

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 135811

Court of Appeals No. 281006

V

Circuit Court No. 07-118-FC

CHARLES WILLIAM MERCER,

Defendant-Appellant,

_____ /

**PEOPLE'S ANSWER TO DEFENDANT'S APPLICATION FOR LEAVE TO
APPEAL**

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COUNTER STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT DEFENDANT MUST SHOW THAT PLAINTIFF INTENTIONALLY DELAYED HIS ARREST TO GAIN A TACTICAL ADVANTAGE?

Plaintiff-Appellee says, "Yes."
Defendant-Appellant says, "No."

II. WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON PRE-ARREST DELAY WHEN THE COURT FOUND THAT THE PROSECUTION DID NOT DELAY DEFENDANT'S ARREST TO GAIN A TACTICAL ADVANTAGE?

Plaintiff-Appellee says, "Yes."
Defendant-Appellant says, "No."

STATEMENT OF APPELLATE JURISDICTION

Defendant filed a motion in the trial court to dismiss based on pre-arrest delay. The trial court granted the motion in an order dated August 8, 2007. Plaintiff moved for reconsideration. That motion was denied in an order dated September 7, 2007.

Plaintiff filed a claim of appeal and motion for peremptory reversal on October 4, 2007. The Court of Appeals, in an order dated December 18, 2007, granted the motion for peremptory reversal and remanded to the trial court for further proceedings. It is from this order that Defendant now appeals. This Court has jurisdiction to review Defendant's application pursuant to MCR 7.301 and MCR 7.302(B).

STATEMENT OF FACTS

Dr. William Mercer's first wife, Sally Mercer, died on February 27, 1968 (6/27/06 Prelim. Tr, p 206). The Ingham County Prosecuting Attorney, Donald Reisig, believed Sally's death was a homicide, and Defendant was the suspect (6/27/06 Prelim. Tr, pp 212, 222).

Pathologist, Dr. Charles Black, performed the autopsy on Sally's body. Before the autopsy, Dr. Black met with Defendant's father, who was also a physician and who had a relationship with Dr. Black (6/27/06 Prelim. Tr, pp 212-213). Following the autopsy, Dr. Black determined that Sally died as the result of bulbar polio even though the police found no evidence that she had been ill prior to her death (6/27/06 Prelim. Tr, pp 209, 214). Mr. Reisig and police investigators met with Dr. Black and disputed his findings (6/27/06 Prelim. Tr, p 217). Dr. Black did not change his conclusion as to the cause of death (6/27/06 Prelim. Tr, p 217). Mr. Reisig testified at the preliminary examination that he directed the police to contact a Dr. Halpern to review Dr. Black's findings, however, there is no record evidence indicating that anyone contacted Dr. Halpern or any other pathologist (6/27/06 Prelim. Tr, p 219). Mr. Reisig ultimately concluded that he could not proceed with a criminal prosecution based on the existing evidence (6/27/06 Prelim. Tr, pp 220-221).

In 1995, Detective Townsend, as part of a cold-case team, began to reinvestigate the death of Sally Mercer. However, Sally's mother denied Townsend's request for permission to exhume Sally's body (7/31/07 Motion Tr, p 36 (Attachment 3)). Sally's body was later exhumed pursuant to a search

warrant in 2003, and tissue samples were collected (7/31/07 Motion Tr, p 38; 11/8/06 Prelim. Tr, p 103). The samples were tested by the private National Medical Service laboratory. A forensic toxicologist from that laboratory testified that tests revealed a lethal level of the drug propoxyphene in Sally's body (11/13/06 Prelim. Tr, pp 8-11).¹ The investigation continued in the following years with at least one witness being questioned pursuant to an investigative subpoena in 2006 (Attachment 3, p 36).

A friend of Sally Mercer, Eunice Klewicki, testified that in 1968 she lived around the corner from the Mercers and she would have coffee with Sally in the Mercer home two to three times per week in the months before Sally's death (6/26/06 Prelim. Tr, p 29). On the morning of February 27, 1968, Sally telephoned Eunice and invited her over for coffee. Eunice went to the Mercer home late in the morning (6/26/06 Prelim. Tr, p 17). When Eunice arrived, Sally was home alone with her baby daughter (6/26/06 Prelim. Tr, p 22). Sally was "distraught" as she told Eunice that she had confronted Defendant regarding his being a "womanizer" and had told him she wanted a divorce (6/26/06 Prelim. Tr, pp 18, 23-24). Sally said she wanted to move to her parents' home (6/26/06 Prelim. Tr, p 18).

