

June 17, 2020

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARREN B. WOODARD,

Defendant - Appellant.

No. 19-5009
(D.C. No. 4:18-CR-00086-GFK-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH, SEYMOUR,** and **MCHUGH,** Circuit Judges.

Darrin B. Woodard entered a conditional guilty plea for a violation of [18 U.S.C. § 924\(c\)\(1\)\(A\)\(i\)](#), possession of a firearm in furtherance of a drug trafficking crime. He preserved this appeal from the district court's denial of his motion to dismiss (and supplemental motion to dismiss) for unconstitutional pre-indictment delay. We affirm.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments. It may be cited, however, for its persuasive value consistent with [Fed. R. App. P. 32.1](#) and [10th Cir. R. 32.1](#).

I.

In early 2015, Tulsa Police received information that Darrin Woodard and others were selling cocaine and marijuana from a house in Tulsa. After finding cocaine and marijuana residue in the trash outside that residence, they sought and received a search warrant. They executed a search warrant on March 2, 2015. When police arrived at the house, they saw four men enter a vehicle parked in the driveway and drive away from the residence. The officers followed the vehicle and ultimately pulled it over for a speeding violation. The officers identified one of the men in the vehicle as defendant Darrin Woodard. During the traffic detention, the warrant team searched the house and found ammunition and weapons, including a Taurus Judge .40 caliber pistol. They also found cocaine powder and base. On the day of the search, the officers recorded a mirandized interview with Mr. Woodard, in which he admitted to owning the pistol.

In April 2018, a federal grand jury charged Mr. Woodard and others with drug and firearm offenses based on the 2015 search of the house. Mr. Woodard moved thereafter to dismiss the indictment, alleging unconstitutional pre-indictment delay.¹ On October 15, 2018, the day before trial was to begin, Mr. Woodard filed a Supplemental Motion to

¹ Defendant filed a motion to dismiss. He argued that the pre-indictment delay violated his right to a speedy trial under the Sixth Amendment. He also cited numerous cases that related to post-indictment delay. In response, the government noted that Mr. Woodard had conflated the notions of pre-indictment and post-indictment delay. The district court denied the motion to dismiss based on its consideration of Fifth Amendment due process cases relating to pre-indictment delay.

Dismiss asserting that the delay was partially the result of government efforts to convince Mr. Woodard to cooperate in another matter.

The district court held three hearings on the motions. The last two hearings occurred separately on the day of trial. During the third hearing, the court permitted Mr. Woodard to call witnesses and present testimony. At the conclusion of that hearing, the court found that Mr. Woodard had suffered prejudice as the result of the pre-indictment delay due to the suicide of a key witness, but it held that he had failed to prove the government's delay was intentional and purposeful as opposed to merely negligent. Mr. Woodard appeals, asserting the district court applied the wrong standard.

II.

The focus of Mr. Woodard's argument in this appeal relates to a comment the district court made prior to hearing evidence on the motion and supplemental motion to dismiss at the October 16, 2018 hearing. During the first moments of that hearing the court engaged in a discussion with counsel and commented:

[T]he pre-indictment delay[] must be intentionally or purposefully designed and pursued by the government to gain some tactical advantage over or to harass him.

It does raise the interesting question of would the government's motive to attempt to get the defendant to help it in other investigations, is that the type of delay that would satisfy this requirement; or rather . . . must the delay be intentionally or purposefully designed and pursued by the government to negatively impact the defendant in that prosecution?

Rec., vol. II at 18. Mr. Woodard contends these comments show the district court applied an incorrect legal standard in concluding that he failed to prove the government's delay

was intentional and purposeful and designed to gain a tactical advantage “in that prosecution.”

We review the denial of a motion to dismiss for pre-indictment delay for abuse of discretion. *United States v. Bernard Comosona*, [848 F.2d 1110, 1113](#) (10th Cir. 1988). “A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment,” *Liberty Mut. Fire Ins. Co. v. Woolman*, [913 F.3d 977, 990](#) (10th Cir. 2019) (internal quotation marks and citation omitted), or alternatively when the court “base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence,” *United States v. Dixon*, [901 F.3d 1170, 1176](#) (10th Cir. 2018) (citation omitted).

