

IN THE DISTRICT COURT OF MUSKOGEE COUNTY FOR THE
STATE OF OKLAHOMA

2015 NOV 30 AM 9:25

STATE OF OKLAHOMA,

Plaintiff,

v.

Case No. CF-2008-896

**LAURA PHIPPS,
a/k/a, LAURA STARETS,**

Defendant.

**MOTION TO DISMISS WITH PREJUDICE FOR
VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS
AND SPEEDY TRIAL, AND BRIEF IN SUPPORT**

The State charged Laura Phipps by Information in November 2008 for alleged criminal activity occurring in 2005. The State made no effort to arrest Mrs. Phipps and bring her before the Court until September 2015, nearly seven years after being charged and ten years after the events giving rise to the Information. The State's failure to prosecute this case, whether intentional or accidental, violated Mrs. Phipps's Sixth Amendment right to a speedy trial and her Fourteenth Amendment Due Process rights to avoid delay in prosecution. The Court should dismiss the Information with prejudice.

SUMMARY OF ARGUMENT

Mrs. Phipps has a Sixth Amendment right to a speedy trial. The State filed its Information charging Mrs. Phipps in November 2008, the face of which shows the State's knowledge of her residence in Texas, where she moved after completing nursing school. Notwithstanding the State's knowledge of her whereabouts, it did not attempt to arrest her until September 2015, nearly seven years later. As the facts demonstrate, the State's failure to act on the Information for nearly seven years violated Mrs. Phipps's Sixth Amendment right to a speedy trial. The Court should dismiss on this violation alone.

But the Sixth Amendment violation is compounded by the Fourteenth Amendment Due Process Clause violation for failure to bring the charges in a timely manner. Although the facts giving rise to the alleged violations concluded in December 2005, the State did not bring the charges until November 2008. The timing of filing the Information was no coincidence, just as the timing of Mrs. Phipps's arrest was no coincidence. The State did not charge Mrs. Phipps until after the alleged victim, Lloyd Payton, died on October 27, 2008. The State filed charges *seven days* after his death, on November 3, 2008. As the facts below demonstrate, the State's pre-filing delay was purposeful, waiting for the alleged victim to die so he could not be called as a witness on behalf of Mrs. Phipps. The State's pre-charging delay is further reason to dismiss the Information with prejudice.

FACTS

1. Mrs. Phipps was employed during 2004 and 2005 as a receptionist for a mortgage origination company at which Lloyd Payton's son, Greg Payton, was also employed. During this time, Mrs. Phipps was attending nursing school.
2. During 2004, while working for Greg Payton, Lloyd Payton's wife, Ersel, was terminally ill with cancer, and the family needed overnight care and supervision. The Payton family asked Mrs. Phipps if she would stay and provide this care, and she did.
3. Ersel Payton died on June 10, 2004.
4. Mrs. Phipps's overnight assignment turned into a request by the Lloyd Payton for Mrs. Phipps to manage his monthly expenses. Lloyd Payton paid Mrs. Phipps monthly for about six months, but after six months Mrs. Phipps did not receive a paycheck. Instead, Lloyd Payton paid Mrs. Phipps by purchasing items for her in lieu of a paycheck. Mrs. Phipps did not receive any paychecks after December 2004.

5. Mrs. Phipps continued in her role until the end of 2005. At the end of 2005, Lloyd Payton's two sons, Greg Payton and Jeff Payton, sought out Mrs. Phipps's assistance in declaring Lloyd Payton incompetent. She refused to cooperate with Greg and Jeff Payton.

6. Lloyd Payton was diagnosed with throat cancer in mid-2005.

7. In approximately February 2006, Jeff Payton confronted Mrs. Phipps and accused her of taking money from Lloyd Payton's accounts and told her he would crush her nursing career as well as her husband's career with Dal-Tile.

