

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
RICKEY E. FERDINAND**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD73610

DATE: May 15, 2012

Appeal From:

Jackson County Circuit Court
The Honorable Ann Mesle, Judge

Appellate Judges:

Division Four: Lisa White Hardwick, Chief Judge, Presiding, Cynthia L. Martin, Judge and
Joel P. Fahnestock, Special Judge

Attorneys:

Shaun J. Mackelprang and Daniel N. McPherson, Jefferson City, MO, for respondent.

S. Kate Webber, Kansas City, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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STATE OF MISSOURI,

RESPONDENT,

v.

RICKEY E. FERDINAND,

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No. WD73610

Jackson County

Before Division Four: Lisa White Hardwick, Chief Judge, Presiding, Cynthia L. Martin, Judge and Joel P. Fahnestock, Special Judge

Rickey Ferdinand appeals from the trial court's judgment convicting him of forcible rape after a bench trial. Ferdinand contends that the trial court erred in denying his motion to dismiss for violation of his right to a speedy trial and his motion to dismiss for violation of his due process rights in that (1) he was brought to trial seventeen years after his initial arrest, and after the State had twice dismissed and re-filed the charges against him; (2) he demanded a speedy trial after the second and third filings of charges against him; and (3) the State's decision to twice dismiss and re-file the charges against him was an intentional device to gain tactical advantage. Ferdinand also claims that as a result of the delay in his ultimate prosecution, his ability to demonstrate the Victim's motivation to lie was prejudiced because he was unable to locate a witness, and that he was required to serve more prison time because he was deprived of the opportunity to serve a concurrent sentence at an earlier point in time.

Affirmed.

Division Four holds:

To decide whether a defendant has been denied his constitutionally-guaranteed right to a speedy trial, a four-prong balancing test is employed. The factors include the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The length of the delay is a triggering mechanism because until there is a delay that is presumptively prejudicial, there is no need to discuss the other factors.

The period between the voluntary dismissal of charges and their re-filing does not count in determining Sixth Amendment speedy trial violations. Thus, the length of delay was not seventeen years but was twenty-four months, a time period that is presumptively prejudicial.

The State's delay for DNA test results was reasonable and further tempered by delay attributable to Ferdinand's multiple continuance requests and a motion for a change of judge.

Ferdinand's assertion of his right to a speedy trial was specific to the Second Filing of the charges and did not relate back to the First Filing, or carry forward to the Third Filing.

Ferdinand's delay in asserting the right to a speedy trial after agreeing to the trial setting in the Third Filing attenuated the delay chargeable to the State.

The record demonstrates no actual impairment of Ferdinand's defense. Ferdinand failed to demonstrate a diligent, complete search for the alleged missing witness and his general assertions about what the missing witness's testimony might have been were insufficient to establish that the witness's absence at trial was prejudicial to Ferdinand's defense. Moreover, given Ferdinand's admission that he had sexual intercourse with the Victim without her consent by use of forcible compulsion, any prospect of prejudice based on the fact that Collier *might* have been able to testify that the Victim had a motivation to lie is negated.

Ferdinand retained the ability to negate any prejudice associated with denied or delayed concurrent sentencing by pleading guilty in response to either the First or Second Filing.

To establish a Fifth Amendment due process violation due to the tardy commencement of proceedings, the defense must show *both* that (1) the State intentionally delayed the filing of charges in order to obtain a tactical advantage over the accused, and (2) the delay caused substantial prejudice to the defendant's right to a fair trial in specific ways beyond simple claims that memories have faded, witnesses are unavailable, and evidence is lost.

The determination that Ferdinand failed to demonstrate the prejudice required to substantiate a Sixth Amendment speedy trial violation necessitates the conclusion that he cannot satisfy the more stringent substantial prejudice standard required to demonstrate a Fifth Amendment due process violation. Ferdinand's claim regarding what the missing witness's testimony was merely speculative and does not qualify as substantial prejudice to demonstrate a Fifth Amendment due process violation.

Even if Ferdinand could overcome the hurdle of establishing the substantial actual prejudice required to support a Fifth Amendment due process violation, Ferdinand has failed to make any showing regarding the other required prong--that the State delayed his indictment solely to gain a tactical advantage.

Opinion by Cynthia L. Martin, Judge

May 15, 2012

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