Dismissal for Post-

or

The State Never Met a Case It Didn't Like

by Diana Patton

With prosecuting agencies across the nation struggling to keep pace with ever-growing numbers of criminal defendants, the defense bar more frequently is encountering unconscionable delays between charging and actual prosecution of clients. Every criminal defense attorney, particularly in larger counties, likely has encountered post-indictment delay of a year or so. The good news is that delays that stretch into years are not common; the bad news is that when they do occur, they can drag on for six years, eight years, or more.

THEO HAWKINS

Indictment Delay

The Waiting Game

The typical post-indictment delay begins with an arrest or some other form of police detention. The person is released and goes about his business hoping that no charges result from the encounter. Police may or may not submit the incident to prosecutors for charging, and prosecutors may or may not submit the case to the grand jury for indictment. If the grand jury indicts, a summons usually issues and is served on the defendant, ordering him to appear at a certain place and time.

This is the crucial event in a situation of post-indictment delay. If the defendant cannot be served—say, he is homeless or moves frequently—he never is served and thus does not have notice that he is ordered to appear in a court. When he does not appear, a warrant issues for his arrest, and the case essentially is in a holding pattern—possibly for years.

Defense counsel enters the picture when the client is re-arrested years later. You read the police reports and shout into the brittle and yellowing pages, "They can't do that!" But they have. And to make matters worse, your overworked prosecutor has too many new, interesting and serious cases demanding her attention to be overly concerned about your client's arrest seven years ago.

But the U.S. Supreme Court has given you some ammunition with which to bring your client's case to conclusion. You can file a motion to dismiss[1] for post-indictment delay. The Court has delineated four areas of inquiry that your trial judge should weigh when considering your motion to dismiss the indictment: (1) whether delay before trial was uncommonly long; (2) whether the government or the defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as the delay's result.[2] Of the four factors, the length of the delay is the least important factor, and the prejudice the defendant suffers is the most important factor.[3]

How Much Delay Is Too Much Delay?

In *Doggett v. United States*,[4] the defendant was indicted in 1980 on drug charges but went to Panama before the Drug Enforcement Administration (DEA) could arrest him. It later learned that he was imprisoned in Panama and requested that he be returned to the United States. The DEA did not follow through, however, and eventually learned that Doggett had gone to Colombia. In 1982, Doggett returned to the United States, where he acquired a college degree, steady employment and a wife. He lived openly under his true name. A simple credit check, however, again put the government on Mr. Doggett's trail, and he was arrested in 1988—more than eight years after his indictment.

In reversing Doggett's conviction, the Supreme Court discussed the first area of inquiry—whether 8.5 years between indictment and arrest was "uncommonly long." Not surprisingly, the Court concluded that it was, citing *Barker v. Wingo*[5] and holding that a criminal defendant cannot claim a violation of his speedy trial rights if the state has "prosecuted his case with *customary promptness*."[6] The Court also offered the commonsense proposition that, all things being equal, the required showing of prejudice will intensify as the pretrial delay grows longer.[7]

In Arizona, five years' delay has been held to warrant dismissal of the indictment. In *Humble v. Superior Court*, [8] the pivotal issue was whether the state had used due diligence to serve Mr. Humble with notice of his charges. Upon his arrest for DUI, defendant provided the officers with a correct name, current address, social security number, and the name and local phone number of his father. He attended his preliminary hearing, was told his case had been "scratched"[9] and was given no further information. A summons was prepared when the indictment was filed, and the state unsuccessfully attempted to serve the defendant personally at home. The summons also was mailed but was returned as "unclaimed." After these efforts, a warrant was partly drafted but was neither completed nor served.

The State's Duty To Be Diligent

In determining whether Mr. Humble's speedy trial rights had been violated by the passage of five years between indictment and arrest, the court of appeals held that the state's due diligence obligation required a showing that it had followed the "usual investigative procedures for determining the whereabouts of a person."[10] The court held that a mere two attempts to serve the summons even by accepted methods was not due diligence when the state had other "significant leads" to locate Mr. Humble. The court also rejected the excuse that alternative methods were not used because of a shortage of manpower and resources.

