

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

)

Case No.: 2009-2122

Plaintiff-Appellee,

)

C.A. Case No.: L08-1301

C.P. Case No.: CR07-2498

-vs-

)

APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS,
SIXTH APPELLATE DISTRICT

LINDA S. COOK,

)

Defendant-Appellant.

)

MERIT BRIEF OF DEFENDANT-APPELLANT, LINDA S. COOK

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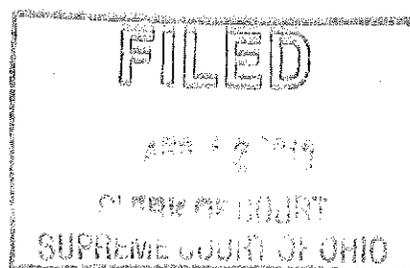


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STATEMENT OF THE FACTS

This is an appeal from the decision of the Lucas County Court of Appeals that reversed the dismissal of a felony charge of Tampering with Records as being barred by the statute of limitations. The Court of Appeals certified a conflict as to the following question:

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.

A copy of the Decision and Judgment Entry certifying the conflict is appended hereto at A-24.

This is a felony case which began on July 18, 2007, when Defendant-Appellant, Linda S. Cook (hereafter referred to as "Defendant") was indicted by the Lucas County Grand Jury in a two-count Indictment. Count One charges the offense of Tampering with Records (a felony of the third degree). Count Two charges Aggravated Theft (a felony of the second degree). The Common Pleas Court, on motion of Defendant and after conducting an evidentiary hearing, dismissed Count One.

Count Two, alleging Aggravated Theft (a felony of the second degree) remains pending in the Lucas County Court of Common Pleas awaiting a trial date. On the prosecution's appeal from the dismissal of Count One, the Sixth District Court of Appeals reversed.

Count One of the Indictment reads as follows:

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **LINDA S. COOK**, 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, in violation of **§2913.42(A)(1) AND (B)(4) OF THE OHIO REVISED CODE, TAMPERING WITH RECORDS, BEING A FELONY OF THE THIRD DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The offense charged in Count One is alleged to have occurred on July 12, 2001. The Indictment was returned on July 18, 2007, more than six (6) years later. On that basis, the Common Pleas Court dismissed Count One because the applicable six year statute of limitations had already expired by the time the Indictment was brought.

The pertinent facts were developed at an evidentiary hearing conducted in the Common Pleas Court on Defendant's Motion to Dismiss. At the evidentiary hearing, the parties stipulated that the "record" referred to in Count One of the Indictment was a deed recorded with the Fulton County Recorder on July 12, 2002 (transcript of Evidentiary Hearing held before the Hon. Gary G. Cook on July 8, 2008, hereafter cited as "T" at 14). At the time of the alleged offense, Defendant was an attorney at law admitted to practice in the State of Ohio. As a result of the conduct constituting the offense described in Count One of the Indictment, Defendant was disbarred by this court on July 11, 2007. Toledo Bar Association vs. Cook, 114 O.St.3d 108 2007-Ohio-3253.

Jonathan Cherry is Bar Counsel for the Toledo Bar Association. He prosecuted the grievance which resulted in Defendant's disbarment (T. 23-24). He started his investigation on April 23, 2004 and filed a Complaint with the Ohio Supreme Court Board of Commissioners on Grievances and Discipline on April 18, 2005, which was assigned case

number 05-047 (Marked EXHIBIT A at the hearing). Paragraphs 4, 5 and 13 of the Complaint (EXHIBIT A) described the recording of the deed that was recorded with the Fulton County Recorder on July 12, 2001 and essentially describe the conduct of Defendant that is alleged to constitute the offense charged in Count One. Attached to the Complaint (EXHIBIT A) was a copy of the deed that was recorded on July 12, 2001. An Amended Complaint was filed on September 13, 2005 (EXHIBIT B) which restated the same allegations set forth in Paragraphs 4, 5 and 13 of the Complaint filed on April 18, 2005. A copy of the deed recorded on July 12, 2001 was also attached to EXHIBIT B (T. 28, 30-35).

Paragraphs 4, 5 and 13 in both the Complaint and First Amended Complaint (EXHIBITS A and B) filed with the Ohio Supreme Court Board of Commissioners on Grievances and Discipline read as follows:

4. An initial deed (Deed A, attached) was prepared by Respondent and purports to have been executed on May 20, 1998, by Benfer. The grantor on Deed A is "Esther J. Benfer, Single" and the grantee is "Linda S. Cook, Trustee".

5. Deed A was not recorded until July 12, 2001.

* * *

13. In an attempt to avoid the Medicaid "look back" provision, Respondent backdated Deed A to falsely reflect an execution date of May 20, 1998.

As explained by Mr. Cherry, pursuant to Bar.Gov.R.V, Section 11 (E)(2)(9), each of these filings and all proceedings before the Board of Commissioners on Grievances and Discipline were public records (T.30).

