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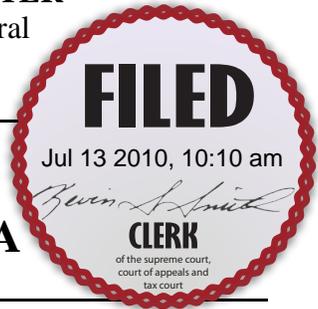
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**IN THE
COURT OF APPEALS OF INDIANA**

ANDY ZULU,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0911-CR-1113

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0907-FB-64993

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Andy Zulu appeals his convictions and sentences for rape¹ and criminal deviate conduct,² each as a Class B felony, raising the following restated issues:

- I. Whether the trial court erred when it denied Zulu's motion to dismiss due to untimely prosecution; and
- II. Whether Zulu's sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of June 7, 2003, after parking her car in one of the Circle Center Mall parking garages in Indianapolis, Indiana, R.P. and her friend, Nicole, walked to Have A Nice Day Café ("Café"). At the Café, R.P. met Zulu for the first time on the dance floor. After dancing with R.P., Zulu gave her a drink that made her legs feel like "Jello." *Tr.* 229-30.

When the Café closed, Zulu accompanied R.P. and Nicole to R.P.'s parked car where Zulu placed himself next to R.P. in the back seat of the car and remained there despite Nicole's request that he get out. After about fifteen minutes of argument with Zulu, Nicole drove to her mother's house with Zulu and R.P. in the back seat of the car. While Nicole went inside the house to speak with her mother, Betty, Zulu inserted his finger and penis into R.P.'s vagina. Zulu then exited the car and walked away.

After Zulu left, Betty helped R.P. ("victim") into her house and then called the police, who came and took statements. The victim was taken to a hospital where a sexual

¹ See Ind. Code § 35-42-4-1.

² See Ind. Code § 35-42-4-2.

assault nurse-examiner took samples to complete a rape kit.

Indianapolis Metropolitan Police Detective Michelle Floyd, who was assigned to investigate Zulu's crimes, had items in the victim's rape kit tested and sent for DNA analysis in 2003. *Tr.* at 286. A DNA profile of a then-unknown male was made from a DNA sample recovered from the victim. This DNA profile was then entered into the Combined DNA Index System (CODIS), a national DNA database, in 2004. *Tr.* at 571-72. In 2009, Zulu was convicted of another crime, and a DNA sample from Zulu was entered into CODIS for the first time. In May of 2009, the State was notified that CODIS had identified Zulu as a match for the unknown male's DNA. *Tr.* at 197-98, 313, 572.

On July 16, 2009, the State charged Zulu with rape and criminal deviate conduct. On September 18, 2009, Zulu filed a motion to dismiss due to untimely prosecution, which was denied by the trial court. Zulu was convicted as charged. The trial court sentenced Zulu to ten years for rape and ten years for criminal deviate conduct and ordered the sentences to be served concurrently. Zulu now appeals.

DISCUSSION AND DECISION

I. Motion to Dismiss

a. Due Diligence

Zulu argues that the trial court erred when it denied his motion to dismiss due to untimely prosecution. Specifically, Zulu contends that the State failed to bring the charges against him within the five-year statute of limitations set forth in Indiana Code section 35-41-4-2(a)(1) and that through the exercise of due diligence, the State could have discovered sufficient evidence to charge him within the statutory period.

Our standard of review for a motion to dismiss is abuse of discretion. *Zitlaw v. State*, 880 N.E.2d 724, 728 (Ind. Ct. App. 2008). In reviewing a trial court's decision for an abuse of discretion, we reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Indiana Code section 35-41-4-2 states in part:

(a) Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced:

(1) within five (5) years after the commission of the offense, in the case of a Class B ... felony;

(b) A prosecution for a Class B... felony that would otherwise be barred under this section may be commenced within one (1) year after the earlier of the date on which the state:

(1) first discovers evidence sufficient to charge the offender with the offense through DNA (deoxyribonucleic acid) analysis; or

(2) could have discovered evidence sufficient to charge the offender with the offense through DNA (deoxyribonucleic acid) analysis by the exercise of due diligence.

Ind. Code § 35-41-4-2.

Zulu's offenses occurred on June 7, 2003, and charges were brought against him for those offenses on July 16, 2009. As a result, the charges would be barred by subsection (a) unless the exception described in subsection (b) applies. It is the State's burden to prove that the crime charged was committed within the statute of limitations. *State v. Lindsay*, 862 N.E.2d 314, 317 (Ind. Ct. App. 2007), *trans. denied*. Any exception to the limitation period in a statute of limitations must be construed narrowly and in a light most favorable to the accused. *Thakkar v. State*, 613 N.E.2d 453, 457 (Ind. Ct. App. 1993).

