

In the
Supreme Court of Ohio

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

REPLY BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL RICHARD CORDRAY
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

WILLIAM D. MASON (0037540)
Cuyahoga County Prosecutor

RICHARD CORDRAY (0038034)
Attorney General of Ohio

T. ALLAN REGAS* (0067336)
Assistant Prosecuting Attorney
**Counsel of Record*
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
216-443-7800

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

BRANDON J. LESTER (0079884)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980

Counsel for Plaintiff-Appellant
State of Ohio

614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

DAVID L. DOUGHTON (0002847)
4403 St. Clair Avenue
Cleveland, Ohio 44103
216-361-1112

Counsel for *Amicus Curiae*
Ohio Attorney General Richard Cordray

Counsel for Defendant-Appellee
Larry Bess

JEREMY J. MASTERS (0079587)
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614-466-5394

Counsel for *Amicus Curiae*
Ohio Public Defender

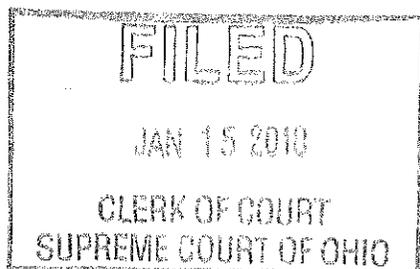


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INTRODUCTION

R.C. 2901.13(G) sets forth a significant exception to the finite periods of time in which the State may commence a prosecution against an individual: “The period of limitation shall not run during any time when the accused purposely avoids prosecution.” As both the State of Ohio and amicus Attorney General argue more fully in their opening briefs, there are two basic reasons for why this provision stops the clock for all charges that may be brought against an individual when he flees the jurisdiction, conceals his identity, or otherwise acts to evade detection for one offense. First, the plain language of the statute broadly tolls the statute of limitations “during *any* time” that an individual avoids prosecution, and it does not include a qualifier like “purposely avoids prosecution *for the charged offense*.” Second, common sense supports this rule. When an individual takes drastic steps to frustrate law enforcement—like fleeing the State—he hinders law enforcement’s ability to investigate other offenses he may have committed, and he makes it effectively impossible for them to charge and convict him of such offenses. In short, the effects of such evasive actions extend beyond the offense that motivated them, and the individual alone should be responsible for any delays occasioned by his own bad actions.

In arguing for an offense-specific tolling rule, appellee Larry Bess and his amicus, the Ohio Public Defender, make three primary arguments: (1) the tolling provision does not apply unless a prosecution has been “commenced” at the time of the flight, which did not occur here; (2) viewed in the context of the full provision, R.C. 2901.13(G) applies only when an individual purposely leaves a jurisdiction to avoid the offense charged, and the rule of lenity also requires that this provision only applies to the crimes that motivated the flight; and (3) a broad tolling rule would unfairly burden defendants. They are mistaken on all counts.

First, the Ohio Public Defender’s argument that the tolling provision applies only after a prosecution has been “commenced” under R.C. 2901.13(E) is misguided. The tolling provision

in R.C. 2901.13(G) exists only to toll the time *for the State to commence prosecution*; it serves no purpose once a prosecution actually begins. At that point, the State's ability to prosecute is subject to speedy trial principles, which themselves provide an exemption for delay occasioned by the defendant's flight. These are separate processes, with separate purposes, and this Court should reject the Public Defender's interpretation, which seeks to combine them.

Second, neither Bess nor his amicus have identified anything in the other sections of R.C. 2901.13 to support a circumscribed reading of R.C. 2901.13(G); instead, they rely on a conclusory statement in an unreported Eighth District case to that effect. But no authority was cited for that assertion, which is not surprising considering that the statute was created "to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct." Committee Comment to Am. Sub. H.B. No. 511 (effective Jan. 1, 1974). A rule that would allow an individual to escape culpability for a host of offenses because he hid from one neither encourages efficient law enforcement nor ensures criminal accountability. Further, while the rule of lenity requires courts to construe criminal statutes strictly against the State, the rule is a measure of last resort, to be applied only to resolve an intractable ambiguity. Because no ambiguity exists here, the rule of lenity does not apply.

