

IN THIS DISTRICT COURT IN AND FOR MAYES COUNTY
STATE OF OKLAHOMA

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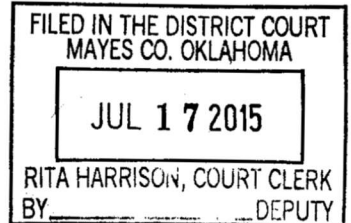
Plaintiff

vs.

JEREMY SCOTT NIEDERBUHL,

Defendant

CF-2013-472



ORDER ON DEFENDANT'S MOTION TO DISMISS

Now on this 17 day of July 2015, this matter comes on for decision on the Defendant's Motion to Dismiss for Violation of his Right to a Speedy Trial and Violation of his Right to Due Process of Law. The defendant appeared with counsel, Ms. Misty Fields, and the District Attorney appeared through Assistant District Attorney, Ms. Mary Walters. The Court heard various arguments on July 7, 2015, and made certain rulings and again on July 10, 2015. The Court having considered the files and records in the case, the pleadings of all the parties, the arguments of counsel, the evidence submitted, and being fully advised in the premises, FINDS:

On or about November 1 and 2, 2013, the events that gave rise to this prosecution for the crime of attempted burglary in the first degree occurred. According to the victim, Steven Scott, the defendant, his wife/girlfriend, and two kids came to Scott's house for a barbeque, and the record doesn't reveal entirely what transpired. There were text messages between the defendant and the victim about the barbeque. The transcript of the preliminary hearing indicates that the victim's version is that the defendant at some point chased after the defendant's wife/girlfriend as she was driving away from the victim's house. The victim and a friend, Mr. Back, went to look for the defendant. At some point, the defendant jumped on the hood of the car and Mr. Back managed to throw him off. Later, the defendant showed up at the victim's home and tried to get in. There are allegedly text messages between the victim and the defendant, one of which is a threat by the defendant to the victim (See preliminary hearing transcript, p. 11). When the defendant could not get through the door, he tried a window, whereupon the victim shot two times, hitting the defendant in the testicles. The victim indicates that he saved the text messages. (Preliminary hearing transcript, pgs. 16-17).

The defendant was transported to a hospital in Tulsa, Oklahoma, and at the request of the Mayes County Sheriff's Office was interviewed by an officer of the Tulsa Police Department. The defendant was not arrested, but, rather, told he had nothing to worry about after the interview.

The defendant was released from the hospital in a couple of weeks and went home to his father's house in Mayes County.

The next month, December 2013, a charge of Attempted First Degree Burglary was filed and a warrant for the defendant was issued in this case. The defendant remained at his father's house, a residence known to law enforcement to be where the defendant routinely stays.

In April of 2014, the defendant moved to his mother's home in Arkansas until approximately July. In July, the defendant moved back to Mayes County with the "mother of his children" in Chouteau, Oklahoma, where he remained until late September. In September of 2014, the mother of his children filed for a protective order and the Mayes County Sheriff's Office went to the defendant's father's home to serve it. The defendant was not present and his father indicated he didn't know where the defendant was. In November 2014, the defendant was told by his father that law enforcement was looking for him for a protective order and the defendant surrendered himself to the Mayes County Sheriff's Office. The defendant had no knowledge that charges had been filed and a warrant issued a year earlier for the charges in this case until he surrendered himself for the protective order on November 30 or December 1, 2014, which, as an aside, was dismissed on October 29, 2014, when no person appeared. Law enforcement made no attempt to locate the defendant or serve the warrant on him before September 24, 2014, and then they were trying to serve a protective order, not the warrant in this case.

The defendant was bound over for trial after a preliminary hearing held on March 9, 2015. During the preliminary hearing, the text messages were discussed, but no mention was made of an interview by the Tulsa Police Department of the defendant immediately after the incident on November 2, 2013. The victim testified that he had received the text messages and that he still had them. (See preliminary hearing transcript: pgs. 11, 16-17, 28-29)

The Court has been advised that there were text conversations between the defendant and the alleged victim discussing various things having to do with the circumstances surrounding the events before and after the incident giving rise to these charges. The defendant claims that the version testified to by the victim, his former best friend, is not accurate and that the texts contained on the victim's phone could be used for impeachment and possibly substantive proof.

