

ORIGINAL

IN THE SUPREME COURT OF OHIO

No. 2009-1196.

State of Ohio,	:	
	:	
Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District
	:	
Larry Bess,	:	Court of Appeals
	:	Case Nos. 91429
Appellee.	:	

APPELLEE'S MEMORANDUM IN OPPOSITION OF JURISDICTION

RECEIVED
 JUL 28 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 JUL 28 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT:

WILLIAM D. MASON, ESQ.
 Cuyahoga County Prosecutor
 Justice Center-9th Floor
 1200 Ontario Street
 Cleveland, Ohio 44113
 (216) 443-7800

COUNSEL FOR APPELLEE:

DAVID L. DOUGHTEN, ESQ.
 Regis. No. 0002847
 4403 St. Clair Avenue
 Cleveland, OH 44103-1125
 (216) 361-1112
 FAX: (216) 881-3928

TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST NOR DOES IT INVOLVE A SUBSTANTIAL CONSTITUTIONAL
QUESTION 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT 5

Proposition of Law I:

 When the evidence does not sufficiently establish that a defendant fled the
 jurisdiction because of his knowledge that he if facing criminal prosecution, the
 statute of limitations is not tolled pursuant to R.C. §2903.01 (G). 5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST NOR DOES IT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

It is unequivocal that R.C. §2901.13(G) tolls the statute of limitations for a specified offense if the accused has purposely avoided the prosecution for the offense by leaving the jurisdiction. However, there must be evidence to support that the accused left the jurisdiction purposely to avoid the offense charged. The mere fact that an accused is not in the jurisdiction or left the jurisdiction during the investigation is not enough to toll the statute, even if he did so to avoid other legal trouble. It must be proven that he did so purposely to avoid the specific prosecution charged.

The trial court here found that the state failed to bring charges within the statute of limitations. The prosecution admitted that charges were not timely brought against Bess, but argued that the time should be tolled because Bess had left the jurisdiction to avoid prosecution for another alleged victim, not the victim here, John Doe. Because there was no proof that Bess left the jurisdiction to avoid prosecution in relation to John Doe, the trial court determined that the statute of limitations had been violated. It is important to note that the court found Bess had left the jurisdiction to avoid prosecution in the case of Jane Doe. Bess was convicted of those offenses and is serving a life sentence for those convictions.

In this matter, the decisions of the trial court and the Eighth District Court of Appeals did not misread the tolling statute, R.C. §2901.13 (G). This statute reads as follows.

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

The prosecution argues that the term “purposely avoids” does not require intent to the specific crime. The argument is that if an accused leaves for one offense, that statute of limitations is tolled for every and any other offense that the state may choose to bring against that accused; regardless of whether the accused had any knowledge of the second offense or of an investigation being conducted into that second offense. The prosecution’s bottom-line is that if an accused leaves the jurisdiction to avoid one offense, he waives the statute of limitations for any other offense that he may be accused of committing during a similar time period.

This interpretation is not consistent with the plain meaning of the statute or established precedent. Purposely requires a specific intent for specific conduct. In addition, the rules of construction required the courts below to rule as they did.

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties *shall be strictly construed against the state, and liberally construed in favor of the accused.*

(Emphasis added)

The legislature’s above requirement was followed by the courts below. The trial judge found that there was insufficient evidence that Bess knew of any pending charges or investigations relating to John Doe. Citing this Court’s standards set in State v. Burnside, 100 Ohio St. 3d 152, 2003 Ohio 5372, the Eighth District Court of Appeals found that the trial court’s findings were supported by competent, credible evidence. The court also concluded that the facts satisfied the applicable legal standard.

Thus, there is nothing in the determination of facts, the standard of review applied or the application of the facts to the law that is not consistent with Ohio precedent. This case is not of great public interest, nor does it present a significant constitutional question.

STATEMENT OF THE CASE AND FACTS

The Charges

On April 26, 2007, the Cuyahoga County Grand Jury indicted the defendant-appellee Larry Bess on a ten count indictment. The charges included six counts of Rape in violation in violation of R. C. §2907.02, one counts of Attempted Rape in violation of R. C. §2907.02-2923.02, one count of Complicity to commit Rape and two Counts of Gross Sexual Imposition counts of Rape in violation in violation of R. C. §2907.05. The above charges spanned the time period of June 1, 1982 to February 21, 1989. The alleged victim was John Doe.

Previously, on November 2, 1989, the grand jury charged the Appellee Bess in a separate case which charged three charges of Rape and seven counts of Gross Sexual Imposition against a minor, Jane Doe. Bess was determined to have left the jurisdiction because of the these earlier charges.

In the April 2007 indictment, John Doe reached that age of majority on March 15, 1991. The prosecution had six years to commence prosecution from this date or until March 15, 1997.

