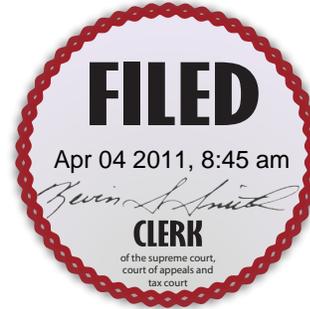


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT ARNOLD, )

Appellant-Defendant, )

vs. )

No. 49A04-1008-CR-510

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patricia J. Gifford, Judge  
Cause No. 49G06-0908-FA-76930

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**April 4, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Robert Arnold (Arnold) appeals from his conviction after a jury trial of two counts of class A felony Child Molesting.<sup>1</sup> He raises the following issue for our review: Did the trial court abuse its discretion by denying Arnold's motion to dismiss the charges against him for excessive pre-charge delay?

We affirm.

Between 2000 and 2001, when C.H. was seven years old, she spent a great deal of time at her grandparents' house. Arnold was married to C.H.'s grandmother, and C.H. considered him to be her grandfather. Arnold touched C.H. inappropriately three times when she was seven years old. Arnold told C.H. not to tell anyone about the incidents or they would both be in trouble. Sometime in 2001, when C.H. and her two young cousins were spending the night at Arnold's house, C.H. told her cousins about the incidents of abuse. The rest of the family soon learned about C.H.'s claims and a family meeting was held involving C.H.'s mother, father, stepfather, and grandmother. Arnold left the home. C.H. was examined at a hospital and C.H.'s mother reported the abuse to law enforcement officials. Detective Juanita Carter of the Marion County Sheriff's Department investigated the incidents, and C.H. was interviewed by a caseworker for Child Protective Services. No charges were filed against Arnold at that time.

In August 2009, Indianapolis Metropolitan Police Sergeant Jan Faber became involved in the investigation and contacted C.H.'s mother. Sergeant Faber interviewed C.H., her mother, her grandmother, and her aunt, who was the mother of the cousins to whom C.H. had initially reported the abuse. After Sergeant Faber completed her investigation, she was

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<sup>1</sup>Ind. Code Ann. § 35-42-4-3 (West, Westlaw current through 2010 2<sup>nd</sup> Reg. Sess.).

given a copy of the file from Detective Carter's initial investigation in 2001. In the file were notations indicating that the CPS interview of C.H. had been videotaped and that the tape had been given to Detective Carter. No medical records were contained in the file, and the videotape was not in the file. Sergeant Faber had no contact with Detective Carter, who had since retired, or the prosecutor who made the initial decision not to file charges.

On August 31, 2009, the State charged Arnold with two counts of child molesting as class A felonies. On June 14, 2010, Arnold filed a motion to dismiss pursuant to Ind. Crim. Rule 4(D), which the trial court denied. Arnold filed an amended motion to dismiss based on pre-indictment delay on July 15, 2010, which was denied after a hearing. At the conclusion of his jury trial, Arnold was found guilty as charged. The trial court sentenced Arnold to the Department of Correction for concurrent terms of thirty years. Arnold now appeals.

Arnold claims that the trial court abused its discretion by denying his motion to dismiss, both prior to and during the trial, and alleges that he was denied due process. More specifically, Arnold claims that the length of time between the commission of his offenses and the filing of charges against him was excessively long and in violation of the Due Process Clause of the Fifth Amendment.

A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. *Ingram v. State*, 760 N.E.2d 615 (Ind. Ct. App. 2001). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances. *Id.* Arnold had the burden of proving his claims supporting his motion to dismiss by a preponderance of the evidence. Ind. Code Ann. § 35-34-1-8(f) (West, Westlaw current through 2010 2<sup>nd</sup> Reg. Sess.). Arnold was unsuccessful in meeting his burden of proof

pertaining to his motion to dismiss and now appeals from a negative judgment. The trial court's denial of Arnold's motion will be reversed only if the evidence is without conflict and leads inescapably to the conclusion that Arnold was entitled to dismissal. *Lewis v. State*, 755 N.E.2d 1116 (Ind. Ct. App. 2001).

“The Due Process Clause of the Fifth Amendment protects defendants against excessive pre-indictment delay.” *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008). A charge filed within the appropriate statute of limitations will be considered timely in most instances. *Schiro v. State*, 888 N.E.2d 828. In the present case, Arnold was charged in 2009 with two class A felony child molestation offenses from 2000 or 2001. The prosecution of class A felony offenses may be commenced at any time. Ind. Code Ann. § 35-41-4-2(c) (West, Westlaw current through 2010 2<sup>nd</sup> Reg. Sess.). In particular, charges for child molestation must be filed before the victim reaches thirty-one years of age. I.C. § 35-41-4-2(e)(1). C.H. was sixteen years old when the charges against Arnold were filed. Thus, the charges were filed well within the statute of limitations period.

