

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No.: 09-2122
Appellee,)	C.A. Case No.: L08-1301
-vs-)	C.P. Case No.: CR07-2498
LINDA S. COOK,)	APPEAL FROM THE LUCAS
Appellant.)	COUNTY COURT OF APPEALS,
		SIXTH APPELLATE DISTRICT

NOTICE OF CERTIFIED CONFLICT

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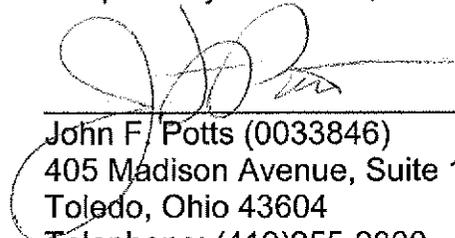
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 SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellant, Linda S. Cook, hereby gives notice that on October 28, 2009, the Lucas County Court of Appeals, Sixth Appellate District, issued a Decision and Judgment in State of Ohio vs. Linda S. Cook finding its decision in State vs. Cook, 2009-Ohio-4917 to be in conflict with the decision of the Eighth District Court of Appeals in State vs. Mitchell, 78 O.App.3d 613 (1992) and certifying the matter to the Ohio Supreme Court for review and final determination pursuant to Section 3(B)(4), Article IV of the Ohio Constitution.

The Decision and Judgment dated October 28, 2009 certifying the conflict is attached hereto as EXHIBIT A. The Decision and Judgment of the Sixth District Court of Appeals in State vs. Cook, 2009-Ohio-4917 is attached hereto as EXHIBIT B. A copy of the reported decision of the Eighth District Court of Appeals in State vs. Mitchell, 78 O.App.3d 613 (1992) is attached hereto as EXHIBIT C.

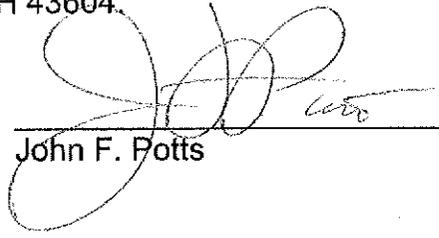
Respectfully submitted,



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CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 20th day of November, 2009 upon: Evy M. Jarrett, Assistant Lucas County Prosecutor, 700 Adams Street, 2nd Floor, Toledo, OH 43604.



John F. Potts

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio
Appellant

Court of Appeals No. L-08-1301
Trial Court No. CR 07-2498

v.

Linda S. Cook
Appellee

DECISION AND JUDGMENT

Decided: **OCT 28 2009**

* * * * *

This matter is before the court on the motion of defendant-appellee, Linda S. Cook, to certify our decision in this case as being in conflict with the Eighth Appellate District's decision in *State v. Mitchell* (1992), 78 Ohio App.3d 613, and the Second Appellate District's decision in *State v. Stephens* (July 25, 1997), 2d Dist. No. 96 CA 0117 (relying on *Mitchell*.)

In our September 18, 2009 decision, we held that the six-year statute of limitations period set forth in R.C. 2901.13(A)(1)(a) was enlarged by R.C. 2901.13(F) where the corpus delicti of the tampering with records charge was not discovered until

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approximately three years following the alleged crime, though within the six-year limitations period.

Upon review of the above-cited cases, we conclude that our determination that R.C. 2901.13(F) tolled the limitations period is in conflict with the Eighth Appellate District's resolution of the issue in *Mitchell*. Thus, we certify the record in this case to the Supreme Court of Ohio, pursuant to Article IV, Section 3(B)(4), Ohio Constitution, for review and final determination on the following issue:

"Whether R.C. 2901.13(F) operates to toll the six-year period of limitations provided for in R.C. 2901.13(A) so that it extends beyond six years from the date upon which a felony offense was committed where the corpus delicti of the offense is discovered within the period of limitations and more than one year prior to expiration of the limitations period."

The parties are referred to S.Ct.Prac.R. IV for guidance on how to proceed.

