IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON MURIC DORADO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79556

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE CASE

On September 3, 2019, Appellant filed a Notice of Appeal. 2RA000313-16. On March 12, 2020, Appellant filed his Opening Brief. The State filed its Answering Brief on April 13, 2020. On May 4, 2020, Appellant filed his Reply Brief.

On August 17, 2020, this Court entered an Order of Limited Remand directing the district court to hold an evidentiary hearing on Appellant's Motion to Dismiss for Pre-Indictment Delay. The district court held an evidentiary hearing on November 10, 2020, December 8, 2020, December 15, 2020, and December 17, 2020. Supplemental Appendix ("SA") at 40. On December 29, 2020, the district court entered its Order denying the Motion to Dismiss. SA 1-3.

On December 23, 2020, Appellant filed a Motion to File Supplemental briefing. On January 8, 2021, this Court entered an Order granting Appellant's Motion.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS INDICTMENT.

Appellant claims that the district court abused its discretion when it denied Appellant's Motion to Dismiss for Pre-Indictment Delay. Appellant's Supplemental Brief ("ASB"), p. 2-10. This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008); McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

Appellant has the burden to prove that the delay in bringing an indictment "was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." Wyman v. State, 125 Nev. 592, 600-01 (2009); see also United States v. Gouveia, 467 U.S. 180, 192 (1984). In Wyman, this Court concluded that the district court did not abuse its discretion by refusing to dismiss a complaint due to alleged pre-indictment delay. Id. at 575. The court noted that witnesses may have died or moved away after 32 years but that the defendant had not shown that she was 1) prejudiced by the delay and 2) that the State intentionally delayed filing the complaint to gain a tactical advantage over Wyman. Id.

Appellant argues that the State acted negligently and recklessly in processing charges against him. First, the State maintains, and the district court found, Appellant is arguing an incorrect standard under the current state of law. This Court appropriately cited to the United States Supreme Court in United States v. Lovasco, 431 U.S. 783 (1977), to support the adoption of the two-pronged test.

In Lovasco, the Supreme Court determined that demonstration of prejudice alone is not sufficient to dismiss an indictment based on pre-indictment delay. See id. at 789-90. The Court further outlined the considerations involving pre-indictment delay:

> In United States v. Marion, 404 U.S. 307, [] (1971), this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections" of that provision. Id., at 320, []. We went on to note that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide "'the primary guarantee, against bringing overly stale criminal charges.'" Id., at 322, [], quoting United States v. Ewell, 383 U.S. 116, 122, [] (1966). But we did acknowledge that the "statute of limitations does not fully define (defendants') rights with respect to the events occurring prior to indictment," 404 U.S., at 324, [], and that the Due Process Clause has a ***limited role to play*** in protecting against oppressive delay.

Id. at 788–89 (emphasis added). The Court further noted that the appropriate consideration was, "to determine only whether the action complained of here, compelling respondent to stand trial after the Government delayed indictment to investigate further violates those "'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Id. at 790.

The Court further analyzed whether Lovasco suffered actual prejudice, and then continued on to analyze the ***intent*** of the State regarding the delay. The Court held that further investigation to ensure the guilt of the accused is a justifiable reason to delay prosecution. Id. at 790-92, 97 S. Ct. at 2049-50. The Court further held that investigative delay is fundamentally unlike delay undertaken solely to gain a ***tactical advantage***. Id. at 795, 97 S. Ct. at 2051.The Court further held 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, 97 S. Ct. at 2051-52.

The Court in Lovasco's concluding paragraph clearly shows that this Court did exactly what was intended:

> In Marion we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S., at 324, 92 S.Ct., at 465. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional

> significance of various reasons for delay. ***We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.***

Id. at 796-97 (emphasis added).

Further, this Court specifically cited to United States v. DeGeorge, 380 F.3d 1204 (9th Cir. 2004) as authority for the two-pronged test put forth in Wyman. In DeGeorge, the Ninth Circuit further determined that DeGeorge must satisfy a two-part test in order to establish that pre-indictment delay has violated his due process rights: 1) he must prove that he suffered actual, non-speculative prejudice from the delay; and 2) he must show that the delay, when balanced against the government's reasons for it, "'offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Id. at 1210-11 (*citing* to United States v. Doe, 149 F.3d 945, 948 (9th Cir.1998) (quoting United States v. Sherlock, 962 F.2d 1349, 1353–54 (9th Cir.1989)) The Ninth Circuit found that DeGeorge could not demonstrate actual prejudice and declined to reach the second part of the test. Id. at 1212.

Appellant contends that this is at odds with the test set forth in Wyman. Firstly, as the Court did not even consider the second part of the test, this Court likely cited DeGeorge in part for the analysis of the first prong regarding actual prejudice.

Additionally, the Wyman court likely cited to DeGeorge for their second prong based on the DeGeorge court's discussion regarding bad faith:

> DeGeorge has not shown that the scuttled vessel would have been helpful to his defense and has provided no evidence that the ***government acted in bad faith*** in connection with its loss. The government has no obligation under the due process clause to preserve "potentially useful" evidence, particularly where there is no showing of bad faith. *See Illinois v. Fisher,* 540 U.S. 544, ——– – –—, 124 S.Ct. 1200, 1202–03, 157 L.Ed.2d 1060 (2004) (per curiam); *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Id. at 1212 (emphasis added).