Finally, statutes of limitations exist by virtue of legislative grace: There is no constitutional right to a limited period for prosecution. While the statute of limitations was indeed created to protect defendants from having to defend against stale charges, this protection comes at a cost—the defendant must not himself occasion the delay. When a defendant flees a jurisdiction for any crime, he makes prosecution for all impossible. Any harms he suffers from this rule are self-imposed, and thus cannot be said to be an unfair burden.

For these reasons, this Court should reverse the Eighth District's decision.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law No. 1:

Under R.C. 2901.13(G), when an individual purposely avoids prosecution for one crime, the relevant statutes of limitations for all crimes in the jurisdiction are tolled as long as the individual remains a fugitive from justice.

A. The tolling provision in R.C. 2901.13(G) tolls the time for the State to commence prosecution; it does not apply once a prosecution has been commenced.

As a preliminary matter, the Public Defender cites a recent lower court decision for the principle that R.C. 2901.13(G) does not apply because no “prosecution” existed for Bess to avoid. Public Defender Brief at 5–6 (citing *State v. Russell* (6th Dist.), 2009-Ohio-1747). In short, they claim that, because R.C. 2901.13(G) applies when an individual “purposely avoids prosecution,” the individual must be avoiding an actual prosecution for it to apply. Under R.C. 2901.13(E), a prosecution “commences” when an indictment is returned or an information is filed and reasonable diligence is used to execute it; an arrest is made without a warrant; or a warrant, summons, citation, or other process is issued and reasonable diligence is used to execute it—whichever happens first. Because the State did not take any of these actions against Bess for his stepson’s allegations until 2007, after the statute of limitations expired, the Public Defender claims Bess was not “avoiding a prosecution” during his nearly twenty-year absence from Ohio. See also *Russell*, 2009-Ohio-1747, ¶ 17.

This argument misapprehends the nature of the statute of limitations and the tolling provision in R.C. 2901.13(G). R.C. 2901.13(A) provides a limited period in which the State *may commence a prosecution* against an individual: “[A] prosecution shall be barred unless it is commenced within the following periods after an offense is committed. . . .” *Id.* at (A)(1). In short, the various time periods set forth in the statute refer to the time in which the State may initiate a prosecution by taking one of the steps in R.C. 2901.13(E). The tolling provision in

R.C. 2901.13(G), like all of the other subsections in R.C. 2901.13, refers back to this “period of limitation,” stating that that period “shall not run during any time when the accused purposely avoids prosecution.” It operates solely to expand the limited amount of time that the State has to commence a prosecution when the accused has taken steps to hinder this process by fleeing from the jurisdiction, concealing his identity, or taking some similar action. It makes no sense, then, to say that a prosecution must be commenced for this tolling provision to apply; the time to initiate a prosecution cannot be tolled when the prosecution has already begun.

If Bess had been arrested before he left or if a prosecution had otherwise been commenced against him, a separate set of timing rules, those based on his speedy trial rights, would have applied. See *State v. Sanchez*, 110 Ohio St. 3d 274, 2006-Ohio-4478, ¶¶ 6–8. R.C. 2945.71(C)(2) provides that once a prosecution has commenced for a felony, a defendant must be tried within 270 days from the arrest. R.C. 2945.71(C)(2). That time can be tolled for various reasons, including for “[a]ny period of delay occasioned by the neglect or improper act of the accused.” See R.C. 2945.72(D). Moreover, that provision covers time where an individual flees the jurisdiction or fails to appear for trial, making prosecution impossible. See, e.g., *State v. Miller* (6th Dist.), 2008-Ohio-379, ¶¶ 7–10; *State v. Fultz* (4th Dist.), 2007-Ohio-3619, ¶ 11.

In short, these processes are wholly separate concerns that feature different tolling rules. The tolling provision in R.C. 2901.13(G) refers only to the time that the State has to initiate the prosecution; it does not pertain to actions taken after State commences a prosecution, which the Eighth District noted here. See *State v. Bess* (8th Dist.), 182 Ohio App. 3d 364, 2009-Ohio-2254, ¶¶ 37–40 (citing *State v. Koren* (8th Dist. Jan. 24, 1985), 1985 Ohio App. Lexis 5547). As such, the fact that the State had not commenced a prosecution against Bess when he fled does not preclude using the tolling rule in R.C. 2901.13(G); rather, it proves that the rule is appropriate.