Peter M. Handwork, P.J.

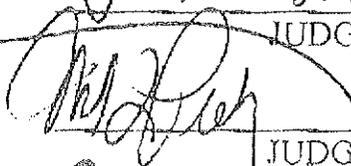
Mark L. Pietrykowski, J.

John R. Willamowski, J.

CONCUR.



JUDGE

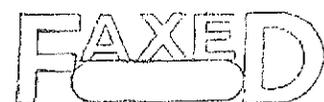


JUDGE



JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.



IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio
Appellant

Court of Appeals No. L-08-1301

Trial Court No. CR 07-2498

v.

Linda S. Cook

DECISION AND JUDGMENT

Appellee

Decided: September 18, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellant.

John F. Potts, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a state appeal from the August 25, 2008 judgment of the Lucas County Court of Common Pleas which dismissed Count I of the indictment against defendant-appellee, Linda S. Cook, finding that it was barred by the six-year limitations period set forth in R.C. 2901.13(A). The court further denied the state's motion to amend

Count I of the indictment. Because we find that R.C. 2901.13(F) tolled the running of the limitations period, we reverse.

{¶ 2} The relevant facts of this case are as follows.¹ On July 18, 2007, appellee was indicted on one count of tampering with records, in violation of R.C. 2913.42(A)(1) and (B)(4), and one count of theft from an elderly person or disabled adult, in violation of R.C. 2913.02(A)(2) and (B)(3). The charges stemmed from appellee's legal representation of an elderly client. Specifically, appellee, a former Ohio attorney with her office located in Lucas County, Ohio, was hired by an elderly client to aid with estate planning. The client, with no immediate family, expressed her desire to donate her real property, located in Fulton County, to the church she attended. It is undisputed that on July 12, 2001, a deed was recorded by the Fulton County Recorder's Office wherein, appellee, as trustee, received title to her client's farm. The deed was alleged to have been executed in 1998. On September 10, 2001, the deed was rerecorded with the word "trustee" deleted and the word "married" inserted. Thereafter, on December 13, 2001, a third deed was recorded which transferred the property from appellee, as a married individual, to the church with a life estate reserved in her client. Appellee entered not guilty pleas to the charges.

¹A detailed recitation of the underlying facts is set forth in *Toledo Bar Assn. v. Cook*, 114 Ohio St.3d 108, 2007-Ohio-3253.

{¶ 3} At issue in this appeal, Count I alleged:

{¶ 4} "[Appellee], on or about the 12th day of July, 2001, in Lucas County, Ohio, knowing the person had no privilege to do so, and with purpose to defraud or knowing that the person was facilitating a fraud, did falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, computer data, or record, when the writing, data, computer software, or record was kept by or belonged to a local, state, or federal governmental entity * * *."

{¶ 5} The state filed a bill of particulars and, with regard to the above-quoted charge,² further clarified:

{¶ 6} "b. The defendant has admitted to recording a deed in 2001, in Fulton County, which purported the transfer of the real estate to have occurred in 1998 when the transaction actually occurred three years later, in the year 2001.

{¶ 7} "c. The defendant has admitted that this transaction occurred with an understanding that Medicaid laws provide for a mechanism to undo real estate transfers between individuals when the grantor begins receiving Medicaid benefits sooner than three years after the real estate transfer."

{¶ 8} On October 16, 2007, appellee filed two motions to dismiss: one to dismiss Count I of the indictment and one to dismiss Count II of the indictment. As to Count I, appellee argued that the indictment was filed more than six years after the alleged crime

²Although the bill of particulars does not delineate between the charges, at the hearing on the motion to dismiss, it was discussed that paragraphs "b" and "c" related to Count I of the indictment.

occurred; thus, it was barred by the six-year statute of limitations set forth in R.C. 2901.13(A)(1)(a). Appellee contended that the July 12, 2001 filing of the deed served as notice of the alleged criminal act. In response, the state argued that under the time enlargement provisions of R.C. 2901.13(D) and (F), the indictment was timely filed. First, the state argued that appellee's activities were a continuing course of conduct and that the limitations period did not begin to run until the conduct ceased (at least December 13, 2001). Alternatively, the state contended that, under R.C. 2901.13(F), the corpus delicti, was not discovered until 2004.