A hearing was held before the Board of Commissioners and Grievances at the Sixth District Court of Appeals in Toledo, Ohio on August 17-18, 2006, during which evidence

was presented to support the allegations against Defendant, including those described in Paragraphs 4, 5, and 13 of the Complaint and Amended Complaint. This hearing was open to the public (T.35-36).

On October 26, 2006, the Board of Commissioners filed its Findings of Fact, Conclusions of Law and Recommendation (EXHIBIT C) which included the following findings at Paragraphs 10 and 11:

- (10) Respondent prepared a Quit-Claim Deed transferring the Benfer Farm, to "Linda S. Cook, Trustee" (Exhibit A). Amazingly enough, this Quit-Claim Deed is dated May 20, 1998. This Quit-Claim Deed shows that it was recorded in the Fulton County Recorder's Office on July 12, 2001. At the hearing, Respondent maintained that the 1998 date was typographical error. The Respondent testified that the typographical error occurred because a prior deed with the date of May 20, 1998 was saved on a computer and was used as a template, and all information was changed except that date. Respondent testified that the deed was actually prepared and executed in May or June of 2000.
- (11) The Panel does not find credible the testimony of Respondent that the date on the Quit-Claim Deed (Exhibit A) was a mistake...

[footnotes omitted]

It is undisputed that EXHIBITS A, B, and C constitute public records (T. 36).

Joseph Woodring was a friend of Esther Benfer. They were both members of Metamora United Methodist Church. Mr. Woodring contacted attorney Terry Kaper on behalf of Esther Benfer in April of 2004. Attorney Kaper prepared a Power of Attorney for Mrs. Benfer to sign and was made aware of the discrepancies concerning the deed that had been recorded on July 12, 2001 (T. 60-61; 71; 80-81).

Harriet Loar had been friends with Esther Benfer since childhood and was also a member of the congregation at Metamora United Methodist Church. She was appointed

legal guardian of Esther Benfer on August 11, 2004 (T. 84; 86).

Ms. Loar was specifically made aware of the discrepancies and problems with the deed that had been recorded on July 12, 2001 by Mr. Woodring prior to the time she was appointed guardian (T. 77-78; 88; 92). She testified that she knew of the problems with the July 12, 2001 deed at least as early as April, 2004 (T. 92-93).

Attorney Jan Stamm is a partner in the same law office with attorney Terry Kaper. Mr. Stamm has been a real estate title examiner for over 23 years. Attorney Kaper brought attorney Stamm in to work on the Benfer matter and Mr. Stamm was retained to represent Esther Benfer in April of 2004 (T. 95-97). During April of 2004, Mr. Stamm became fully aware of the discrepancies and inaccuracies in the deed recorded on July 12, 2001 (T. 110-111). Mr. Stamm discussed all of these matters with Harriet Loar some time between April, 2004 and June, 2004 (T. 11-12). Attorney Stamm testified that he was able to identify problems with the deed that had been recorded on July 12, 2004 just by looking at it, and he discussed these problems in detail with both Attorney Kaper and Harriet Loar (T. 119; 121-122).

In summary, the uncontradicted evidence established that the facts alleged to constitute the offense charged in Count One of the Indictment were known to the Toledo Bar Counsel as early as April, 2004, were a matter of public record in filings with the Supreme Court Board of Commissioners on Grievances and Discipline on April 18, 2005 and September 13, 2005, were the subject of a public hearing on August 17-18, 2006, and were summarized in Findings of Fact and Conclusion of Law made by the Board of Commissioners on Grievances and Discipline and filed on October 26, 2006, which is also a matter of public record. The uncontradicted evidence also established that the facts alleged to constitute the offense charged in Count One were known to attorney Terry Kaper

and attorney Jan Stamm (who were representing the alleged victim, Esther Benfer) as early as April, 2004, and were also known to Harriet Loar (who was appointed legal guardian of Esther Benfer on August 11, 2004) in April, 2004. Indeed, the Court below characterized February, 2004 as being the “earliest” date upon which the offense became known. State vs. Cook, 2009-Ohio-4917 at ¶37.

Based upon this undisputed evidence, the Common Pleas Court made a finding “that Count One of the Indictment must be dismissed because the State was aware of the allegations against Cook before the statute of limitations expired but did not indict Cook until after the expiration of the statute of limitations” Opinion and Judgment Entry filed August 22, 2008 and journalized August 25, 2008 at 6-7 (copy appended at Tab 1). On this basis, the Common Pleas Court had granted Defendant’s Motion to Dismiss Count One.

The prosecution appealed the dismissal to the Sixth District Court of Appeals, State vs. Cook, 6th District, 2009-Ohio-4917 (copy appended hereto at A-9). The Court of Appeals reversed the dismissal, reasoning as follows ¶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. 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.