8. In February 2006, Mrs. Phipps was coerced by Greg and Jeff Payton and their attorney, Ron Wright, into an agreement to repay money to Lloyd Payton. Mrs. Phipps stopped working for Lloyd Payton in February 2006.

9. Prior to Ersel Payton's death, Lloyd Payton began a relationship with Patti Davis.

10. Lloyd Payton died on October 27, 2008. The State filed the Information against Laura Phipps exactly seven days later on November 3, 2008. The face of the Information identifies Mrs. Phipps by her married name and her maiden name, Laura Starits, and it correctly identifies the city, state, and zip code where she lived at the time of filing the Information.

11. Patti Davis died on August 10, 2015.

12. Laura Phipps was arrested at her home in Rockwall, Texas, on September 1, 2015.

13. Laura Phipps moved from Muskogee to Texas in 2007 upon graduation from nursing school. She married Daniel Phipps on April 7, 2005. From 2008 through 2010, Mrs. Phipps resided at 1005 S. San Antonio, Forney, Texas 75126, the same city, state, and zip code on the face of the Information. Ms Phipps and her husband leased the home, and the lease was registered in their names.

14. From August 2010 until 2013, Mrs. Phipps resided at 659 Sorita Circle, Heath, Texas 75032 in a home titled in the name of Daniel and Laura Phipps. The Phippses separated in 2013, and Mrs. Phipps moved to 1650 S. John King, #601, Rockwall, Texas 75032. Daniel and Laura were divorced in July 2014. Daniel Phipps continued to live in the house on Sorita Circle, but Mrs. Phipps continued to receive her mail at the Sorita Circle address.

15. Mrs. Phipps's residential information was publicly available on the internet at a website maintained by the Rockwall County Appraisal District:

<http://www.rockwallcad.com/> (last viewed November 7, 2015).

16. Mrs. Phipps was arrested at her apartment on S. John King in Rockwall. At the time of her arrest, Mrs. Phipps was reconciling with her ex-husband and was in the process of moving back to the Sorita Circle address.

17. Since 2008, Mrs. Phipps has maintained a Facebook account with no less than 13 "friends" in Muskogee. Mrs. Phipps's husband works for the same company he worked for in Muskogee, which transferred him to Texas in late 2007. Mr. Phipps regularly travels to Muskogee on business and has done so since moving to Texas in 2007.

18. Mrs. Phipps has been licensed by the Texas Board of Nursing since January 2008, and information about her license is publicly available on the internet at a site maintained by the Board: <http://www.bon.texas.gov> (last viewed October 28, 2015).

19. Mrs. Phipps has always lived in Texas since 2008 under her married name.

ARGUMENT

I. THE STATE VIOLATED MRS. PHIPPS'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL BY FAILING TO ARREST HER FOR NEARLY SEVEN YEARS AFTER FILING THE INFORMATION.

The Sixth Amendment right to a speedy trial applies when the State files its Information. *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971). The test to determine whether a defendant's right to a speedy trial has been violated were set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). In evaluating speedy trial claims, the Court established a balancing test consisting of four factors: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of her right; and (4) prejudice to the defendant. *Id.* at 530, 92 S.Ct. at 2192. The Court explained that these factors are to be evaluated by balancing them against the defendant's right to a speedy trial. *Id.*

A. LENGTH OF DELAY.

The United States Supreme Court has recognized that generally a delay which approaches one year is presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 658, 112 S.Ct. 2686, 2691 n.1, 2694 (1992). The Oklahoma Court of Criminal Appeals engaged a full *Barker* analysis in *Harmon v. State*, 748 P.2d 992 (Okla. Crim. 1988) when the delay was only five months. When the *Barker* balancing test has been triggered, the court must consider the length of the delay with "the presumption that pretrial delay has prejudiced the accused [and has] intensifie[d] over time." *Doggett*, 505 U.S. at 652, 112 S.Ct. at 2691.