{¶ 9} On January 18, 2008, the state filed a motion to amend Count I of the indictment. The state requested that the July 12, 2001 date be changed to September 10, 2001, which was the date the second deed was filed. Appellee opposed the motion arguing that an alteration of the date would impermissibly change the identity of the crime in violation of Crim.R. 7(D).

{¶ 10} On July 8, 2008, a hearing was held on the motion to dismiss and the following evidence was presented. Toledo Bar Association ("TBA") counsel, Jonathon Cherry, testified that he investigates grievances filed with the TBA. Cherry testified that in April 2004, he learned of the matter involving appellee. Cherry stated that he was aware of "friction" between appellee and her client's church in March 2004.

{¶ 11} Cherry testified that following his investigation, he found probable cause that appellee violated the code of professional responsibility and filed a complaint with the Board of Commissioners on Grievances and Discipline. In the summer of 2007,

following the conclusion of the disciplinary proceedings, Cherry stated that he forwarded the findings to the Lucas County Prosecutor's Office.

{¶ 12} During cross-examination, Cherry testified that he was aware of the July 12, 2001 "deed issue" on April 23, 2004. Cherry stated that the April 18, 2005 complaint filed by the TBA against appellee was a public record. Cherry agreed that copies of the deeds filed July 12, September 10, and December 13, 2001, attached to the complaint, were also public records.

{¶ 13} Cherry testified that it was the TBA's contention that appellee engaged in a dishonest act when she recorded the July 12, 2001 deed. The TBA further alleged misconduct in appellee's September 10, 2001 recording of the deed in her own name. Cherry agreed that the misconduct on each separate date was not dependent on the other. Each could have been completed independently.

{¶ 14} Joe Woodring testified that he knew appellee's client all his life and that they attended the same church. Woodring stated that he was present in 2000, when the client donated her farm to the church. In 2003, as a church trustee, Woodring met with appellee and informed her that they had never received any paperwork evidencing the transfer. Woodring testified that the church received the contract in January 2004. Thereafter, the church trustees consulted with an attorney who advised that they review the deed at the recorder's office. In February 2004, they reviewed all the deeds and, due to some concerns, retained counsel. Woodring stated that in May 2004, they filed a grievance with the bar association.

{¶ 15} Harriet Loar testified that on August 11, 2004, she was appointed as the client's guardian. Loar testified that in April 2004, she was made aware of problems with the transfer of the client's property.

{¶ 16} Next, attorney Jan Stamm testified that he had been a title agent for approximately 24 years. Stamm stated that his legal partner, Terry Kaper, was contacted by the church on April 15, 2004. Immediately thereafter, Stamm was enlisted to review the deeds. Stamm testified that after reviewing the deed recorded on July 12, 2001, he noticed that the deed purportedly was executed on May 20, 1998, but that the notary stamp had a May 30, 2005 expiration date. Stamm explained that the standard notary stamp is good for only five years. Stamm stated that the delay between the alleged 1998 execution and the 2001 recording of the deed was also suspicious. Stamm testified that the county recorder would not have looked into these issues.

{¶ 17} During cross-examination, Stamm testified that, on its face, the July 12, 2001 deed was "questionable." Stamm stated that he reviewed it for "a little bit" prior to finding the issues. When questioned by the court, Stamm clarified that when reviewing a deed, the recorder or auditor is generally concerned with the accuracy of the legal description of the property. Stamm stated that the type of defects found in the deed were the responsibility of a "title examining attorney" not a recorder's.

{¶ 18} Lucas County Deputy Clerk Ann Emerick testified that she retains the records of the notary public commissions. The notary involved in the execution of the

July 12, 2001 deed had a commission from 2000 until 2005. Emerick stated that the notary records are public and may be reviewed upon request.