[footnote omitted]

Upon Motion of Defendant, on October 28, 2009, the Sixth District Court of Appeals certified its decision as being in conflict with the decision of the Eighth District Court of Appeals in State vs. Mitchell, 78 O.App.3d 613 (1992), *jurisdictional motion overruled*, 64 O.St.3d 1498. A copy of the Decision and Judgment certifying the conflict is appended hereto at A-26).

This case is now before the Court for review and final determination pursuant to Section 3 (B)(4), Article IV of the Ohio Constitution.

Such further facts as may be pertinent to the question presented for review are set forth under the Proposition of Law, *infra*.

PROPOSITION OF LAW.

R.C. 2913.01 (F) does not operate to toll the six year period of limitations provided for in 2901.13 (A) where the corpus delicti of an offense of which an element is fraud is discovered by legal representatives of the aggrieved person within the period of limitations and more than one year prior to expiration of the limitations period.

Defendant was indicted in a two count Indictment, for Tampering with Records (Count One) and Aggravated Theft (Count Two). Only Count One was dismissed. That Count reads as follows:

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **LINDA S. COOK**, 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, in violation of **§2913.42(A)(1) AND (B)(4) OF THE OHIO REVISED CODE, TAMPERING WITH RECORDS, BEING A FELONY OF THE THIRD DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Clearly, Tampering with Records is an offense an element of which is fraud. The offense is alleged to have occurred on July 12, 2001, Defendant was not indicted until July 18, 2007, which is more than six (6) years later.

R.C. Section 2901.13 provides, in pertinent part, as follows:

(A)(1) Except...as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

(a) For a felony, six years.

* * *

(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.

* * *

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

Both Division (B) and Division (F) of the above quoted statute are tolling provisions.

In State vs. Climaco, Climaco, Semitore, Lefkowitz and Garofoli Co., LPA, 85 O.St.3d 582,

1999-Ohio-408, which was not a case involving a fraud offense, this Court reasoned as

follows at 587:

Moreover to construe subsection (F) as controlling would render subsection (A)(2) meaningless, that is, a prosecution for a misdemeanor offense would be barred if it were not commenced within two years after the offense was committed. Subsection(A) is of no consequence if subsection (F) controls all circumstances, including situations, such as here, in which discovery occurs within the statutory period. The two-year period for misdemeanors would begin only on discovery of the offense, regardless of the date of the commission of the offense. Had the General Assembly intended this, it would have required that prosecution be initiated within two years after an offense is discovered instead of within two years after an offense is committed. The language expect as otherwise provided contained within subsection (A) clearly does not contemplate such an expansive reading of the statute.

Additionally, the state's interpretation could subject a person to criminal liability indefinitely with virtually no time limit, and this would frustrate the legislative intent on criminal statutes of limitations. We will not endorse such a broad interpretation of subsection (F). See *Hensley*, 59 Ohio St.3d at 139, 571 N.E.2d at 714.

Thus, in Climaco, this Court held that 2913.01(F) does not apply in situations where the corpus delicti of an offense is discovered within the statutory period of limitations.

In the case *sub judice*, the Court of Appeals held that pursuant to 2913.01(F), the six year statute of limitations did not begin to run until the corpus delicti was "discovered" in February of 2004. It is undisputed that what the Court of Appeals considered to be the date of discovery¹ occurred which was at a point in time when there were more than three (3) years still remaining on the six year statute of limitations if the period of limitations were to be computed from the date upon which the allegedly fraudulent deed was recorded. The holding of the Court of Appeals is not only inconsistent with the decision of this Court in Climaco, but it also completely disregards the provisions of 2901.13(B).

As previously mentioned, both Divisions (B) and (F) of the 2901.13 are tolling provisions. Division (B) applies to offenses which have fraud as an element. The offense that was the subject of the dismissed Count in the instant case is Tampering with Records, a violation of R.C.2913.42, which is an offense that has fraud as an element.

Pursuant to R.C.1.51 and R.C.1.12, specific statutory provisions prevail over conflicting general statutory provisions. See, State vs. Volpe, 38 O.St.3d 191 (1988). Of course, this principle applies to statutes of limitations. See, e.g., State vs. Detillio, 90 O.App.3d 241 (1992).

It is apparent that the offense of Tampering with Records under 2913.42 is an offense of which fraud is an element. Accordingly, in circumstances where the period of limitations is appropriately computed from the date upon which the corpus delicti of the offense is discovered, it is R.C.2901.13(B), not 2901.13(F), which specifies the time in

¹ Defendant maintains that the corpus delicti was never concealed in the first place and was ascertainable as soon as the deed in question was recorded.

which the prosecution must be commenced, which is "within one year after discovery of the offense..." Under such circumstances, it is the specific provisions of 2901.13(B) are controlling, not the more general provisions of 2901.13(F). The decision of the court below to the contrary is erroneous. State vs. Stephens, 2nd District case number 96CA0117 (July 25, 1997), 1997WL435694; State vs. Mitchell, 78 O.App.3d 613 (1992) *jurisdictional motion overruled*, 64 O.St.3d 1498.