On the issue of pre-indictment delay, the Supreme Court has stated that: “statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide ‘the primary guarantee, against bringing overly stale criminal charges.’” *United States v. Lovasco*, [431 U.S. 783, 789](#) (1977) (citation omitted). However, there is also protection under the due process clause of the Fifth Amendment that can arise before the statute of limitations expires. *Id.* Such a “due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *Id.* at 790. As the Court explained in *United States v. Marion*, [404 U.S. 307, 325](#) (1971), which involved a 38-month pre-indictment delay, the defendants failed to “demonstrate[] that the pre-indictment delay by the Government violated the Due Process Clause.”

Not only did the defendants in that case fail to prove actual prejudice, “there [was] no showing that the Government intentionally delayed to gain some tactical advantage over [the defendants] or to harass them.” *Id.* As we recognized in *United States v. Rufus Comosona*, [614 F.2d 695, 696 n.1](#) (10th Cir. 1980), “[i]t is important to observe that something more than ordinary negligence on the part of Government representatives must be shown, no matter how high the actual proof of prejudice is. The Government’s delay must be intentional and purposeful.”

The district court applied this analysis here and determined that while Mr. Woodard suffered actual prejudice as the result of the pre-indictment delay, “[s]imply put, the defendant has not demonstrated the delay here was intentional and purposeful; specifically, that it was more than ordinary negligence” on the part of the government. Rec., vol. II at 82. Negligent acts by their very nature are not intentional nor are they designed to accomplish an end. A consideration of whether any tactical advantage on the part of the government must have been with respect to the trial in this case or in general is only relevant if the district court had first found that the pre-indictment delay was an intentional or purposeful device employed by the government. Because Mr. Woodard failed to offer evidence that the delay here constituted anything more than negligent conduct on the part of the government, we need not resolve whether the tactical advantage requirement was designed to apply in general or in connection with the pending case against a defendant.

Accordingly, the district court did not abuse its discretion in denying Mr. Woodard's motion and supplemental motion to dismiss for unconstitutional pre-indictment delay. For the foregoing reasons, we AFFIRM.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

1 accuracy on the issue before the court, which is the continuing
2 and reasserted motion to dismiss raised by the defendant based
3 upon pre-indictment delay. And I understand how it is when you
4 get up here and this dialogue starts, but I need to pull you
5 back, we need to focus on the issue at hand. Go ahead.

6 Q. (BY MR. DUNCOMBE) Mr. Woodard, the testimony you gave
7 about Mr. Gillespie, would you be willing to give all of that
8 testimony if this case proceeded to trial?

9 A. Yes, sir.

10 Q. Thank you.

11 MR. DUNCOMBE: Nothing further.

12 THE COURT: Redirect?

13 MR. KIRKPATRICK: Not based on those, Judge.

14 THE COURT: Very well. You may step down, sir. Any
15 further witnesses?

16 MR. KIRKPATRICK: No, Judge.

17 THE COURT: All right. Let me cut through it here.
18 It does appear that as to the first element, that of prejudice,
19 that the defendant has shown prejudice with respect to the
20 pre-indictment delay. Specifically, as to the death of
21 Mr. Gillespie, his suicide, there is prejudice insofar as
22 Mr. Gillespie committed suicide in 2017, and had this
23 indictment been brought in 2015 or even 2016, Mr. Gillespie, at
24 least there would have been a possibility that he could have
25 been brought to this courthouse on behalf of the defendant to

1 testify, as the defendant contends, that the house is really
2 Mr. Gillespie's and that Mr. Woodard was simply covering the
3 bills to help Mr. Gillespie.

4 Further, there's been testimony here elicited from the
5 defendant that Roger Reed, defendant's cousin, is in prison.
6 Of course, there's nothing before this court to indicate that
7 he couldn't be writted to this courthouse to testify on the
8 defendant's behalf.

9 Now, any further argument? I know we've had argument
10 both at the pretrial conference, these issues have been
11 presented to the court in the motion to dismiss, the response
12 to the motion to dismiss, the supplement to the motion to
13 dismiss, and we've discussed it further this morning when the
14 court denied at that point the supplement to the motion to
15 dismiss.

16 Any further argument bringing into focus the evidence
17 that's been elicited here this afternoon relative to the issue
18 of whether or not the delay was intentionally or purposefully
19 -- purposely -- excuse me -- p-u-r-p-o-s-e-l-y -- designed and
20 pursued by the government to gain some tactical advantage over
21 the defendant or to harass him? Mr. Kirkpatrick.