After discovery was turned over by the State, it was learned by the defense that the State had the victim's cell phone in its possession. The defense advised the assistant district attorney that said phone had text messages that were exculpatory and contained statements by the defendant concerning the crime, a fact of which she should have had knowledge, and the

defendant requested that the cell phone be retrieved from the sheriff and searched and turned over to the defense. The victim himself was in fact in the Mayes County Jail on unrelated charges and the cell phone was in his belongings in the possession of the Mayes County Sheriff's Office. The prosecutor refused to take any action on the cell phone and advised the defendant that they would have to subpoena the phone if they wanted it. By the time the defendant made it to the jail to serve the subpoena, the victim had been released and was gone and, unfortunately, the cell phone with him.

When asked by the Court about the incident, the prosecutor informed the Court that she "isn't in the habit of going through inmates' property." This Court is aware that the State routinely seizes and searches inmates' property and this Court has personally issued numerous warrants for the search of cell phones at the request of the State. It seems that when told the cell phone in the possession of the State contains evidence relevant to the crime and text conversations between the victim and defendant and that said evidence is likely exculpatory to the defendant, the State had no interest in it but in fact told the defense that, if they wanted it, they would have to get it themselves. The State then released the victim's cell phone.

The Court finds that such action amounts to more than negligence or indifference but, rather, a purposeful action to prevent discovery of the contents of the cell phone within the State's custody. Rather than exercising due diligence to retrieve all evidence, the State seemed to pick and choose which evidence it wanted to keep. Only evidence of guilt was preserved, and evidence that could be exculpatory or mitigating seems to have gone missing. It seems odd that the prosecution would not want to see and use as evidence a text from the defendant threatening to kill the victim if it exists, as testified to by the victim. (See preliminary hearing transcript, p. 11).

The Tulsa Police Department was requested shortly after the incident to interview the defendant in the hospital where the defendant had been taken for treatment of a gunshot wound to the testicles allegedly inflicted by the victim in this case. The interview of the defendant shortly after the crime alleged in this case is missing. Interestingly, the district attorney in preparing for the preliminary hearing should have noticed that there was further police investigation missing from the file, yet it appears that no one sought the information until requested by the defendant after the defendant had received discovery in this case, which was not until the deadline set by the Court. It is baffling to understand the reason that a lack of such an important part of a police investigation did not trigger some action on the part of the State.

The 911 call made at the time of the alleged crime or shortly thereafter is mostly missing. Only part of the recording is available, the explanation of which is that it was not "pulled" and therefore was deleted, or at least part of it was deleted. This evidence is now destroyed and likely would have been available had the defendant been arrested in a timely fashion. Again, evidence that could have been exculpatory is gone.

Photos of the gunshot wound the defendant suffered at the hands of the alleged victim are now missing and are evidence of the events surrounding the charged crime and at the very least could have been used as mitigation of punishment. While testimony is available, the picture that has been said to be worth a thousand words is missing.

SPEEDY TRIAL ISSUE:

The time between the commission of the crime and the filing of the charges in this case is approximately six weeks, the charges having been filed on December 13, 2013. The defendant surrendered himself on an unrelated matter without knowledge of the charges in this case on November 30 or December 1, 2014, nearly a year after charges were filed and more than a year after the incident giving rise to the charges herein. The jury trial of this matter is currently set for July 27, 2015, almost 21 months after the commission of the offense. The defendant has been in jail awaiting trial nearly eight months. In assessing whether a defendant's right to speedy trial has been violated, the Court looks to four factors:

1. Length of the delay. In this case, the delay is less than one year from the time of arrest but nearly two years from the time of the issuance of the warrant for arrest. While a significant delay, without more, it cannot be said to violate due process in and of itself.
2. Reason for delay. For nearly six months after the warrant was issued for the defendant, he resided at his father's home, a place law enforcement knew to look for the defendant. The defendant was out of state for approximately four months and then returned to Mayes County and resided with his girlfriend (the mother of his children) until the end of September 2014. The defendant then resided with a friend in Mayes County until he surrendered himself to law enforcement on November 30, 2014 or December 1, 2014. He has been in custody since. The police could have arrested the defendant at his father's home until sometime in April 2014, and, in fact, attempted to serve him with a protective order there later in the year. The defendant was out of state for three to four months and not available. It is undetermined how hard he would have been to be found the rest of the year until his voluntary surrender. There is no question that the defendant did not know that there was a warrant for his arrest, nor that the police were looking for him, until the protective order was communicated to him and he then surrendered himself. There is no indication that the police ever tried to serve the arrest warrant on him for the crime herein charged.
3. The assertion of the right to speedy trial. The defendant has not affirmatively asserted his right to speedy trial until recently; however, he has not requested any delay of the proceedings, and when he found out the police were looking for him (albeit on another matter) he surrendered himself to authorities.
4. Prejudice to the defendant. It is likely that, had the defendant been arrested and proceedings started sooner, that the 911 call would have been available, as well as the interview with the defendant by the Tulsa Police Department immediately after the

incident giving rise to the charges. In addition perhaps the pictures of the wounds to the defendant could have been located. These are all items that arguably could have helped the defendant in his defense and possibly have been exculpatory.

While there are certainly items of prejudice that the defendant can show as a result of the delay in prosecution, the Court cannot say that, absent bad faith, the defendant is deprived of due process of law solely on the issue of speedy trial.

DUE PROCESS ISSUE

Closely related to the speedy trial issue is the matter of the defendant's argument of his denial of due process. In addition to the items of prejudice cited above, the defendant argues that the prosecutor denied him material evidence that is both exculpatory and relevant in the text messages contained on the victim's cell phone that was in the possession of the State. In this case, the Court set a discovery deadline for compliance of July 1, 2015. After receiving discovery, the defense learned that the victim was incarcerated in the Mayes County Jail on domestic abuse charges and that his cell phone was in the possession of the Mayes County sheriff. Defense counsel contacted the assistant district attorney to retrieve said phone and the assistant district attorney refused, informing defense counsel that, if she wanted the cell phone, she would have to subpoena it. Defense counsel drew up a subpoena, and when she arrived at the sheriff's office, the defendant and his cell phone had been released, which occurred on July 6, 2015. The victim had been in jail for several days. The defendant claims that the cell phone contains evidence of text messages between himself and the victim before and after the alleged crime herein. The victim verified this at the preliminary hearing and indicated that he had saved the messages.

On July 7, 2015, this Court held a hearing on the defendant's motion to determine discovery compliance. At the hearing, several pieces of evidence were addressed. There were color photographs not given to the defense, the 911 call mentioned above was discussed, the Tulsa police interview with the defendant was addressed, missing pictures of the defendant's gunshot wound was discussed, and the victim's cell phone was discussed. The prosecutor was given until July 10, 2015, to retrieve the said cell phone and make inquiries on the other items. On July 10, 2015, the prosecutor stated that she had talked to the "victim" (indicating the wife of Steve Scott) and she thought that the cell phone was in storage now. It has not been produced to date.

In order to obtain relief for violation of due process for the State not adequately preserving or examining evidence, the defendant must not only show that he was deprived of due process but that it was a result of bad faith. HOGAN v. STATE, 877 P.2d 1157 (Okla. Cr. 1994), MOLLETT v. STATE, 939 P.2d 1 (Okla. Cr. 1997).

