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Supreme Court No. (to be set)
Court of Appeals No. 63880-7-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

vs.

Jesse Willingham
Appellant/Petitioner

Jefferson County Superior Court
Cause No. 08-1-00182-8
The Honorable Judge Craddock Verser

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER.....1

II. COURT OF APPEALS DECISION1

III. ISSUE PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....3

The Supreme Court should accept review and hold that the statute of limitations continued to run during Mr. Willingham’s two-week absence from Washington. The interpretation of the statute of limitations is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). 3

VI. CONCLUSION8

Appendix A: Court of Appeals Decision

TABLE OF AUTHORITIES

WASHINGTON CASES

Owned Forests v. Sutherland, 124 Wn.App. 400, 101 P.3d 880 (2004) 4, 6
State v. Ansell, 36 Wn.App. 492, 675 P.2d 614 (1984) 5, 6
State v. Christensen, 153 Wn.2d 186, 102 P.3d 789, (2004) 4
State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) 4

WASHINGTON STATUTES

RCW 9A.04.080..... 3, 4, 5, 7

OTHER AUTHORITIES

Graham v. Commonwealth of Pennsylvania, 51 Pa. 255 (1866) 5
People v. Carman, 52 N.E.2d 197 (Ill.1943) 6
RAP 13.4..... 3, 4, 7, 8

I. IDENTITY OF PETITIONER

Petitioner Jesse Willingham, the Respondent below, asks this Court to review the decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Jesse Willingham seeks review of the Court of Appeals Opinion entered on November 2, 2009. A copy of the Opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

Does the statute of limitations continue to run during a brief, temporary absence from Washington if the accused person has at all times been usually and publicly resident within the state?

IV. STATEMENT OF THE CASE

Jesse Willingham was charged with Indecent Liberties. CP 1-2. The original Information, filed on August 14, 2008, charged two incidents alleged to have occurred on or about July 1 and August 1, 2005. CP 1-2.

Mr. Willingham moved to dismiss both charges because they were outside the statute of limitations. CP 12-13, 39-42. In response, the state filed an Amended Information, alleging that Mr. Willingham was absent from Washington from June 2 through June 16, 2008. CP 37-38. The

state argued that that this two-week period tolled the three-year statute of limitations, allowing prosecution of the August 1 allegation. CP 14-34.

On June 2, 2008, Mr. Willingham had applied for a job with a trucking firm in Salt Lake City, Utah. CP 17. On his application and employment materials, he listed his post office box address in Port Hadlock, Washington, and provided his Washington state driver's license information. CP 17, 18, 34. On his I-9 form he listed his street address in Chimacum, Washington. CP 25. He obtained a temporary Utah commercial driver's license, using the address of the trucking firm. CP 33. The job terminated on June 16, 2008. CP 31.

The trial judge dismissed the prosecution with prejudice. CP 50-52. The court found that Mr. Willingham's short temporary absence from Washington for job training did not change Mr. Willingham's status as usually and publicly resident within the state. The court also noted that Mr. Willingham had changed neither his Washington address nor his Chimacum phone number, and showed no intent to reside anywhere but in Washington State. RP (11/4/08) 34-36; CP 50-52.

The state appealed. CP 44. The Court of Appeals, Division I, reversed the trial court's ruling in an unpublished opinion dated November 2, 2009. The court held "that Willingham's two-week absence from Washington tolled the three-year statute of limitations..." Opinion, p. 6.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that the statute of limitations continued to run during Mr. Willingham's two-week absence from Washington. The interpretation of the statute of limitations is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

RCW 9A.04.080(1) provides that "[p]rosecutions for criminal offenses shall not be commenced after the periods prescribed in this section." RCW 9A.04.080(1). Under the statute, a charge of indecent liberties may not be commenced "more than three years after its commission." RCW 9A.04.080(1)(h). There is an exception to the statute of limitations, which provides that "[t]he periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state." RCW 9A.04.080(2).

The interpretation of this statute is an issue of considerable public importance. Although some prosecutions are commenced promptly, others are delayed, and, for various reasons, cannot be filed until the statute of limitations has nearly run. Because of this, prosecutors, courts, defense attorneys, and citizens must have a clear idea of how temporary absence from Washington affects the government's ability to prosecute.

Accordingly, the Supreme Court should accept review under RAP 13.4(b)(4).

