

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EMILIO BERMUDEZ GONZALES,

Defendant-Appellee.

UNPUBLISHED

June 21, 2005

No. 255667

Ingham Circuit Court

LC No. 04-000345-FC

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

In this prosecutor appeal, plaintiff appeals as of right the circuit court order dismissing the prosecution's action against defendant on the ground of prearrest delay. We reverse and remand.

In early June 2003, defendant was interviewed regarding an allegation that he was involved in a home invasion that occurred on November 11, 2002. It was alleged that defendant and another man broke into a dwelling and stole a safe, from which they later took, among other things, several credit cards. An arrest warrant charging defendant with second-degree home invasion, MCL 750.110a(3),¹ was authorized on June 30, 2003. Another arrest warrant charging

¹ MCL 750.110a(3) states as follows:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

defendant with safe breaking, MCL 750.531,² was authorized on February 20, 2004.

Defendant moved to dismiss the safe breaking charge, arguing that he was prejudiced by the lengthy arrest delay. The prosecution explained that because the act of safe breaking actually occurred in Eaton County, the Ingham County detective assigned to the case tried to request a warrant from that county. However, Eaton County sent the request back in December 2003 or January 2004, explaining that the proper forum for a continuing criminal transaction is the county where the crime begins. The prosecution pointed out that the safe breaking warrant was then issued by Ingham County in February 2004. The trial court found that defendant was prejudiced based on the fact that the warrant for the safe breaking charge was not issued until long after the home invasion charge. Accordingly, the court ordered the safe breaking charge against defendant dismissed.

The prosecution argues, as its sole issue on appeal, that the trial court erred in finding that defendant suffered actual prejudice given that the court admitted that it made no finding that the delay in defendant's arrest was intentional. We agree that the trial court erred in finding that defendant suffered actual prejudice, but we disagree that the court was required to find that the delay in defendant's arrest was intentional.

We review a trial court's decision whether to grant a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). An abuse of discretion should only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). However, a challenge to a prearrest delay implicates constitutional due process rights that we review de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case, a balancing test is applied to determine whether a prearrest delay establishes a due process violation requiring reversal of a defendant's conviction. *Herndon, supra* at 390; *Cain, supra* at 108. Under the balancing test, the defendant bears the initial burden to demonstrate actual and substantial prejudice to his right to a fair trial. *Herndon, supra*; *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To be "actual and substantial," the prejudice "must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected." *Id.* If, and only if, the defendant establishes prejudice, the prosecutor then bears the

² MCL 750.531 states as in pertinent part follows:

Any person who, with intent to commit the crime of larceny, . . . shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny . . . be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

burden to establish that the reason for the delay was sufficient to justify that prejudice. *Herndon, supra; People v Adams*, 232 Mich App 128, 135, 139; 591 NW2d 44 (1998). “In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate or done with intent to gain a tactical advantage, and whether undue prejudice attached to the defendant.” *Herndon, supra*, quoting *People v McIntire*, 232 Mich App 71, 94; 591 NW2d 231 (1998), rev’d on other grounds 461 Mich 147 (1999). The need for further investigation is a proper reason for a delay; the state bears the responsibility for determining when an investigation should end. *Adams, supra* at 134, 140.

Contrary to plaintiff’s contentions, dismissal is not warranted only where there is a finding that the prosecution acted with intent to gain a tactical advantage. To be sure, dismissal would be appropriate if there was a finding of prosecutorial intent to delay, but absence of such intent does not mandate that the action continue. After a finding is made that the defendant suffered actual and substantial prejudice, the prosecution then bears the burden to justify the prejudice, i.e., the prosecution must offer an acceptable reason to explain the delay. In evaluating the proffered explanation, the trial court may consider several factors, one of which is whether the delay was intentional. *Herndon, supra*. Indeed, a court could find that there was prejudice and that there was no tactical intent behind the delay, but yet find that the prosecution merely failed to persuade the court that the delay was justified. Thus, a finding of intentional delay is not a prerequisite to dismissal. To hold otherwise would conflict with the rationale behind the balancing test, which, as stated, places the burden on the defendant to establish prejudice because he is most likely to have facts regarding prejudice at his disposal but places the burden of persuasion on the state because it is most likely to have access to facts concerning the reasons for delay. See *Adams, supra* at 134.

The trial court concluded that defendant had shown actual and substantial prejudice to his right to a fair trial because of the lapse of time and the death of a witness who was implicated in receiving the credit cards stolen from the safe. We disagree. Regarding the court’s finding that the charge should have been brought sooner, this Court has made clear that mere lapse of time is not a denial of due process. *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979). “There is no constitutional right to be arrested.” *Id.* Moreover, we are not convinced the lapse of time between the alleged crime and the charge of safe breaking could have meaningfully impaired defendant’s ability to defend against the charges in such a manner that the outcome of the proceedings would likely be affected. Defendant already knew he was being charged with home invasion in June 2003. The location and testimony of any exculpatory witnesses relevant to that charge could have been secured shortly thereafter, and those witnesses would arguably also be exculpatory for the safe breaking charge, given that both charges arose from the same criminal event.

With respect to the trial court’s comment about the deceased witness, we have made clear that the mere death of a witness is insufficient to show actual and substantial prejudice. *Adams, supra* at 136, quoting *United States v Rogers*, 118 F3d 466, 475 (CA 6, 1997) (observing that “a defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness’s testimony would have been and whether the substance of the testimony was otherwise available”). Here, defendant never clearly indicated what the testimony of the deceased witness would have been. It can be inferred that defendant might have expected to present him to prove that defendant was not involved in the crime, but defendant has

not shown how the deceased would have supported his claim of innocence. This Court will not speculate on how a witness might have testified, it is defendant's burden, not ours, to establish the requisite prejudice. Ostensibly, the substance of the deceased witness' testimony could also be elicited from his wife, who allegedly also had personal knowledge of the crime, and who was also unavailable as a witness. Again, however, defendant never clearly indicated what the wife's testimony would have been. See *Adams, supra* at 137.

Likewise, defendant's other primary claim of prejudice was based on his allegations that "other" witnesses were also unreachable or had faded memories. The particular testimony of those witnesses, however, was not disclosed, and their identities were not revealed. See *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988). Alleged witness memory loss or imperfections are insufficient to show actual and substantial prejudice. *Crear, supra; Adams, supra* at 136-138. Proof of prejudice requires more than just generalized allegations or unsupported statements of prejudice by defense counsel. *Crear, supra; People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982).

It is true that if "absence of memory by a defendant's material witnesses due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown." *Loyer, supra* at 120. However, here, "no such impediment or hindrance was manifest," *id.*, and defendant's mere speculation that their testimony would have been exculpatory is insufficient. See *Adams, supra* at 137.

Accordingly, because defendant's "claims of prejudice are too indefinite and speculative to satisfy the threshold requirement . . . that 'actual and substantial' prejudice be shown," *Adams, supra* at 139, we conclude that the trial court abused its discretion in dismissing the safe breaking charge.³

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

³ Given our conclusion, we need not address the prosecution's burden to offer a reasonable explanation for the delay. However, we note that the prosecution was able to provide a legitimate explanation for the delay, there was no evidence that the delay was deliberate or done with intent to gain a tactical advantage, and, as explained, no undue prejudice attached to defendant.