In *Doggett*, the Supreme Court reached the same conclusion concerning the DEA's efforts when it knew Mr. Doggett was living abroad. The Court even made the sweeping statement that "if the Government had pursued Doggett with *reasonable diligence* from his indictment to his arrest, his speedy trial claim would fail."[11]

Thus, both the *Doggett* and *Humble* courts held that the state was to blame for the delays rather than the defendants, neither of whom fled prosecution but had lived openly under their true names, right under the government's nose, as it were, while the authorities failed to follow up on known leads.[12]

Did the Defendant Assert His Right to a Speedy Trial?

Of all the factors cited by the *Doggett* court, whether the defendant ever asserted his right receives the least discussion by the majority.[19] However, the dissent addresses it at more length,

and in several ways it concludes that because Mr. Doggett did not assert his right to a speedy trial (as he did not know of the proceedings against him), he could not have suffered prejudice in the form of anxiety about his future, impairment of going about his normal business and so forth.[20] Thus, it is likely—if not completely clear—that both the majority and the dissent can agree on one thing: Assertion of the speedy trial right is bound up in the notion of two other factors: the length of the delay and the prejudice suffered. The two sides merely differ on whether someone who is not aware of his right to a speedy trial can suffer as much prejudice over a long period of time as can someone who is aware he is charged with a criminal offense.[21]

Has the Defendant Suffered By the Delay?

The final consideration in determining whether post-indictment delay mandates dismissal of the indictment is the prejudice suffered by the defendant. The *Doggett* court rejected the notion that a specific or actual prejudice must be shown (e.g., the death of an important witness). The Supreme Court found that "presumptive prejudice" is inherent in undue delay, because it is usually impossible to guess in hindsight what advantages the defendant might have employed at a timely trial: "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify."[13]

In addition to alerting the court to "presumptive prejudice" when seeking dismissal, defense counsel should make the trial judge aware of actual or specific prejudice to the client that justifies dismissal of the indictment. One obvious form of prejudice after a delay of several years is the destruction of evidence.[14] That the destroyed evidence "might" have been exculpatory suffices for dismissal because negligent destruction of critical evidence denies the accused due process whether or not it can be determined that exculpatory evidence would have developed from the destroyed evidence.[15]

It is well settled that "When the state destroys evidence that a defendant has specifically requested be kept, a sanction must be imposed."[16] However, the defendant need not make a specific request when the evidence is of a crucial nature.[17] Arizona courts also are in agreement that the appropriate sanction for destruction of crucial evidence is dismissal.[18]

Aiming for Dismissal With Prejudice

If the defense motion has succeeded either in convincing the state to move for dismissal or the judge to dismiss the indictment, how do you achieve "dismissal with prejudice"? Rule 16.6(d), ARIZ.R.CRIM.PRO., states that dismissal of the indictment, information or complaint "shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice."

The test for "prejudice" is the same imprecise general test as set forth in the four *Doggett* factors, and thus prejudice will increase as the delay lengthens. In determining whether the interests of justice require dismissal of the prosecution, the court should consider the usual pertinent factors, such as whether defendant's right to a speedy trial was violated and any prejudice that resulted.[22] Prejudice that gives the state a tactical advantage may be more serious than that which results from negligence or understaffing.[23] Even the anxiety and inconvenience to a defendant should be considered. For example, a defendant may be fired or passed over for raises or promotions if he has taken time off work to attend court appearances, or he simply may face obstacles in getting to court and then find that the state has secured another continuance.[24] Presenting all the prejudice sustained by a defendant will give the trial judge the ammunition she needs to justify putting a silver stake in an already dead case.