The State's delay in Mrs. Phipps's case is seven times greater than the presumptively prejudicial period. For that entire seven years, Mrs. Phipps was living in the same zip code identified on the face of the Information. For that seven years, Mrs. Phipps was openly and notoriously working and living with her family. At no time was Mrs. Phipps obscuring her identify or living under any other name. The only conclusion to be drawn from all these

facts is this: the State made no attempt to locate her for seven years. An equally plausible explanation is that the State knew where Mrs. Phipps was during the entire period of time, but it purposefully waited to arrest her and bring her before the Court. And the State's attempt to bring Mrs. Phipps before the Court did not begin until Patti Davis died in August 2015. Mrs. Davis would have been a favorable witness for Mrs. Phipps.

The seven-year delay triggered the *Barker* test, so we must look next at the remaining three factors.

B. THE REASON FOR THE DELAY.

The circumstantial evidence pointing to the reason for the delay is simple: the State was waiting for a favorable witness, Patti Davis, to die before arresting Mrs. Phipps. There is no other logical explanation for the timing of Mrs. Phipps's arrest. Mrs. Phipps believes Patti Davis would have provided testimony favorable to her defense. The timing of the arrest is just as suspicious as the timing of the filing of the charges only one week after Lloyd Payton's death (*see* argument below).

There are three categories of delay: deliberate, neutral, and valid. *Barker* assigned different weights to the three reasons:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts could be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531, 92 S.Ct. at 2192. The State's reason for the delay must be lawful and in good faith, *Conley v. State*, 798 P.2d 1088, 1089 (Okla. Cr. 1990), with relief being virtually automatic in cases where delay is premised on bad-faith. *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693. Delays for good cause that are "necessary to further the ends of justice and ensure that the . . . [defendant] receive[s] a fair and impartial trial" weigh in favor of the State.

McDuffie v. State, 651 P.2d 1055, 1056 (Okla. Cr. 1982) (stating delays were necessitated in order to secure court appointed counsel without conflict of interest, a continuance by request of counsel finally appointed, illness of counsel, failure of a witness to appear at the preliminary hearing, and defendant's request for a preliminary hearing transcript). Official negligence in bringing an accused to trial lies in the middle between diligent prosecution and bad-faith delay. *McDuffie*, 651 P.2d at 1056. The weight assigned to official negligence "compounds over time as the presumption of evidentiary prejudice grows [and] [t]hus . . . [the] toleration of such negligence varies inversely with its protractedness, . . . and its consequent threat to the fairness of the accused's trial." *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693. Additionally, mistake or neglect by the State is no justification for the delay "since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Conley*, 798 P.2d at 1089-90.

All of the fault for the delay lies with the State. Mrs. Phipps knew nothing of these charges until she was arrested on September 1, 2015. All the facts point to a deliberate delay by the State in waiting seven years to arrest Mrs. Phipps. The State does not have a good faith explanation for the delay. This factor therefore weighs heavily against the State and in favor of Mrs. Phipps.

C. MRS. PHIPPS'S ASSERTION OF HER RIGHT TO A SPEEDY TRIAL.

Mrs. Phipps has asserted her right to a speedy trial. To date she has not requested any extension of time or continuance of any proceeding. Mrs. Phipps is diligently defending herself against the charge in the Information. Mrs. Phipps's assertion of her right to speedy trial therefore weighs in her favor.

D. MRS. PHIPPS HAS BEEN PREJUDICED BY THE DELAY.

The fourth factor of the *Barker* balancing test is prejudice to the defendant and prejudice to the defendant's interests. The most significant of these interests is the

possibility of impairment to the defense by “dimming memories and loss of exculpatory evidence.” *Doggett*, 505 U.S. at 654, 112 S.Ct. at 2692. It is the most significant of these interests “because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193.

A defendant does not have to show an affirmative demonstration of prejudice to make a speedy trial claim, and prejudice is not limited to prejudice of the defendant’s defense. *Simpson v. State*, 642 P.2d 272, 275 (Okla. Cr. 1982). Impairment to the accused’s defense is the most difficult to prove because it “can rarely be shown” and prejudice may presumptively be found where the delay is excessive. *Doggett*, 505 U.S. at 655-56, 112 S.Ct. at 2693.