Zulu claims that the State completed its investigation in 2004 and did nothing

more until it filed charges in 2009. In short, Zulu asserts that the State has not shown when identification sufficient to bring charges could have been made, but only when it was made. Thus, Zulu contends that the exception described in Indiana Code section 35-41-4-2(b) does not apply in the current case. We disagree.

The State filed charges within the one-year extension provided by Indiana Code section 35-41-4-2(b). After pursuing several leads with little or no success, Detective Floyd had the items in the rape kit tested and sent for DNA analysis in 2003. A DNA profile of a then-unknown male was made from a DNA sample recovered from the swabs taken from the victim. This DNA profile was then entered into CODIS, a national DNA database, in 2004. Zulu stipulated to the fact that a DNA sample taken from him was first entered into CODIS in 2009 pursuant to his conviction for a different crime. In May of 2009, the State was notified that CODIS had turned up a match for the unknown male's DNA, which was Zulu. On July 16, 2009, the State charged Zulu with rape and criminal deviate conduct. These facts are sufficient to support the trial court's determination that the State by the exercise of due diligence could not have discovered the DNA evidence sufficient to charge Zulu with the offense until 2009. Well within a year of learning Zulu's identity through DNA analysis, the State brought charges against him in accordance with Indiana Code section 35-41-4-2(b).

b. Due Process³

³ Zulu also claims a violation of his right to a speedy trial under Article I, Section 12 of the Indiana Constitution. However, Zulu has waived this claim of error for appellate review because he did not raise this argument prior to his appeal. *Gill v. State*, 730 N.E. 2d 709, 711 (Ind. 2000) ("It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal.").

Next, Zulu argues that the State's delay in charging him resulted in the denial of due process. Specifically, Zulu claims that he was denied due process because two pieces of evidence were unavailable at his trial because of the delay: 1) a videotape from a security camera in the parking garage where Zulu entered the victim's car that may have been probative as to whether Zulu's behavior at that time was amicable or a prelude to rape; and 2) a recording of the 911 call made by Betty following the rape that could have clarified conflicting testimony as to who asked Betty to make the 911 call.

In order to obtain relief in a pre-indictment delay situation, a defendant must first show actual and substantial prejudice to his right to a fair trial. *Allen v. State*, 813 N.E.2d 349, 366 (Ind. Ct. App. 2004). Should a defendant overcome that burden, he must then demonstrate that the State had no justification for the delay. *Id.* The defendant must show that the State delayed in order to gain a tactical advantage or for some other impermissible reason. *Marshall*, 832 N.E.2d at 626.

The mere passage of time between the commission of the crime and an indictment is not presumed to be prejudicial to a defendant. *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008). To satisfy the threshold burden of prejudice, a defendant must make specific and concrete allegations of prejudice from the delay that are supported by the evidence. *Id.*

Zulu has failed to show actual and substantial prejudice to his right to a fair trial. Although Zulu claims that the parking garage security tape "might" have shown amicable behavior between himself and the victim when they entered the car, he does not explain how, even if true, it would be probative of his criminal acts upon leaving the parking

garage. Moreover, the fact that there was a discrepancy in the testimony of two of the State's witnesses concerning Betty's 911 call was not prejudicial to Zulu, because that discrepancy was brought out during the trial. Finally, Zulu makes no argument that the State delayed in order to gain a tactical advantage or for some other impermissible reason. Therefore, Zulu failed to establish that the State's delay in charging him violated his right to due process.

II. Sentencing

Zulu next argues that his sentence is inappropriate. We have authority to revise a sentence authorized by statute if we find it to be inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). We give "due consideration" to the trial court's decision. *Id.* The burden is on the defendant to persuade us that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007).

Regarding the nature of the offenses, Zulu acknowledges the seriousness of his crimes. However, Zulu suggests that his crimes were not as serious as they could have been, because they were not well-planned and calculated. Furthermore, Zulu points out that there was no scientific evidence to support the victim's contention that Zulu gave her a tainted drink at the Café. Regarding the character of the offender, Zulu describes his exemplary work record, devotion as a father, prompt and generous support payments, and service to his girlfriend's family. However, Zulu does have a prior criminal history, which consisted of a felony and two misdemeanor convictions. The trial court sentenced Zulu to an advisory ten-year sentence for each of his Class B felony convictions and

ordered the sentences to be served concurrently. Zulu has failed to show that his ten-year executed sentence for his rape and criminal deviate conduct convictions is inappropriate in light of the nature of the offenses and the character of the offender.⁴

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.

⁴ Zulu suggests as part of his 7(B) argument that his imminent deportation by the Immigration and Naturalization Service ought to affect our review of his sentence. We decline to consider this argument because it is unrelated to either the nature of the offenses or the character of the offender.