Eventually, Sally took Eunice to the second floor of the home to show her a purse her mother had given her. While on the second floor, Sally told Eunice

¹ The forensic scientist who conducted the toxicology tests in 1968 testified that he could have detected the presence of propoxyphene with the instruments available at that time if the level of propoxyphene was high enough (8/15/06 Prelim. Tr, pp 36). In contrast, today's instruments are far more capable of detecting trace amounts of propoxyphene (8/15/06 Prelim. Tr, p 35). The testimony did not address whether the levels found in Sally's body after exhumation would have been detectable in 1968.

that Defendant had told her "that the day he would give me a divorce would be the day that he would take Sara [their baby daughter] and I and throw us off the upstairs." (6/26/06 Prelim. Tr, p 22). As Sally said this, she lifted the baby to demonstrate how Defendant would have thrown the baby from the second to the first floor (6/26/06 Prelim. Tr, p 22).

The two women eventually returned to the first floor and Defendant walked in (6/26/06 Prelim. Tr, p 26). Eunice was surprised to see him because she had never seen him come home in the middle of the day (6/26/06 Prelim. Tr, p 26). It was then about noon and Eunice left for home (6/26/06 Prelim. Tr, pp 27, 29). Eunice testified that when she left, Sally appeared to be in normal health with no indication she was under the influence of any substances (6/26/06 Prelim. Tr, pp 24-25). Eunice did not see any injuries on Sally such as bruises or cuts (6/26/06 Prelim. Tr, p 20). Later that day, Eunice heard a siren and walked to the corner to see what was happening. She saw that an ambulance was at the Mercer home (6/26/06 Prelim. Tr, p 30). She later learned that Sally was dead.

Ambulance attendant, Terry Pierce, arrived at the Mercer home that day at 4:49 p.m. (People's Exhibit 5, 6/26/06 Prelim. Tr, p 109; Attachment 7). When he arrived, Sally was dead and the body, which was lying between a bedroom and the bathroom, was cold (6/26/06 Prelim. Tr, pp 104-105, 110). Sally's body appeared to be in full rigor mortis (6/26/06 Prelim. Tr, p 105; 10/11/06 Prelim. Tr, p 74).² Defendant was present in the home (6/26/06 Prelim. Tr, p 105).

Sally Mercer's friend, Debra Daley, received a letter from Sally the day after Sally died (6/27/06 Prelim. Tr, p 258). In the letter, Sally said she was afraid

² It takes approximately four hours for a body to reach full rigor mortis (10/11/06 Prelim. Tr, p 73).

and that if anything happened to her, "Bill was the one who did it" (6/27/06 Prelim. Tr, p 263).

After the investigation was reopened, the investigators asked Dr. Stephen Cole, the Kent County Medical Examiner, in 1996 to review Dr. Black's autopsy report and the existing evidence (10/11/06 Prelim. Tr, p 15).³ Dr. Cole believed the evidence was inconsistent with Dr. Black's conclusion that Sally died of bulbar polio (10/11/06 Prelim. Tr, p 16). Dr. Cole noted that: (1) Sally had five deep scalp bruises on the top of her head and one deep scalp bruise on the side of her head; and (2) Sally had fresh bruises on her hands and arms that were consistent with defensive injuries (10/11/06 Prelim. Tr, pp 20, 22, 28, 30, 32, 34). Dr. Cole opined that the bruises on the scalp were from blunt trauma, such as from a club, and that the blows could have been sufficient to stun Sally or render her unconscious (10/11/06 Prelim. Tr, pp 34, 111).

Dr. Black noted in the first autopsy that some of Sally's blood vessels exhibited a "surrounding collar of lymphocytes" (10/11/06 Prelim. Tr, p 136). Dr. Cole testified that is a sign of a mild viral infection (10/11/06 Prelim. Tr, p 136). Dr. Cole further testified that a person who is dying from polio cannot carry on the normal functions of life because the disease would render them immobile (10/11/06 Prelim. Tr, p 45).