Statutory interpretation “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 410, 101 P.3d 880 (2004).

Under the plain language of the statute of limitations, tolling occurs only when the accused is “not usually and publicly resident.” RCW 9A.04.080(2). Thus, a person whose usual and public residence is within the state may temporarily leave and return without tolling the statute.¹ RCW 9A.04.080(2). This interpretation of tolling provisions dates at least as far back as the Civil War, when a Pennsylvania court barred the prosecution of a returning veteran for the crime of adultery:

[W]e think that all the time he was in the service his absence was temporary, and that he remained “an inhabitant of the state or usual resident therein,” so that there was not the least obstacle in the way of instituting a prosecution against him, or even in claiming him to answer. His usual residence was not changed by the fact that he

¹ Even if the statute were believed to be ambiguous, the rule of lenity would require that it be interpreted in favor of the accused. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

obeyed the call of the president, and volunteered to fight for his country at her command.

Graham v. Commonwealth of Pennsylvania, 51 Pa. 255 (1866).

In this case, the court found that Mr. Willingham was usually and publicly resident within the state from 2005 through 2008. RP (11/4/08) 35-36. Although Mr. Willingham traveled to Utah for a temporary job, he continued to use his Washington address during the two weeks he was absent from the state. RP (11/4/08) 35. Accordingly, his two-week absence did not toll the statute of limitations. RCW 9A.04.080.

In reaching a contrary result, the Court of Appeals relied primarily on *State v. Ansell*, 36 Wn.App. 492, 675 P.2d 614 (1984). But *Ansell* should not control this case. In *Ansell*, the defendant abandoned his Washington address, and lived openly and publicly in Iowa, Colorado, and Alaska. The *Ansell* court held that the fact that the defendant was not a fugitive was irrelevant, because “mere absence, regardless of intent to evade justice, is enough to toll a statute of limitation...” *Id.*, at 496. Here, by contrast, Mr. Willingham continued to live “usually and publicly” within the state. Furthermore, Mr. Willingham was only absent from the state for two weeks, unlike the defendant in *Ansell*, who spent more than two years outside of Washington. *Id.*, at 493-494.

The Court of Appeals also cited “the leading case of *People v. Carman*, 52 N.E.2d 197 (Ill.1943),” discussed in *Ansell*. Opinion, pp. 3-4. In *Carman*, the Illinois Supreme Court held that legal residence within the state was not by itself sufficient to thwart the tolling provision, if the defendant was not usually and publicly resident within the state. (The defendant in *Carman* was arrested in Kentucky and extradited to Missouri, spending more than three years in custody outside of Illinois, all the while maintaining a permanent legal address within the state of Illinois).

Mr. Willingham’s situation is not like the defendant’s in *Carman*. In that case, the defendant was absent from Illinois for more than three years—thus he was not usually and publicly resident within the state. Mr. Willingham, by contrast, remained usually and publicly resident within Washington. His two-week absence was not enough to suggest that he “usually” resided outside the state.

The Court of Appeals’ interpretation violates the directive to give effect to all the language of the statute, rendering no portion meaningless or superfluous. *Sutherland*, at 410. Under the Court of Appeals’ reasoning, the word “usually” is superfluous, because the statute of limitations would be tolled whenever a person is not publicly resident within the state. But this is not the language chosen by the legislature. The statute requires the court to examine an accused person’s *usual*

residence—if they are usually and publicly resident within Washington, the limitation period continues to run. RCW 9A.04.080(2).

If the Court of Appeals' interpretation is allowed to stand, any absence from Washington, no matter how brief, will toll the statute of limitations. Prosecutors will be free to tabulate a person's out-of-state vacations, overnight stays in neighboring states (and provinces), short trips for employment or school purposes, and so forth. The possibility of a brief absence will trigger investigation into phone records, credit card bills, expense vouchers, and other documentation that might demonstrate that the accused person crossed the state line at some point during the period of limitations. Statutes of limitation are intended to mark a definite endpoint, after which a prosecution may not be commenced. The Court of Appeals' interpretation of RCW 9A.04.080 must not be permitted to prevail.

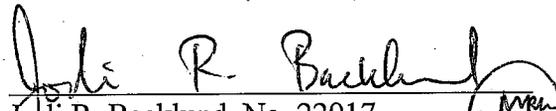
Mr. Willingham was usually and publicly resident within this state during the running of the limitations period. Thus the statute did not toll during the two weeks he spent in Utah, and the trial court correctly dismissed this prosecution for Indecent Liberties. The Supreme Court should accept review under RAP 13.4(b)(4), reverse the Court of Appeals, and reinstate the trial judge's dismissal.