{¶ 19} Thereafter, on August 25, 2008, the trial court granted appellee's motion to dismiss Count I of the indictment and denied the state's motion to amend the indictment. In its judgment entry, the court agreed with appellee that she would be prejudiced by the state amending the indictment. Further, the court found that because the state knew of the alleged crime prior to the expiration of the statute of limitations, it erred by failing to indict her until after the limitations period expired. This appeal followed.

{¶ 20} On appeal, the state has presented the following three assignments of error for our consideration:

{¶ 21} "Assignment of Error No. 1: The trial court erred in dismissing Count One of the indictment because the corpus delicti of the offense charged was not discovered until, at the earliest, March 2004.

{¶ 22} "Assignment of Error No. 2: Alternatively, the trial court erred in granting a defendant's motion to dismiss a charge of tampering with records in violation of R.C. 2913.42(A)(1), because the filing of a falsified deed initiated a 'continuing course of conduct' under which defendant took title to real property in order to facilitate a scheme of taking federal income tax deductions over several years. The statute of limitations did not begin to run until the last year in which defendant wrongfully took the deductions.

{¶ 23} "Assignment of Error No. 3: The trial court erred in denying the state's motion to amend the indictment when the requested amendment would not have changed

the identity or the degree of the offense charged or increased the penalty attached to the offense charged."

{¶ 24} In the state's first assignment of error, it argues that the trial court erred when it dismissed Count I of the indictment because the six-year limitations period had not yet run. The state makes several arguments in supporting the alleged error. First, the state contends that the court erroneously held that R.C. 2901.13(F) applies only where the statute of limitations period has expired prior to the discovery of the corpus delicti. Related to this argument, the state asserts that *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, 85 Ohio St.3d 582, 1999-Ohio-408 is inapplicable. Finally, the state argues that the exception to the limitations period for fraud set forth in R.C. 2901.12(B), does not bar the indictment.

{¶ 25} At the outset, we note that the standard of review for a state appeal regarding the dismissal of an indictment based on the expiration of the statute of limitations "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 correctly applied the law to the facts of the case." *State v. Bess*, 8th Dist. No. 91429, 2009-Ohio-2254, ¶ 23, quoting *State v. Stamper*, 4th Dist. No. 05CA21, 2006-Ohio-722, ¶ 30. See, also, *State v. Davis*, 11th Dist. No. 2008-L-021, 2008-Ohio-6991.

{¶ 26} At issue in the state's first assignment of error is the application of the correct statute of limitations period. R.C. 2901.13 provides, in relevant part:

{¶ 27} "(A)(1) Except as provided in division (A)(2) or (3) of this section or as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

{¶ 28} "(a) For a felony, six years;

{¶ 29} "* * *

{¶ 30} "(B) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

{¶ 31} "* * *.

{¶ 32} "(F) The period of limitation shall not run during any time when the corpus delicti remains undiscovered."

{¶ 33} The state first argues that the trial court determined that the tolling provision under subsection (F) applied only where the statute of limitations period expired prior to the discovery of the corpus delicti. We note that the corpus delicti of a crime is the "body or the substance of the crime, included in which are usually two elements: the act, and the criminal agency of the act." *State v. Black* (1978), 54 Ohio St.2d 304, 307. See *State v. Hensley* (1991), 59 Ohio St.3d 136, 138.

{¶ 34} Reviewing the August 25, 2008 judgment entry, it appears that the trial court's decision was largely based on its (and appellee's) interpretation of *Climaco*, 85

Ohio St.3d 582, 1999-Ohio-408. In *Climaco*, in early 1994, following press scrutiny, the Attorney General's Office began investigating alleged lobbyist registration and reporting violations. In March 1994, the Attorney General reported its findings to the Franklin County Prosecutor. *Id.* at 584. On February 1, 1996, the Franklin County Prosecutor filed indictments for two counts of falsification which allegedly occurred in June and October 1993. The defendants raised the issue of the expiration of the two-year statute of limitations in its motion to dismiss. The trial court denied the motion and the appellate court affirmed.

