

ORIGINAL

NO. 09-1196

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 91429

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

LARRY BESS  
Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION**

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Cuyahoga County Prosecutor

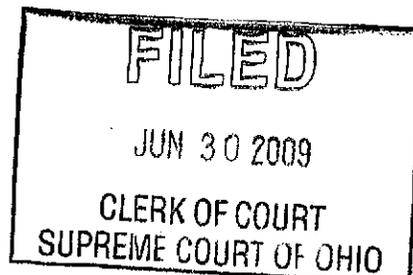
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*State v. Bess* 2009-Ohio-2254

**WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

The State of Ohio brought charges against Larry Bess, Appellee, for the rape of a minor child John Doe. After fleeing Ohio to evade prosecution for the rape of another minor child, Jane Doe, Bess lived for 18 years under an assumed identity in another state. The Eighth District Court of Appeals has found that Bess may evade prosecution for his crimes against John Doe by adding an element of knowledge to the tolling provisions of Ohio's statute of limitations. This case presents a substantial question that this Court must hear in order to ensure that the laws of the State of Ohio can be enforced and in order that justice may be done on behalf of the citizens of the State of Ohio.

The Eighth District Court of Appeals has determined that under R.C. §2901.13(G), which read at the time of Bess' crimes:

G) The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused absented himself from this state or concealed his identity or whereabouts is prima-facie evidence of his purpose to avoid prosecution.

The evidence presented to the trial court in this case was definitive; Bess fled the jurisdiction to avoid prosecution for sexually molesting a minor child, Jane Doe, a young girl related to John Doe. Bess was tried and convicted for those crimes. *State v. Bess*, Cuyahoga App. No. 91560, 2009-Ohio-2032. However, the indictment in this matter alleging that Bess committed 6 counts of rape, one count of attempted rape, one count of complicity in rape and two counts of gross sexual imposition from June 1, 1982 to February 21, 1989 cannot be prosecuted.

In lieu of reading R.C. §2901.13(G) with its plain meaning and intent as it had in past cases, the appellate court added to the statute by determining that the statute of limitations is tolled only when an accused is aware of prosecution and is fleeing from that prosecution. This reading is in contrast to cases from the Eighth District Court of Appeals in *State v. Roberts*, Cuyahoga App. No. 84949, 2005-Ohio-2615; *State v. Koren* (Jan. 24, 1985), Cuyahoga App. No. 48461; and the Third Appellate District in *State v. Bixler*, Putnam App. No. 12-03-18, 2004-Ohio-2468. These cases do not embellish the law and read into the tolling provision requirements not written nor intended. R.C. §2901.13(G) tolls the statute of limitations for bringing criminal offenses when a “when the accused purposely avoids prosecution.” Bess fled prosecution. The State should be allowed to pursue the indictments brought against him.

For these reasons, the State asks that this Court accept jurisdiction over this matter upon the following proposition of law:

The statute of limitations upon criminal offenses is tolled pursuant to former R.C. §2901.13(G) when the accused purposely avoids prosecution for an offense.

The law is simply written; it is not ambiguous; and it does not tie the tolling of the statute to the accused. As stated by Judge Blackmon of the Eighth District Court of Appeals, “I believe prosecution means prosecution \*\*\*. If a person is avoiding prosecution for a crime, it is his ‘bad luck’ that, while avoiding the prosecution, an undiscovered crime surfaces.”

Bess fled Ohio to avoid prosecution for molesting Jane Doe. When he was found 18 years later, John Doe came forward with allegations of molestation. The indictment

regarding the crimes committed against John Doe remain untried and Bess, who hid for 18 years, will not have to answer that indictment.

Because the Eighth District Court of Appeals has misread the tolling provision in Ohio law and has provided Bess, and other like him the ability to flee the State of Ohio and avoid prosecution for crimes they committed. This result is in direct contrast to the plain language, meaning, and intent of the tolling provision to the statute of limitations. The Eighth District Court's majority opinion in this case should be considered by this Court and overturned.