Dr. Cole performed a second autopsy when Sally's body was exhumed in Illinois in 2003. This autopsy did not reveal any additional evidence except the samples that were collected for laboratory testing. Dr. Cole did not find any

³ Dr. Cole also performed the autopsy of Sally's body after it was exhumed in 2003.

evidence of injection sites on Sally's body, however, given the state of the body at that time this was not unexpected (10/11/06 Prelim. Tr, pp 57-58).

The National Medical Service's final report, which concluded that Sally's body contained a lethal level of propoxyphene, was issued in July 2004 (10/11/06 Prelim. Tr, p 162).⁴ Based on that report, and the other evidence, Dr. Cole concluded that Sally died of acute propoxyphene intoxication and that the manner of death was homicide (10/11/06 Prelim. Tr, pp 74-75).

At the conclusion of the 18-day preliminary examination, the district court bound the matter over for trial on a charge of open murder (1/25/07 Prelim. Tr, pp 75-76).

In circuit court, Defendant filed several motions, including a motion to dismiss based on pre-arrest delay. Several witnesses had died, some of the physical evidence had been lost or destroyed, and witnesses had forgotten some of the details surrounding Sally Mercer's death. Defendant argued that he had suffered prejudice as a result of the delay and that the reason for the delay was the product of intentional, bad faith, or reckless conduct by the prosecution (See Defendant's brief in support, pp 28-33; see also 7/31/07 Motion Tr, pp 5-26).

Plaintiff argued that the delay in arrest was due to insufficient evidence to file charges and that Defendant was not arrested until new evidence had been developed (7/31/07 Motion Tr, pp 26-34). Plaintiff also argued that the missing witnesses and evidence cut both ways because it impaired the cases of both the prosecution and defense (7/31/07 Motion Tr, pp 27-39; Attachment 4, pp 1-3).

⁴ Defendant presented the testimony of two experts to rebut this evidence. The district court suppressed the toxicology evidence.

The trial court ultimately granted the motion to dismiss finding that the delay was too long and the missing witnesses and evidence prevented Defendant from receiving a fair trial (Attachment 5).

ARGUMENTS

I. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT DEFENDANT MUST SHOW THAT PLAINTIFF INTENTIONALLY DELAYED HIS ARREST TO GAIN A TACTICAL ADVANTAGE.

Issue Preservation

Plaintiff argued that this issue must be decided using the two-part test for pre-arrest delay found in *People v Crear*, 242 Mich App 158, 166 (2000) (Attachment 4, p 2). The trial court, however, applied the four-part test for a violation of the right to speedy trial found in *People v Collins*, 388 Mich 680 (1972) (See Attachment 5, p 8). Plaintiff filed a motion for reconsideration asserting the trial court had committed palpable error by applying the wrong test (Attachment 6). However, the trial court denied the motion in an order stating that it had applied the correct test (Attachment 2).

Defendant asserted in the Court of Appeals that whether the delay was to gain a tactical advantage is merely part of a balancing test, not a bright line rule. The Court of Appeals rejected that position. Therefore, this issue is preserved for appellate review.

Standard of Review

The issue of the proper test for a claim of pre-arrest delay is a question of law. This Court reviews questions of law de novo. *People v Francisco*, 474 Mich 82, 84 (2006).

Plaintiff's Argument

The Court of Appeals correctly determined that the trial court erred when it dismissed this case based on pre-arrest delay when the trial court determined that Defendant need not prove that Plaintiff delayed his arrest to gain a tactical advantage.

"The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Cleveland Williams*, 475 Mich 245, 261 (2006). In determining whether a defendant has been denied the right to a speedy trial, the courts balance four factors: (1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. *Cleveland Williams, supra* at 261-262.

In contrast, the time for judging whether there has been a pre-arrest delay that warrants dismissal is from the date of the offense to the time when the defendant is arrested. *People v Darnell Walker*, 276 Mich App 528, 545-546 (2007), vacated in part on other grounds ___ Mich ___ (2008). "The right to a speedy trial guaranteed by the Sixth Amendment does not apply to delay occurring before an arrest or initiation of a formal criminal charge . . . and the primary restraint on such delay is found in applicable limitation periods adopted by the Legislature." *People v Tanner*, 255 Mich App 369, 414 (2003) (citations omitted).

