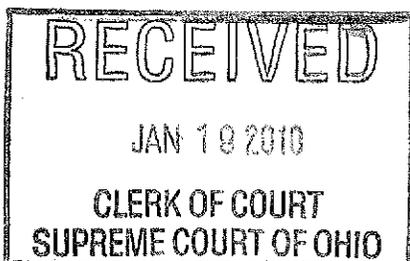


NO. 09-1196

IN THE SUPREME COURT OF OHIO

ORIGINAL

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



STATE OF OHIO,  
Plaintiff-Appellant

-vs-

LARRY BESS,  
Defendant-Appellee

**APPELLANT'S REPLY BRIEF IN RESPONSE TO APPELLEE LARRY BESS'S AND AMICUS  
CURIAE THE OHIO PUBLIC DEFENDER'S MERIT BRIEFS**

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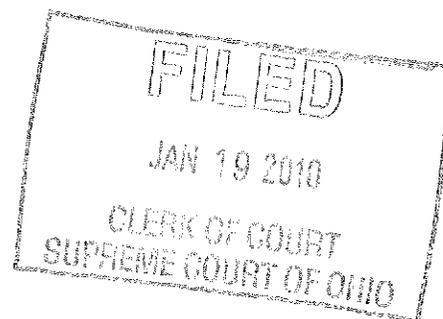
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**TABLE OF AUTHORITIES**

**Cases**

*Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 626 N.E.2d 939, 942 ..... 3  
*State v. Bess*, 182 Ohio App.3d 364, 374, 912 N.E.2d 1162, 1169, 2009-Ohio-2254..... 3  
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**Statutes**

R.C. 2901.04(A) ..... 2, 3  
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R.C. 2901.13(G) ..... 1, 2, 4

**APPELLANT'S REPLY BRIEF IN RESPONSE TO APPELLEE LARRY BESS'S AND AMICUS CURIAE THE OHIO PUBLIC DEFENDER'S MERIT BRIEFS**

Appellee Larry Bess filed his Merit Brief on January 4, 2010. Within that brief he argues that the appellate court was correct because it relied on its own divided precedent, asks this court to construe the statute of limitations in his favor by inserting terms that do not exist in the statute and in argument ignores the plain meaning of the statute as it is written. Amicus Curiae Office of the Ohio Public Defender filed a Merit Brief within this matter. Within that brief, the Public Defender has confused the language of Ohio's statute of limitations by importing definitions of prosecution from other statutes, similarly relied on the same precedent that Appellee relies, precedent that is without further authority or citation interpreting the statute of limitations, and arguing that adoption of the State's proposition of law would serve to harass the innocent later accused of crimes. It would not.

This Court should reject these arguments where the issue raised by the state is answered by a simple reading and application of R.C. 2901.13(G) as it is written. The State has asked this Court to adopt the following proposition of law:

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

This rule of law flows from the plain reading of R.C. 2901.13(G), without reference to intent or without insertion of any limits upon the language of the statute. There is no need to "construe" or construct the statute, as it is not ambiguous.

R.C. 2901.13(G) reads in pertinent part:

The period of limitation shall not run during any time when the accused purposely avoids prosecution.

The arguments made by Appellee and the Ohio Public Defender ask this Court not to apply the statute as written, but to import intent and add a limiting condition to the language of the statute, that the reason for flight to avoid prosecution is based upon actual knowledge and a conscious decision by the fugitive to flee for *only* a specific offense. In support of this reading of the statute, Appellee asks this Court to apply R.C. 2901.04(A) to rewrite the tolling provision at issue in this case. However, that statute is inapplicable; it applies only in the construing of \*\*\* sections of the Revised Code *defining offenses or penalties* \*\*\*." R.C. 2901.13 is neither an offense nor penalty statute and reference to the rule of construction in R.C. 2901.04(A) is not warranted in this case. More importantly, the tolling provision does not require any judicial construction; it reads that the statute of limitations "shall not run during any time when the accused purposely avoids prosecution." R.C. 2901.13(G). This language is simple, clear, and unambiguous. It does not purport to limit the tolling period for certain prosecutions, nor does it require knowledge that specific offenses are being investigated or prosecuted. Because of this, the arguments by Appellee and the Ohio Public Defender are unpersuasive where they presume that ambiguity exists in the statute. As noted by Judge Blackmon in her dissent to *State v. McGraw*, (Jun. 16, 1994) Cuyahoga App. No. 65202:

Of course, I believe that prosecution means prosecution, which answers the second question in this dissent. If a person is avoiding prosecution for a crime, it is his "bad luck" that, while he is avoiding the prosecution, an undiscovered crime surfaces.

Both Appellee and the Ohio Public Defender cite and heavily rely upon *McGraw* in defense of their argument that it is proper for a court to insert language into a statute that does not require any construction. However, in *McGraw*, the simple majority in that matter set forth no precedent that supported its limited reading of the tolling provision

from statutory law, from this Court, or any other appellate courts support. The two judges in *McGraw* when addressing the scope of the tolling provision simply stated, “The entire text of R.C. 2901.13 suggests that paragraph (G) read in *pari materia* means the instant prosecution not one for a different crime. There is nothing in the statute to suggest that flight or concealment from some other prosecution operates to toll the statute for the instant prosecution. Criminal statutes must be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04(A). We find the trial court did not err in so construing the statute.”

In *McGraw*, the majority relied on R.C. 2901.04(A) as its authority to limit the tolling provision to a specific offense. However, by its own language R.C. 2901.04(A) does not apply to the statute of limitations. Even if it did, this Court has rejected the liberal application of the constructionary rule where a statute is not ambiguous. “Nevertheless, courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized.” *State v. Snowden*, 87 Ohio St.3d 335, 336-37, 720 N.E.2d 909, 910-11, 1999-Ohio-135 (Quoting, *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 626 N.E.2d 939, 942.)

As Judge Blackmon dissented from the unwarranted limitation on the law, so did Judge Sweeney in dissent of the appellate opinion in this case. He wrote, “Nothing in the plain reading of this statute refers to a specific prosecution or ‘the’ prosecution. In essence, by fleeing from justice, the defendant waived his right to assert the statute-of-limitations defense for crimes he could still, otherwise, be prosecuted for.” *State v. Bess*, 182 Ohio App.3d 364, 374, 912 N.E.2d 1162, 1169, 2009-Ohio-2254, at ¶48.

The arguments made by Appellee and the Ohio Public Defender are based upon the unwarranted premise that R.C. 2901.13(G) is ambiguous and requires judicial intervention and construction. R.C. 2901.13(G) is not ambiguous; it does not require construction; and it does not limit the tolling period to only certain offenses.

For these reasons, this Court need not construe R.C. 2901.13(G) to mean anything other than what it says, "The period of limitation shall not run during any time when the accused purposely avoids prosecution." By refraining from active construction of a statute that requires none, this Court should reverse the opinion of the appellate court and remand this matter so that the State may proceed in prosecution upon the indictments.

Respectfully submitted,

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**SERVICE**

A copy of the foregoing Reply Brief has been mailed this 15<sup>th</sup> day of January 2010, to Benjamin C. Mizer, Office of the Ohio Attorney General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215; David L. Doughten, 4403 St. Clair Avenue, Cleveland, Ohio 44103. and to Jeremy J. Masters, Assistant State Public Defender, 250 East Broad Street #1400, Columbus, Ohio 43215.

  
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