### **STATEMENT OF THE CASE AND FACTS**

Appellee Larry Bess was indicted by a grand jury in Cuyahoga County Court of Common Pleas Case No. 495093 for 6 counts of rape, one count of attempted rape, one count of complicity in rape, and two counts of gross sexual imposition. The charges span a period of time of June 1, 1982 to February 21, 1989 alleging crimes committed against "John Doe" then a minor child with a date of birth of March 15<sup>th</sup>, 1973. This indictment was dismissed by the trial court after hearing.

In addition to the charges in this case, Appellee was under indictment in Cuyahoga Court of Common Please Case No. 243403 for three charges of rape and seven charges of gross sexual imposition which charges spanned a similar time frame alleging crimes were committed against "Jane Doe" then a minor child and younger sister of John Doe. Appellee was indicted on that case in November, 1989 and fled the jurisdiction aware of the charges in the case.

Appellee was apprehended in the State of Georgia in March 2007 and returned to Cuyahoga County to stand trial in Case No. 243403. Only after Appellee's arrest in 2007, John Doe made the disclosures that led to this indictment.

Appellee filed a motion to dismiss the indictments in both this case and Case No. 243403. The trial court took evidence on the motions and granted the motion to dismiss the indictment in this case, but denied the motion in Case No. 243403. That case proceeded to trial and Appellee was found guilty of three counts of rape and two counts of gross sexual imposition. His convictions were affirmed. *State v. Bess*, Cuyahoga App. No. 91560, 2009-Ohio-2032.

The Court heard testimony from witnesses upon Appellee's motions to dismiss the indictments in both cases. The following witnesses testified at hearing: Theresa Ogden-Bess, Appellee's ex-wife and mother of John and Jane Doe; John Doe, Detective Douglas Jopek, and Detective David Sword.

Theresa Ogden-Bess testified that she was married to Bess in 1986 and that in 1989, after Jane Doe made allegations of sexual molestation, Bess made plans to change his identity because he didn't want to go to jail. John Doe testified that he was born on March 15<sup>th</sup>, 1973 and that Appellee lived with his family from 1982 or 83 to 1989. Tr. 175. John remembered that in 1989, the police investigated Appellee regarding Jane Doe, his younger sister. At that time, John Doe had not disclosed any abuse; however, prior to Bess' indictment, Appellee admitted sexual acts between he and John Doe, but denied doing anything to Jane Doe. Detective David Sword of the North Royalton Police Department testified that John Doe met with him after Appellee's arrest and that was the first disclosure of sexual abuse to the North Royalton Police

Department. Cuyahoga County Deputy Sheriff, Detective Douglas Jopek testified that that Appellee was arrested on March 5<sup>th</sup>, 2007.

After hearing evidence, the trial court the trial court determined that Appellee was aware that he was going to be indicted and was "underway with plans to leave." Tr. 258. The trial court further noted that the state periodically attempted to locate Appellee, but that "while there is a post-indictment delay in [Case No. 246403] it's attributable to the actions of defendant." Tr. 259. On April 14, 2008, the trial court wrote an opinion finding that Appellee's flight from prosecution was not applicable to the charges brought by John Doe, "since Defendant was not on notice that any charges were contemplated involving [John Doe]." Journal Entry, p.2.

Appellant, the State of Ohio, sought review of the trial court's dismissal of the indictment. By a majority opinion, the appellate court found that R.C. §2901.13(G) requires specific knowledge on the part of the accused that crimes were discovered and a specific intent to flee the jurisdiction to evade prosecution for crimes that were discovered. The language of the statute requires no such elements in order for the statute of limitations to be tolled.

## **LAW AND ARGUMENT**

### **PROPOSITION OF LAW:**

The statute of limitations upon criminal offenses is tolled pursuant to former R.C. §2901.13(G) when the accused purposely avoids prosecution for an offense.

In this case, Appellee fled the jurisdiction of the Court, lived under an assumed identity, and was apprehended 18 years after indictment for the sexual abuse of Jane Doe, his stepdaughter. Prior to absconding, Appellee was aware that John Doe had

been interviewed by police. He was not told the extent of the interview or whether or not John Doe had disclosed the sexual abuse to anyone. Appellee admitted to John Doe that he had committed sexual abuse, but denied the charges about to be levied against him by Jane Doe prior to the time he disappeared for 18 years.

