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DEPUTY CLERK OF COURT

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
) Plaintiff,)
))
) vs.)
))
ALFRED FLORES,)
))
) Defendant.)
)

Criminal Case No. 92-197
OPINION AND ORDER

The Defendant, Alfred Flores, moves to dismiss with prejudice the criminal charges against him pursuant to: (1) Article I, § 4(d) of the C.N.M.I. Constitution; (2) Article I, § 5 of the C.N.M.I. Constitution; and (3) Rule 48 of the Commonwealth Rules of Criminal Procedure.

I. FACTUAL BACKGROUND

In October or November of 1989, it is alleged that the Defendant "unlawfully engaged in sexual contact with a child under the age of 16 years who was not his spouse, . . ." This incident was not reported to the Division of Youth Services (hereinafter "DYS") until May 7, 1992.

During June of 1992, DYS investigated the matter. DYS questioned the victim, the Defendant, and other family members, and brought the victim to the Commonwealth Health Center for a medical

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examination. During the course of its investigation, DYS learned that the victim and the victim's mother were apprehensive about having the Government file charges against the Defendant because of the effect it would have on the family. The victim's mother was concerned about publicity relating to the case. On June 30, 1992, DYS informed the Attorney General's Office of the incident.

Throughout August of 1992, the victim and her parents received counselling services.

II. PROCEDURAL HISTORY

On December 7, 1992, the Government filed criminal information against the Defendant, charging him with sexual abuse of a child in violation of 6 C.M.C. § 1311. On the same day, a warrant for his arrest was executed.

On March 8, 1993, the Court conducted a hearing on the Defendant's motion to dismiss. Trial is scheduled to begin on April 26, 1993.

III. ISSUES PRESENTED

The Court will consider the following issues: (1) whether a four month delay between the Defendant's arrest and the commencement of his trial violates the Defendant's right to a speedy trial pursuant to Article I, §4(d) of the C.N.M.I. Constitution; (2) whether the Defendant's due process rights pursuant to Article I, § 5 of the C.N.M.I. Constitution were denied; and (3) whether Rule 48 of the Commonwealth Rules of

Criminal Procedure requires dismissal of the criminal charges.

IV. ANALYSIS

A. Constitutional Right to a Speedy Trial

The Defendant asserts that his constitutional rights were violated because of an "unreasonable and prejudicial lapse of time between the allegation against the defendant, the completion of investigation, submission of case to the Attorney General, and the time set for trial." Defendant's Motion to Dismiss for Violation of Rule 48, For Pre-indictment Delay and for Lack of Speedy Trial, at 2 (Feb. 3, 1993).

Article I, § 4(d) of the C.N.M.I. Constitution and the Sixth Amendment to the United States Constitution guarantee an accused in all criminal prosecution the right to speedy trial. N.M.I. Const. Art. I, § 4(d); U.S. Const. Amend. XI. The right to a speedy trial is intended to ensure "early and proper disposition" of the criminal case. *United States v. Marion*, 404 U.S. 321, 313, 92 S.Ct. 455, 459 (1971).

The right attaches when the individual has been "accused" of committing a criminal offense. *C.N.M.I. v. Aquino*, Crim. Action No. 90-127, slip op. at 3 (Apr. 24, 1991) (citing *Marion*, 404 U.S. 321, 92 S.Ct. 455). The right attaches when the defendant has been indicted. *Marion*, 404 U.S. at 320, 92 S.Ct. at 463. In the Commonwealth, an individual becomes an "accused" upon the execution of an arrest warrant. *Aquino, supra*, slip op. at 3.

The determination of whether the length of delay has violated

the defendant's right to a speedy trial must be made on a case-by-case basis. 3A Wright & Miller, *Federal Practice & Procedure: Criminal* §813, at 204 (2d ed. 1982) [hereinafter "*Federal Practice & Procedure*"]. In *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S.Ct. 2182, 2192-93 (1972), the United States Supreme Court enunciated the test for analyzing whether this right has been violated. The test requires an analysis of: "1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant." *Aquino, supra*, slip op. at 4 (citing *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192); see, e.g., *United States v. Simmons*, 536 F.2d 827, 830-31 (9th Cir. 1976), cert. denied, 429 U.S. 854, 97 S.Ct. 148 (1976).