It is a well established principle of statutory construction that a statute must be interpreted so as to give effect to all of its provisions, and "none of the language employed should be disregarded". Carter vs. Youngstown Division of Water, 146 O.St. 203 (1946); Weaver vs. Shaw Hospital, 104 O.St.3d 390 at 393, 2004-Ohio-6544 at ¶12; Sarmiento vs. Grange Mutual Casualty Company, 106 O.St.3d 403 at 407-408, 2005-Ohio-5410 at ¶25. "[S]ignificance and effect should, if possible, be accorded to every word, phrase, sentence, and part of the act." *Id.*, 2004-Ohio-6544 at ¶13; 2005-Ohio-5410 at ¶25; Wachendorf vs. Shaver, 149 O.St.23, (1948); *Accord*, State vs. Wilson, 77 O.St.3d 334 at 336, 1997-Ohio-35; State vs. Jackson, 102 O.St.3d 380, 2004-Ohio-3206. Consistent with these principles of statutory construction, the decisions in Stephens and Mitchell, *supra*, distinguish between the tolling provisions codified in R.C.2901.13(B), which apply exclusively to offenses of which fraud is an element, and the tolling provisions codified in R.C.2901.13(F) which apply to all other cases.

However, in State vs. Martin, 4th District, 2001-Ohio-2547 at *10-*11, a different analysis was postulated to harmonize the provisions of R.C.2901.13(B) and 2901.13(F):

. . . we find that the two provisions are not necessarily inconsistent. R.C.2901.13 (F) tolls the statute of limitations until *anyone* discovers the corpus delicti, while R.C. 2901.13 (B) tolls the statute of limitations until the party aggrieved by the fraud discovers the corpus delicti. Thus, R.C. 1.12 does not apply because the two provisions are not inconsistent.

However, in addressing Martin's argument, we assume that R.C.2901.13 (B) applies here.

R.C.2901.13 (B) applies to "an offense of which an *element is fraud or breach of fiduciary duty*" R.C.2901.13 (B). Thus, to determine whether R.C.2901.13 (B) applies here, we focus on the elements of the offenses with which Martin was charged, *i.e.*, R.C.2913.02 (A)(1)-(3).

Thus, depending upon what approach is taken, the factors which render R.C.2901.13 (B) applicable to the exclusion of R.C.2901.13 (F) are: A) an offense of which fraud or breach of fiduciary duty is an element, or B) an offense of which fraud or breach of fiduciary duty was an element and which was discovered by the aggrieved person or legal representatives of the aggrieved person. Whichever analysis is employed, it is apparent that the instant case meets all pertinent criteria. The dismissed count involved an offense which has fraud as an element and the offense was discovered by legal representatives of the aggrieved person (her attorneys and her legal guardian). This discovery occurred in April of 2004, well within the period of limitations and more than a year before the six (6) year period of limitations expired. Under such circumstances, R.C.2901.13 (B) would be the only potentially applicable tolling provision and R.C.2901.13 (F) would be inapplicable. The holding of the court below to the contrary is erroneous and contrary to law.

Of course, the burden of proof as to whether the prosecution has commenced within the applicable statute of limitations is upon the State. State vs. Young, 2 O.App.3d 155 (1981). Pursuant to R.C.2901.04 (A), statutes of limitations must be strictly construed against the State. State vs. McGraw, 8th District case number 65202 (June 16, 1994) 1994 WL 264401 at *3; State vs. Dauwalter, 42 O.Misc.2d 17 at 18 (C.P., 1988). Accordingly, any ambiguity or uncertainty as to the inapplicability of R.C. Section 2901.13 (F) to the circumstances presented in this case must be resolved in Defendant's favor. In this regard, it is well established that statutes of limitations must be "liberally interpreted in favor of

repose.” Toussie vs. United States, 397 U.S. 112 at 115 (1970), cited with approval in State vs. Climaco, Climaco, Semitore, Lefkowitz and Garofoli Co., LPA, 85 O. St. 3d at 586.

It remains Defendant’s contention that 2901.13 (F) never applies in situations where the corpus delicti of the offense is discovered before expiration of the period of limitations. State vs. Climaco, Climaco, Semitore, Lefkowitz and Garofoli Co., LPA, 85 O.St.3d at 588: “Here, we do not need to resort to subsection (F) because the alleged offenses were discovered within the statute of limitations of R.C.2901.13 (A)(2).” Accord, State vs. Mitchell; State vs. Stephens; and State vs. Dauwalter, supra. Be that as it may, in cases such as the case at bar, involving an offense of which fraud is an element, and where the offense is first discovered by legal representatives of the aggrieved person, there should be no question that the specific tolling provisions of R.C.2901.13 (B) govern to the exclusion of the more general tolling provisions of R.C.2901.13 (F). Defendant respectfully contends that the court below erred in applying R.C.2901.13 (F) to extend the computation of the limitations in this case.