{¶ 35} Citing *State v. Hensley*, *supra*, the *Climaco* court noted that the primary purpose of criminal statutes of limitations is to limit exposure to criminal prosecution to a fixed period of time. *Id.* at 586. Additionally, it encourages law enforcement to investigate expeditiously suspected criminal activity. *Id.*

{¶ 36} The court declined to find that the tolling provision in R.C. 2901.13(F) applied, in part, because the alleged crime was reported in the newspapers in February 1994, prior to the expiration of the limitations period. *Id.* at 587. The court explained that the state had, at the latest, "everything it needed to indict" on March 22, 1994. The court generally noted that subsection (F) would render the applicable statute of limitations meaningless if it controlled in all circumstances. The court distinguished its holding in *Hensley* where it applied the subsection to toll the limitations period in child sexual abuse cases.

{¶ 37} Unlike *Climaco*, the present facts demonstrate that the corpus delicti of the tampering with records charge in relation to the filing of the July 12, 2001 deed was not known until, at the earliest, February 2004, when the church trustees discovered irregularities in the deeds.³ Following this discovery and retention of counsel, the matter was promptly investigated and reported to the TBA. In turn, the TBA conducted a full investigation and filed a complaint with the Board of Commissioners of Grievances and Discipline.

{¶ 38} Following a hearing on August 17 and 18, 2006, the Board forwarded its recommendations to the Supreme Court of Ohio which, on July 11, 2007, issued its decision to permanently disbar appellee. According to the testimony of TBA counsel, Jonathon Cherry, the TBA forwarded the Ohio Supreme Court's findings to the Lucas County Prosecutor's Office. The indictment was filed on July 18, 2007.

{¶ 39} Appellee further argues that because the deed was a public record, the corpus delicti was immediately discoverable and, thus, the statute of limitations began to run on the date of its filing. We disagree.

{¶ 40} In *State v. Edwards* (1997), 119 Ohio App.3d 237, the court examined when the corpus delicti of the crime of bigamy was discovered. The court rejected the appellee's argument that it was discovered upon the filing of the application for a marriage license. *Id.* at 240. The court reasoned, citing *Hensley*, *supra*, that alleged

³Further, the parties do not dispute that appellee's client was in her nineties and that her competency had been at issue during the relevant dates.

crime was not actually discovered until a "competent person" confirmed the appellee's prior identity. *Id.*

{¶ 41} In the present case, at the hearing on the motion to dismiss, attorney Jan Stamm testified that he had been a title agent for 24 years. Stamm stated that he studied the July 12, 2001 deed for a while prior to discovering the date discrepancy. Stamm testified that when reviewing a deed, the "key function" of the auditor or recorder is to review the accuracy of the property's legal description. Stamm stated that the defects he observed in the deed are not the type that an auditor or recorder would discover. Stamm surmised that it would be a title examining attorney's responsibility to look for such defects, not a recorder's responsibility.

{¶ 42} This court agrees with the *Climaco* dissent's observation that the majority holdings in *Hensley* and *Climaco* make it difficult to discern under which circumstances the tolling provision in subsection (F) is applicable.⁴ Because we have found that there are significant differences in the facts of this case from the facts in *Climaco*, we find that the statute of limitations did not begin to run until, at the earliest February 2004, upon the discovery of the corpus delicti. Accordingly, the state's first assignment of error is well-taken.

{¶ 43} In the state's second assignment of error, it alternatively argues that the July 12, 2001 filing of the falsified deed was part of a continuing course of conduct; thus,

⁴We do acknowledge that the General Assembly has amended R.C. 2901.13 to increase the limitations period for certain sex offenses to 20 years.

the statute of limitations did not begin to run until the last year in which appellee wrongfully took the income tax deductions. R.C. 2901.13(D) provides:

{¶ 44} "An offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first."