B. The plain language of R.C. 2901.13(G) requires that all possible prosecutions be tolled while an individual is purposely avoiding prosecution for any other offense, and neither the rest of R.C. 2901.13 nor the rule of lenity changes that fact.

Neither Bess nor the Public Defender rebut the plain language of the operative part of R.C. 2901.13(G), which is the same under both the present version of the statute and the one in effect at the time of the alleged crimes here: “The period of limitation shall not run during any time when the accused purposely avoids prosecution.”¹ As discussed more fully in the State’s and amicus Attorney General’s merit briefs, this provision is not in any way limited to a specific offense. Rather, it tolls the statute of limitations whenever an individual is avoiding prosecution, which makes sense given that a fleeing defendant makes it essentially impossible for the State to prosecute him for all offenses in his absence, not just the one that spurred him to flee.

Lacking support in the plain language, Bess and the Public Defender argue that two interpretational doctrines—the principle that statutory subsections are to be read and construed within the larger statutory context, and the rule of lenity—change the clear import of this provision. Neither argument is persuasive.

1. A full reading of R.C. 2901.13 suggests that the General Assembly intended to toll the statute of limitations whenever a delay in prosecution is not fairly chargeable to the State; it does not in any way support a limited reading of R.C. 2901.13(G).

First, Bess and the Public Defender argue that the broader context of R.C. 2901.13 shows that R.C. 2901.13(G) only tolls the statute of limitations for the specific offense that motivated the individual to flee. Appellee Brief at 7; Public Defender Brief at 7–8. To be sure, “a court

¹ As noted in amicus Attorney General’s Merit Brief, R.C. 2901.13 has been revised several times since the occurrence of the alleged crimes at issue in this case. The newer versions include revisions to specific limitations periods, grammatical changes, new tolling provisions, and other things that are of minimal importance to the issue here. The operative language in R.C. 2901.13(G) (the first sentence) remains the same in both the current and former versions. But, to be clear, the version effective Jan. 1, 1974 applies to this case. Attorney General Merit Brief at 7. The references to the “former version” of R.C. 2901.13 in this brief are to the 1974 version.

cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.” *State v. Wilson* (1997), 77 Ohio St. 3d 334, 336. But neither Bess nor the Public Defender actually examines the text of R.C. 2901.13, or even identifies which specific provisions support its interpretation. Instead, they simply cite to *State v. McGraw* (8th Dist. June 16, 1994), 1994 Ohio App. Lexis 2599, an unreported case that states, without analysis or citation: “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.” *Id.* at *12–13.

The Eighth District’s bald assertion in *McGraw* lacks support in the plain language of R.C. 2901.13. Like all criminal statutes of limitations, R.C. 2901.13 establishes deadlines for the prosecution of criminal offenses “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.” *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St. 3d 582, 586 (quoting *Toussie v. United States* (1970), 397 U.S. 112, 114–15). Thus, in both the current and former versions of R.C. 2901.13, section (A) provides that the State must generally initiate a prosecution within certain periods of time set forth in the statute. Further, in both versions, section (D) specifies that these time periods begin to run when every element of the offense occurs, and section (E) explains what actions the State must take to commence a prosecution within the meaning of the statute. These provisions merely establish the statute of limitations as a general rule; they do not shed any light on the meaning of R.C. 2901.13(G).

The remaining provisions in the statute provide various exceptions to the rule. In both the current and former versions, R.C. 2901.13(B) tolls the limitations period in fraud or breach of fiduciary duty cases where the victim has not yet discovered the offense. Section (C) in both versions tolls the limitations period when the offense is misconduct in office by a public servant for as long as the individual remains in the public service, and for the next two years. Both versions have an identical section (F), which tolls the limitations period until the corpus delicti of the offense—that is, the specific existence of the crime—is discovered, and an essentially identical section (H), which tolls the limitations period while a prosecution against the accused based on the same conduct is ongoing somewhere in the State. The current version also includes a tolling provision for crimes against children until they reach majority, or until the crime has been discovered by an authority figure that is not the child’s parent or guardian, see R.C. 2901.13(I), which is similar to the rule this Court announced *State v. Hensley* (1991), 59 Ohio St. 3d 136. Aside from a definition of the term “peace officer” in the current version, see R.C. 2901.13(J), no other provisions exist in either version.

