

**IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION VI**

STATE OF TENNESSEE

VS.

CALVIN OGLIN ATCHISON, II

) FILED
Davidson County
Criminal Court Clerk
)
DEC 07 2022
)
BY _____ VP
Deputy Clerk

CASE NO. 2021-B-724

MEMORANDUM OPINION

This matter is before the court upon defendant's motion to dismiss the indictment as a result of the violation of his due process rights for the pre-accusatory delay in issuing the indictment guaranteed to him under the Fifth and Fourteenth Amendment to the United States Constitution and Article I, § 8 and 9 of the Tennessee Constitution.

UNDISPUTED FACTS OF THE CASE

On June 15, 2000, Velma A. Tharpe was found deceased in an alley in North Nashville and ultimately determined to be the victim of a homicide. On January 5, 2001, a TBI crime lab report testing sperm and semen from the body of Ms. Tharpe was tested for DNA. The reported results, which were forwarded to Detective Roy Dunaway of the Metro Nashville Police Department (MNPD) Murder Squad, indicated the presence of an unknown male donor of the DNA, but excluded Paul Garrett, an active suspect for the homicide at the time, as the donor. In August 2001, Mr. Garrett remained a suspect in the death of Ms. Tharpe when he was arrested for the rape of Maria Swift. Apparently while in custody for the rape charge, Mr. Garrett purportedly implicated himself in the murder of Ms. Tharpe. He was subsequently indicted for her murder and ultimately pleaded guilty to second degree murder in 2003.

In 2004, a CODIS match was made of the DNA recovered from the sperm and semen on Ms. Tharpe identifying the defendant Mr. Atchison as the donor. The results of the CODIS hit were forwarded to Det. Dunaway and the District Attorney's Office by the TBI. No action was taken by the State in response to this newly discovered evidence although Mr. Garrett filed an unsuccessful petition to have his conviction vacated in 2010.

In 2011, Detective Michael Roland with the MNP Cold Case Unit, formerly the Murder Squad, was investigating the death of two homicide victims who were known prostitutes in which no suspects had been developed. To develop possible leads, Detective Roland began reviewing old prostitute murder cases, solved and unsolved, to see if any connection could be established with the two cases actively under investigation. One of the files reviewed was the Velma Tharpe homicide for which Mr. Garrett was serving time. Detective Roland quickly noted the inadequacy of the investigative file and the TBI CODIS letter identifying Mr. Atchison as the donor of the DNA found on Ms. Tharpe. He briefed his supervisor Sgt. Pat Postiglione of his findings, and they opened a new investigation into the Tharpe homicide. They concluded that Mr. Garrett had not committed the crime and that Mr. Atchison had. They had Assistant District Attorney Kathy Morante conduct her own independent investigation of the matter and she concurred that Mr. Atchison, not Mr. Garrett, murdered Ms. Tharpe.

Based on their conclusions that Mr. Garrett had been wrongfully convicted and that the DNA CODIS findings had identified Mr. Atchison as the actual killer of Ms. Tharpe, the three convened a meeting attended by District Attorney General Torry Johnson, Deputy District Attorney Tom Thurman, Chief of Police Steve Anderson, MNP Public Information Officer Don Aaron, and the District Attorney's Public Information Officer Susan Niland. Whatever the discussion and outcome of that meeting, no further action was taken to respond to or investigate further the DNA CODIS results. Consequently, Apparently, not satisfied with the status quo, Detective Roland desired to take the matter directly to the grand jury, but his effort to do so was thwarted by his superiors.

The Tharpe case was closed and remained so until 2021 when Detective Roland sought the assistance of the newly created Wrongful Conviction Unit of the District Attorney's Office. Mr. Atchison was indicted by the grand jury on May 19, 2021. A Post-Conviction Relief Petition was filed on behalf of Mr. Garrett which was heard on July 22, 2021. It was subsequently granted and his conviction vacated. It is from this indictment that Mr. Atchison complains that his due process rights have been violated by the intentional pre-accusatory delay in the issuance of the indictment under the Fifth and Fourteenth Amendments to the United States Constitution and/or Article I, § 8 and 9 of the Tennessee Constitution.