Bess filed a motion to dismiss both indictments relating to both Jane and John Doe because the statute of limitations had run before the commencement of charges against him. The trial court heard the evidence and found that although the statute had been tolled by Bess' leaving

the jurisdiction because of the Jane Doe charges, there was no evidence that Bess left because of the John Doe allegations. Therefore, the court dismissed the charges against Bess relating to John Doe which were contained in the April 2007 indictment.

The jury convicted Bess of the November 1989 charges involving Jane Doe. These charges are not part of this appeal. (Bess is appealing the affirming of those convictions by the Eighth District Court of Appeals to this Court in S.Ct. No. 09-1021)

The prosecution appealed the dismissal of the John Doe charges. On May 26, 2009, the Eighth District Court of Appeals agreed with the trial court and affirmed the decision to dismiss the case because of the Statue of Limitations violation. State v. Bess, 5/26/2009 (8th Dist. No. 91429)

The State of Ohio timely appealed. The facts will be further discussed in the following Propositions of Law.

ARGUMENT

Proposition of Law I:

When the evidence does not sufficiently establish that a defendant fled the jurisdiction because of his knowledge that he is facing criminal prosecution, the statute of limitations is not tolled pursuant to R.C. §2903.01 (G).

The state indicted the appellee Larry Bess for multiple counts of sexual conduct against John Doe. John Doe was born on March 15, 1973. The offenses purportedly occurred between 1982 and 1989. Thus, John Doe was a juvenile when the alleged acts purportedly occurred.

There is a six year statute of limitations for the offense of rape. R.C. §2901.13(A). Ohio Revised Code 2901.13(F) provides that the “The period of limitation shall not run during any time when the corpus delicti remains undiscovered.” This court has found that corpus delicti for crimes involving child abuse or neglect is discovered when a responsible adult has knowledge of both the act and the criminal nature of the act. State v. Hensley (1991), 59 Ohio St.3d 136.

John Doe reached the age of majority on March 15, 1991. The prosecution had six years from that date, or until March 15, 1997, to bring charges against Bess. The prosecution has conceded that this was not accomplished, but instead argued that the statute of limitations had been tolled.

The Eighth District Court of Appeals framed the issue properly.

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.

Bess at 9.

The court then noted that it had already determined that answer almost fifteen years ago

in State v. McGraw (June 16, 1994), 8th Dist. No. 6502. McGraw concluded that the flight of concealment must be from prosecution of the instant sexual offenses. In McGraw, the defendant had avoided prosecution from an alcohol charge. There was no evidence in the lower court that McGraw had any knowledge of pending charges. The court concluded that because there was not evidence that the avoidance was related to the instant charges, the tolling did not apply.

The Court stated in State v. Climaco, Climaco, Seminatore, Lefkowitz and Garofoli Co., L.P.A., 85 Ohio St.3d 582, 586, 1999 Ohio 408, that:

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 investigation suspecte criminal activity. *Id.*

In Hensley, supra, this Court quoted the Legislative Service Commission Comment to R.C. §2901.13 with approval:

The rationale for limiting criminal prosecutions is that they should be based on reasonable fresh, and therefore more trustworthy evidence.

In the present case, no indictment or criminal charges existed in relation to John Doe before the statute of limitations expired on March 15, 1997. The investigative detective testified that he had not received the case file for Jane Doe until March 5, 2007. He acknowledged that the Jane Doe file contained no mention of John Doe in the original investigative file, dating back to 1989. Consistently, the detective testified that John Doe denied the allegations against Bess when first questioned about the possibility.

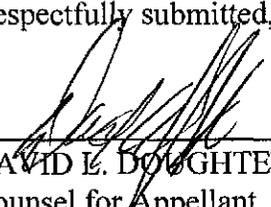
John Doe testified that after his sister, Jane Doe, made her allegations to the North Royalton Police Department, he was also interviewed. He admitted that he denied any allegations of sexual abuse relating to Bess. John Doe made his first allegations about Bess on March 21 or 22, 2007. Not even law enforcement knew of the alleged abuse within the disputed time period, let alone Bess.

Thus, the trial court correctly determined that there was no evidence that Bess left the jurisdiction because of the pending charge. Both the trial court and the appellate court correctly determined the facts, applied the correct standard of review and correctly applied the facts to the law.

CONCLUSION

Pursuant to the preceding Propositions of Law, the defendant-appellant, Larry Bess, respectfully requests that this Honorable Court refuse jurisdiction of this case.

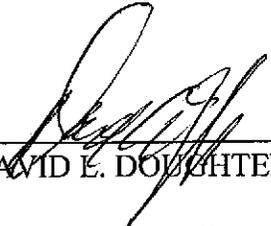
Respectfully submitted,



DAVID E. DOUGHTEN
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Opposing Support of Jurisdiction was served upon William D. Mason, Esq. Cuyahoga County Prosecutor, Justice Center-9th Floor, 1200 Ontario Street, Cleveland, Ohio, 44113 on this 22 day of July, 2009.



DAVID E. DOUGHTEN
Counsel for Appellant