

DISTRICT COURT LA PLATA COUNTY, COLORADO 1060 EAST SECOND AVENUE DURANGO COLORADO 81301	DATE FILED: September 21, 2018 2:57 PM FILING ID: FCA343286ABED CASE NUMBER: 2017CR343
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. Mark Redwine, Defendant	◊ COURT USE ONLY ◊
Megan Ring, Colorado State Public Defender Justin Bogan 33827 John Moran 36019 175 Mercado Suite 250 Durango Colorado 81301	Case Number: 17CR343 Division: 1
[D-98] MOTION TO DISMISS THIS CASE BASED ON THE PROSECUTION'S UNREASONABLE FIVE-YEAR DELAY IN BRINGING CHARGES AGAINST MR. REDWINE IN VIOLATION OF HIS RIGHT TO FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 25 OF THE COLORADO CONSTITUTION	

Mark Redwine, through counsel, moves to dismiss this case based on the prosecution's unreasonable and unfair five-year delay in indicting him. This delay violated Mr. Redwine's right to due process of law under the Fifth Amendment to the United States Constitution and art. II, § 25 of the Colorado Constitution. Compelling him to stand trial under these circumstances would be fundamentally unfair. As grounds, Mr. Redwine states:

I. Abbreviated Chronology

II. The Due Process Clause Protects Against Preaccusation Delay

1. The Fifth Amendment provides in relevant part that no person shall be "deprived of life, liberty, or property, without due process or law[.]" Article 2, § 25 of the Colorado Constitution likewise decrees that "No person shall be deprived of life, liberty or property, without due process of law."

2. When the State delays bringing a charge for an offense known to it for an unreasonably lengthy period of time, the Due Process Clause requires dismissal if "the pre-indictment delay . . . caused substantial prejudice to [the defendant's] right to a fair trial and . . . the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971).
3. This protection is separate and apart from the shelter afforded an accused by a statute of limitations. Even if a charge is brought within the applicable of statute of limitations, the Fifth Amendment may still require its dismissal "if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *United States v. Gouveia*, 467 U.S. 180, 192 (1984). See also Colo. Const. art. II, § 25.
4. In assessing a due process claim for unreasonable preaccusation delay, the court must make a "delicate judgment" that "accommodate[s] the sound administration of justice to the rights of the defendant to a fair trial." *Gouveia*, *supra* at 325. This judgment necessarily depends on the facts of each case. *Id.*
5. Proof of prejudice to the accused is "generally a necessary but not sufficient element of a due process claim" for unreasonably pre-charging delay. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). In addition to prejudice, the "due process inquiry must consider the reasons for the delay[.]" *Id.*
6. This inquiry asks whether the preaccusation delay "violates those []fundamental conceptions of justice which lie at the base of our civil and political institutions[] . . . and which define []the community's sense of fair play and decency[.]" *Lovasco*, 431 U.S. at 790 (internal citations and quotations omitted).
7. In both *Marion* and *Lovasco*, the Court declined to enumerate the "circumstances in which preaccusation delay would require dismissing prosecutions." *Lovasco*, 431 U.S. at 796. Instead, the Court entrusted the "lower courts, in the first instance, [with] the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 797.
8. The Colorado Supreme Court addressed the issue of preaccusation delay in *People ex rel. Coca v. District Court*, 187 Colo. 280, 530 P.2d 958 (1975). The court recognized the individual's "right to have a criminal case promptly processed by the filing of charges." *Id.* at 283, 530 P.2d at 959.
9. To decide whether a delay in bringing charges has violated an individual's due process rights, the *Coca* court listed "[c]ertain key factors[.]" These factors include, but are not limited to:
 - Whether defense witnesses have become unavailable by reason of the delay;
 - Whether the delay was purposeful and intended to prejudice the defendant;
 - The kind of evidence and the quantum which is available to prove the prosecution's case; and

- Whether justice dictates that the case be dismissed.

Coca, 187 Colo. at 285, 530 P.2d at 960.

III. THE DELAY IN THIS CASE SUBSTANTIALLY PREJUDICED MR. REDWINE

A. Defense Witnesses Have Become Unavailable by Reason of the Delay

1. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). U.S. Const. amend. VI, VIX; Colo. Const. art. II, §§ 16, 25.
2. In 2013 Martin Webster, now deceased, confessed to killing a boy in or around Bayfield, Colorado. The only boy that has died as a result of a suspected homicide in the area is Dylan Redwine. Mr. Webster was deceased long before defense counsel became aware of his confession. The prosecution's decision rendered it impossible to develop his confession effectively suppressing and destroying it.