The prejudice to Mrs. Phipps is real. Mrs. Phipps believes that Lloyd Payton would have testified that the money she allegedly embezzled from him was in fact either payment for services rendered or a gift to her for the services she had been performing for him. *See* Ex. 1, Affidavit of Laura Phipps. Mrs. Phipps believes that Lloyd Payton’s testimony would demonstrate there was no embezzlement.

Mrs. Phipps also believes that the testimony of Patti Davis would have been favorable to the defense. *See* Ex. 1. Mrs. Phipps came to know Mrs. Davis after the death of Mr. Payton’s wife. Mrs. Phipps believes that Mrs. Davis would testify that Mr. Payton intended for Mrs. Phipps to have the money and items purchased for her by Mr. Payton. Mrs. Phipps also believes that Mrs. Davis would testify that both she and Mr. Payton did not believe that Mrs. Phipps had done anything wrong. Mrs. Davis would have been particularly important to Mrs. Phipps’s defense. Mrs. Davis is unrelated to Mr. Payton’s two sons who were complaining of Mrs. Phipps’s conduct and were trying to declare Mr. Payton incompetent at the time these events took place. Mrs. Davis would further confirm that

Mr. Payton's two sons were inappropriately trying to declare Mr. Payton incompetent and take over his affairs.

The prejudice to Mrs. Phipps is real. With Mrs. Phipps's showing of a presumption of prejudice, the burden now shifts to the State to rebut this presumption. *Doggett*, 505 U.S. at 655-56, 112 S.Ct. at 2693. If the State fails to disprove the prejudice, and the presumption stands. *Williamson v. State*, 812 P.2d 384, 394 (Okla. Cr. 1991).

E. THE COURT MUST DISMISS THE CASE.

A defendant whose right to a speedy trial has been violated, must have her case dismissed. *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263-64 (1973). Although the remedy of dismissal has been characterized as an "unsatisfactorily severe remedy," *Barker*, 407 U.S. at 522, 92 S.Ct. at 2188, the Court has held that it must remain "the only possible remedy." *Strunk*, 412 U.S. at 440, 93 S.Ct. at 2263.

II. MRS. PHIPPS'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE OF THE STATE'S PRE-ACCUSATION DELAY OF NEARLY THREE YEARS.

Although the applicable statute of limitations is the typical protection against the State from bringing a stale criminal charge, the United States Supreme Court has recognized that "the statute of limitations does not fully define [defendants'] rights with respect to events occurring prior to indictment, ...and that the Due Process Clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048 (1977). In *Lovasco*, the Court held that a due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. *Id.* 431 U.S. at 790, 97 S.Ct. at 2048-49.

If the reason for the delay is "to gain tactical advantage over the accused" due process will be violated. *Lovasco*, 431 U.S. 795 n.17, 97 S.Ct. at 2051 n.17. Additionally, due process may be violated "upon a showing of prosecutorial delay incurred in reckless disregard of

circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.” *Id.*

These principles were applied by the Oklahoma Court of Criminal Appeals in *Williamson v. State*, 812 P.2d 384 (Okla. Cr. 1991), order corrected by 905 P.2d 1135 (Okla. Cr. 1991), in which the defendant alleged that he had been prejudiced by the five-year delay in charging him for murder. The defendant claimed that the reason for the delay was negligence on the part of the State and processing certain items of evidence and that this delay prejudiced his defense because his only alibi witness, his mother, died three years after the murder occurred. The court stated the principles used to analyze prejudice to a speedy trial resulting from the death of a defense witness would be helpful in analyzing due process claims as well. *Id.* at 384. Therefore, once the defendant raises the presumption of prejudice, as supported by the record or by affidavits as to what the witness might have testified, the burden is on the State to rebut such prejudice. *Id.*

