

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 16, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2140-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CF-991**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SISAKHONE S. DOUANGMALA,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Sisakhone Douangmala appeals from an order denying his motion to vacate and dismiss his convictions after a jury trial for the crime of physical abuse of a child, with a weapon enhancer and a criminal gang enhancer, party to a crime. The circuit court sentenced him to ten years in prison consecutive to another sentence he was already serving. Douangmala contends

that his convictions should be reversed and the charges dismissed because the State's precharging delay violated his due process rights under both the United States and Wisconsin Constitutions. We disagree and affirm the order.

¶2 On April 26, 1998, A.Y. gave a written statement to detective James Swanson of the Green Bay Police Department in which he claimed that on a Wednesday night in late January 1998, he was assaulted by Douangmala and several other individuals after he left the Green Bay Boys and Girls Club. At the time A.Y. gave this statement, Douangmala was in jail on unrelated offenses. Swanson had interviewed Douangmala on the other offenses and was aware that he was still in jail.

¶3 On January 6, 1999, Douangmala was sentenced to twenty-five years in prison on these other unrelated offenses. On the same date he was sentenced for these unrelated offenses, Swanson obtained written statements from C.Y. and B.Y. in which they stated that Douangmala was a participant in the January 1998 assault on A.Y. On October 21, 1999, the State charged Douangmala with physical abuse of a child, with weapons and gang enhancers.

¶4 Douangmala claims that the year-and-a-half delay between April 26, 1998, when the victim reported the crime, and October 21, 1999, when the charges were filed, represents an unlawful deliberate delay and denial of due process.

¶5 Precharging delays are analyzed under the due process clause, which plays a limited role in protecting against oppressive delay between the commission of an offense and the initiation of the prosecution. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). In order for Douangmala to prevail on a due process claim, he must demonstrate that the State deliberately delayed filing charges to obtain a tactical advantage and that this delay caused him actual prejudice in presenting his

defense. *See State v. Monarch*, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999). Douangmala has made neither showing.

¶6 Douangmala argues that when the charges were filed, he was 120 miles away in prison on an unrelated case. He concludes that this distance from his attorney and potential witnesses gave the State a tactical advantage in preparing for trial. However, as the State correctly observes, Douangmala presented no evidence to support his conclusion that the State engineered this delay to gain a tactical advantage. At the jury trial, Swanson testified that following his receipt of the victim's report on April 26, 1998, there was an ongoing attempt to locate different people for interviews regarding the assault. Eventually, Swanson interviewed two people on January 6, 1999, and another on February 23, 1999. The police then referred the case to the district attorney on June 8, 1999. Five months later, on October 21, the district attorney filed the complaint.

¶7 While it may be argued that the police did not pursue this case as expeditiously as possible and the prosecution could have filed the charges sooner, the delays do not show or demonstrate that the State deliberately sought to gain a tactical advantage. Prosecutors are not obliged to file charges as soon as they have enough evidence to do so. *See Lovasco*, 431 U.S. at 791-95. If anything, the delay could also arguably work to the State's disadvantage due to the possibility that witnesses' memories may dim.

¶8 Douangmala also reasons that the State's motives in delaying the charges were suspect because the charges were filed following his appeal on the unrelated charges. He contends the State filed these charges because it feared Douangmala might succeed in getting his conviction reversed in the unrelated

case.<sup>1</sup> However, at the hearing on Douangmala's postconviction motion to vacate the judgment and dismiss these charges, the assistant district attorney stated that there were no intentional acts on the State's part to prejudice Douangmala's defense by the delay in filing the criminal complaint. The assistant district attorney specifically rejected any suggestion that the complaint was issued in relationship to Douangmala's appeal. He noted that the previous conviction showed Douangmala's personality and dangerousness as a legitimate sentencing argument, but had nothing to do with any tactical advantage relating to issuing these charges.

¶9 Nor does the record show how the delay actually prejudiced Douangmala's defense. His claim that the precharging delay limited his ability to confer with his attorney and to provide alibi witnesses is unsupported. Douangmala admitted at the postconviction hearing that his attorney never informed him that the attorney was having any difficulty investigating the case. Douangmala's grandmother could not recall his whereabouts during the time of the assault, and he made no attempt to contact his other alibi witness. The State correctly cites *United States v. Marion*, 404 U.S. 307, 325-26 (1971), for the holding that in light of the statute of limitations (six years in Douangmala's case), the real possibility inherent in any extended delay that memories will dim, witnesses will become inaccessible and evidence will be lost cannot in and of themselves demonstrate that a precharging delay caused actual prejudice. Here, Douangmala fails to refer us to any evidence, pretrial or during trial, to support his

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<sup>1</sup> In fact, on June 19, 2002, the Wisconsin Supreme Court reversed the circuit court order denying Douangmala's motion to withdraw his no contest plea in these unrelated cases. *See State v. Douangmala*, 2002 WI 62, \_\_\_ Wis. 2d \_\_\_, 646 N.W.2d 1.

prejudice argument. He makes no argument that witnesses were unavailable because of the delay. He makes no argument as to what evidence the alibi witnesses would have prevented. Furthermore, he does not argue that had the charges been filed earlier, the two alibi witnesses would have provided an account of his whereabouts on the date of the assault.

¶10 Therefore, we affirm the trial court's order denying Douangmala's due process claim. He has not demonstrated that the State delayed filing the criminal complaint in order to gain a tactical advantage or that his defense was actually prejudiced by the precharging delay.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