ADDITIONAL FINDING OF FACTS

The original investigative file developed and maintained by Det. Dunaway and Det. E.J. Bernard¹ was lacking in many respects. In addition to missing supplemental reports, the file did not contain the TBI files, including the CODIS report implicating Mr. Atchison, although they were preserved by the TBI. The court finds these documents were destroyed by Det. Dunaway to cover-up his misdeeds during the investigation, if you can call it that, which led to Mr. Garrett pleading guilty to the homicide of Ms. Tharpe. To make matters worse, the lead detectives intentionally lied by claiming that Mr. Garrett had admitted committing the homicide telling the “that she deserved it.” The claimed confession was not recorded although there are 4-5 recorded statements of Mr. Garrett. Clearly no such confession or admissions against interest ever occurred.

Mr. Seth Carelli, a private investigator for Mr. Atchison, conducted extensive research to locate any potential witnesses that may have knowledge of the Ms. Tharpe’s homicide. Det. E.J. Bernard died in 2006. Det. Dunaway suffers from severe multiple sclerosis and triple by-pass surgery. He has not been interviewed. Crime scene investigator Officer Merriman is deceased. The medical examiner, Dr. John Gerber, died in 2004. Lt. Russ Hackett, the polygraph examiner who misrepresented that Mr. Garrett failed the polygraph exam, died in 2012.² Grant Reid, a suspect based on hid DNA being found at the scene, died in October 2021. Monica Monique Evans, A sex worker in the area and the victim of an aggravated assault by Grant Reid, died in November 2003. Johnny Fugate, a known “john” who frequented the area of the homicide died October 25, 2012. Catuer (sp.?) Pickett, a known sex worker in the vicinity and at the time of the homicide died in February 2022. Dennis Beverly who lived nearby and had been arrested in a sex sting operation in the area died in 2007. David Purcell, a jail snitch who was prepared to testify that Mr. Garrett admitted to him that he had killed Ms. Tharpe, is deceased. Richard Mayers, another jailhouse snitch that claims Mr. Garrett bragged about committing the murder, is alive. He has not been interviewed. Mattie Sue Riley, age 98, suffers from severe dementia. She lived in the immediate area of the murder and was the last person to see Ms. Tharpe alive according to a police report. Linda Simmons, a sex worker who lived in the area, saw Ms. Tharpe exit a vehicle around the time of her death. She died in November 2017. A Ms. Charlie Johnson who lived in the immediate area died in 2015. Pammecia Alexander who lived in the immediate area and was

¹ Det. Bernard actively assisted Det. Dunaway in the investigation of the Tharpe homicide although Det. Dunaway was designated the lead detective.

² Although the results of the polygraph exam are obviously not admissible, the false result was a factor in Mr. Garrett pleading guilty.

interviewed by the police died in November 2005. Maria Swift, a sex worker who accused Mr. Garrett of rape, cannot be located. Diane Wilson whose vehicle was seen in the immediate area of the vehicle died in 2019. Theresa Beasley who lived near the murder was likely the last person to see Ms. Tharpe alive. She saw the victim exit a red Chevy blazer shortly before her death. She died in 2015. Rhondell Williams who was one of the last people to see Ms. Tharpe alive said she went to home of Mr. Garrett to trade sex for a shower.

Mr. Carelli was unable to develop any defense witnesses notwithstanding his exhaustive efforts to locate possible defense witnesses. He acknowledges that he is unaware if the people about whom he testified has any personal knowledge relevant to the Tharpe homicide beyond what is described above.