The court found that the reasons for the delay in charging the defendant were not “tactical” or designed to impair the ability of the defendant to mount his defense. *Id.* at 395. Rather, the delay was “investigative” and “the prosecutor acted properly in refusing to file a criminal charge of murder until he was completely satisfied that he could prosecute and that he would be able to establish guilt beyond a reasonable doubt.” *Id.*

The State cannot establish the same excuses for its delay in this case. Although counsel for Mrs. Phipps have not yet seen the State’s discovery, the defense is confident that there was no investigation occurring from December 2005 until November 2008 when the charges were actually filed. There was little if any investigative work to be done during that period. Mrs. Phipps’s case is not one which requires forensic laboratory examination of evidence. Mrs. Phipps’s case is not one in which there may have been eyewitnesses who had to be located and interviewed. All seven of the witnesses endorsed by the state on the

information were alive and available to be interviewed from December 2005 until November 2008. There is simply no justifiable reason for the delay of nearly 3 years to bring these charges.

The prejudice to Mrs. Phipps, however, is very real. The victim of her alleged offense, Lloyd Payton, died exactly one week prior to the filing of these charges. As set out in Mrs. Phipps's affidavit, Lloyd Payton's testimony would have been useful to her defense, notwithstanding the fact that he was endorsed by the State as a witness on the Information. Under the circumstances of this case, the delay in charging Mrs. Phipps was a tactical maneuver by the State to wait until Mr. Payton died to file the charges. Under those circumstances and under the case law of the United States Supreme Court and the Oklahoma Court of Criminal Appeals, this Court should dismiss the Information against Mrs. Phipps with prejudice.

CONCLUSION

The State had no justification for waiting three years to charge Mrs. Phipps. Once charged, the State had no justifiable reason for waiting nearly seven years to arrest her, particularly since the State knew where she was the entire time. The only logical explanation is that the State waited for two key witnesses to die. The State's misconduct warrants dismissal with prejudice.

Dated: 24 November 2015

Respectfully submitted,



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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on 24 November 2015, a full, true, and correct copy of the "MOTION TO DISMISS WITH PREJUDICE" was deposited in the U.S. Mail with proper first-class postage, to the following counsel of record at the following address:

Matt Ballard, District Attorney
Rogers County Courthouse
200 S. Lynn Riggs Blvd.
Claremore, Oklahoma 74014

COUNSEL FOR PLAINTIFF



John D. Russell

IN THE DISTRICT COURT OF MUSKOGEE COUNTY FOR THE
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

**LAURA PHIPPS,
a/k/a, LAURA STARITS,**

Defendant.

Case No. CF-2008-896

AFFIDAVIT OF LAURA PHIPPS

STATE OF TEXAS)
) ss.
COUNTY OF ROCKWALL)

I, Laura Phipps, am over 18 years old and of sound mind. I understand this Affidavit is offered in support of my motion to dismiss with prejudice. I am familiar with the facts stated in this Affidavit. Upon my oath of truthfulness, I state:

1. In 2004, I was employed as a receptionist by a mortgage origination company at which Lloyd Payton's son, Greg Payton, worked. While working with Greg Payton, I was attending nursing school.

2. During 2004, while working at the same mortgage origination business as Greg Payton, Lloyd Payton's wife, Ersel, was terminally ill with ALS, and the family needed overnight care and supervision for Ersel. Lloyd Payton family asked me if I would stay overnight and provide this care. I agreed to do so.

3. Ersel Payton died on June 10, 2004.

4. After my overnight assignment, Lloyd Payton asked me to continue assisting him and to assist with insuring his monthly expenses were paid. I was paid by Lloyd Payton to

perform these duties, but after six months I did not receive a paycheck. Instead, Lloyd Payton paid me by purchasing items for me or by giving me money on an as-needed basis. I did not receive any paychecks after December 2004.