{¶ 45} In *State v. Gravelle*, 6th Dist. Nos. H-06-042, H-06-043, H-06-044, H-06-045, 2008-Ohio-4031, this court reviewed the dismissal of five counts of an indictment charging falsification of multiple adoption applications. Each charge was subject to a two-year limitation period.

{¶ 46} Upon review of the parties' arguments, we rejected the state's argument that the crimes constituted a continuing course of conduct and concluded that the alleged false statements made by the appellees were "each a discrete act." *Id.* at ¶ 41, relying on *State v. Rodriguez*, 8th Dist. No. 89198, 2007-Ohio-68.

{¶ 47} Here, we also find that the alleged tampering with records charge was complete on July 12, 2001. Appellant's second assignment of error is not well-taken.

{¶ 48} The state's third and final assignment of error disputes the trial court's denial of its motion to amend the indictment to reflect the date of the recording of the second deed. Crim.R. 7(D) permits the following:

{¶ 49} "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect,

imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

{¶ 50} Based upon our review of the indictment, the bill of particulars, and the hearing testimony, we agree that amending the indictment from the July 12, 2001, to September 10, 2001 deed would have changed the identity of the crime charged. The July 12, 2001 deed allegedly contained a false execution date with the purpose of defrauding the Medicaid system. The September and December deeds allegedly acted to deprive appellee's client of her property without her consent. Accordingly, we find that the state's third assignment of error is not well-taken.

{¶ 51} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Lucas County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

John R. Willamowski, J.

CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

H

Court of Appeals of Ohio, Eighth District,
 Cuyahoga County.
 The STATE of Ohio, Appellant,
 v.
 MITCHELL, Appellee.^{FN*}

FN* Reporter's Note: A motion for leave to appeal to the Supreme Court of Ohio was overruled in (1992), 64 Ohio St.3d 1428, 594 N.E.2d 970.

No. 62265.

Decided March 9, 1992.

Defendant was indicted for theft of and trafficking in food stamps for which he allegedly was not eligible. The Common Pleas Court, Cuyahoga County, dismissed. State appealed. The Court of Appeals held that statute of limitations barred prosecutions.

Affirmed.

West Headnotes

[1] Criminal Law 110 ↪151.1

110 Criminal Law
 110X Limitation of Prosecutions
 110k151 Exceptions and Suspension
 110k151.1 k. In General. Most Cited Cases
 (Formerly 110k151)
 Six-year statute of limitations to bring felony prosecution was not tolled until discovery of offense; tolling six-year period would render superfluous limitations period of one year from discovery of offense involving fraud or breach of fiduciary duty. R.C. § 2901.13(A)(1), (B, E, F).

[2] Criminal Law 110 ↪151.1

110 Criminal Law
 110X Limitation of Prosecutions

110k151 Exceptions and Suspension
 110k151.1 k. In General. Most Cited Cases
 (Formerly 110k151)
 Limitations period was extended for one year after discovery of alleged fraud, since discovery occurred during sixth year after alleged offense. R.C. §§ 2901.13, 2901.13(A)(1), (B).

[3] Criminal Law 110 ↪147

110 Criminal Law
 110X Limitation of Prosecutions
 110k147 k. Limitations Applicable. Most Cited Cases
 Six-year statute of limitations for felony, rather than limitations period of one year from discovery, applied to case involving discovery of alleged fraud sooner than five years from occurrence. R.C. §§ 2901.13, 2901.13(A)(1), (B).
 **979 *613 Stephanie Tubbs Jones, Cuyahoga County Pros. Atty., and David Zimmerman, Asst. Pros. Atty., Cleveland, for appellant.

Susan Grossman, Lyndhurst, for appellee.

***614 PER CURIAM.**

The state appeals trial court's determination that the statute of limitations pursuant to R.C. 2901.13 had expired and the subsequent granting of defendant-appellee Gloria Mitchell's motion to dismiss. For the reasons adduced below, we affirm.