If the State purposefully uses the delay to improve its position by weakening that of the defense, however, or otherwise impairs a defendant's right to a fair trial, an unusually lengthy pre-indictment delay may be found to violate a defendant's due process rights. *Schiro v. State*, 888 N.E.2d 828. In order to obtain relief, the defendant must first demonstrate that he suffered actual and substantial prejudice to his right to a fair trial. *Allen v. State*, 813 N.E.2d 349 (Ind. Ct. App. 2004). If the defendant successfully makes that showing, he must then demonstrate that the State had no justification for the delay. *Id.* In other words, the defendant must establish that the State delayed the indictment to gain a

tactical advantage or for some other impermissible reason. *Schiro v. State*, 888 N.E.2d 828. Arnold must prove that the particular circumstances of his case demonstrate that the delayed but timely-filed charges violated due process. *Patterson v. State*, 495 N.E.2d 714 (Ind. 1986).

“The mere passage of time is not presumed to be prejudicial, and to satisfy the threshold burden of prejudice, a defendant must make specific and concrete allegations of prejudice that are supported by the evidence.” *Allen v. State*, 813 N.E.2d 349, 366 (Ind. Ct. App. 2004) (citing *United States v. Spears*, 159 F.3d 1081 (7<sup>th</sup> Cir. 1998)). Here, Arnold argues that the loss of the videotaped interview of C.H. prejudiced him in that the statement “may have contained statements regarding time and place of the events” and “may have . . . [been] tantamount to a recantation.” *Appellant’s Brief* at 9. Beyond those assertions, Arnold has offered no testimony, affidavits, depositions, or other evidence to support his claim that the contents of the videotape contained potentially exculpatory evidence. We continue to reject this type of argument as speculative. *See, e.g., Allen v. State*, 813 N.E.2d 349 (mere allegation that the passage of time impaired the witnesses’ memories is not sufficient to establish prejudice); *Johnson v. State*, 810 N.E.2d 772 (Ind. Ct. App. 2004) (defendant failed to support his claim of prejudice from the thirteen-year delay between the commission of the offense and the filing of charges by doing no more than allege that potentially important witnesses had died in the interim).

Arnold has presented no evidence to support his allegation of prejudice. He had the opportunity to prepare for C.H.’s testimony by deposing her prior to trial and took advantage of that opportunity. C.H. testified at trial and could not remember the CPS interview. C.H.

testified about the circumstances surrounding the molestations, and Arnold was able to challenge her allegations, credibility, and memory of the events during cross-examination. Further, the file from the 2001 investigation contained detailed notes regarding the videotaped CPS interview and C.H.'s allegations. During discovery Arnold was given two pages of notes handwritten by the CPS caseworker, one page of Detective Carter's notes, the Marion County Sheriff's Department's case report, and a CPS report, among other documents. None of that information suggests the existence of exculpatory evidence in the missing videotape of the CPS interview.

Arnold asks us to draw an inference from the State's decision to decline to file charges in 2001 that the videotape of the CPS interview contained exculpatory evidence. The record does not allow us to draw that inference as many other explanations for that decision are possible, e.g., lack of proper investigation early on, C.H.'s youth and inability to articulate the events in detail at that time, or C.H.'s reluctance to testify against Arnold. We will not engage in speculation one way or the other. Arnold has failed to meet his burden of showing actual and substantial prejudice to his right to a fair trial. The trial court did not abuse its discretion by denying Arnold's motion to dismiss.

Had we concluded otherwise, Arnold's claim would fail nonetheless, as he has also failed to establish that the State delayed filing the charges against him for an unjustifiable reason. We have stated:

A prosecutor's belief that further investigation is warranted to solidify a case is a reason for a pre-indictment delay. It is proper for a prosecutor to delay filing charges until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt.

*Schiro v. State*, 888 N.E.2d at 837 (internal citations omitted). Prosecutors are vested with broad discretion in deciding whether and when to prosecute, among other things. *State v. Sagalovsky*, 836 N.E.2d 260 (Ind. Ct. App. 2005). The record reflects that the State's case was potentially damaged as much if not more than Arnold's case was damaged due to the delay. Had the State been in possession of the missing videotaped interview, it is just as likely that the consistent prior statement could have bolstered the State's case. Because of the delay in filing, Arnold was able to bring to the jury's attention C.H.'s difficulty in remembering more specific details involving the timing of events. Arnold has failed to show that the State's delay in filing the charges was inexcusable.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.