History of the Rule

The Court of Appeals in *People v Hernandez*, 15 Mich App 141, 147 (1968), enunciated the test for a due process claim based on pre-arrest delay

which required the prosecution to show: (1) an explanation for the delay, (2) that the delay was not deliberate,⁵ and (3) that no undue prejudice attached to the defendant.

The United States Supreme Court in *United States v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971), considered the appropriate test for reviewing a claim of pre-arrest delay. It stated, "[t]here is no constitutional right to be arrested." *Id.* at 325, n 18. The Court recognized that dismissal of an indictment was required "if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage of the accused." *Id.* at 324. The Court noted that statutes of limitations provide "'the primary guarantee against bringing overly stale criminal charges.'" *Id.* at 322, quoting *United States v Ewell*, 383 US 116, 122 (1966).

In *United States v Lovasco*, 431 US 783; 97 S Ct 2044; 52 L Ed 2d 752 (1977), the defendant was indicted more than 18 months after the alleged offenses. He claimed that the indictment should be dismissed because of pre-arrest delay. The federal district court dismissed the case on that basis and the Court of Appeals affirmed. The Supreme Court reversed determining that the delay was for investigative purposes. 431 US at 796. The Court noted that, "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused'" *Id.* at 795, quoting *Marion, supra* at 324. The Court noted, "[i]n *Marion* we noted with approval that

⁵The delay was considered "deliberate" if it was done "to prejudice the defendant." *People v White*, 59 Mich App 164, 165 (1975).

the Government conceded that a "tactical" delay would violate the Due Process Clause." *Id.* at 796, n 17. The Court concluded, "[w]e therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796.

In 1982, the Michigan Court of Appeals decided *People v Bisard*, 114 Mich App 784 (1982). In that case, the circuit court, applying the test enunciated in *Hernandez, supra*, dismissed the case because of a 196-day delay between the offense and the defendant's arrest. The Court of Appeals reconsidered the *Hernandez* test in light of the decisions in *Marion* and *Lovasco*. The Court of Appeals adopted a new test that had been implemented by the Illinois Supreme Court. It noted that the Illinois courts held that "once a defendant has shown some actual and substantial prejudice, the burden shifts to the prosecution to show the reasonableness of the delay. The Illinois courts must then weigh the reasons for the delay against the seriousness of the prejudice resulting from delay." *Id.* at 790.

Subsequent decisions of the Court of Appeals followed the Illinois balancing test adopted by the Court in *Bisard*.⁶ However, a majority of the federal circuit courts of appeal, including the United States Court of Appeals, Sixth Circuit, interpreted the decisions in *Marion* and *Lovasco* as "plac[ing] the burden on the defendant to show not only prejudice that is actual *and substantial*,

⁶ See e.g., *People v Betancourt*, 120 Mich App 58 (1982); *People v Evans*, 128 Mich App 311 (1983); *People v Vargo*, 139 Mich App 573 (1984); *People v Dungy*, 147 Mich App 83 (1985); *People v Shelson*, 150 Mich App 718 (1986); *People v McIntire*, 232 Mich App 71 (1998); *People v Cain*, 238 Mich App 95 (1999).

but also to show intentional delay by the government to gain an unfair tactical advantage." *McIntire, supra* at 94, n 11.⁷

The panel in *People v White*, 208 Mich App 126 (1994), departed from the *Bisard* test, based on the language in *Marion* and *United States v Lash*, 937 F2d 1077, 1088 (CA 6, 1991), in holding that "a defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage." *White, supra* at 134.⁸

Since *White* was decided, the Court of Appeals in *People v Crear*, 242 Mich App 158 (2000) and *People v Tanner*, 255 Mich App 369, rev'd on other grounds 469 Mich 437 (2003), followed the two-part test established by *Marion* and *Lovasco*, which requires the defendant to show that the prosecution delayed arrest to gain a tactical advantage. The Court of Appeals in *Tanner* stated, in relevant part:

To establish a due-process violation meriting dismissal of the charges, a defendant must demonstrate both actual and substantial prejudice that impairs the defendant's right to a fair trial. 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. Furthermore, **a defendant must show that the prosecution intended to gain a**

⁷ See e.g., *Jones v Angelone*, 94 F3d 900, 905 (CA 4, 1996); *United States v Brown*, 959 F2d 63, 66 (CA 6, 1992); *United States v Atchley*, 474 F3d 840 (CA 6, 2007); *United States v Brown*, 498 F3d 523 (CA 6, 2007).