A review of the record reveals that Mitchell was indicted on two counts of theft in violation of R.C. 2913.02. The date of the offense on the first count was from February to December 1982. The date of the offense on the second count was from January 1983 to May 1984.

Mitchell was also indicted on a third count of trafficking in food stamps in violation of R.C. 2913.46 for the period of time July 1983 to May 1984. The

605 N.E.2d 978
 78 Ohio App.3d 613, 605 N.E.2d 978
 (Cite as: 78 Ohio App.3d 613, 605 N.E.2d 978)

Page 2

three counts were premised on the allegation that Mitchell had received food stamps when she was not eligible for the benefit.

The administrative agency responsible for the benefits became aware of each of these violations on June 22, 1988. The indictment was filed on August 23, 1990.

On April 23, 1991, Mitchell filed a motion to dismiss, alleging that the statute of limitations had expired. This motion was heard on May 24, 1991, in open court. The trial court granted the motion after determining that R.C. 2901.13(B) had not been followed by the state, and dismissed the case on July 25, 1991. This appeal by the state, raising one assignment of error, followed:

“The trial court erred in granting the motion to dismiss and ruling that the time period under the statute of limitations, R.C. 2901.13, had expired.”

The Supreme Court recently stated in *State v. Hensley* (1991), 59 Ohio St.3d 136, 137, 571 N.E.2d 711, 713,

“R.C. 2901.13 is a general statute of limitations which prescribes the time within which criminal prosecutions must be brought by the state, and provides in part:

“ (A) *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[.]’

“Thus, the plain wording of the statute requires that *felony prosecutions* (other than aggravated murder or murder) *must be brought within six years from the date the offense is committed.* However, by use of the phrase ‘[e]xcept as otherwise provided in this section,’ the General Assembly has afforded the state *certain statutory exceptions to the absolute bar*, and has done so in the form of specialized

rules and tolling provisions. Indeed, the *615 legislature has enumerated these rules and *tolling exceptions in the succeeding paragraphs of R.C. 2901.13.* For example, *R.C. 2901.13(B) provides a special rule extending the time period for the commencement of prosecution for an offense of which an element is fraud or breach of fiduciary duty. * * **”
 FN1 (Emphasis added.)

FN1. R.C. 2901.13(B) provides: “If the period of limitation provided in division (A) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by his legal representative who is not himself a party to the offense.”

R.C. 2901.13(E) provides in pertinent part: “A prosecution is commenced on the date an indictment is returned or an information filed, or on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. * * *”

**980 [1] The state argues that R.C. 2901.13(F) tolled the start of the six-year statute of limitations contained in R.C. 2901.13(A)(1) until the date of discovery on June 22, 1988, by the administrative agency.^{FN2} Thus, the state believes that it had until June 22, 1994, to return an indictment.

FN2. R.C. 2901.13(F) provides: “The period of limitation shall not run during any time when the corpus delicti remains undiscovered.”

The defendant-appellee urges this court to agree with the trial court’s application of *State v. Dauwalter* (C.P.1988), 43 Ohio Misc.2d 17, 540 N.E.2d 336, in this welfare fraud case and reconcile R.C. 2901.13(B) and (F) as the *Dauwalter* court did. In *Dauwalter*, the fraud was discovered four to five

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months after the offense occurred, but the indictment was not returned until five years and eight months after discovery, and slightly over six years from the occurrence of the fraud. The state in *Dauwalter*, as in this case, argued that R.C. 2901.13(F) applied to toll the statute of limitations for a period of six years from the date of discovery, thereby rendering the indictment valid.

The court in *Dauwalter* stated the following:

“Defendant argues that prosecution is barred under subsections (A) and (B) unless the indictment is returned either: (1) within the original six-year period if the fraud is discovered *sooner* than five years from the date of the offense (as in the present case); or (2) within one year after discovery of the offense when discovery occurs at some time during the fifth year of the six-year limitation designated by subsection (A); or (3) within one year after discovery of the offense if discovery occurs after the six-year limit has run.