5. I continued in my role assisting Mr. Payton until December 2005. At the end of 2005, Lloyd Payton's two sons, Greg Payton and Jeff Payton, asked me to assist them in declaring Lloyd Payton incompetent. I refused to cooperate with Greg and Jeff Payton.

6. Lloyd Payton was diagnosed with throat cancer in mid-2005.

7. In approximately February 2006, Jeff Payton confronted me and accused me of taking money from Lloyd Payton's accounts and told me he would crush my nursing career as well as my husband's career with Dal-Tile.

8. In February 2006, I was summoned to the office of attorney Ron Wright, who is representing Greg and Jeff Payton, and coerced into signing documents suggesting that I had improperly taken money from Lloyd Payton. I stopped working for Lloyd Payton in February 2006.

9. Prior to Payton's death, Lloyd Payton began a relationship with Patti Davis.

10. Lloyd Payton died on October 27, 2008.

11. Patti Davis died on August 10, 2015.

12. My husband and I moved away from Muskogee in 2007 following my graduation from nursing school. My husband is employed by Dal-Tile, which has a facility in Muskogee. His company transferred him to Dallas. He is still working for Dal-Tile. My husband makes regular trips to Muskogee for business.

13. From 2008 through 2010, I resided with my husband at 1005 S. San Antonio, Forney, TX 75126. My husband and I leased this home, the lease was held in our names jointly.

14. From August 2010 until 2013, I resided at 659 Sorita Cir., Heath, TX 75032, in a house titled in the name of Daniel and Laura Phipps. My husband and I separated in 2013, and I moved into an apartment at 1650 S. John King, # 601, Rockwall, TX 75032. My husband and I divorced July 2014. My ex-husband, Daniel Phipps, continued to live in the house on Sorita Circle, and I continued to receive my mail at the Sorita circle address following my divorce.

15. At the time of my arrest, my ex-husband and I had reconciled, and I was in the process of moving my belongings back into the Sorita Circle house.

16. My residential information has been publicly available on the Internet at the website hosted by the Rockwall County appraisal District, at:

<http://www.rockwallcad.com/>.

17. Since 2008, I have maintained a Facebook account with no less than 13 "friends" in Muskogee.

18. I have been licensed by the Texas Board of Nursing since January 2008, and the information about my license is publicly available on the Internet:

<http://www.bon.texas.gov>.

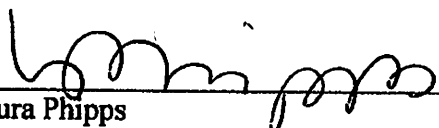
19. During the entire time I have lived in Texas, I have been known by my married name, Laura Phipps. I have never used any alias name, nor in any way attempted to conceal or obfuscate my name, location, or place of residence or business. I have at all times lived openly and notoriously under my true and accurate personal identification information.

20. Lloyd Payton did not believe I had done anything wrong. He knew and approved of all of the money paid and gifts purchased for me.

21. Patti Davis, with whom Lloyd Payton had a relationship prior to and following the death of Ersel Payton, knew about the payments and gifts to me by Lloyd. She would have testified in my defense and would have corroborated my defense that Lloyd Payton knew what he was doing and approved of all payments and gifts to me.

This Affidavit was reviewed and approved on the ___ day of November, 2015. Although I did not type the words in this Affidavit, I provided the information in the Affidavit, and I believe all facts stated in this Affidavit are true and correct to the best of my knowledge and belief.

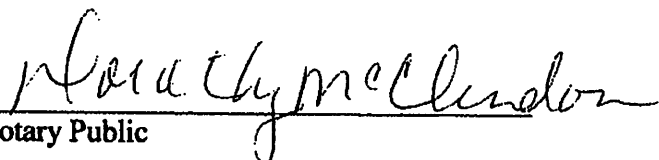
Further affiant sayeth not.



Laura Phipps

Subscribed and sworn to before me this 24 day of November, 2015.

[SEAL]



Notary Public

Commission No./Expiration Date:

Oct 11, 2017

