

NOTICE  
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2016 IL App (5th) 140477-U

NO. 5-14-0477

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 13-CF-1435
	)	
GARY WARWICK,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's dismissal of the indictment filed against the defendant is reversed where the defendant did not establish that his fifth amendment due process rights were violated by a 39-year preindictment delay as his allegations of prejudice were speculative and potential rather than actual and substantial.

¶ 2 The State appeals the trial court's dismissal of the indictment filed against the defendant, Gary Warwick, for first-degree murder on the basis that an approximately 39-year preindictment delay violated the defendant's fifth amendment due process rights. For the reasons which follow, we reverse the order of the circuit court and remand for further proceedings.

¶ 3 This case involves an effort by the State to reinitiate prosecution against the defendant for the first-degree murder of a one-year-old child. According to the State, on December 30, 1972, between approximately 1 a.m. and 1:30 a.m., the defendant, who was in a relationship with the deceased child's mother, allegedly heard a noise coming from the child's bedroom. Upon entering the bedroom, the defendant allegedly discovered the child lying over the handlebars of his toy motorcycle. The child was pronounced dead on arrival at the hospital.

¶ 4 Following an investigation into the child's death, the defendant was indicted for first-degree murder in April 1973. However, the case was dismissed upon motion by the State on September 23, 1974. The reasons for the dismissal are unclear. On September 13, 2013, a criminal complaint was filed against the defendant renewing the charges. On January 10, 2014, the defendant filed a motion to dismiss the newly filed indictment on the basis, *inter alia*, that the 39-year delay between the dismissal of the original indictment and the filing of the new indictment constituted a violation of his fifth amendment due process rights. In the motion, the defendant noted that circumstances had changed that would result in his suffering actual and substantial prejudice if the prosecution was allowed to proceed. Specifically, the defendant identified the following changed circumstances: the lead detective in the case was deceased; the maternal grandmother of the child, who was the first person allegedly on the scene, was deceased; that the lead detective and the maternal grandmother had married each other following the events; the forensic pathologist who examined the child was deceased as well as the child's treating physicians; a number of "other central witnesses" were also deceased or

were unavailable; "essential records" were rendered unavailable; and that "memories [were] gone and those recollections that remain [were] distorted due to passage of time." Thus, the defendant argued that the indictment should be dismissed.

¶ 5 In response, the State filed a memorandum in opposition to the defendant's motion to dismiss in which it argued, *inter alia*, that proceeding to trial on the first-degree murder charge did not violate the defendant's due process rights. The State argued that the determination of whether a defendant's due process rights had been violated based on a preindictment delay involved a two-prong analysis. First, the defendant must establish that the delay between the crime and arrest or the charge caused substantial prejudice to a defendant's right to a fair trial. Then, a defendant must establish that the delay was an intentional device used by the State to gain tactical advantage over the accused. The State argued that the defendant was unable to meet both requirements in that his allegations of prejudice were not specific, concrete, and were not supported by the evidence. Moreover, the State argued that the defendant could not establish that the delay between the dismissal of the first indictment and the filing of the subsequent indictment was an intentional device used by the State to gain a tactical advantage.

¶ 6 With regard to the prejudice prong, the State argued that the "bare assertion of an inability to recall details and the subsequent inability to aid in the preparation of a defense was insufficient to establish prejudice." In addition, an allegation that witnesses were deceased was insufficient, by itself, to establish prejudice absent a demonstration by the defendant of the exculpatory value of the lost testimony, and allegations concerning

the unavailability of "essential records" and lost memories due to the passage of time were mere speculation.

¶ 7 As for the tactical advantage prong, the State argued that the evidence indicates that the likely reason for the dismissal of the original indictment was for the benefit of the defendant.<sup>1</sup> The State argued that there was no evidence that the delay between the dismissal of the original indictment and the filing of the new indictment was intended as a device to gain a tactical advantage over the defendant.