“ *To rule otherwise would mean that subsection (B), which sets forth the one-year limitation, would never apply under any circumstances.* Under the state's interpretation, and its reliance upon the tolling aspect of subsection (F), the state could file charges within six years of the ‘discovery’ of an *616 offense no matter how far back the offense occurred. In the hypothetical situation where one assumed a fraud was discovered twenty years after its commission, the state would argue under subsection (F) that it could return an indictment for up to six years thereafter, or within a period of twenty-six years after the commission of the offense. *Subsection (B) in such instance would be superfluous and could never be applied because the state would always have six full years from ‘discovery,’ and this time would always eclipse the one-year restriction under subsection (B). The court can not believe the legislature intended to enact a superfluous provision of the statute in question.* It is apparent subsections (B) and (F) are in conflict and irreconcilable under such a stringent interpretation.

“Defendant cites the case of *State v. Young* (1981), 2 Ohio App.3d 155, 2 OBR 171, 440 N.E.2d 1379, for the proposition that the state's indictment is untimely. The holding in *Young* is twofold. First, a ‘five month investigatory period’ is too long and an unreasonable period of time for completion of a ‘discovery of the offense’ to come within the ‘one-year saving provision of R.C., 2901.13(B).’ *Id.*

“Second, ‘[t]he State bears the burden of proving that the time when the crime was committed comes within the appropriate statute of limitations.’ *Id.* The issue of proper time limitation is jurisdictional. See *Cleveland v. Hirsch* (1971), 26 Ohio App.2d 6, 55 O.O.2d 26, 268 N.E.2d 600. In statutory construction, special provisions of the Revised Code are presumed to take precedence over general provisions. See *Cincinnati v. Thomas Soft Ice Cream* (1976), 54 Ohio App.2d 61, 8 O.O.3d 63, 374 N.E.2d 646. Criminal laws are mandated to be strictly construed under R.C. 2901.13(A). The holding in *Young* makes it clear the state bears the burden of proof in a time-limitation case. In light of the express Committee Comments to H.B. No. 511 and R.C. 2901.13, which indicate the legislative intent in providing time limitations is to ‘discourage inefficient or dilatory law enforcement,’ it appears defendant's motion **981 is well-taken and ought to be granted.” (Emphasis added.) *Id.*, 43 Ohio Misc.2d at 17-18, 540 N.E.2d at 337. ^{FN3}

FN3. This court has held that in cases premised on allegations of fraud, R.C. 2901.13(B) applies. See *Shaker Hts. v. Heffernan* (1989), 48 Ohio App.3d 307, 549 N.E.2d 1231, motion to certify overruled (1989), 44 Ohio St.3d 713, 542 N.E.2d 1109.

Were we to endorse the state's argument, the intent of the General Assembly in enacting R.C. 2901.13, particularly in cases dealing with fraud, to wit, to discourage inefficient and dilatory law enforcement, would be frustrated and R.C. 2901.13(B) would be ineffectual and superfluous.

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*617 Therefore, we affirm the trial court's determination to apply the *Dauwalter* reasoning to this case.

In the present case, but for the tolling provisions, the first count would ordinarily have to be commenced prior to December 1988, the second count by May 1990, and the third count by May 1990. R.C. 2901.13(A)(1).

[2] On the first count, since the discovery of the fraud occurred on June 22, 1988, the limitations period was extended until June 22, 1989, pursuant to the second criterion enunciated by *Dauwalter*. The indictment was filed on August 23, 1990, thirteen months past the statute of limitations deadline, and was therefore not timely.

[3] The second and third counts present a set of circumstances covered by the first criterion set forth in *Dauwalter*, since the fraud was discovered sooner than five years from the occurrence. The period of limitations ran for six years from the month of May 1984, lapsing in May 1990. The indictment was filed approximately three months after the running of the statute of limitations, thereby rendering the indictments invalid.

Judgment affirmed.

MATIA, C.J., and JAMES D. SWEENEY and
BLACKMON, JJ., concur.
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