The abuse alleged by John and Jane Doe, and proven as to the rapes against Jane Doe, was a long-term pattern of abuse against these victims. The crimes contained a commonality in the time, location, and identity. Despite this, the trial court determined, and a majority of the appellate panel agreed, that Appellee would have to have actual notice of charges brought by John Doe in order for the statute of limitations to be tolled. This finding is inapposite to the plain reading of applicable law and eviscerates the tolling provision of Ohio's statute of limitations.

It is clear in this case that the statute of limitations was tolled when Appellee fled the jurisdiction to avoid prosecution for the then disclosed molestation of Jane Doe. At the time of his crimes, R.C. §2901.13(G) read:

G) The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused absented himself from this state or concealed his identity or whereabouts is prima-facie evidence of his purpose to avoid prosecution.

The language of the statute is simple and direct: the statute of limitations is tolled when an accused flees to avoid prosecution. Any prosecution.

In 1985, Eighth District Court of Appeals determined what actions constituted flight from prosecution sufficient to toll time under R.C. §2901.13(G). *State v. Koren* (Jan. 24, 1985), Cuyahoga App. No. 48461, unreported In that case, the defendant was indicted for involuntary manslaughter and robbery six months and six days after the

crimes had occurred. The Court noted that after the robbery and shooting of a convenience store clerk:

However there was adequate evidence for the trial court to rule that limitations had not expired here. Defendant's friend testified that the defendant requested and obtained money to leave the state on the morning of the offense. The defendant testified that three weeks after the offense he went to Colorado for a month. He also acknowledged a trip to Illinois in October, 1976, and his incarceration in Illinois for more than two years from February 15, 1980, until his extradition to Ohio after this indictment.

Additionally, the defendant admitted using two different alias names during his encounters with police while they were investigating other incidents. He maintained no regular address. His mother testified that he lived in Mansfield, Ohio and Illinois after 1976. Collectively, this evidence supported the trial court's implicit finding that the defendant purposely avoided prosecution for more than six months, so that limitations had not expired when the grand jury indicted him.

Here, the trial court granted the motion to dismiss because it determined that Appellee did not have *actual notice of pending charges* for crimes against John Doe. The tolling provision does not require this, nor should such a requirement be attached.

There can be no question that Bess fled the State of Ohio to avoid prosecution for child molestation. At the time of the crimes, John and Jane Doe lived in the same home. After Jane Doe made allegations of abuse, a police investigation was initiated as well as a Children and Family Services investigation. After Bess contacted a lawyer, he made arrangements to leave the jurisdiction and hide from the charges and the investigation. These actions tolled the statute of limitations for the crimes as to Jane Doe; but by what rationale can they not also toll the statute of limitations for the now alleged crimes by John Doe.

The longstanding law in Ohio has been to read the tolling provision as requiring flight from prosecution. Not flight from a specific prosecution. Here, the majority

opinion determined that tolling provision to require that the accused have notice of pending or actual charges. But that holding is inapposite to another court of appeals. In *State v. Bixler*, Putnam App. No. 12-03-18, 2004-Ohio-2468, the defendant was found ten years after the crime had occurred through a DNA database search. *Id.*, at ¶ 2. In resolving whether counsel was ineffective by withdrawing a motion to dismiss the indictment based upon the statute of limitations, the court wrote:

The evidence is clear that Bixler had left the jurisdiction of the State of Ohio before the statute of limitations had expired. The statute specifically provides for a tolling of the statute of limitations if the defendant willfully leaves the jurisdiction to avoid prosecution. R.C. 2901.13(G). The fact that the defendant absented himself from the state is prima facie evidence of the intent to avoid prosecution. *Id.* Given the evidence that Bixler left the State of Ohio before his incarceration in Kansas in 1994, the trial court reasonably could have concluded that Bixler left the State of Ohio to avoid prosecution. Thus, trial counsel was not deficient for arranging a plea agreement with the State and withdrawing the motion to dismiss.

*Id.*, at ¶ 7.

This rationale is clear: the tolling of the statute of limitation operates where the defendant has fled to avoid any prosecution.