¶ 8 A hearing on the motion to dismiss was held on March 19, 2014. At the hearing, defense counsel noted that the defendant did not make an inculpatory statement in relation to the allegations against him and that there were likely no eyewitnesses to the occurrence. However, the defendant argued that there were several other witnesses whose testimony would be difficult to produce due to their deaths and the passage of time. The defendant further argued that relevant records were lost over the course of time.

¶ 9 Specifically, the defendant noted as follows with regard to the evidence that was now unavailable due to the passage of time: (1) there was evidence to indicate that approximately 9 to 10 days before the minor child's death, the child was admitted to a

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<sup>1</sup>Although the State's motion to dismiss the original indictment did not identify a reason for the dismissal, the State argued that the dismissal occurred because the defendant was suffering from some form of eye disease which rendered him blind and affected his ability to stand trial.

local hospital where he was treated for a period of five days, but the majority of the hospital records relating to this hospitalization were unavailable and there was no way to locate the personnel discussed in the records that were available<sup>2</sup>; (2) that the doctor who likely treated the child during that visit was deceased; (3) that the available records indicated that the mother made inconsistent statements to hospital personnel concerning the cause of the child's injuries, *i.e.*, that the injuries resulted from a fall from the crib and that the injuries were caused by the child's father; (4) that the aunt of the child, who was now deceased, had observed him two days prior to his death and gave a statement to the lead detective indicating that the child had appeared extremely ill on those occasions; (5) that the first responders at the scene were EMTs from Robin's Ambulance Service, which no longer existed, and there were no existing records detailing who the EMTs were; (6) there were no remaining records from the hospital where the child was taken on the night in question, which detailed the findings of the hospital personnel; (7) the physicians and nurses present when the child arrived at the hospital were no longer available as witnesses; (8) the officer who had prepared the initial police report and the second deputy that arrived on the scene were both deceased; (9) the forensic pathologist was deceased; (10) the maternal grandmother and the lead investigator had married each other "in the years" following the investigation and they were both deceased; (11) the lead

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<sup>2</sup>It appears that the only remaining documents relating to this five-day hospitalization are a nurse's referral to DCFS and a one-page document from the now-deceased doctor.

investigator's report relating to the investigation indicated that there were notes from his interviews with the child's mother that were now unavailable; (12) the lead investigator's report also indicated that he had conducted interviews with other individuals during the course of the investigation, but there were no available notes concerning those interviews; and (13) that the records from the child's mother's stay in the psychiatric ward of Memorial Hospital in February 1973 and subsequent stay at Alton Mental Health Facility were unavailable. In addition, the defendant noted that the child's mother, one of the only remaining witnesses, was questioned by police officers on April 26, 2013, and she indicated that she did not remember too many details regarding the murder. Thus, due to the unavailability of key witnesses and relevant documents, the defendant argued that he had made a showing of substantial prejudice as required for the fifth amendment due process claim.

¶ 10 In response, the State acknowledged that there were witnesses that were deceased in this case, but noted that only two people, the defendant and the child's mother, were present in the residence when the minor child was found. The State noted that both were available to testify. None of the other witnesses identified by the defendant as deceased were present when the child was discovered. The State argued that the law would allow another forensic pathologist to use her expertise, judgment, and skill to review the postmortem photographs and the protocol and form her own ultimate conclusion on the cause of death. Likewise, the State argued that the original autopsy report was available and admissible as an exception to hearsay. The State acknowledged that all of the medical records relating to the child's five-day hospitalization and on the day of the

child's death were not available, but noted that the child's biological father was available to testify and that the doctor's one-page report created on the day of the minor's death was available. To foreclose the defendant's argument that he would be unable to impeach the child's mother with prior inconsistent statements, the State, in a concession, advised the court that it would not object to the impeachment of the child's mother on foundation grounds should the defendant find cause to impeach her with prior inconsistent statements.