These exceptions have a common theme: They all toll the statute of limitations for delays not attributable to the State. This concept comports with the General Assembly’s stated motivation in enacting R.C. 2901.13, which was “to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct.” Committee Comment to Am. Sub. H.B. No. 511 (effective Jan. 1, 1974). Thus, to the extent that certain conditions make it impossible for the State to commence a prosecution within the stated time frame through no fault of its own, R.C. 2901.13 stops the clock until that condition ends.

The plain language interpretation of R.C. 2901.13(G) outlined above furthers this purpose. When an individual like Bess flees the jurisdiction and conceals his identify, he makes it virtually impossible for the State to investigate his involvement in or hold him accountable for any and all crimes during his absence. While a certain offense may spur such an individual to flee, the effects of that bad action stretch far beyond that motivating crime. The entirety of R.C. 2901.13 shows that, in circumstances where an individual's own bad acts alone prevent the State from prosecuting him no matter how diligently law enforcement entities act, the statute of limitations tolls until that condition ends. Otherwise, the statute of limitations becomes little more than a loophole for offenders to avoid liability for their crimes. The General Assembly explicitly sought to avoid such a result, and neither the plain language of the provision nor the full context of the statute demand it. This Court should reject this attempt to undermine the plain meaning of the R.C. 2901.13(G).

2. The rule of lenity does not apply because R.C. 2901.13(G) is not ambiguous.

Next, Bess and the Public Defender argue that the rule of lenity requires a limited reading of R.C. 2901.13(G). They are mistaken.

In Ohio, the rule of lenity provides that statutory provisions “defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” R.C. 2901.04(A). As the United States Supreme Court has noted, the rule of lenity is to be used “as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Callanan v. United States* (1961), 364 U.S. 587, 596. Thus, to the extent that this rule even applies to R.C. 2901.13, which does not define an offense or a penalty, it may only be used to rectify an ambiguity in the

statute, not to change the plain language of the provision. See *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶ 40; *United States v. Johnson* (2000), 529 U.S. 53, 59.

“Ambiguous language is language which is susceptible to different interpretations or meanings. A word or phrase is ambiguous if it is capable of being interpreted as referring to more than one object or event.” *State ex rel. Cunningham v. Indus. Comm’n of Ohio* (1987), 30 Ohio St. 3d 73, 76. Bess argues that R.C. 2901.13(G) is ambiguous because “numerous” lower court decisions have interpreted it differently than the State and amicus Attorney General have here. Appellee Brief at 11. However, neither Bess nor the Public Defender identifies any such decisions apart from the one in this case and the one in *McGraw*, an unreported Eighth District case cited extensively by the lower court that features virtually no analysis of the plain language of the statute. 1994 Ohio App. Lexis 2599, at *12--13. Amicus Attorney General is not aware of any other Ohio cases that have addressed this precise issue.

Such a bare disagreement is not enough to create an ambiguity, especially when the full context of the statute and the expressed opinion of the General Assembly supports the plain meaning, see *State ex rel. Toledo v. Bd. of Comm’rs of Lucas County* (1987), 32 Ohio St. 3d 352, 357, and when the contrary opinions do not even analyze the text of the statute itself suggest why it is ambiguous. Again, nothing in R.C. 2901.13(G) limits the tolling rule to a specific prosecution that the individual is avoiding. The only way to create such a limited rule is to add language to the statute, which courts may not do. See *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶ 24; *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St. 3d 52, 2006-Ohio-6498, ¶ 16 (refusing to find an ambiguity when doing so would require adding words to the statute). Given the absence of any ambiguity, the rule of lenity is inapplicable.

C. When a defendant occasions the delay in his prosecution by fleeing to avoid prosecution for any offense, any prejudice that arises is fairly chargeable to him.

