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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD HOLMAN,

Defendant and Appellant.

B276649

(Los Angeles County
Super. Ct. No. BA432938)

APPEAL from a judgment of Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Harold Holman was charged on August 4, 2015, and convicted on July 13, 2016, of a first degree murder committed on August 27, 1972. Defendant beat the 79-year-old victim to death in her home. On appeal from the judgment, defendant argues the nearly 43-year precharging delay prejudiced his ability to defend himself in violation of his fair trial and due process rights under the federal and state Constitutions (U.S. Const., Amends. 5, 14; Cal. Const., art. I, § 15.) We conclude the trial court did not abuse its discretion when it denied defendant's motion to dismiss on those grounds. Accordingly, we affirm the judgment.

II. THE APPLICABLE LAW

Our Supreme Court set forth the applicable law in *People v. Cowan* (2010) 50 Cal.4th 401, 430-431: "The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. [Citations.] Such prearrest or precharging delay does not implicate the defendant's state and federal speedy trial rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), as those rights do not attach until a defendant has been arrested or a charging document has been filed. [Citation.]"¹

¹ Defendant relied in part on his speedy trial rights in support of his motion to dismiss.

“When, as here, a defendant does not complain of delay after his arrest and charging, but only of delay between the crimes and his arrest, he is ‘not without recourse if the delay is unjustified and prejudicial. “[T]he right of due process protects a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” [Citation.] Accordingly, “[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.” [Citation.]’ [Citation.]

“Prejudice may be shown by “loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.” [Citations.] And although the federal constitutional standard for what constitutes sufficient justification for delay is unclear [citation], we have noted that ‘the law under the California Constitution is at least as favorable for defendant in this regard’ as federal law. [Citation.] Accordingly, . . . we apply California law here.

“Under the California standard, ‘negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. This does not mean, however, that whether the delay was purposeful or negligent is irrelevant.’ [Citation.] Rather, ‘whether the delay was negligent

or purposeful is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.’ [Citation.] The justification for the delay is strong when there is ‘investigative delay, nothing else.’ [Citation.]^[2]

“We review for abuse of discretion a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation].”

III. BACKGROUND

In 2014, Los Angeles Police Department “cold case” homicide detectives submitted evidence from the murder scene for DNA analysis and discovered that semen detected on the victim’s bedding matched defendant’s DNA. Defendant had the initial burden to demonstrate prejudice. (*People v. Cordova* (2015) 62 Cal.4th 104, 119; *People v. Abel* (2012) 53 Cal.4th 891, 908-909.) Prejudice is not presumed. (*People v. Cordova, supra*, 62 Cal.4th at p.119; *People v. Abel, supra*, 53 Cal.4th at pp. 908-909.)

In support of his motion to dismiss, defendant argued: His DNA was added to CODIS, the Combined DNA Index System, in 2002 but the police did not submit DNA from the murder scene for analysis until 2012, a 10-year delay; if the DNA from the

² Defendant at no time asserted the delay was purposeful.

murder scene had been tested earlier, defendant's United States Postal Service (USPS) employment records might have provided an alibi defense. Further, "The prejudice to the defense resulting from the delay in testing the evidence is substantial. Although the USPS records obtained by the defense indicate [defendant] was employed full-time by the USPS at least from June through December of 1972, any records indicating the exact dates and times of his employment have been destroyed or lost. Without these specific records related to [defendant's] work schedule on the date of the crime, he cannot present any alibi defense."

Defense counsel filed a declaration in support of the motion stating in part: "In 2015, the defense attempted to secure copies of [defendant's] employment records from the [USPS]. At the time of the 1972 crime, [defendant] worked the so-called 'graveyard' shift as a mail handler. The defense received a response from the USPS that the only employment records available were 'Quarterly Individual Earnings Records' spanning the months of June, September, and December of 1972. [¶] . . . The defense determined that these records do not provide information about [defendant's] specific hours worked regarding precise dates and times. Therefore, the defense is unable to present an alibi defense for [defendant] during the estimated time period during which the crime occurred."

At the hearing on defendant's motion, defense counsel advised the court USPS was unable to tell her how long employment records would have been retained or when they were destroyed. Following argument, the trial court reasoned that even if the records showed defendant was working he could still leave work and commit the crime. It then denied defendant's

motion to dismiss but without prejudice to renewing it at a later time. Defendant did not renew his dismissal motion.

IV. DISCUSSION

The Attorney General supports his arguments on appeal by reference to trial testimony. However, defendant brought his dismissal motion prior to trial. As noted above, although expressly permitted to do so, defendant did not renew his motion. We asked the parties to brief the question whether this court should consider only the evidence that was before the trial court when it ruled on defendant's motion, or could the asserted abuse of discretion be determined in the context of subsequent developments at trial? Each of them responded to this inquiry. We conclude we may consider only the evidence that was before the trial court when it ruled on defendant's motion. (*People v. Cowan, supra*, 50 Cal.4th at p. 431; *People v. Catlin* (2001) 26 Cal.4th 81, 110-111; *People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.) As our Supreme Court explained in *In re Zeth S.* (2003) 31 Cal.4th 396, 405, "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment [or order] as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]"

Defendant did not meet his prejudice burden. There was no evidence USPS records showing "specific hours worked regarding precise dates and times" ever existed. There was no evidence defense counsel ever specifically asked whether such records had ever existed. There was no evidence such records would have been available to defendant had he been earlier

charged and requested them. Even if such records were available and had been produced, they would at best have been some circumstantial evidence of a possible alibi. Defendant's prejudice showing was purely speculative. (See *People v. Cordova, supra*, 62 Cal.4th at p. 120; *People v. Cowan, supra*, 50 Cal.4th at p. 432.) The trial court did not abuse its discretion when it denied his motion to dismiss.

V. DISPOSITION

The judgment is affirmed.

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LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.