In the present case, on December 7, 1992, the Government executed an arrest warrant for the Defendant and filed criminal information against him. The Defendant's trial is scheduled to begin on April 26, 1993. As such, there is a four and one-half month delay between the execution of the arrest warrant and the commencement of his trial. During this period, the Government and the Defendant have conducted pre-trial discovery and have filed pre-trial motions, thus facilitating the proper disposition of the case. Further, it does not appear that the Defendant made a formal assertion of his right to a speedy trial before he filed the motion to dismiss on the basis of this right.¹ See, e.g., *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192 (assertion of right is entitled to

¹ Failure to assert the right to a speedy trial, however, does not constitute waiver of that right. *Barker*, 407 U.S. at 528, 92 S.Ct. at 2191.

strong evidentiary weight in finding constitutional deprivation). Finally, the Defendant has not shown that the delay has prejudiced him in any way. This Court, therefore, holds that the Defendant's right to a speedy trial has not been violated. See, e.g., *United States v. Gonzalez*, 671 F.2d 441 (11th Cir. 1982); *United States v. Garza*, 502 F. Supp. 537 (D. Tex. 1980).

B. Due Process Clause

The Defendant contends that he was prejudiced because: (1) he might have been able to establish an alibi had the charges been filed sooner; (2) physical evidence of any abuse has been lost in the delay; (3) the victim's ability to accurately recollect the incident might have been susceptible to suggestions as to what truly happened; and (4) one of the Defendant's witnesses, an uncle of the victim, is no longer available.²

The Ninth Circuit applies a two-prong test in ascertaining whether a pre-indictment delay constitutes a denial of due process. *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1050 (9th Cir. 1990); *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). First, the defendant must show actual prejudice. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2042, 2048 (1977); *United States v. Moran*, 759 F.2d 777, 780 (9th Cir. 1985); see, e.g., *Gonzalez-Sandoval*, 894 F.2d at 1050-51 (no due process violation where defendant failed to prove how lost testimony would

² The Defendant has not explained why the uncle is no longer available and has not demonstrated how the loss of his testimony would impair the Defendant's ability to defend himself.

have supported defendant's claims); *United States v. Russo*, 796 F.2d 1443, 1451 (11th Cir. 1986). Second, the defendant must prove that "the length of the delay, when balanced against the government's reasons for the delay, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Valentine*, 783 F.2d at 1416 (citing *Moran*, 759 F.2d at 782); see also *Simmons*, 536 F.2d at 831.

In *C.N.M.I. v. Inos*, Traffic Case No. 92-2871 (Jan. 5, 1993), the Government delayed six months in filing information against the defendant for reckless driving even though the Government knew of the offense and the identity of perpetrator on the date of the offense. *Id.* at 2. The Government did not interview the defendant until nearly four and one-half months later. *Id.* By that time, the defendant could not recall where he was on the date of the offense and had lost potential witnesses as a result of the delay. *Id.* The *Inos* court held that the delay denied the defendant due process of law.

In the present case, the Defendant merely speculates as to how the delay has prejudiced him.³ *Gonzalez-Sandoval*, 894 F.2d at 1050; see *United States v. Scott*, 795 F.2d 1245, 1250 (5th Cir.

³ Even if the Defendant satisfied the first prong of the test, he has not satisfied the second prong for two reasons. First, it is not uncommon for allegations of sexual abuse to arise years after the incident, especially where the victim is a child. Second, such allegations are emotionally charged and extremely sensitive. In light of the stigma that attaches to an individual by the mere filing of the charges, this Court will not penalize the Government for taking this amount of time to determine whether there was sufficient evidence of abuse before it filed criminal charges. See *Lovasco*, 431 U.S. at 795-96, 97 S.Ct. at 2051-52.

1986) (no prejudice where bald assertions regarding loss of unknown alibi witnesses); *Moran*, 759 F.2d at 782-83. The speculative nature of his claim is evidenced by the language he uses in describing the alleged prejudice and by the Defendant's failure to demonstrate exactly how his ability to defend himself is impaired. Further, the Government did not learn of the incident and did not know the identity of the alleged perpetrator until May of 1992. Therefore, this Court holds that the Defendant's due process rights were not violated.

C. Rule 48 of the Commonwealth Rules of Criminal Procedure

The Defendant argues that Rule 48 was violated because the Government unnecessarily delayed in filing the criminal information and in bringing him to trial.

The Commonwealth Rules of Criminal Procedure provide an alternative means for dismissing criminal information. Rule 48(b) states that, "[i]f there is unnecessary delay in filing an information against a defendant who has been held to answer, or if there is necessary delay in bringing a defendant to trial, the court may dismiss the information or complaint." Com. R. Crim. Pro. 48(b). The scope of Rule 48(b) is limited to delays which occur after the Defendant has been arrested. *Lovasco*, 431 U.S. at 788, 97 S.Ct. at 2048.

In the case at bar, the Defendant was arrested on December 7, 1992. The Government did not delay in filing the criminal information against him because they filed it on the day that he

was arrested. As for any alleged delay in bringing the Defendant to trial, the record does not reflect any unnecessary delays. Therefore, the Defendant's contention must fail.

V. CONCLUSION

For these reasons, the Defendant's motion to dismiss the criminal charges is hereby denied.

So ordered this 22nd day of March, 1993.



EDWARD MANIBUSAN
Associate Judge