B. Regardless of the Motivation For This Delay, It Prejudiced Mr. Redwine

1. When an accused moves to dismiss a case for prearrest delay, he must show both actual prejudice and "[i]ntentional or negligent misconduct on the government's part." *People v. Small*, 631 P.2d 148, 157 (Colo. 1981). Mr. Redwine can satisfy both of these requirements.
2. From very early on, the State focused on Mr. Redwine as its primary suspect in this investigation. Within 48 hours of the first report that Dylan was missing law enforcement identified Mr. Redwine as the target of a criminal investigation into Dylan Redwine's disappearance to Dylan's mom Elaine Redwine.
3. In many instances, police officers cleared all other potential suspects for a variety of dubious reasons.
4. The State's five-year delay in bringing charges has hamstrung Mr. Redwine's ability to prepare and present a defense, as the evidence available to exonerate him became stale, memories faded and witnesses became lost due in part to the State's deliberate decision not to keep track of them. This is especially so for the period of time between the discovery of Ms. Birgfeld's remains and the eventual filing of charges more than 2 ½ years later.
5. In *People v. Melanson*, 937 P.2d 826 (Colo. App. 1996), a division of the Court of Appeals found that a prearrest delay was justified by the prosecution's concern about proceeding with a homicide case prior to locating the decedent's body because that evidence was "critical to the identification of the victim at trial." *Id.* at 832. Here, there was no such concern particularly after discovery of Dylan's remains on June 23, 2013.

6. While there is no constitutional right to a speedy arrest, “a point can be reached where the delay is so great that the prejudice to the defendant caused by it—due to faded memories of the parties and witnesses, loss of contact with witnesses and loss of documents—becomes so great that due process and fundamental fairness require that the charges be dismissed.” *People v. Hall*, 729 P.2d 373, 375 (Colo. 1986), citing *People v. Hutchinson*, 192 Colo. 204, 557 P.2d 376 (1976).
7. In *Hall*, the court affirmed the trial court’s dismissal of a charge even where the lower court determined that the prosecution had not delayed charging intentionally because of the prejudice the delay caused to the accused. Specifically, because of the delay, three witnesses who would be able to challenge the credibility of the State’s key witness had become unavailable. With regard to one of these witnesses, the defense could not locate him because the police had failed to keep track of him. *Hall*, 729 P.2d at 375.
8. In *Hutchinson*, *supra*, the court emphasized that actual evidentiary deprivation is sometimes sufficient to trigger the quantum of prejudice necessary to require dismissal for unreasonable delay in charging a suspect. There, the court remanded for a hearing to determine if a confidential informant was actually unavailable to testify as a key defense witness because of a purposeful delay by the State. *Hutchinson*, 192 Colo. at 206-207, 557 P.2d at 377.
9. “[T]he actions of a prosecutor, although procedurally within the law, may result in a violation of the defendant’s rights to due process and fundamental fairness[.]” *People v. Aragon*, 643 P.2d 43, 46 (Colo. 1982) (forcing defendant to defend against charge at three consecutive trials held to be due process violation under circumstances of particular case).

IV. THE NATURE OF THE EVIDENCE AVAILABLE TO PROVE THE PROSECUTION’S CASE IS BOTH THIN AND UNRELIABLE BECAUSE OF THE PASSAGE OF TIME

1. Much of the investigation in this case occurred between 2012 and 2013. Therefore, the great majority of the witnesses the prosecution will be calling at trial will be asked to testify about memories that are more than five years old.
2. The law recognizes many instances in which stale information is unreliable. *See, e.g. People v. Miller*, 75 P.3d 1108 (Colo. 2003) (evidence in search warrant affidavit too stale to form basis for finding of probable cause); *Robbins v. People*, 107 P.3d 384 (Colo. 2005) (where witnesses’ memories have dimmed, equitable doctrine of laches may preclude relief in post-conviction context).
3. Moreover, the case against Mr. Redwine is circumstantial and speculative in nature.
4. In light of this, the third *Coca* factor also weighs in favor of dismissal of the charges.

V. JUSTICE DICTATES THAT THIS CASE BE DISMISSED

1. Applying the "community's sense of fair play and decency" to this matter requires this Court to ask if an ordinary person would find the five year delay for charges to be filed, under all of the circumstances of this case, to be readily understandable.
2. The answer is no.
3. In *People v. Orr*, no dismissal was warranted in part because the court found that the delay in charging was contributed to by the defendant's own actions. *Orr*, 39 Colo.App. 289, 566 P.2d 1361 (1977). "[M]uch of the delay can be attributed to defendant's attempts to conceal his involvement in the crime, including hiding the gun and concocting an alibi story with [other witnesses]." *Id.* at 293, 566 P.2d at 1364.
4. That is not the case for Mr. Redwine. He has maintained a residence in Vallecito at all times. He has suffered the anxiety and humiliation of being surveilled for years by the LPCSO as he goes about his daily affairs. He has had a GPS tracking device surreptitiously placed on his car. Family members and neighbors record conversations with him. There are cameras mounted to capture images of him near his home. He has lived with the worry of this investigation looming over his life for five years. It is unconscionable, especially after the discovery of Dylan's remains in June 2013 that the prosecution waited until July of 2017 to indict him. Due process demands that this case be dismissed. U.S. Const. amends. V,VI, XIV; Colo. Const. art. II, § 25.
5. Mr. Redwine demands a hearing on this motion.

/s/ Justin Bogan

Justin Bogan
Deputy State Public Defender

CERTIFICATE OF SERVICE

I certify that on September 21,
2018 _____,
I served the foregoing document by delivering
To opposing counsel

/s/ JB