In State vs. Climaco, Climaco, Semitore and Garafoli Co., LPA, supra, 85 O.St. 3d at 588, this Court rejected the proposition that “. . . subsection (F) controls in all situations, such as here, in which the discovery occurs within the statutory period.” In Climaco, which involved a prosecution for misdemeanor charges of Falsification, this Court reasoned as follows, *Id.*:

Moreover, to construe subsection (F) as controlling would render subsection (A)(2) meaningless, that is, a prosecution for a misdemeanor offense would be barred if it were not commenced within two years after the offense was committed. Subsection (A) is of no consequence if subsection (F) controls all circumstances, including situations, such as here, in which discovery occurs within the statutory period. The two-year period for misdemeanors would begin only on discovery of the

offense, regardless of the date of the commission of the offense. Had the General Assembly intended this, it would have required that prosecution be initiated within two years after an offense is discovered instead of within two years after an offense is committed. The language "except as otherwise provided" contained within subsection (A) clearly does not contemplate such an expansive reading of the statute.

Additionally, the state's interpretation could subject a person to criminal liability indefinitely with virtually no time limit, and this would frustrate the legislative intent on criminal statutes of limitations. We will not endorse such a broad interpretation of subsection (F). See *Hensley*, 59 Ohio St.3d at 139, 571 N.E.2d at 714.

[emphasis supplied]

The Court below relied on in *State vs. Hensley*, 59 O.St.3d 136 (1991) to support its determination not to follow the holding in *State vs. Climaco, Climaco, Semitore and Garafoli Co., LPA, supra*. Observing that the "holdings in *Hensley* and *Climaco* make it difficult to discern under which circumstances the tolling provision in subsection (F) is applicable" the Court below held as follows, 2009-Ohio-4917 at ¶42:

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 delict.

The above quoted analysis completely fails to take into account that the dismissed count charged an offense "an offense of which an element is fraud or breach of fiduciary duty" within the meaning of R.C.2901.13(B). This being so, R.C.2901.13 (B) would be the governing tolling provision, not the R.C.2901.13(F). In this regard, unlike the case at bar, *State vs. Hensley, supra*, did not involve an offense which has "fraud or breach of fiduciary duty as an element," within the meaning of R.C.2901.13 (B). Further, the holding in *Hensley* is expressly limited as applying to "crimes involving child abuse or neglect," *Id.*, at 140, 141 and *Syllabus*.

Indeed, in State vs. Gravelle, 6th District, 2008-Ohio-4031, another recent decision by the Court below, it was recognized that the tolling provision of R.C.2901.13 (B) is controlling in cases involving an offense of which fraud is an element. This was also recognized and discussed in Chief Justice Moyer's widely cited dissenting opinion in Climaco, 85 O.St.3d at 593:

Because fraud is not an element of the offense proscribed by R.C.2921.13, Subsection (B) of the statute [R.C.2901.13] is inapplicable to the case at bar and we need not interpret any inconsistencies that may exist between that subsection and other subsections of R.C.2901.13.

But fraud is an element of the offense involved in the case *sub judice*, and the limitations period set forth in Subsection (B) would make no sense if those provisions are trumped or superceded by the provisions of Subsection (F). Since all provisions of a statute must be given effect, it follows that, in cases in which fraud is element, R.C.2901.13 (B) necessarily applies to the exclusion of R.C.2901.13 (F). See, State vs. Dauwalter, 43 O.Misc.2d at 18:

Under the state's interpretation, relying in the tolling aspect of Subsection (F), the state could file charges within six years of the "discovery" of an offense no matter how far back the offense occurred. Subsection (B) in such instance would be superfluous and could never be applied since the state would always have six full years from the "discovery," and this time would *always* eclipse the one-year restriction under Subsection (B). This Court cannot believe the legislature intended to enact a superfluous provision of the statute in question.

The above-quoted analysis was applied and adopted in State vs. Stephens, *supra*. Both Dauwalter and Stephens involved offenses which had fraud as an element.

In this regard, it is important to keep in mind that fraud was not an element of the offenses involved in State vs. Hensley, *supra*, where the tolling provision of R.C.2901.13 (F) was held to apply with full force and effect. Nor was fraud an element of the offense

in State vs. Edwards, 119 O.App.3d 237 (1997), which is the other case cited and relied upon by the Court below. Edwards involved a prosecution for bigamy.