Finally, Bess argues that the plain language of the provision will unfairly burden certain defendants. “It is possible that a defendant may actually be innocent of the additional charges. If a defendant is innocent of the offenses, he or she would be by definition completely unaware of any pending charges,” and the delay would “mak[e] tardy charges difficult to properly defend against.” Appellee Brief at 9. This concern is unavailing.

As the Tenth Circuit has noted, “[a] statute of limitations is not a constitutional right.” *United States v. Morgan* (10th Cir. 1991), 922 F.2d 1495, 1497; see also R.C. 2901.13(A)(2) (stating that no statute of limitations applies to aggravated murder under R.C. 2903.01 and murder under R.C. 2903.02). The Ohio statute of limitations is an act of legislative grace entered to protect individuals from the harms arising from inefficient and dilatory law enforcement activities. See Committee Comment to Am. Sub. H.B. No. 511 (effective Jan. 1, 1974). The General Assembly saw fit to include exceptions like R.C. 2901.13(G) to ensure that individuals do not exploit this protection by fleeing the State, concealing their identities, or taking other steps to frustrate law enforcement efforts until the time for such offenses expires.

Under the rule outlined above, it is certainly possible that individuals may face charges of which they are innocent years after the crimes were allegedly committed. Indeed, Bess himself may very well be innocent of the charges here. And it will undoubtedly be more difficult for him to mount a defense to those charges after such a delay. But the reverse side of that coin is also true: The passage of time will make it more difficult for the State to prosecute the case.

The fact remains, though, that R.C. 2901.13(G) applies *only* when an individual takes some improper action purposely to avoid prosecution. See *State v. Gallant* (3d Dist.), 174 Ohio App. 3d 264, 2007-Ohio-6714, ¶ 14–22 (refusing to toll when the defendant changed her last name

because she got married and moved frequently because her husband was in the Navy). But for that bad action, the resultant delay would not have occurred, and the statute of limitations would have applied as normal. Here, if Bess had not left Ohio for nearly twenty years, moved frequently, and assumed various aliases to avoid facing responsibility for his stepdaughter's allegations of sexual abuse, he would not now be on trial for other allegations arising from that time period. To the extent that Bess seeks to mitigate, on equitable grounds, the difficulties he will face in defending against the charges arising from his stepson's allegations here, his argument fails due to his unclean hands; he cannot complain of the prejudice he engendered through his own bad action. See *State ex rel. Mallory v. Public Employees Retirement Bd.* (1998), 82 Ohio St. 3d 235, 243–44.

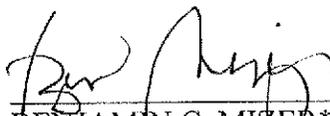
It is virtually impossible to know what specific combination of factors leads an individual to flee the jurisdiction, conceal his identity, or take some other evasive action, especially when the individual may have committed multiple offenses. If a bank robber robs several banks, and flees the State when he finds out that he is a suspect for one such robbery, is it just that offense that motivated him to leave the State, or the prospect of being caught for all of them? Such complex inquiries into the criminal mind are unnecessary. When an individual flees the State or conceals his identity to avoid being held accountable for certain criminal acts, he prohibits law enforcement from both investigating and prosecuting him for all criminal offenses that could have been prosecuted during that period of time. The General Assembly explicitly sought to protect society against such evasive conduct in R.C. 2901.13(G), and this Court should uphold that protection.

CONCLUSION

For the above reasons, the Attorney General respectfully asks this Court to reverse the Eighth District's decision.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

BRANDON J. LESTER (0079884)
Deputy Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

Ohio Attorney General Richard Cordray

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 15th day of January 2010, upon the following counsel:

William D. Mason
Cuyahoga County Prosecutor
T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

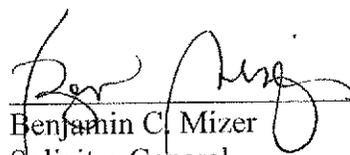
Counsel for Plaintiff-Appellant
State of Ohio

David L. Doughton
4403 St. Clair Avenue
Cleveland, Ohio 44103

Counsel for Defendant-Appellee
Larry Bess

Jeremy J. Masters
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Public Defender



Benjamin C. Mizer
Solicitor General