In dismissing the indictment in this case, the trial court, and the majority appellate opinion relied upon another majority opinion from the Eighth District Court of Appeals. *State v. McGraw* (Jun. 16, 1994) Cuyahoga App. No. 65202, unreported. In *McGraw*, the court found that the tolling provision statute under R.C. §2901.13(G) operated only if the flight was shown to be for the charges in that case, not a flight to avoid prosecution as written in the law. In *McGraw*, Judge Blackmon wrote in dissent that such requirement of a nexus to the crimes charged and the accused's intent is beyond the plain language of the statute and not required:

The reality is that R.C. 2901.13(G) does not say what prosecution the accused is avoiding. It merely says "avoiding prosecution." The trial court and the majority both concluded that the clear import of the statute was the prosecution for rape not the DWI. Since he did not know about the rape, he could not have been avoiding it. Of course, I believe that prosecution means prosecution, which answers the second question in this dissent. If a person is avoiding prosecution for a crime, it is his "bad luck" that, while he is avoiding the prosecution, an undiscovered crime surfaces.

*Id.*

The law requires no nexus between flight and actual knowledge of investigation or charges. As such, the State asks that this Court accept jurisdiction so that those who flee the jurisdiction to avoid prosecution cannot be successful in thwarting the operation of justice.

### **CONCLUSION**

For the foregoing reasons, the State asks that this Court accept jurisdiction in this matter, adopt the State's proposition of law, reverse the trial court's dismissal of the charges in the indictment, and remand this cause so that Bess can stand trial upon the charges brought by John Doe in this case.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

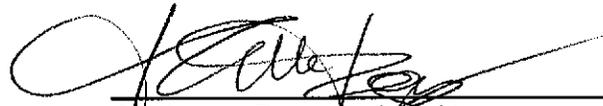
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**SERVICE**

A copy of the foregoing Memorandum in Support has been mailed this 29<sup>th</sup> day of June 2009, to David L. Doughten, 4403 St. Clair Avenue, Cleveland, Ohio 44103 and to Larry Bess, A544857, Hocking Correctional Facility, P.O. Box 59, 16759 Snake Hollow Road, Nelsonville, Ohio 45764.

  
\_\_\_\_\_  
Assistant Prosecuting Attorney

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 91429

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**LARRY BESS**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-495093

**BEFORE:** Boyle, J., Dyke, P.J., and Sweeney, J.

**RELEASED:** May 14, 2009

**JOURNALIZED:** MAY 26 2009

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**MAY 26 2009**

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**MAY 14 2009**

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

MARY J. BOYLE, J.:

Plaintiff-appellant, the State of Ohio, appeals from the trial court's judgment granting defendant-appellee, Larry Bess's motion to dismiss the indictment against him because the applicable statute of limitations had expired. For the reasons that follow, we affirm.

Bess was indicted in November 1989 in Case No. CR-243403 on ten counts of sex offenses, including rape and gross sexual imposition. These charges arose from allegations made by Bess's stepdaughter, L.O. (d.o.b. 8-23-76), in February 1989. Sometime before he was indicted, around October 1989, Bess fled Ohio, and a capias was issued for his arrest. He concealed his identity and his whereabouts until March 2007, when he was found in Georgia under the name of Norman Weatherby. He was arrested and extradited to Ohio to be prosecuted for sexual abuse against L.O.

On March 22, 2007, Bess's stepson and L.O.'s brother, A.O. (d.o.b. 3-15-73), told police that he had also been sexually abused by Bess from the time he was 8 or 9 years old until he was 16 years old. A.O. turned 18 on March 15, 1991. Based on A.O.'s allegations, Bess was indicted in Case No. CR-495093 (the underlying case) on six counts of rape, one count each of attempted rape and complicity in the commission of rape, and two counts of gross sexual imposition.

Bess filed a motion to dismiss both indictments.<sup>1</sup> The indictment at issue in this case involves A.O., Case No. CR-495093. Bess argued that under R.C. 2901.13, the six-year statute of limitations expired on March 15, 1997, which was six years after A.O. turned 18. The following evidence was presented at the hearing on his motion to dismiss the indictment.

Facts Presented at Motion Hearing

Theresa Ogden-Bess married Bess in 1986. In February 1989, her daughter, L.O., told a school counselor that Bess had been sexually abusing her for years. She recalled talking to the police and children services about the case.