¶ 11 Assuming *arguendo* that the defendant had established actual and substantial prejudice, the State argued that he was unable to show that the delay was an intentional tactic by the State to gain an advantage. At this point in the argument, there was a discussion as to whether the appropriate test was the two-prong test suggested by the State, *i.e.*, the defendant must establish actual and substantial prejudice and that the delay was the result of intentional tactical maneuvering by the State, or a shifting burden analysis set forth by the Illinois Supreme Court in *People v. Lawson*, 67 Ill. 2d 449 (1977). According to the trial court, *Lawson* established a shifting burden analysis where once the defendant established actual and substantial prejudice, the burden then shifted to the State to show the reasonableness of the delay.

¶ 12 On March 31, 2014, the trial court entered a written order, finding that the defendant had met his burden of showing actual and substantial prejudice, and that pursuant to the established case law, this finding shifted the burden to the State to show the reasonableness, if not the necessity, of the delay. Thus, the court set the matter for

further hearing to allow the State an opportunity to present evidence and/or argument on the issue of the reasonableness of the delay.

¶ 13 On April 14, 2014, an additional hearing regarding the reasonableness of the delay was held on the defendant's motion to dismiss. At this hearing, the State argued that the reasonableness of the delay should be adjudged in terms of the State's motive in prosecuting the defendant and whether the State acted in bad faith. The State argued that there was absolutely no evidence that it had acted in bad faith or that there was any type of intentional tactical maneuvering in dismissing the original indictment and reindicting approximately 39 years later. The State argued that given what it knew about the defendant's eye condition, it was entirely reasonable for it to dismiss the indictment. Furthermore, the State noted that the September 2013 indictment resulted after the family of the deceased child approached the police department on behalf of the child. Thus, the State argued that it had acted in good faith when it dismissed the indictment in 1974 and again when it reindicted the defendant in 2013.

¶ 14 In response, the defendant argued that the State had failed to present any evidence as to the reasonableness of the delay. Upon questioning by the trial court, the defendant acknowledged that there was no evidence to show that the delay was an intentional device used by the State to gain tactical advantage or intentional misconduct by the State. The parties agreed that there was no change in the factual circumstances of the case from the date that the original indictment was dismissed to the present time.

¶ 15 On May 14, 2014, the trial court entered an order, finding that the defendant's fifth amendment due process rights had been violated by "virtue of the more than 41 year



delay between [the minor child's] death and the current indictment." In making this decision, the court found that the defendant had been substantially prejudiced by the delay, a finding that was balanced with the State's lack of explanation at the two separate hearings to explain the reasoning or necessity for such a lengthy delay.

¶ 16 With regard to the finding of actual and substantial prejudice, the trial court found as follows: (1) that witnesses to inconsistent statements made by the child's mother were deceased and the defendant was thereby deprived of the opportunity to present full, effective, and complete impeachment; (2) that nurses, doctors, and other personnel who provided medical care to the child prior to his death were deceased and the defendant was thereby deprived of the opportunity to present testimony and evidence to prove that he was not the cause of the child's death or that the death was caused by other violent means; and (3) that family members and other individuals who had contact with the child prior to his death were deceased thereby depriving the defendant of the opportunity to present evidence to prove that he was not the cause of the child's death or that the child's death was caused by other than violent means.

¶ 17 Furthermore, with regard to the reasonableness of the delay, the trial court concluded that the State had offered no explanation for the delay and had asserted that no additional evidence had been cultivated in the case. The court recognized that the State could have asserted faulty police procedures, negligence, or incompetence as reasons for that delay, but noted that it appreciated "the State's forthrightness in not propounding spurious, unsupported reasons for a delay of this length." The court concluded from the State's argument that the evidence that existed in 1974 had not been enhanced by recently

acquired scientific evidence, advances in scientific analysis, and/or testamentary evidence.