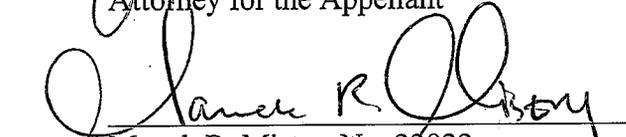
VI. CONCLUSION

The issue raised in this Petition could impact a large number of criminal cases. Accordingly, it is of substantial public interest, and should be reviewed by the Supreme Court. RAP 13.4(b)(4).

Respectfully submitted November 20, 2009.

BACKLUND AND MISTRY


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APPENDIX A:

Court of Appeals Decision

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 63880-7-1
Appellant,)	
v.)	UNPUBLISHED OPINION
JESSE WILLINGHAM,)	
Respondent.)	
		FILED: <u>November 2, 2009</u>

SCHINDLER, C.J. — The State must file a charge of indecent liberties within the three-year statute of limitations. However, the statute of limitations is tolled for “any time when the person charged is not usually and publicly resident within this state.” RCW 9A.04.080(2). The State appeals an order dismissing the criminal charge of indecent liberties against Jesse Willingham as barred by the statute of limitations. The State contends the trial court erred in concluding that the statute of limitations was not tolled for the two-week period Willingham spent in Utah. Because legal residence is irrelevant for purposes of the tolling provision and under the plain language of RCW 9A.04.080(2), “mere absence” tolls the three-year statute of limitations for indecent liberties, we reverse.

In an interview with a Jefferson County Sherriff’s Officer, Jesse Willingham admitted having sexual contact with his foster child A.R. On August 14, 2008,

No.63880-7-1/2

the State filed an information charging Willingham with two counts of indecent liberties in violation of RCW 9A.44.100(1)(c). The State alleged that Willingham sexually assaulted his developmentally delayed foster daughter A.R. on or about July 1, 2005, Count I, and on or about August 1, 2005, Count II.

Willingham filed a motion to dismiss, arguing that the three-year statute of limitations under RCW 9A.04.080(1)(h) barred prosecution. The State filed a motion to amend the information to only charge Willingham with the one count of indecent liberties alleged to have occurred on August 1, 2005. The State conceded that the information was filed more than three years after the alleged crime occurred, but asserted that the statute of limitations was tolled when Willingham was in Utah from June 2 to June 16, 2008. The State presented documentation establishing that Willingham was in Utah in June 2008 for at least two weeks.

Willingham did not dispute that he was in Utah for the two weeks in June. But Willingham argued that the tolling provision under RCW 9A.04.080(2) does not apply to a temporary absence from the State. The court ruled that the statute of limitations was not tolled during Willingham's absence and dismissed the criminal charge of indecent liberties with prejudice. The State appeals.

DECISION

RCW 9A.04.080(1)(h) requires the State to file charges of indecent liberties within three years. But under RCW 9A.04.080(2), “[t]he periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.”

The State relies on State v. Ansell, 36 Wn. App. 492, 675 P.2d 614 (1984), to argue that Willingham’s two-week absence tolled the three-year statute of limitations under RCW 9A.04.080(2). Willingham asserts that because he continued to reside in Washington and “use his Washington address” when he was in Utah, his two-week absence did not toll the statute of limitations.

The meaning of a statute is a question of law that we review de novo. Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When interpreting a statute, the court’s primary objective is to ascertain and give effect to the intent and purpose of the legislature. American Continental Ins. Co., v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). In determining legislative intent, we first look to the plain language and ordinary meaning of the statute. Nat’l Elec. Contractors Ass’n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). If the meaning of the statute is plain and unambiguous, our inquiry is at an end. Berrocal v. Fernandez, 155 Wn.2d 585, 599, 121 P.3d 82 (2005).