Ogden-Bess explained that between February and October 1989, Bess would disappear for long periods of time. He told her that he was planning to leave the area and change his identity because he did not want to go to jail. She said that Bess told her that he was trying to establish a paper trail, "doing things like registering to vote under various names, anything with a name on it

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<sup>1</sup>The trial court denied Bess's motion to dismiss the indictment involving L.O., Case No. CR-243403. Bess was convicted in that case of three counts of rape and five counts of gross sexual imposition. He received an aggregate sentence of life in prison. He appealed his conviction, which we affirmed. See *State v. Bess*, 8th Dist. No. 91560, 2009-Ohio-2032.

that, you know, he might be able to use." He also searched church records to find the identity of a child who had died.

Ogden-Bess testified that she did not know where Bess went when he disappeared. She knew that he went to West Virginia at one point. She also remembered that he suggested that the whole family go to the Philippines because there was no extradition to the United States.

She further recalled that Bess was not living with her at the time the indictment came in the mail. They had sold their house in North Royalton because he wanted his share of the money. He purchased a van, loaded it up, and left town.

At first, she would hear from him periodically, every couple of months. He would call and send cards. But she said that she had no idea where he was or what name he was using. She recalled that he may have lived in Texas at one time. She also recalled having a phone number at one time, but she could no longer remember what it was. She said that she never saw him again after he left.

Ogden-Bess explained that she never told the police that Bess was planning to leave the area. When asked why, she replied, "[h]e hadn't been indicted" and "[n]obody asked." She further stated that she never told the police when he called her over the years.

She agreed on cross-examination that the reason she did not try to stop Bess is because she did not believe that he did anything to her daughter. She also admitted that she knew where Bess was living when he was in West Virginia because she went to see him there twice. She also saw him in Texas on another occasion. She never told the police that she saw him or that she knew where he was. She said the police never asked her. Later, she came to believe her daughter about the abuse allegations. She said that "complete contact was broken off" approximately "ten years ago."

A.O. testified that Bess lived with his family from approximately 1983 to 1989. He recalled that at one point, Bess had him "sign a name on a Bible" in an attempt to make it look like it had been "passed down to him from a fictitious family." He explained that after they moved to Parma, Bess came to their house one time to get the money from the sale of their North Royalton home. After that, A.O. said that he never saw Bess again.

After Bess was arrested in Georgia in 2007, A.O. came forward for the first time with allegations of abuse that occurred from 1982 to 1989. He stated that he had never told anyone prior to March 2007 – not the police, doctors, or social services – because he was afraid to tell anyone. After that, "there was no reason to, other than to maybe upset my mother more." When police had Bess in

custody, however, A.O. said he came forward because something could be done about it.

On cross-examination, A.O. recalled talking to Detective Napier in 1989 about his sister. A.O. admitted that he told Detective Napier that his sister was lying and that he did not have any knowledge about the alleged abuse.

Detective David Sword testified that he took over the case after Detective Napier retired. He said that he talked to L.O., and she told him that her brother and mother were still in the area. The first time he talked to A.O. in March 2007, Detective Sword asked him if there had ever been any incidents of abuse against him, and he replied "no." But Detective Sword said that A.O. became "kind of emotional" when he said no. The next day, A.O. called Detective Sword and told him that he needed to meet with him. That is when A.O. first made sexual abuse allegations against Bess.

On cross-examination, Detective Sword stated that he could not find anything in the original file that indicated that there were any allegations of abuse regarding A.O.

At the close of the hearing, the trial court found that no evidence was presented establishing that Bess avoided prosecution relating to A.O. and that there was "no indication that he knew he was going to be indicted or charged in this case." The trial court further found that the testimony of Bess's ex-wife

proved that he left town to avoid prosecution for the case involving L.O. The trial court then granted Bess's motion to dismiss the indictment in Case No. CR-495093.

It is from this judgment that the State appeals, raising one assignment of error for our review:

"The trial court erred by granting appellee's motion to dismiss the indictment on the grounds that the statute of limitations had run."