¶ 18 Applying the burden-shifting analysis set forth in *Lawson*, the trial court balanced the substantial prejudice to the defendant occasioned by the delay with the reasonableness and/or necessity for the delay. The court noted that "delay at any stage of the process can tend to erode information of evidentiary significance," and that, in this case, "there can be no doubt that the extreme amount of time that has passed has substantially affected both sides in the truth seeking process." The court further noted that the fact that the State offered no reason for the delay "[weighed] heavily." Thus, the court concluded that the defendant's fifth amendment due process rights were violated by the delay.

¶ 19 On June 11, 2014, the State filed a motion to reconsider, arguing that the defendant had failed to establish that he suffered actual and substantial prejudice as a result of the delay. Regarding the evidence specifically cited by the court in its May 2014 order, the State argued that it anticipated that the child's mother would acknowledge any prior inconsistent statements, which would eliminate the need for an impeachment witness. The State also agreed to stipulate to any inconsistent statements made by the child's mother that were documented in reports and/or witness statements and stated that it would not object to the admission of any witness statements or police reports the defense wished to introduce to show inconsistent statements, which would provide the defense with an opportunity to perfect impeachment regarding any inconsistent statements made by the mother.

¶ 20 As for the deceased nurses, doctors, and other personnel who provided medical care to the child prior to his death, the State argued that the cause of death was not an issue in the case as the medical records clearly established that the cause of death was a lacerated liver and that the testimony of medical personnel had been preserved for use at trial in the form of the available medical records. The State also noted that the defendant's acts were not required to be the sole and immediate cause of death for him to be guilty of murder; it was sufficient that the criminal acts contributed to the victim's death. The State argued that a veteran forensic pathologist had reviewed the autopsy report and photographs, as well as other relevant documents, which included documents relating to the child's December 1972 hospitalization. The forensic pathologist concurred that the cause of death was a lacerated liver inflicted from blunt force trauma to the child's abdomen, an injury that would have caused death within 24 hours. The State noted that the defendant admitted to being in the child's presence within that relevant time period.

¶ 21 Regarding the lack of hospital records from the prior hospitalization, the State noted that the available records for the five-day hospitalization indicated that the child was treated for specific injuries, which included bruising to his face, neck, fingernails, and toenails, dog bites on both of his ears, and an infection in both eyes. The State noted that there was nothing in the available records about injury to the child's abdomen, a point that was disputed by the defendant, who noted that the records indicated a bruising on the "left side" of the child's body. As for the family members and other individuals who had contact with the deceased prior to his death, the State argued that there were

family members who had contact with the child prior to his death that were available to testify. According to the State, the only unavailable family member was the grandmother. Furthermore, the State argued that the defendant had failed to identify any family member or other individual who had contact with the child within the last 24 hours of his life and who was now deceased.

¶ 22 Regarding the reasonableness of the delay, the State argued that the "reasonableness" of a delay should be defined in terms of the absence of intentional tactical maneuvering by the State. The State argued that the delay in this case was not designed to obtain a tactical advantage over the defendant nor did the State act in bad faith. The State argued that the court could reasonably infer that the reason for the dismissal was based on the defendant's medical condition.

¶ 23 On August 27, 2014, the trial court held a hearing on the State's motion to reconsider. Following the arguments of counsel, the court denied the State's motion to reconsider, noting that its decision was not "based upon merely the passage of time." It noted that the previous order engaged in the burden-shifting analysis set forth in *Lawson* and that certain conclusions and findings were made as a result of that analysis. Thus, the court denied the State's motion. The State appeals.

¶ 24 The initial issue raised on appeal by the State is the standard used to determine the issue of whether the due process clause of the fifth amendment requires a dismissal of an indictment due to the preindictment delay caused by the government. The State and the defendant both acknowledge that the courts that have addressed this issue all agree that a defendant is required, as a threshold matter, to establish that he suffered actual and

substantial prejudice from the delay. Although the courts are in agreement that there is another step in the analysis, the courts have differed as to what that next step involves. However, we need not determine the next step in the analysis because we conclude that the defendant has not established that he suffered actual and substantial prejudice, a requirement under both the shifting burden test established by *Lawson* and the two-prong analysis argued by the State.

