

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	Case No. 2009-1196
Plaintiff-Appellant,	:	On Appeal from the Cuyahoga County
vs.	:	Court of Appeals, Eighth Appellate
LARRY BESS,	:	District Case No. 91429
Defendant-Appellee.	:	

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE LARRY BESS**

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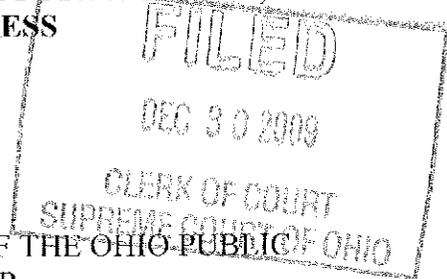
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STATEMENT OF THE CASE AND OF THE FACTS

Theresa Ogden-Bess married Larry Bess in 1986. In February 1989, her daughter, L.O., told a school counselor that Mr. Bess had been sexually abusing her. *State v. Bess*, 8th Dist. No. 91429, 2009-Ohio-2254 ¶4-5. Ms. Ogden-Bess explained that between February and October 1989, Mr. 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. *Bess*, at ¶6. Ms. Ogden-Bess stated that she did not know where Mr. Bess went when he disappeared. Although 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. *Bess*, at ¶7.

Larry Bess was indicted in November 1989 on ten counts of sexually based offenses. Those charges arose from allegations made by Mr. Bess's stepdaughter, L.O., in February 1989. Mr. 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 offenses related to his stepdaughter, L.O. *Bess*, at ¶2.

On March 22, 2007, Mr. Bess's stepson, and L.O.'s brother, A.O., told police that he had also been sexually abused by Mr. Bess from the time he was eight or nine years old until he was sixteen years old. A.O. turned eighteen on March 15, 1991. A.O. had talked to Detective Napier in 1989 about his sister. At that time, A.O. had told Detective Napier that his sister was lying and that he did not have any knowledge about the alleged abuse. *Bess*, at ¶14. Nothing in the original police file indicated that there were any allegations of abuse regarding A.O. *Bess*, at ¶16. Based on A.O.'s 2007 allegations, Mr. Bess was separately indicted 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 with regard to his stepson, A.O. *Bess*, at ¶3.

The indictment at issue in the present case involves A.O. Mr. 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 eighteen. *Bess*, at ¶4. The trial court held that no evidence was presented establishing that Mr. Bess avoided prosecution relating to A.O., and that there was no indication that he knew he was going to be indicted or charged with regard to A.O. The trial court further found that the testimony of Mr. Bess's ex-wife demonstrated that he left Ohio to avoid prosecution for the case involving L.O. The trial court then granted Mr. Bess's motion to dismiss the indictment involving A.O. *Bess*, at ¶17.

The State appealed the trial court's judgment. The court of appeals held that the trial court had properly applied the facts to the law when it granted Mr. Bess's motion to dismiss the indictment against him involving A.O., since it found that Mr. Bess fled Ohio and concealed his identity to avoid being prosecuted for alleged abuse against L.O., and not A.O. The court of appeals held also that the tolling provision of R.C. 2901.13(G) does not apply to any and all later prosecutions that may arise after an accused avoids an earlier, different prosecution. The State filed a memorandum in support of jurisdiction with this Court regarding that issue, which this Court accepted for review. (September 30, 2009 Entry, 2009-1196).

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court will determine the proper application of the tolling provision of R.C. 2901.13(G) as it relates to multiple prosecutions.

ARGUMENT

PROPOSITION OF LAW

The tolling provision of R.C. 2901.13(G) applies to a specific prosecution, and not to any and all prosecutions that may later be commenced against an accused.

A. Ohio's Statute of Limitations.

The purpose of a statute of limitations, such as R.C. 2901.13, is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish as criminal. A statute of limitations is designed to protect an accused from having to defend himself or herself 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. *State v. Swartz*, 88 Ohio St.3d 131, 2000-Ohio-277, citing *Toussie v. United States* (1970), 397 U.S. 112, 114-115, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156, 161.

This Court has held that the intent of Ohio's statute of limitations, R.C. 2901.13, is to discourage inefficient or dilatory law enforcement, rather than to give the accused a chance to avoid criminal liability for his or her conduct. *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St.3d 582, 586, citing *State v. Hensley* (1991), 59 Ohio St.3d 136, 138. However, this Court has also recognized the interests of the accused in the context of Ohio's statute of limitations, acknowledging that R.C. 2901.04(A) dictates that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." *Swartz*, at 133.

B. The Tolling Provision and Commencing a Prosecution.

Ohio Revised Code Section 2901.13 contains Ohio's statute of limitations. Ohio Revised Code Section 2901.13(G) is a tolling provision, which suspends the period of limitation while a defendant avoids prosecution for an offense:

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.