Standard of Review on Motion to Dismiss an Indictment

The State argues that we should review the trial court's granting of Bess's motion to dismiss the indictment under a de novo review. We disagree.

"The Supreme Court of Ohio has explained that 'any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such order is a final order and may be appealed pursuant to R.C. 2945.67 and Crim.R. 12(J).'" *State v. Putich*, 8th Dist. No. 89005, 2008-Ohio-681, ¶13, quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, syllabus (in *Putich*, defendant filed a motion to dismiss the complaint against him). See, also, *State v. Davis*, 11th Dist. No. 2008-L-021, 2008-Ohio-6991 (citing *Putich's* standard of

review as the “standard of review for motion to dismiss indictment”); *State v. Bewley*, 9th Dist. No. 23693, 2007-Ohio-7026.<sup>2</sup>

A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. “When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” (Internal citations omitted.) *Id.*

In addition, we review statute of limitations issues similarly. “[O]ur review of statute of limitations issues involves a mixed question of law and fact. Therefore, we accord due deference to a trial court’s findings of fact if supported by competent, credible evidence, but determine independently if the trial court

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<sup>2</sup>We are aware of this court’s decision where we only applied an abuse-of-discretion standard when reviewing a trial court’s decision to dismiss an indictment. See *State v. Warfield*, 8th Dist. No. 86055, 2006-Ohio-935. That case, however, dealt with the issue of whether the “trial court may use the most severe sanction against the State for its failure to comply with discovery.” *Id.* at ¶8. That is not the case here, where the trial court held an evidentiary hearing, observed witnesses testify, made findings of fact, and applied those findings to the law on statute of limitations.

correctly applied the law to the facts of the case.” *State v. Stamper*, 4th Dist. No. 05CA21, 2006-Ohio-722, ¶30.

Statute of Limitations for Felonies

At the outset, we note that the State bears the burden of proving that the offense was committed within the appropriate statute of limitations. *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, 85 Ohio St.3d 582, 586, 1999-Ohio-408, citing *State v. Young* (1981), 2 Ohio App.3d 155.

Former R.C. 2901.13(A) sets forth the applicable statute of limitations in this case.<sup>3</sup> It provided:

“Except as otherwise provided in this section, a prosecution is barred unless it is commenced within the following periods after an offense is committed:

“(1) For a felony other than aggravated murder or murder, six years.”

The State concedes that “the delay in the reporting by [A.O.] would be beyond then applicable 6-year statute of limitations” had Bess not fled from the jurisdiction to avoid prosecution. The State argues that the statute of limitations was tolled by R.C. 2901.13(G), which at the time of his alleged crimes stated:

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<sup>3</sup>R.C. 2901.13 was amended in 1999; the applicable statute of limitations is now 20 years. See H.B. 49.

“The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused absented himself from this state or concealed his identity or whereabouts is prima-facie evidence of his purpose to avoid prosecution.”

The narrow question then that is at the crux of this appeal is whether the phrase “purposely avoids prosecution” means avoiding prosecution for the instant offense or whether it could apply when the offender avoids prosecution for a different offense. This court has already answered this exact question in *State v. McGraw* (June 16, 1994), 8th Dist. No. 65202.

*State v. McGraw*

The State maintains that the trial court erred when it relied on this court’s decision in *State v. McGraw* (June 16, 1994), 8th Dist. No. 65202. The State urges this panel to overrule the majority opinion issued by a different panel in *McGraw* and adopt the dissenting opinion. We decline, however, to do so. As the Supreme Court of Ohio stated in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, “conflicting rulings on the same legal issue create confusion for lawyers and litigants and do not promote public confidence in the judiciary.” *Id.* at ¶18. Therefore, we find the trial court’s reliance on *McGraw* to be proper since it is directly on point and is still good law.

In *McGraw*, the defendant had been charged for sex offenses against his stepdaughter, which were alleged to have occurred more than 12 years prior to the indictment. The defendant had moved out of the family's home sometime in 1980. In May 1981, the defendant fled Ohio after he was charged with driving while intoxicated ("DWI"). In March 1992, the victim saw the defendant's picture on the front page of the Cleveland Plain Dealer and disclosed her abuse to the police. She was 29 years old at the time, and she had never suppressed memories of the abuse.