In DeGeorge, the Ninth Circuit cites to both United States v. Doe, 149 F.3d 945, 948 (9th Cir.1998) and United States v. Sherlock, 962 F.2d 1349, 1353–54 (9th Cir.1989) when articulating their broad version of the appropriate test. In Sherlock, the Court determined that Sherlock must show 1) "actual, non-speculative delay" and 2) show that the delay, when balanced against the ***prosecution's reasons for it***, offends those "fundamental conceptions of justice which lie at the base of our civil and political institutions." Id. at 1353-54 (emphasis added). The Court held that the defendant's burden to establish prejudice is quite heavy and that the proof must be definite and not speculative. Id. at 1354. The Ninth Circuit found that defendants could not establish actual prejudice because loss of memory and as well as the sexual assault kit could have occurred regardless of any pre-indictment delay. Id.

As to the second prong, the Court also found that the Government's investigative need was a legitimate reason for the delay. Id. at 1355. When actually analyzing the second prong as articulated, the Court further discussed the element of intent of the government regarding the delay, and specifically focused the analysis on whether the delay was undertaken to "gain a tactical advantage" Id. at 1354–55. The test put forth by this Court in Wyman is not inconsistent with the federal authorities cited. The test is taken directly from the analysis by the United States Supreme Court in Lovasco, and is not inconsistent with the test put forth by the Ninth Circuit.

There is absolutely no showing that the State used the delay as an intentional device or that there was any tactical advantage gained. In fact, if anything, the State was prejudiced due to the delay as well. The State has the same copy of the SANE exam that was provided to the defense through the archived records, and must deal with the same witness issues, including witnesses who may have retired or moved on. The delay in the case does not serve as a tactical advantage to the State.

At the evidentiary hearing, Appellant called multiple witnesses that failed to demonstrate either willful delay by the State or prejudice to Appellant. In fact, Appellant only called individuals that either remembered nothing about the case or knew nothing about LVMPD's evidence retention polices in 1999. See Supp. AA 86-116. In fact, Detective Hnatuick testified that M.L. was unable to provide the

apartment number for the apartment where she was assaulted and could only provide the name "Ray" to law enforcement. Id. at 112. Detective Hnatuick also testified that it was his understanding that "Ray" brought M.L. to a friend's apartment so he felt they would not be able to identify which apartment they were in based on a records check. Id. Detective Hnatuick also testified that he had no idea what happened to the physical evidence in the case. Id. at 114. Appellant blindly argues that the investigation "was against Metro's normal policy," but provides no evidence concerning what Metro's policy regarding interviews was back in 1999. Appellant's circular argument that the mere fact the evidence was lost proves that the detective lost them in bad faith amounts to nothing more than mere speculation and lacks merit.

Appellant provides this Court with nothing but speculation about LVMPD's ability to make a case against Appellant in 1999 and whether any evidence was willfully destroyed. Notably, Appellant's argument centers around the fact that "pure common sense indicates that no 1999 policy would have allowed destruction of evidence a mere eight months after a crime that could carry a life sentence. ASB at 4. Appellant essentially admits that he has no proof that LVMPD violated any of its policies or that the State delayed Appellant's case in order to gain any sort of tactical advantage. As such, Appellant's claim fails.

Appellant claims he has suffered "actual prejudice" as a result of the delay in filing this case. However, Appellant fails to demonstrate actual prejudice and, thus, his claim must be denied. Wyman argued that she suffered prejudice because "witnesses are difficult to locate, and important neighbors, family members, and the coroner in 1974 are now deceased." Wyman, 125 Nev. at 597. Additionally, Wyman argued that these witnesses "may have been" able to testify as to whether they saw or heard abuse that occurred. Id. This Court found that Wyman failed to "make a particularized showing of actual, nonspeculative prejudice resulting from the delay." Id.

Appellant in the instant case is unable to show "actual, non-speculative prejudice" due to the delay. Appellant claims that he was prejudiced by the pre-indictment delay because witnesses and evidence were lost and/or destroyed prior to trial. ASB at 7-8. Specifically, Appellant claims that he was prejudiced due to the fact that M.L.'s clothes and the audiotape of her interview were destroyed and the fact that the SANE nurse who performed M.L.'s sexual assault exam had died prejudiced his ability to present a defense. Id. However, the report of the original SANE nurse was presented at trial and was reviewed by Dr. Ekroos. Appellant had the opportunity to review the report and cross-examine Dr. Ekroos regarding the difference between her review of the photographs and the conclusions made by the original nurse. Appellant also had access to the arrest report, which indicated that

the nurse stated that there was minimal bruising and she could not definitively conclude there was a sexual assault. 1AA000035. Further, there is always a possibility that a witness may die or otherwise become unavailable prior to trial. Thus, Appellant cannot demonstrate prejudice.

Moreover, Appellant was not prejudiced by the destruction of the audiotape of M.L.'s interview and M.L.'s clothing. M.L.'s clothing was never alleged to have any evidentiary value in Appellant's case. There was plenty of other evidence to document that M.L. had struggled during the assault. She had bruising on her face and had broken fingernails. 7AA000676; 8AA000763-64. Additionally, there was a transcript of M.L.'s voluntary statement which Appellant could use for impeachment. 1AA000039-51. Appellant has failed to demonstrate how having the audio recording in addition to the transcript would have aided in his defense in any way. Therefore, Appellant has failed to demonstrate prejudice and his claim fails.

Appellant has failed to demonstrate that the delay was deliberate to allow the State tactical advantage and has similarly failed to demonstrate prejudice. Thus, Appellant's claim fails. Therefore, the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 29th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 2,347 words and does not exceed 10 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 29, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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