A defendant is entitled to relief for preindictment delay under the federal Due Process Clause when he shows that the delay (1) caused substantial prejudice to his right to a fair trial, and (2) was an intentional device used to gain a tactical advantage over the accused or for some other bad-faith purpose. *Id.* at 814–15. There must be proof of both elements. *Id.* at 814.

Appellant admits that the evidence does not show that the State's delay in indicting him was an intentional device used to gain a tactical advantage or for some other bad faith purpose. *See id.* at 814–15. Instead, he claims the delay resulted from the State's negligence in not analyzing the DNA evidence sooner. Thus, Appellant acknowledges that he cannot meet the test set out by the Court of Criminal Appeals in *Krizan–Wilson* to be entitled to relief under the Due Process Clause for preindictment delay.

To support his request for reversal, Appellant asserts that this Court should follow the dissenting opinion in *United States v. Crouch*, 84 F.3d 1497, 1524-25 (5th Cir. 1996) (C.J., Politz, dissenting) (indicating that showing of bad faith is not

required to sustain challenge to an indictment based on preindictment delay).[3] Even putting aside that he relies on a dissenting rather than a majority opinion, Appellant fails to recognize that the Texas Court of Criminal Appeals in *Krizan–Wilson* made clear that we, as a court of appeals, are not bound by the rulings of the Fifth Circuit "with respect to the framework in which to conduct a due-process analysis." *Krizan–Wilson*, 354 S.W.3d at 818. Rather, we are "bound by the precedents of [the Court of Criminal Appeals], which has held for more than two decades that, in order to establish a due-process violation, [the accused] has the burden of proving both prejudice and that an intentional delay was designed to give the state a tactical advantage." *Id.* Thus, we are bound to follow the requirement in *Krizan–Wilson* that Appellant must show the State's delay in indicting him was an intentional device used to gain a tactical advantage over him or was for some other bad-faith purpose. *See id.* at 814–15.

Here, Appellant admittedly cannot show that the State delayed indictment to gain a tactical advantage or for some other bad faith purpose. *See id.* For this reason, we conclude that Appellant does not show that he is entitled to relief based on his claim that the preindictment delay violated his right to due process.

---

[3] The majority in *Crouch* agreed with a "significant majority of [its] sister circuits" requiring a showing that the prosecutor "intentionally delayed to gain tactical advantage or to advance some other improper purpose." *United States v. Crouch*, 84 F.3d 1497, 1511 (5th Cir. 1996).

Similarly, even assuming the issue is preserved, Appellant does not show that he is entitled to relief for an alleged due-course-of-law violation under the Texas Constitution. The same standards that govern due-process claims also control due course-of-law claims. *See State v. Moore*, 943 S.W.2d 127, 129–30 (Tex. App.—Austin 1997, pet. ref'd) ("The standards required to show a violation of federal due process rights caused by preindictment delay, we find, are sound and well-reasoned. . . . These standards are persuasive and we hold that it is appropriate to apply them to the due course of law provision of the Texas Constitution in connection with preindictment delay."); *accord State v. Krizan-Wilson*, 321 S.W.3d 619, 627 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 354 S.W.3d 808 (Tex. Crim. App. 2011); *Griffith v. State*, 976 S.W.2d 686, 696 (Tex. App.—Tyler 1997, pet. ref'd). Appellant does not provide convincing argument that a different standard should be applied to his due-course-of-law claim. Accordingly, we conclude that Appellant has not shown a due-course-of-law violation for the same reason that he has not shown a due-process violation.

We overrule Appellant's first and second issues.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Lloyd, and Caughey.

Do not publish. TEX. R. APP. P. 47.2(b).