The lower court in *McGraw* granted the defendant's motion to dismiss the indictment, finding that "the flight or concealment must be from prosecution of the instant sexual offenses." The lower court in *McGraw* further explained:

"The Court finds that had there been any testimony whatsoever from the victim that a threat with regard to prosecution on sexual abuse charges, if that had been issued at any time to this victim during that eleven-year period, the Court would find that the defendant was purposely avoiding prosecution for the instant offenses. But, based upon the law and the reading of the statute, this Court finds that the avoiding prosecution language in the tolling section applies to avoiding the prosecution for the DWI herein."

Upholding the lower court's decision, this court reasoned:

“The entire text of R.C. 2901.13 suggests that paragraph (G) read in *pari materia* means the instant prosecution not one for a different crime. There is nothing in the statute to suggest that flight or concealment from some other prosecution operates to toll the statute for the instant prosecution. Criminal statutes must be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04(A). We find the trial court did not err in so construing the statute.”

The State argues that *McGraw* is distinguishable because the crimes here “contained a commonality in time, location, and identity.” The State maintains that Bess knew that he was going to be indicted for abuse against L.O.; that he did not know if A.O. had disclosed the abuse against him; and that Bess knew that children services had been involved. We decline, however, to extend the statute as the State proposes.

The State further claims that we should follow our decision in *State v. Koren* (Jan. 24, 1985), 8th Dist. No. 48461, where this court held that actual notice of prosecution under R.C. 2901.13(G) was not necessary. Although we agree that *Koren* stands for that proposition, it does not apply to the case *sub judice*.

The evidence in *Koren* established that the defendant robbed a convenience store and killed a clerk who was working there. Immediately after,

the defendant called a friend, confessed to the crimes, and asked the friend if he could borrow money to leave the state. He then fled the state. Thus, in *Koren*, the defendant fled to avoid the same prosecution he was indicted for – he just fled prior to being indicted.

The same facts were actually present in Bess's other case (Case No. CR-243403) with respect to the abuse against L.O. Bess was not actually charged for allegations made by L.O. until November 1989. But the facts at the hearing on the motion to dismiss both indictments established that Bess fled prior to actually being charged and, thus, he fled without actual notice of the charges. Thus, the trial court properly denied Bess's motion to dismiss the indictment with respect to Case No. CR-243403 because, unlike here, in that case Bess fled to avoid prosecution on those charges, i.e., the same offense in that case.

Accordingly, we find that *McGraw* and *Koren* are not in conflict with each other. We further find *Koren* to be inapplicable to facts in the present appeal.

In *Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, supra, at 586, the Ohio Supreme Court stated:

"The primary purpose of a criminal statute of limitations is to limit exposure to prosecution to a certain fixed period of time following the occurrence of those acts the General Assembly has decided to punish by criminal sanctions. *Toussie v. United States* (1970), 397 U.S. 112, 114-115. This limitation is

designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.' *Id.* Additionally, such a time limit has the salutary effect of encouraging law enforcement officials to promptly investigate suspected criminal activity. *Id.* We recognized these purposes in [*State v. Hensley* (1991), 59 Ohio St.3d 136] at 138, where we found that the intent of R.C. 2901.13 is to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct. We stated, "The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence," quoting the Ohio Legislative Service Commission Comment to R.C. 2901.13."

Here, the trial court found that Bess fled Ohio to avoid prosecution for the allegations made by L.O. after she told her school counselor. The trial court further found that no evidence was presented that established that Bess avoided prosecution relating to A.O., nor was there any evidence that he even knew he was going to be indicted or charged regarding A.O. Further, additional facts reveal that A.O. never told anyone about the alleged abuse until March 2007. In fact, in 1989, A.O. told the police that his sister was lying about Bess abusing her.

Accordingly, we find that the trial court's findings were supported by competent, credible evidence and thus are afforded due deference. "It is well settled that '[t]he trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *State v. Amburgey* (1987), 33 Ohio St.3d 115, 117, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. That is why we defer to the trial court's discretion in these matters. *Id.*

Thus, we conclude that the trial court properly applied the facts to the law when it granted Bess's motion to dismiss the indictment against him involving A.O., since it found that Bess fled Ohio and concealed his identity to avoid being prosecuted for alleged abuse against L.O., not A.O.