BAD FAITH ISSUE

Bad faith is a refusal to fulfill a duty or obligation (see: The Free Dictionary, DeANDA v. AIU Ins., 98 P.3d 1080, 2004 OK 54 (June 29, 2004)). The prosecutor in this case had a duty to turn over to the defense any statements, whether written or recorded, of the defendant. 22 O.S. sec. 2002 (A)(1)(c). In addition, the prosecutor had a duty to turn over any evidence favorable to the defense. 22 O.S. sec. 2002(A)(2). This obligation of the prosecutor extends to "any information in the possession of law enforcement agencies that regularly report to the prosecutor of which the prosecutor should reasonably know..." 22 O.S. sec. 2002 (A)(3)(b). The Mayes County sheriff falls into this category and, in fact, was the investigating agency for the crime charged herein. The prosecutor knew of the information because of the preliminary hearing and the request by the defendant. Text messages are written statements by the defendant contained on the cell phone that was in the sheriff's possession. In addition, it is contended by the defense that the text messages would be exculpatory and impeachment evidence favorable to the defense.

The prosecutor had a clear duty to turn over the victim's cell phone or at least maintain it for inspection. The discovery request was made while the cell phone was in the custody of the Mayes County sheriff and would have been preserved. Interestingly, the cell phone was returned to the victim and released after the request by the defense.

The Court finds that the prosecutor had a duty and obligation to the defendant by law and court order and refused to comply. That is the very definition of bad faith.

Any conversation or statements by the defendant are uncharacteristically missing in the case, two of which (the interview by the Tulsa Police Department immediately after the incident and the texts on the victim's cell phone) were actually in the possession of the State but are now missing.

CONCLUSION

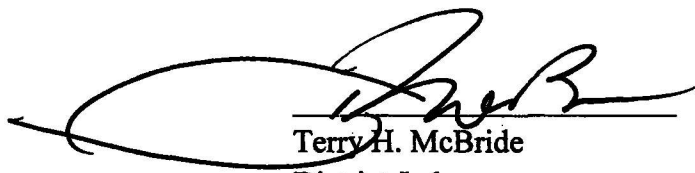
The Court finds that the defendant's right to speedy trial and violation of his due process rights to a fair trial have been violated and, further, that the same is a result of bad faith on the part of the State.

REMEDY

The Court has attempted to restore to the defendant at least the bad faith deprivation of the victim's cell phone containing text messages by giving the State time to retrieve same. Had that occurred, the Court might have considered letting the jury possibly be made aware of the other shortcomings and prejudices and decide the case accordingly. Unfortunately, the missing cell phone, like the other missing evidence, has not been produced. The defendant has been in jail for nearly eight months and it is 20 months since the commission of the acts giving rise to these charges.

This Court cannot fashion a remedy short of dismissal that would insure the defendant a fair trial and, therefore, the Court finds that the defendant's right to due process and his right to a speedy trial have been violated and he has shown bad faith on the part of the State and that he has suffered prejudice as a result.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the COURT that the case herein is hereby DISMISSED. The defendant is ordered released from custody on this case and any bond is exonerated.



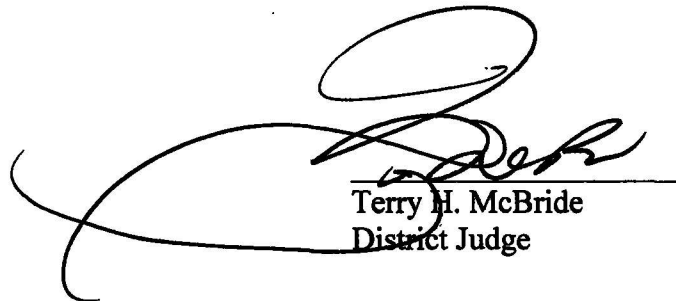
Terry H. McBride
District Judge

Certificate of Mailing

I, Honorable Terry H. McBride, hereby certify that a true and correct file-stamped copy of the above and foregoing Order was mailed on this 17 day of July 2015, with the proper postage affixed thereon to:

Ms. Mary Walters
Mayes County District Attorney's Office
1 Court Place, Suite 250
Pryor, OK 74361

Ms. Misty Fields
3 N. Adair
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Terry H. McBride
District Judge