

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT
OF JUSTICE
SUPERIOR COURT DIVISION



STATE OF NORTH CAROLINA

v.




Defendant.

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MOTION TO DISMISS;
REQUEST FOR HEARING

States Constitution, Article I, Section 19, of the North Carolina Constitution, and N.C.G.S. §15A-954(a)(4), and hereby moves to dismiss this case due to pre-accusation delay that has violated his Due Process rights and prejudiced his ability to defend against the charge in this case. The Defendant requests a hearing on this motion.

The Defendant is charged with the August 19, 1992, murder of  Sr., at the Servco station on West Trade Street in Charlotte. The factual basis for this motion, as will be discussed in more detail below, is that the State had identified and interviewed the Defendant as a suspect in this case back in September, 1992. However, the State waited ten years to charge him with the murder. The Defendant was arrested on October 31, 2002 and charged with the murder. He has remained in continuous pretrial custody since being arrested. He was indicted on November 18, 2002. The Charlotte-Mecklenburg Police Department claimed to have "solved" the case through new evidence obtained, but in actuality the case sat dormant for many years not because the police

believed they had insufficient evidence to charge the Defendant and not because the police were investigating the case to develop more evidence. Rather, the case sat dormant because the assigned investigator believed the case against the Defendant had been taken by the federal authorities for prosecution. The "cold case" unit merely interviewed witnesses that were not, but should have been, interviewed back in 1992 and thereafter decided to pursue prosecution in state court after all. The Defendant has now been in continuous pretrial custody for over 26 months awaiting trial in this case.

The Law of Pre-Accusation Delay

A defendant is protected from unfair or excessive pre-accusation delay by the Due Process clause of the Fifth and Fourteenth Amendments. See United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.ed.2d 752 (1977); United States v. Marion, 404 U.S. 307 (1971). A defendant's Due Process rights can be violated where a defendant can demonstrate prejudice, i.e., that his ability to defend against the charge is impaired by pre-indictment delay and the reason for the delay is improper. See United States v. Lovasco, supra.

Assuming that prejudice has been shown by a defendant, then the court will look at the reason for the pre-accusation delay. Generally, for a due process violation to be found, the delay must have been either intentional, the result of gross negligence, or the result of deliberate indifference, rather than the result of legitimate investigation. See United States v. Lovasco, supra. Generally, where pre-accusation delay is attributable to the exigencies of investigation, the courts have not found a violation of due process. See United States v. Lovasco, supra; see State v. Goldman, 311 N.C. 338, 317 S.E.2d 361 (1984).

In State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969), the North Carolina Supreme Court found that the defendant's Due Process rights were violated by a four to five year delay in prosecuting the defendant where the prejudice was that the pre-accusation delay caused the defendant to serve a prison term that might otherwise have run concurrently with an earlier sentence and the state's reason for the delay was to pressure the defendant to name an unidentified accomplice. In Howell v. Barker, 904 F.2d 889 (4th Cir.), cert. denied, 498 U.S. 1016 (1990), the U.S. Court of Appeals for the Fourth Circuit considered a claim of due process pre-accusation delay in a state prosecution in North Carolina. In that case, the court held that a defendant is not obligated to prove improper prosecutorial motive for the delay—instead, the court applied a balancing test between the prejudice and the reason for delay and found a violation of Due Process where the state conceded that a delay of several years in prosecuting the defendant was negligent and not caused by investigation and where prejudice had been stipulated by the parties. Howell v. Barker, supra, 904 F.2d at 895.

N.C.G.S. Section 15A-954 provides, in pertinent part, as follows:

(a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:

.....

(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

Therefore, this Honorable Court is empowered to dismiss the case against the Defendant upon its finding that the Defendant's trial defense has been prejudiced by unfair and excessive pre-accusation delay and that there is insufficient justification for the State's delay.

The Facts of This Case

On August 19, 1992, [REDACTED] was shot and killed while pumping gas at a gas station on West Trade Street in Charlotte.

Defendant was identified as a suspect and interviewed by the Charlotte-Mecklenburg Police Department on September 4, 1992. According to police reports, he told police that on the day of the incident he fired the gun once into the ground before Codefendant [REDACTED] fired the gun. Codefendant [REDACTED] was also interviewed on September 4, 1992, and told police that he was shooting the gun on the night in question but claimed that the Defendant had actually fired the shot that killed the victim. A police report, summarizing the status of the case, indicated that "[t]he day after the incident both Defendants were interviewed and both admitted to firing the gun." See Exhibit A. Additionally, the police had interview [REDACTED] back on September 9, 1992, who claimed that the Defendant had admitted shooting the victim. See Exhibit D. Thus, although the Defendant denies the truth of the above information, the police had the foundation of a case against [REDACTED] and the Defendant within a month of the shooting back in 1992.