⁸ The panel in *McIntire, supra*, noted the rule adopted in *White* and stated, "[t]his Court must follow a rule of law established in a prior published decision of this Court issued on or after November 1, 1990. MCR 7.215(H)(1). However, because we find no due process violation even under the less stringent standard enunciated in *Bisard*, we decline to decide whether *White* . . . establishes a rule of law that we are required to follow in this case and, if not, whether this Court should nevertheless utilize the federal majority approach in prearrest- or preindictment-delay cases." *Id.* at 94-95, n 11. Subsequent panels in *People v Adams*, 232 Mich App 128 (1998) and *People v Cain*, 238 Mich App 95 (1999), ignored the rule established in *White*.

tactical advantage by delaying formal charges. [*Id.* at 414-415 (emphasis added).]

Based on the foregoing, it is Plaintiff's position that: (1) the balancing test adopted by the panel in *Bisard* is inconsistent with the language of *Marion* and *Lovasco*, and the holdings of the majority of the federal circuits, and (2) the rule adopted by the panel in *White* was binding on all subsequent Court of Appeals' panels, including the panel in the present case, and the trial court.

In the present case, the trial court, in deciding this issue, used a four-part test appropriate for speedy trial claims. The trial court also stated that Defendant was not required to show that Plaintiff intentionally delayed his arrest to gain a tactical advantage. In so doing, the trial court erred and the Court of Appeals appropriately reversed the trial court's decision.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON PRE-ARREST DELAY WHEN THE COURT FOUND THAT THE PROSECUTION DID NOT DELAY DEFENDANT'S ARREST TO GAIN A TACTICAL ADVANTAGE.

Preservation of Issue

Plaintiff opposed the motion to dismiss in the trial court on the same grounds now asserted on appeal. Plaintiff also filed a motion for reconsideration which the trial court denied. The trial court found that Plaintiff did not intentionally delay Defendant's arrest to gain a tactical advantage. This issue was raised in the Court of Appeals. Therefore, it is preserved for appellate review.

Standard of Review

A challenge to a pre-arrest delay implicates constitutional due process rights, which are reviewed de novo. *People v Cain*, 238 Mich App 95, 108 (1999).

Plaintiff's Argument

As noted above, in deciding the motion to dismiss based on pre-arrest delay, the trial court expressly stated that there is no requirement that Plaintiff delayed Defendant's arrest to gain a tactical advantage in order to grant the motion (Attachment 5, p 10). Nonetheless, the trial court found that Plaintiff did not delay to gain a tactical advantage (Attachment 5, pp 10-11). Since Defendant was required to show that Plaintiff delayed his arrest to gain a tactical advantage, and since the trial court expressly found that did not occur, the trial

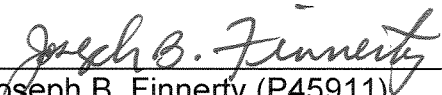
court committed error requiring reversal when it granted the motion to dismiss.
Therefore, the Court of Appeals correctly reversed the trial court's decision.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court affirm the Court of Appeals' order granting Plaintiff's motion for peremptory reversal.

Respectfully submitted,

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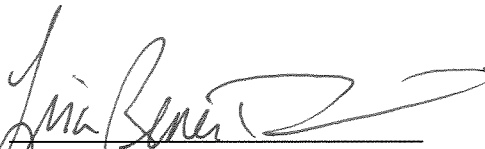
Dated: 3/10/08

CERTIFICATE OF SERVICE

On March 10, 2008, I served a copy of the People's Answer to Defendant's Application for Leave to Appeal on Linda Widener, attorney for Defendant-Appellant, by first class mail addressed to:

Linda Widener
1003 N. Washington Avenue
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I declare that the statements above are true to the best of my knowledge, information, and belief.



Lisa Renee Davis