¶ 25 Thus, we turn to our analysis on the issue of whether the defendant has established that he has suffered actual and substantial prejudice as a result of the preindictment delay. A trial court's ruling on a motion to dismiss an indictment due to oppressive and unreasonable preindictment delay is subject to *de novo* review. *People v. Goad*, 2013 IL App (4th) 120604, ¶ 25. However, a reviewing court will uphold the trial court's factual findings unless they are against the manifest weight of the evidence. *People v. Delgado*, 368 Ill. App. 3d 661, 663 (2006).

¶ 26 Actual and substantial prejudice requires actual damage to a defendant's ability to obtain a fair trial because of the State's unreasonable delay. *Goad*, 2013 IL App (4th) 120604, ¶ 29. Prejudice for this purpose is difficult to prove. *United States v. Doerr*, 886 F.2d 944, 964 (7th Cir. 1989). To establish actual prejudice, the defendant must show more than the possibility of prejudice. *Lawson*, 67 Ill. 2d at 459. The allegations of prejudice must be specific, concrete, and supported by the evidence, as vague, speculative, or conclusory allegations will not suffice. *United States v. Henderson*, 337 F.3d 914, 920 (7th Cir. 2003); *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994). "Such prejudice will inevitably be either the loss of witnesses and/or physical evidence or

the impairment of their use, *e.g.*, dimming of the witnesses' memory." *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). However, the death of a potential witness, the loss of possible physical evidence, and loss of memory, alone, are not sufficient to establish actual and substantial prejudice. *Id.* A defendant must do more than show that a particular witness is unavailable and that the witness' testimony would have helped with his defense. *United States v. Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998). The defendant must establish that the loss of testimony has meaningfully impaired his ability to defend himself. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). A defendant is not deprived of due process if his defense was "somewhat prejudiced" by a lapse of time. *United States v. Lovasco*, 431 U.S. 783, 796 (1977).

¶ 27 The defendant argues that he suffered actual and substantial prejudice as a result of the 39-year delay in the following manner: (1) that most of the witnesses were deceased, which included the lead detective, the child's maternal grandmother, who was allegedly the first person on the scene, the forensic pathologist, and the child's treating physicians; (2) that law enforcement records, records pertaining to the mental health of the child's mother, medical records relating to the five-day hospitalization of the minor child as well as medical records relating to the treatment and setting forth the physician's findings on the night of the child's death were unavailable; (3) that "memories [were] gone and those recollections that remain [were] distorted due to passage of time"; and (4) that the lead detective and the maternal grandmother had married each other following the investigation and both were deceased.

¶ 28 After carefully reviewing the record, we conclude that the defendant's allegations of prejudice are insufficient, at this point in the proceeding, for proof of actual and substantial prejudice. The defendant's obligation to show actual and substantial prejudice is an exacting one. His contentions that witnesses are deceased and records are unavailable without any specificity as to the information that could be gleaned from the unavailable documents, the subject matter of the unavailable witnesses' testimony, the relevance of the lost testimony and evidence, and an explanation as to why this information could not be obtained from another source are inadequate to establish actual prejudice. In making this decision, we acknowledge that there is a real possibility of prejudice with such an extended delay. However, this is presumptive prejudice, not actual prejudice. A far stronger showing is required to establish the requisite actual prejudice than what the defendant has presented at this point. However, this is not to say that the defendant cannot make this motion again to allow the trial court to make a determination of whether actual and substantial prejudice resulted from the improper delay in light of what manifests during preparation for or in the course of the trial. Because we find that the defendant's allegations are speculative and potential rather than actual and substantial, we conclude that the defendant has failed to satisfy the difficult burden of establishing actual and substantial prejudice.

¶ 29 For the foregoing reasons the judgment of the circuit court of St. Clair County is hereby reversed and remanded for further proceedings not inconsistent with this order.

¶ 30 Reversed and remanded.