The Courts of this State have consistently viewed the provisions of R.C.2901.13 (B) as superceding R.C.2901.13 (F) in cases involving an offense of which fraud is an element. See, e.g., State vs. Stephens; State vs. Dauwalter, *supra*; State vs. Lester, 111 O.App.3d 736 (1996). See also, State vs. Martin, *supra*, involving a violation of R.C.2913.02 (A)(3), an element of which is "deception."

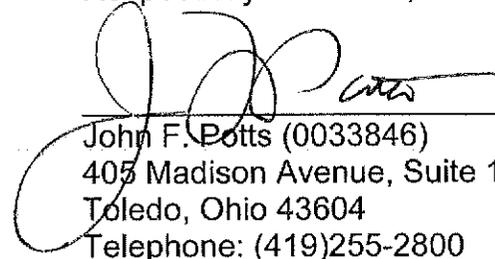
In the instant case, there was ample time for Appellee to have indicted Defendant in a timely manner and there still remains another count pending against Defendant awaiting a trial date in the Common Pleas Court. In this case, there was no obstacle or impediment that interfered with the State's ability to prosecute diligently. There is no reasonable justification for the dilatory commencement of the prosecution as to the dismissed count. The decision of the Court below reversing that dismissal is not well-reasoned and inexplicably fails to take into account the applicability of R.C.2901.13(B). That the Court below would omit to analyze the significance of fraud being an element of the offense involved is irreconcilable with the detailed analysis of that matter set forth in that Court's decision in State vs. Gravelle, *supra*. There is simply no coherence between the analysis set forth in Gravelle and the anomalous decision of the Court below in the instant case.

The decision from which this appeal has been taken should be reversed because it is wrongly decided and contrary to law.

CONCLUSION

For these reasons, the decision appealed from must be reversed and Defendant ordered discharged as to Count One. This case should then be remanded for trial in Count Two.

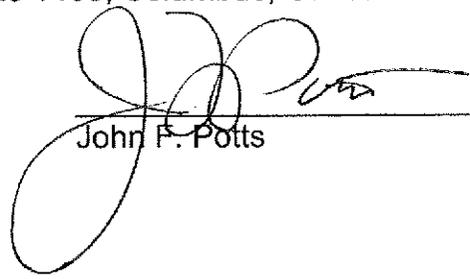
Respectfully submitted,



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405 Madison Avenue, Suite 1010
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Facsimile: (419)255-1105
Attorney for Defendant-Appellant

CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 10th day of April, 2010, upon: Evy M. Jarrett, Assistant Lucas County Prosecutor, 700 Adams Street, 2nd Floor, Toledo, OH 43604; and Peter Galyaredt, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215.



John F. Potts

APPENDIX

FILED
LUCAS COUNTY

AUG 22 P 4:15

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

State of Ohio,	*	Case No. CR 07-2498
	*	
Plaintiff,	*	Judge Gary Cook
	*	
vs.	*	
	*	
Linda S. Cook,	*	OPINION AND
	*	JUDGMENT ENTRY
Defendant.	*	

This case is before the court on the State of Ohio's ("State") motion to amend¹ Count One of the indictment and defendant Linda S. Cook's ("Cook") motion to dismiss Counts One and Two² of the indictment. Memoranda in opposition and reply briefs have been filed, supplemental pleadings have been filed, an evidentiary hearing has been held and the motions are now decisional. Upon review of the pleadings and applicable law, the court finds that the State's motion to amend Count One of the indictment should be denied and Cook's motion to dismiss Count One of the indictment should be granted.

I.

This case arises from a transaction that took place on July 12, 2001. On that date, Cook

¹At the hearing, the State requested that its motion to amend Count Two of the indictment be withdrawn, which the court granted.

²At the hearing, Cook requested that her motion to dismiss Count Two of the indictment be withdrawn but reserved her right to re-file the motion. This request was granted.

recorded a deed that purported to have been executed on May 20, 1998. The deed transferred property from Esther J. Benfer, Single, to Linda S. Cook, Trustee. A second deed was recorded on September 10, 2001, which was identical except the word "Trustee" had been crossed out and the word "Married" was typed above where the word "Trustee" had been. Additionally, typed on the side of the deed was "Being recorded to correct Grantee marital status." A third deed was executed on December 25, 2001, by "Linda S. Cook, married" and "Wayne M. Cook, married, releasing dower rights." The grantor of this deed was "Linda S. Cook, married" and the grantee is "The United Methodist Church, Metamora, Ohio." This deed was recorded on December 13, 2001. A fourth deed was executed on September 2, 2004, by "Linda Cook, Trustee." The grantee of this deed was "The United Methodist Church, Metamora, Ohio." This deed was recorded on September 8, 2004.

At some point in the Spring of 2004, friends of Benfer and fellow church members became aware of problems pertaining to the removal of property from Benfer's home while Cook was present. A church official consulted with and hired attorney Jeffrey L. Robinson ("Robinson"). Robinson wrote a letter to Cook notifying Cook that he now represented Benfer and enclosed a Revocation of a Power of Attorney signed by Benfer. Robinson also told Cook to have no further contact with Benfer or her affairs. Cook did not comply with Robinson's request and in fact had Benfer sign a Comprehensive Durable General Power of Attorney after receiving Robinson's letter.