Conclusion

Years and years of delay between indictment and prosecution are unconscionable. But both in Arizona and elsewhere, extreme delay may warrant dismissal of the indictment. The courts' message is clear: If

the government cannot or will not diligently prosecute a case, it must be persuaded or be forced to dismiss and to concentrate instead on those cases that it will prosecute promptly. Dead cases clutter an already strained system, and the lives of defendants, victims and witnesses should not be put on hold indefinitely simply because the government never met a case it didn't like.

Diana Patton is a trial lawyer with the Maricopa County Office of the Legal Defender.

ENDNOTES

1. Rule 16.6(b), ARIZ. R.CRIM.PRO., reads, "The court, on motion of the defendant, shall order that a prosecution be dismissed upon finding that the indictment, information, or complaint is insufficient as a matter of law" [emphasis added].
2. *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 2690 (1992), *quoting Barker v. Wingo*, 407 U.S. 514, 530 (1992). *See also State v. Kangas*, 704 P.2d 285 (Ariz. Ct. App. 1985); *State v. Granados*, 837 P.2d 1140 (Ariz. Ct. App. 1991); and *State v. Gilbert*, 837 P.2d 1137 (Ariz. Ct. App. 1991).
3. *Kangas*, 704 P.2d at 285; *Granados*, 837 P.2d at 1140; *Gilbert*, 837 P.2d at 1137.
4. 505 U.S. 647, 112 S. Ct. 2686, 2689 (1992).
5. 407 U.S. 514 (1992).
6. *Barker v. Wingo*, 407 U.S. at 533-534 [emphasis added].
7. *Barker v. Wingo*, 407 U.S. at 536.
8. 880 P.2d 629 (Ariz. Ct. App. 1993)
9. A term that to the client can mean anything from "continued" to "dismissed forever" and that causes endless confusion and failures to appear.
10. 880 P.2d at 634, *quoting Duron v. Fleishman*, 751 P.2d 39, 42 (Ariz. Ct. App. 1988).
11. 505 U.S. at 656 [emphasis added].
12. The *Humble* court pointed out that the state had the name of defendant's employer, who was listed in the phone book; the name and phone number of the defendant's father; and a residential address. In addition, no effort was made to trace his social security number.
13. 505 U.S. at 656.
14. For example, in *State v. Richard Smith*, CR 94-02985, the evidence facility destroyed the drug evidence after the co-defendant—also named Smith—entered his guilty plea. Thus, not only was Richard Smith deprived of the opportunity to test the substances' chemistry, but he could not objectively prove that the weights were below the threshold—the difference between prison and probation. Ultimately the prosecutor moved to dismiss in response to defense motions.
15. *State v. Hannah*, 583 P.2d 888 (Ariz. Ct. App. 1988) (police inadvertently destroyed evidence that was not requested by defense counsel until shortly before the trial date).
16. *State v. Lopez*, 754 P.2d 300, 302 (Ariz. Ct. App. 1988) (state destroyed tape recordings requested by defendant only three days after his arrest).
17. *Lopez*, 754 P.2d at 303.
18. *Lopez*, 754 P.2d at 303; *see also State v. Escalante*, 734 P.2d 597 (Ariz. Ct. App. 1986) (state failed to preserve semen samples in a rape case in which the victim was unsure about identification).
19. 505 U.S. at 651-652, 112 S. Ct. at 2690-2691.
20. 505 U.S. at 659-661, 112 S. Ct. at 2695-2700.
21. 505 U.S. at 653, 112 S. Ct. at 2691.
22. *Kangas*, 704 P.2d at 285; *see also State v. Garcia*, 823 P.2d 693 (Ariz. Ct. App. 1991); *Gilbert*, 837 P.2d at 1137; and *Granados*, 837 P.2d at 1140.
23. *Garcia*, 823 P.2d at 695.
24. In *State v. Richard Smith*, CR 94-02985, the client had been arrested and re-arrested so many times while the state tried to salvage its case that he confided he was frightened to attend his court appearances—he never knew whether he would be arrested again for reasons he never fully understood.