22 **MR. KIRKPATRICK:** You know, Judge, I'm not sure
23 exactly what the court means to gain a tactical advantage, and
24 perhaps that is the -- perhaps that's the crux of this case.

25 Anytime that a defendant is deprived of valuable

1 evidence in a case by the government's inaction, whether
2 purposeful or not, then at that point the defendant has
3 suffered what I consider -- what I consider to be extreme
4 prejudice.

5 THE COURT: Well, but that's just not the law and I
6 understand the equity of what you're arguing. But under the
7 law, as stated by the Tenth Circuit, as I understand it, the
8 defendant has to show, in the context of pre-indictment delay,
9 in order to warrant dismissal, a defendant must demonstrate the
10 government's delay was intentional and purposeful. And this is
11 a quote from *United States v. Comosona*. "More than ordinary
12 negligence on the part of government representatives must be
13 shown, no matter how high the actual proof of prejudice is."

14 So as I say, the understand your equity argument but
15 I've got to follow the law. So you've got to show more than
16 ordinary negligence on the part of the government. You've got
17 to show that the delay was intentional and purposeful.

18 MR. KIRKPATRICK: I understand, Judge.

19 THE COURT: Anything in that regard --

20 MR. KIRKPATRICK: Nothing that hadn't already been
21 said, Judge.

22 THE COURT: Okay. Thank you very much.
23 Mr. Duncombe.

24 MR. DUNCOMBE: Your Honor, just a quick point as to
25 prejudice. I just wanted to state for the record that any

1 prejudice claims would be mitigated by the fact that Monica
2 Gillespie has stated that she would testify at trial and that
3 she remembers that her brother owned that house or leased that
4 house; that Ms. Donaho stated that she was willing to testify,
5 she provided a number of facts that she would be willing to say
6 in Mr. Woodard's defense; that Mr. Woodard stated that he would
7 be willing to testify.

8 And with regard to fading of memories, the officers'
9 memories, of course, have faded since that time, too, and they
10 have investigated, each of them, hundreds of cases since that
11 date. I'm not saying that the defendant's memories haven't
12 faded.

13 But I also wanted to bring up that if Mr. Gillespie had
14 been alive to testify at this trial, his credibility would have
15 been undercut by the fact that his sister admits that he had
16 lied to her and that he had been a convicted felon which the
17 government would have elicited pursuant to Rule 609.

18 So the government is not saying that there's no
19 prejudice from a lengthy delay. The government is saying
20 obviously there's some mitigation to that. But also, as the
21 court has articulated, the standard is it must be purposeful,
22 designed to gain a tactical advantage. Thank you, Your Honor.

23 **THE COURT:** Thank you. Those are good points.
24 However, it impressed the court, as Ms. Gillespie was
25 testifying, that had her brother been alive, a jury would be

1 better able to assess his credibility. Not to say that his
2 credibility couldn't have been undermined by the government,
3 but it's more direct evidence for a jury to assess.

4 So it's all very interesting. But the fact of the
5 matter here is that the defendant doesn't satisfy the
6 requirement of the law in the Tenth Circuit as stated in the
7 *Comosona* case; the *U.S. v. Batie* case, 433 F.3d 1287, page 1293
8 (10th Cir. 2006); and I previously referenced the *Crable* case,
9 which is a district court case, and I cited that earlier today.

10 Simply put, the defendant has not demonstrated that the
11 delay here was intentional and purposeful; specifically, that
12 it was more than ordinary negligence. And with that, the
13 continuing motion to dismiss will be denied with all due
14 respect.

15 Now, how do we intend to proceed from this point?
16 Counsel. Mr. Kirkpatrick, maybe I should turn to you first.

17 **MR. KIRKPATRICK:** Judge, I'm going to need about 30
18 seconds to talk to my client.

19 **THE COURT:** Very well. Very well. We'll take five.

20 *(Discussion held off the record)*

21 **THE COURT:** Mr. Kirkpatrick.

22 **MR. KIRKPATRICK:** Your Honor, I've spoken to my
23 client and he tells me that he does desire to accept the
24 proffered pretrial agreement and we would like to go ahead with
25 that.