After an investigation into these events by the Toledo Bar Association and a disciplinary hearing before the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, Cook was permanently disbarred by the Ohio Supreme Court. On July 17, 2007, the State indicted Cook.

II.

Crim.R. 7(D) addresses the amendment of indictments and it states in relevant part:

"Amendment of indictment, information, or complaint. 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."

III.

The State seeks an amendment to the indictment as to Count One to more accurately conform the indictment to the facts of this case. The State requests that the court change the date in Count One of the indictment from July 12, 2001 to September 10, 2001. The State contends that the recording of the deed on July 12, 2001 did not, by itself, divest Benfer's estate of the Benfer farm. The State maintains that only when Cook re-recorded the same deed by alteration on September 10, 2001, did the crime of tampering with records occur.

In opposing the State's motion and in support of her own motion to dismiss, Cook argues that the Grand Jury indicted her for the alleged criminal conduct involving the deed recorded on July 12, 2001, not the deed recorded on September 10, 2001. Cook claims that allowing the State to amend the indictment would alter the identity of the offense charged against her in violation of Crim.R. 7(D) and would result in her being prosecuted for an offense for which she was not indicted by the Grand Jury, a violation of Article I, Section 10 of the Ohio Constitution. Cook asserts that while the July 12th date is arguably within the statute of limitations date, the September 10th date falls clearly outside of the statute of limitations.

Both sides cite *State v. Climaco, Seminatore, Lefowitz and Garofoli, Co., LPA*, 85 Ohio St.3d 582, 1999-Ohio-408, in support of their respective positions.

The State contends that *Climaco* emphasized that the purpose of the statute of limitations is to encourage prompt action by law enforcement officials, but not to give offenders an opportunity to avoid criminal responsibility. The State maintains that, pursuant to R.C. 2901.13(F),³ the statute of limitations begins to run from the discovery of the corpus delicti, which in this case was when it was discovered that the deed was falsified some time in 2004, at the earliest.

Cook asserts that *Climaco* supports her position that Count One should be dismissed because the offenses for which she was charged were discovered within the statutory time period. Cook maintains that as of July 12, 2001, when the deed was recorded, the act described in Count One (the recording of the deed) and the criminal agency of the act (the incorrect or allegedly fraudulent date of execution endorsed on the deed) were matters of public record and constituted notice of its existence "to all of the world." Cook further argues that the Ohio Supreme Court has expressly rejected the notion that a statute of limitations begins to run only when the prosecutor or other law enforcement officers discover the corpus delicti of a crime.⁴ In addition, Cook submits that if the statute of limitations had run before the crime was discovered, then the State would have one year after the discovery of the offense pursuant to R.C. 2901.13(B)(1)⁵ to seek an indictment. Cook is

³R.C. 2901.13(F) states "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered."

⁴*State v. Hensley* (1991), 59 Ohio St.3d 136.

⁵R.C. 2901.13(B)(1) states:

"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.

adamant that the statutory period in this case was from July 12, 2001 to July 12, 2007 and she was indicted on July 17, 2007.

Cook claims that allowing the amendment of the indictment will change the identity of the charges against her and will cause her prejudice in presenting a defense. The State dismisses this claim by arguing that the deed recorded on July 12, 2001 and the deed recorded on September 10, 2001 are one and the same. Additionally, the State contends that the proposed amendment operates only to conform the indictment to the facts that will come out at trial.

In *State v. Vitale* (1994), 96 Ohio App.3d 695, the court held that a court cannot assume that a grand jury which indicted the accused for a particular incident of alleged criminal conduct would also have included in the indictment a different incident of alleged criminal conduct which is not included in the indictment. In reversing the lower court, the appellate court held:

Under such circumstances, we find the conviction cannot stand and must be reversed. Under Crim. R. 7(D), the trial court had discretion to amend the indictment "provided no change is made in the name or identity of the crime charged." Obviously, if the identity of the crime moves from events on June 14 to different events on June 21, at a different time and place, the identity of the crime has been improperly changed. *Id.* at 700-701.

In *State v. Plaster* 2005-Ohio-6770, the court held that the amendment of dates set forth in the indictment without re-submission of the matter to the Grand Jury impermissibly changed the identity of the crime charged in the original indictment in reversing the lower court. The court in *Plaster* stated "a trial court commits reversible error when it permits an amendment that changes the name or identity of the offense charged, regardless of whether the defendant suffers prejudice". *Id.*

Cook points to these two cases, among others, in support of her contention that allowing the State to amend the indictment would change the identity of the offense. Cook asserts that pursuant

to *Vitale* and *Plaster* it is impermissible to allow the amendment without re-submitting her case to the grand jury.