CONCLUSIONS OF LAW

A claim of an unreasonable delay between the commission of a crime and the initiation of adversarial proceedings is to be analyzed under the due process provisions Fifth And Fourteenth Amendments of the United States Constitution rather than the Sixth Amendment right to a speedy trial. *State v. Carico*, 968 S.W.2d 280, 284 (Tenn.1998). A due process analysis for whether a pre-accusatorial delay violates the rights of an accused considers the length of the delay, the reason for the delay was to gain a tactical advantage for the state, and the prejudice to the accused's right to a fair trial, if any. *State v. Gray*, 917 S.W.2d 668, 673 (Tenn.1996). Unlike a speedy trial analysis, potential forms of prejudice in the due process context cannot be presumed. Instead, actual prejudice must be substantiated by the accused. *State v. Utley*, 956 S.W.2d 489, 495 (Tenn.1997).

Here, the length of the delay was from June 15, 2000 to May 19, 2021, a period of almost twenty-one years. The significance of the delay is exacerbated by the untenable fact that the State had DNA evidence as early as January 5, 2001 excluding the State's prime suspect, Paul Garrett, who later pleaded guilty to the murder, and further DNA evidence implicating the defendant as early December 2004. Even the delay more than sixteen years from the receipt of the CODIS report is a clearly a lengthy and unnecessary pre-accusatorial delay which weighs heavily against the State.

The reason for the delay is incomprehensible to this court and is nothing short of malfeasance at several levels in the chain of authority and criminal wrongdoing at one or more levels within law enforcement. There is no question that the delay was an intentional decision that was overtly made as early as January 2001 when Mr. Garrett was excluded as a contributor of the

DNA found on Ms. Tharpe yet prosecution and even persecution of him continued until he was psychologically beaten into submission by Detectives Dunaway and Bernard. An intentional decision to further delay the initiation of adversarial proceedings was again emphatically made when Det. Dunaway destroyed the CODIS report received from the TBI in December 2004. But the most damning and unconscionable intentional decision to further delay indictment of Mr. Atchison occurred when the highest levels of law enforcement within Davidson County refused to take any legal action to undue an egregious affront to the entire legal system after their clandestine meeting in 2011. Because of their malfeasance or at least misfeasance and apparent concern to avoid bad publicity another ten-year delay followed.

The extent of the intentional wrongdoing on so many occasions and at all levels of local law enforcement is so flagrant a violation of fundamental fairness that such conduct should be considered a due process violation standing alone. However, that is not the law. The law also requires that the accused show that the reason for the delay was the State's desire to gain a tactical advantage over the accused. Although arguably that is a collateral consequence of law enforcements actions and inactions, the evidence clearly establishes that all of law enforcement acted to cover-up their wrongdoing and avoid the consequences attended to the wrongdoing. Their intentional decisions were the acts of cowards to hide the truth for fear of the public humiliation and legal retribution that might arise if their wrongdoing saw the light if day. Although the actual motivation for the delay seems to this court a greater evil, it is not the evil at which the due process analysis is directed.

Finally, the court is to consider the **actual** prejudice to the accused's ability to receive a fair trial caused by the delay. Although the defense demonstrated numerous consequences associated with the delay, it failed to show how Mr. Atchison was prejudiced by these multiple events. Although the police investigative file is incomplete because of inept and corrupt police conduct, possible witnesses have died, and memories faded or non-existent, these truths do not establish actual prejudice.

For the foregoing reasons, the motion to dismiss the indictment associated with the lengthy and intentional delay in bringing adversarial proceedings in this case is respectfully **denied**. However, the denial is without prejudice. If further investigation should reveal that more specifically establishes actual prejudice, the defense has leave to file a supplementary motion to dismiss.

It is so ORDERED.

Entered this 7th day of December 2022



Mark J. Fishburn, Judge by Special Designation
Criminal Court, Division VI

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing MEMORANDUM has been sent via electronic mail to Ms. Amy Hunter and Mr. Roger Moore, Assistant District Attorney Generals, amyhunter@jnsnashville.gov and rogermoore@jnsnashville.gov respectfully and Mr. Ben Powers, Attorney for Mr. Atchison, ben@legalpowers.com this 7th day of December 2022.



Mark J. Fishburn