In Ansell, this court interpreted the meaning of the language of RCW 9A.04.080(2). Citing the leading case of People v. Carman, 52 N.E.2d 197 (Ill. 1943), the Ansell court concluded that the language of RCW 9A.04.080(2)

No.63880-7-1/4

unambiguously tolls the statute of limitations while a defendant is absent from the State. Ansell, 36 Wn. App. at 496. In interpreting the language "usually and publicly resident," the Carman court held that the language was "too clear to admit of construction" and to construe the statute to mean legal residence "would do violence to all recognized rules of construction." Carman, 52 N.E.2d at 199. Following the majority of courts, the Ansell court held that the defendant's "mere absence from Washington was enough to toll the statute." Ansell, 36 Wn. App. at 496. "Most courts which have considered this issue have held 'not usually and publically [sic] resident' to simply mean 'absent,' without regard to whether a defendant was concealing himself or fleeing from justice." Ansell, 36 Wn. App. at 494. The Ansell court also cited to the determination of other courts that "mere absence, regardless of intent to evade justice, is enough to toll a statute of limitations similar to Washington's." Ansell, 36 Wn. App. at 495. The court noted that the interpretation of the statute was based solely on a defendant's absence from the State whether it was voluntary or involuntary. Ansell, 36 Wn. App. at 495.

Our courts have adhered to the reasoning of Ansell in subsequent cases. See State v. Newcomer, 48 Wn. App. 83, 91-92, 737 P.2d 1285 (1987) (statute of limitations tolled while defendant was incarcerated outside of Washington); State v. McDonald, 100 Wn. App. 828, 832-33, 1 P.3d 1176 (2000) (statute of limitations tolled while defendant living in New York); State v. Israel, 113 Wn. App. 243, 293-94, 54 P.3d 1218 (2002) (statute of limitations tolled despite

No.63880-7-1/5

ongoing contacts with Washington).¹ Moreover, the “usually and publicly resident” language contained in RCW 9A.04.080(2) has been in effect without amendment for more than thirty years. See State v. Edwards, 84 Wn. App. 5, 12-13, 924 P.2d 397 (1996) (legislature’s failure to amend the law in response to a court’s interpretation implies agreement with that interpretation); Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999) (the legislature is presumed to be aware of judicial interpretations of legislation and the failure to amend a statute following a judicial decision interpreting a statute indicates legislative acquiescence in that decision).

Willingham’s reliance on federal tax cases to argue that a temporary absence from the State does not toll the statute of limitations is unpersuasive. The federal tax cases Willingham cites, United States v. Gross, 159 F.Supp. 316, 321-22 (D. Nev. 1958); United States v. Beard, 118 F.Supp. 297 (D. Md. 1954); and United States v. Mathis, 28 F.Supp. 582, 584-85 (D. N.J. 1939), involve interpretation of an 1884 tolling provision of the Internal Revenue Code that was in effect until 1954. See former 26 U.S.C. § 3748(a). Under former 26 U.S.C. § 3748(a) the statute of limitations was tolled during periods of time when the defendant was “absent from the district” where the crime was committed. Under the current code, the limitations period for violation of tax laws is tolled when a defendant is “outside the United States” or is a fugitive from justice. See 26 U.S.C. § 6531. The federal courts interpret the current tolling provision

¹ We also note that Ansell has been cited with approval and followed by courts in other jurisdictions. See, e.g., State v. Whitman, 466 N.W.2d 193 (Wis. 1991); State v. Stillings, 778 P.2d 406 (Mont. 1989)

No.63880-7-1/6

consistently with our interpretation of the tolling provision contained in RCW 9A.04.080(2) to mean that the tolling provision applies whenever the defendant is outside of the physical boundaries of the United States. See, United States v. Yip, 248 F. Supp. 2d 970, 974 (D. Hawai'i 2003).

We adhere to our decision in Ansell and hold that Willingham's two-week absence from Washington tolled the three-year statute of limitations for the crime of indecent liberties that occurred on or about August 1, 2005. Accordingly, we reverse dismissal of that charge.

Schneider, CT

WE CONCUR:

Appelwick, J.

Ajda, J.

CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

1833 Rye St. SE
Albany, OR 97322

and to:

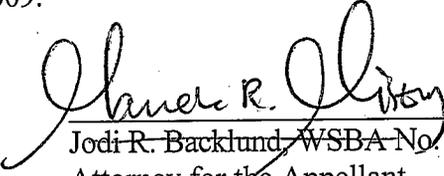
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368

And that I sent the original and one copy to the Court of Appeals, Division I, for filing;

All postage prepaid, on November 20, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 20, 2009.


~~Jodi R. Backlund~~, WSBA No. ~~22917~~ 22922
Attorney for the Appellant