Despite the above information, Charlotte-Mecklenburg Police took no further investigative or prosecutorial action. According to a police report, the case was allowed to go dormant by Detective [REDACTED] who told Detective [REDACTED] that "he didn't clear the case out or take it to the District Attorney because he was under the impression the Federal Government was going to prosecute the suspects with the 'Posse' gang." See Exhibit B.

The State took no further investigative or prosecutorial action on this case for nine years. On April 18, 2001, the case was "reassigned" to Detective [REDACTED] of the "cold case" unit. Still, however, it appears that nothing was done to investigate the case for another eighteen months until October 10, 2002, when Detective [REDACTED] obtained the file and reopened it. This was apparently done in response to a statement obtained that date from [REDACTED] an alleged witness who was apparently not interviewed back in 1992 and who was now looking for a downward departure on his federal sentence. He made a statement to the police claiming that he was present when the shooting occurred, that [REDACTED] had provided the gun, and that [REDACTED] was the one who had actually fired the shot that killed the victim.

However, the police also interviewed [REDACTED] on October 21, 2002. He denied [REDACTED] claim that he had provided the gun. Interestingly, he too had never been contacted or interviewed in 1992. He was asked during his interview why he had not said anything about the incident back in 1992 and his response was as follows: "Didn't nobody ever come to me. I ain't never got asked anything about it. This is . . . y'all the first people that actually came and asked me anything about it." See Exhibit C. This further demonstrates that the police failed to conduct a thorough investigation back in 1992.

The police reports indicate that both the Defendant and Codefendant [REDACTED] [REDACTED] admitted in their 1992 interviews that they fired the gun on the day of the incident that took place in 1992. Additionally, the police even had a witness, [REDACTED] who claimed to them on September 9, 1992, that the Defendant admitted shooting the victim. See Exhibit D. Yet no further investigation or prosecution was pursued back in 1992.

However, police reports from 2002 now claim that four witnesses have come forward and given statements that are supposedly consistent with each other stating that each defendant fired the gun about three to six times and that [REDACTED] is the person directly responsible for killing the victim. See Exhibit A. This hardly makes the case stronger against this Defendant when compared to the state of the evidence back in 1992. If anything, it strengthens the case against Codefendant [REDACTED] not this Defendant. Additionally, there is no justification for why the police did not locate and interview all these witnesses back in 1992 instead of shelving the investigation. As stated by "new" alleged eyewitness [REDACTED] during her October 31, 2002 interview, she was not contacted or interviewed by any police officers back in 1992. See Exhibit E.

Thus, the State, since reopening the investigation in 2002, has essentially not uncovered any significant new evidence against this Defendant that it did not have (or should not have developed) in 1992. Any "new" evidence implicates Codefendant [REDACTED] not this Defendant. There is no good reason for the delay in indicting this Defendant. The basis for the delay is simply gross negligence on the part of the Charlotte-Mecklenburg Police Department. The assigned detective simply put the case on the back burner in 1992, assuming the federal government would prosecute, and the case was forgotten for at least nine years. This constitutes no legal justification for a ten-year delay in indicting the Defendant.

This ten-year delay has prejudiced the Defendant's defense against the charge in this case. When the police contacted him and interviewed him on October 22, 2002, more than 10 years after the incident and his original interview, his ability to remember the events of August 19, 1992, was diminished by the passage of 122 months. According

to police reports, the Defendant told police on October 22, 2002, that he could not remember much regarding the 1992 incident. When asked by Detective [REDACTED] about the 1992 shooting at the Servco Station on West Trade Street, the Defendant "said it had been a long time ago and that he did not remember a whole lot about it." According to Detective [REDACTED] report, the Defendant told him that he did not remember the information that he had provided to police ten years earlier. See Exhibit F.

The Defendant has been continuously incarcerated awaiting trial ever since his arrest on October 31, 2002. Thus, he has now been in jail for more than 26 months waiting for trial. The preparation of his defense has been prejudiced by the ten-year delay in indicting him. His memory of the events of August 19, 2002, cannot be as good as it was in 1992. The defense has been unable to locate certain known eyewitnesses and interview them and subpoena their presence for testimony at trial. Waiting ten years to indict a man for murder, subjecting him to more than two years of pretrial incarceration, and then forcing him to defend his alleged actions on a single night twelve years earlier, is unfair and a denial of due process, especially when his ability to defend against the charge has been harmed by the delay.

The State has no justification for the delay. Police reports demonstrate that the only reason for the delay was the grossly negligent shelving of the investigation back in 1992. This unjustified delay has prejudiced the Defendant's ability to defend himself against the charge in this case. Therefore, the charge against the Defendant should be dismissed.

January 7, 2005

Respectfully submitted,

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