While we recognize that child sexual abuse victims internalize abuse and are frequently inhibited from speaking freely about it, we nonetheless must adhere to the law. Statute of limitations "strike a balance between the need for a time limit and the need to ensure that those who abuse children do not escape criminal responsibility." *Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, *supra*, at 588. In the case sub judice, the statute of limitations expired on March 15, 1997.

Accordingly, we overrule the State's sole assignment of error.

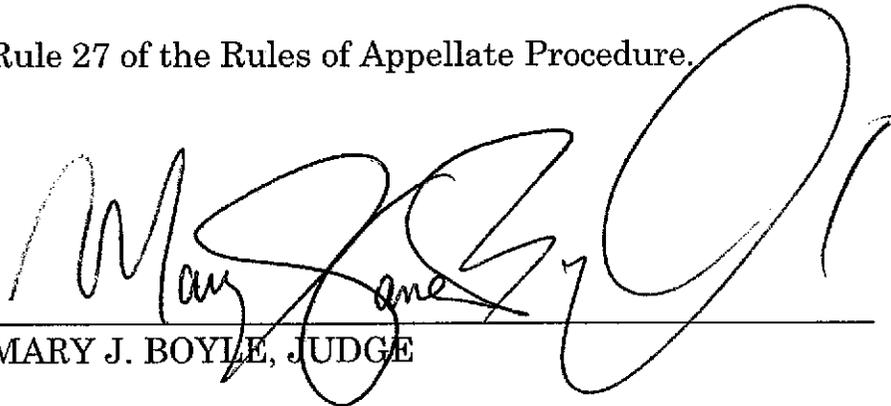
Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



Mary J. Boyle

MARY J. BOYLE, JUDGE

ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY;  
JAMES J. SWEENEY, J., DISSENTS WITH SEPARATE OPINION

JAMES J. SWEENEY, J., DISSENTING:

I respectfully dissent from the majority opinion. Rather, I would reverse the trial court's judgment granting the defendant's motion to dismiss. In my opinion, R.C. 2901.13(G) has a broad meaning, and tolls the statute of limitations for prosecution in general. R.C. 2901.13(G) states that the statute of limitations "shall not run during any time when the accused purposely avoids prosecution." Nothing in the plain reading of this statute refers to a specific prosecution, or "the" prosecution. In essence, by fleeing from justice, the

defendant waived his right to assert the statute of limitations defense for crimes he could still, otherwise, be prosecuted for.

This view finds support in *State v. Roberts*, Cuyahoga App. No. 84949, 2005-Ohio-2615. In *Roberts*, the defendant was convicted of a felony in 1978. Sometime after this, she changed her name and identity, going so far as to falsify fingerprints. In 1996, the defendant was hired as a teacher in the Cleveland public school system. In 2002, the Cleveland School Board discovered defendant's fingerprint discrepancy. On December 8, 2003, the defendant was indicted for illegal use of food stamps, theft, and tampering with records, stemming from actions she took under her new identity against the Department of Employment and Family Services between 1990 and 1996. The statute of limitations on these charges had run.

The defendant filed a motion to dismiss pursuant to R.C. 2901.13(G). The trial court denied this motion and we affirmed, holding that the defendant's actions of concealing her identity are "proof that she purposely avoided prosecution for her crimes." *Id.* at paragraph 14. See, also, *State v. McGraw* (June 16, 1994), Cuyahoga App. No. 65202 (J. Blackmon, dissenting) (concluding that "I believe that prosecution means prosecution \*\*\*. If a person is avoiding prosecution for a crime, it is his 'bad luck' that, while avoiding the prosecution, an undiscovered crime surfaces"); *State v. Bixler*, Putman App. No. 12-03-18,

2004-Ohio-2468 (noting that a defendant who flees the state of Ohio before the statute of limitations has expired for a crime is avoiding prosecution, despite being indicted more than ten years after the date the offense was committed). Compare R.C. 2901.13(G) with 18 U.S.C. 3290, the federal criminal statute of limitations, which is tolled for any crime against the United States, when the defendant is a "fugitive from justice."