Ohio Revised Code Section 2901.13(E) describes the point in time at which a prosecution is commenced in the context of Ohio's statute of limitations:

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. A prosecution is not commenced by the return of an indictment or the filing of an information unless reasonable diligence is exercised to issue and execute process on the same. A prosecution is not commenced upon issuance of a warrant, summons, citation, or other process, unless reasonable diligence is exercised to execute the same.

In *State v. Russell*, 6th Dist. No. OT-08-045, 2009-Ohio-1747, the Sixth District Court of Appeals addressed the ramifications of R.C. 2901.13(E) upon the tolling provision of R.C. 2901.13(G). In 1985, Mr. Russell admitted to law enforcement personnel that he had engaged in sexual conduct with his stepdaughter. However, he was not arrested and no criminal charges were filed at that time. Mr. Russell later left the state. *Russell*, at ¶5-7. In 2008, an indictment was filed against Mr. Russell regarding the earlier conduct with his stepdaughter. *Russell*, at ¶8. The trial court dismissed the indictment, finding that the statute of limitations had not been tolled under R.C. 2901.13(G) because no prosecution against Mr. Russell, within the meaning of R.C. 2901.13(E), had been commenced until the filing of the indictment in 2008.

The State argued in the court of appeals that the statute of limitations should have tolled because Mr. Russell's departure from the state constituted prima-facie evidence of his intent to avoid prosecution. The State argued that R.C. 2901.13(G) requires that the statute of limitations be tolled when prosecution is purposefully avoided. *Russell*, at ¶15.

Addressing the State's argument, the court of appeals explained:

[The State's] assertion that [Mr. Russell] left Ohio to purposefully avoid prosecution assumes that a prosecution had been commenced against [Mr. Russell]. On the contrary, this court finds that the record clearly shows that no prosecution, in accordance with R.C. 2901.13(E), was commenced against [Mr. Russell] until the January 31, 2008 indictment.

Contrary to [the State's] assertions, the record shows that no prosecution, pursuant to R.C. 2901.13(E), commenced against [Mr. Russell] until January 31, 2008. As such, no prosecution existed for [Mr. Russell] to purposefully avoid. Thus [Mr. Russell's] departure could not operate to toll the statute of limitations. More importantly, if this court were to adopt [the State's] approach, [Mr. Russell's] criminal liability would be potentially infinite, thereby frustrating the statutory scheme. Given these facts and circumstances, this court cannot find the trial court's judgment dismissing the case on the clear basis of an extremely untimely prosecution to constitute an abuse of discretion. [The State's] assignment of error is not well-taken. *Russell*, at ¶16-17.

Russell did not involve two different prosecutions for separate offenses. And while *Russell* did not address the precise question at issue in the present case, it did cogently explain that R.C. 2901.13(G) cannot toll the statute of limitations with regard to a prosecution that has not yet been commenced against an accused. According to the State's and the Attorney General's reasoning in the present case, the tolling provision of R.C. 2901.13(G) should function to toll the period of limitations for offenses involving A.O., beginning in 1989, for a prosecution that was not actually commenced under R.C. 2901.13(E) until 2007. That position defies both the sound analysis of *Russell* and the provisions of R.C. 2901.13 when read in pari materia.

C. Ohio Revised Code 2901.13(G), Avoidance, and Later Prosecution for a Different Offense.

The court of appeals in the present case properly applied its own case law in holding that the tolling provision of R.C. 2901.13(G) does not apply to toll the period of limitations for a prosecution that is commenced after an accused avoids a separate, earlier prosecution. The Eighth District Court of Appeals first examined the issue of R.C. 2901.13(G), as it relates to separate prosecutions, in *State v. McGraw* (June 16, 1994), 8th Dist. No. 65202. Mr. McGraw left the State of Ohio to avoid prosecution for a drunk-driving offense. *McGraw*, at 5-6. After Mr. McGraw had moved, a prosecution for sexual offenses was commenced against him. *McGraw*, at 1-2. The State's ability to prosecute Mr. McGraw for the sexual offenses depended upon the statute of limitations for those offenses having been tolled based upon Mr. McGraw's flight from the earlier drunk-driving prosecution. After considering the implications of R.C. 2901.13(G) with regard to later, separate prosecutions, the court of appeals affirmed the trial court's dismissal of the indictment for the sexual offenses.

The court of appeals explained in *McGraw* that the entire text of R.C. 2901.13 must be read in *pari materia*. And that when considered in the context of the entire statute, R.C. 2901.13(G) refers to a discrete prosecution, and not to any later prosecution that might be commenced. *McGraw*, at 13. Nothing in the text of R.C. 2901.13 suggests that flight or concealment from one prosecution operates to toll the statute for any and all later prosecutions. In holding that Mr. McGraw's flight from a drunk-driving offense did not toll the statute of limitations for the later prosecution of a sexual offense after that flight, the court also noted that statutes must be strictly construed against the State and liberally construed in favor of the accused. See R.C. 2901.04(A). *McGraw*, at 13.