In opposition to these arguments put forth by Cook, the State asserts that even if the world was put on notice when Cook recorded the deed, there was no way to know that the deed had been falsified at that time. In the alternative, the State asserts that Count One alleges a continuing course of conduct for which the statute of limitations did not begin to run until, at the earliest, 2004, when Cook's actions were discovered, and therefore, the statute of limitations does not run until the discovery of the corpus delicti. Furthermore, the State insists that allowing the amendment would neither prevent Cook from presenting a defense to the charge nor change the identity of the charges against her, therefore the amendment would not result in any prejudice to Cook's defense. Based on these arguments, the State urges the court to allow it to amend the indictment and to deny Cook's motion to dismiss.

IV.

After careful consideration and analysis of the arguments put forth by the State and Cook in support of their respective positions, as well as the applicable law, the court finds that allowing the State to amend the indictment against Cook would cause prejudice to her. The court has reviewed the indictment. The State has not presented any evidence as to what acts, evidence or testimony was presented to the Grand Jury before it issued the indictment against Cook. The court may not speculate as to this issue and can only look to the indictment. Therefore, based on the arguments of the parties and the limited evidence presented, the court finds that the State's motion to amend Count One of the indictment should be denied. The court further finds that Count One of the indictment must be dismissed because the State was aware of the allegations against Cook before the statute of

limitations expired but did not indict Cook until after the expiration of the statute of limitations.

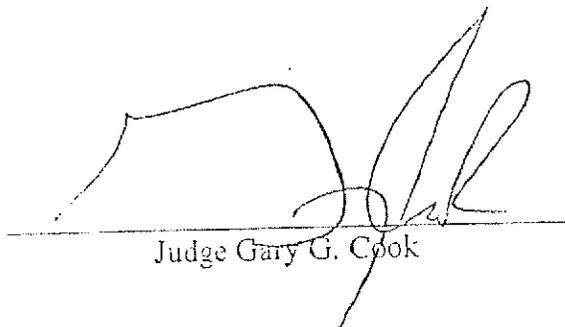
JUDGMENT ENTRY

It is **ORDERED** that the State's motion to amend Count One of the indictment is **DENIED**.

It is further **ORDERED** that Linda S. Cook's the motion to dismiss Count One of the indictment is **GRANTED**.

Dated: _____

8.27.08



Judge Gary G. Cook

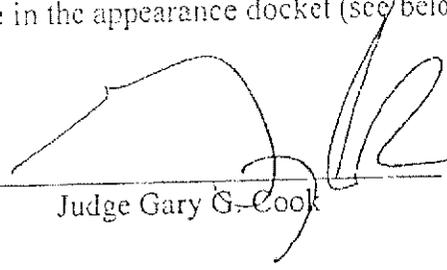
Case No. G-4801-CR-0200702498
State of Ohio v. Linda Cook

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket (see below).

August 22 2008



Judge Gary G. Cook

John F. Potts
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604

Michael E. Narges
Assistant Prosecuting Attorney
Lucas County Common Pleas Court
700 Adams Street
Toledo, Ohio 43604

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

State of Ohio

Court of Appeals No. L-08-1301

Appellant

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>.

FILED
COURT OF APPEALS
2009 OCT 28 P 2:22
COMMON PLEAS COURT
BERNIE GOULTER
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

DECISION AND JUDGMENT

Appellee

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.

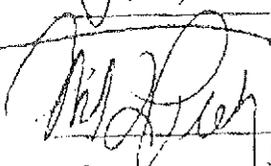
Mark L. Pietrykowski, J.

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.

FAXED

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

LINDA S. COOK,

Appellant.

Case No.: **09-2122**
C.A. Case No.: L08-1301
C.P. Case No.: CR07-2498

APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS,
SIXTH APPELLATE DISTRICT

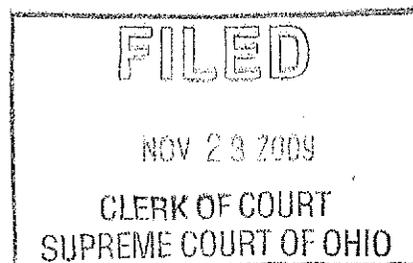
NOTICE OF CERTIFIED CONFLICT

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On Behalf of Appellee

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On Behalf of Appellant



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.

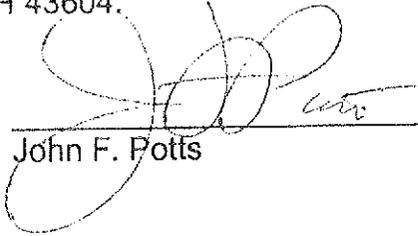
Respectfully submitted,



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Attorney for Appellant

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

Westlaw

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

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

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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.
Ohio App. 8 Dist., 1992.
State v. Mitchell
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