D. The Present Case.

In the present case, the court of appeals addressed the limited question of whether the phrase “purposely avoids prosecution” means avoiding prosecution for a specific offense or whether it also applies to any later prosecution that arises for different offenses. The court noted that it had “already answered this exact question in [*McGraw*].” *Bess*, at ¶29.

The court of appeals explained that the trial court found Mr. Bess fled Ohio to avoid prosecution for the allegations made by L.O. The trial court further found that no evidence was presented that Mr. 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. And 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 Mr. Bess abusing her. *Bess*, at ¶43. And as explained in *Russell*, R.C. 2901.13(G) cannot toll the statute of limitations for a prosecution that had not yet been commenced against an accused.

In the present case, as in *McGraw*, the trial court did not abuse its discretion by dismissing the indictment regarding A.O. Ohio Revised Code Section 2901.13(G), when considered in the context of R.C. 2901.13 as a whole, tolls the statute of limitations with regard to the prosecution that an accused seeks to avoid, and not any and all later prosecutions that may be commenced against an individual. To interpret R.C. 2901.13(G) otherwise would violate R.C. 2901.04(A), indefinitely lengthen criminal liability, and undermine the purpose of R.C. 2901.13.

E. The Federal Statute of Limitations is not Equivalent to Ohio's Statute of Limitations.

Both the State and the Attorney General have argued that this Court should look to the federal tolling provision for guidance in the present case. (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 10-13; December 14, 2009 Merit Brief of Appellant, p. 7-8). However, the Eighth District Court of Appeals fully considered and rejected that argument. *McGraw*, at 13. Rejecting a comparison of R.C 2901.13(G) to 18 U.S.C.A. Sec. 3290, the court of appeals explained that the federal tolling provision is, “on its face. . . much broader than R.C. 2901.13(G).” *McGraw*, at 13. And that “the federal cases employing the broader concept of ‘fleeing from justice’ state that the statute is tolled if the accused is a fugitive from any crime. By the language chosen, we do not find that the Ohio legislature intended such a sweeping result.” *McGraw*, at 13.

The Attorney General has also pointed to a list of twenty-eight states that toll the statute of limitations when an individual is outside of the state, regardless of why the individual left the state. (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 12-13). Those states’ statutes of limitations do not provide guidance in the present case. Ohio Revised Code Section 2901.13(G) specifically provides for tolling only when an individual avoids prosecution. Furthermore, the Attorney General has pointed to eleven states that purportedly have tolling provisions “similar to those in Ohio and the federal system.” (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 13). However, as described above, the federal tolling provision is not analogous to Ohio’s tolling provision. And, assuming arguendo, that the eleven states listed by the Attorney General possess tolling provisions analogous to that of Ohio, the Attorney General has acknowledged that those states have not addressed the issue involved in the present case. (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney

General, p. 13). For the reasons stated above, the State's and the Attorney General's reliance upon the tolling provisions of other jurisdictions is misplaced.

F. This Court has Rejected Arguments Based upon Hypothetical Conjecture.

The Attorney General has argued that the court of appeals' application of R.C. 2901.13(G) will result in "various absurd results and loopholes that serious offenders could exploit to avoid culpability." (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 13). The State has argued that the court of appeals has provided a "roadmap for other Ohio felons to follow on their path to avoiding justice," and a "how-to manual to get away with all crimes other than murder." (December 14, 2009 Merit Brief of Appellant, p. 1-2).

The State and the Attorney General have predicted that offenders will commit minor offenses purposefully, as a pretext for flight from a later prosecution for a more serious offense, in order to prevent the statute of limitations from tolling with regard to that more serious offense. (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 14; December 14, 2009 Merit Brief of Appellant, p. 1). This Court has recently rejected arguments based upon such hypothetical speculation and supposition. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶24.

Furthermore, those ominous predictions are undercut by the passage of fifteen years between *McGraw* and the present case, without a similar case arising. The State's and Attorney General's fears should also be assuaged by the fact that the eleven states listed by the Attorney General as possessing tolling provisions analogous to that of Ohio have failed to produce a case containing factual and legal issues similar to those of the present case. (December 3, 2009 Merit Brief of Amicus Curiae Ohio Attorney General, p. 13).

CONCLUSION

When read in pari materia, and in light of R.C. 2901.04(A), the tolling provision of R.C. 2901.13(G) applies to a specific prosecution, and not to any and all prosecutions that may later be commenced against an accused. Accordingly, the Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Larry Bess** was forwarded by regular U.S. Mail, postage prepaid to T. Allan Regas, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113; Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; and David L. Doughten, 4403 St. Claire Avenue, Cleveland, Ohio 44103, on this 30th day of December, 2009.


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