

68942-8

68942-8

NO. 68942-8-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

JOSEPH A. PELTIER,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB -8 PM 1:45

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I. ASSIGNMENT OF ERROR

1. The trial court erred in dismissing the charges in the second amended information.

2. The trial court erred in denying the State's motion for reconsideration.

II. ISSUE

Can a criminal defendant expressly relinquish the rights conferred by the statute of limitations?

III. STATEMENT OF THE CASE

The charges in this case arise out of sexual assaults allegedly committed by the defendant (respondent), Joseph A. Peltier, on four separate occasions. According to the affidavits of probable cause, the defendant raped B.M. in a wooded area near Dagmar's landing in September, 1993. On Halloween in 1993, he raped S.B. in a school field. On January 5, 1995, he had sexually intercourse with J.D. while she was asleep. In early August, 2001, he molested 13-year-old S.G. in her mother's house and then had sexual intercourse with her in a trailer. The assaults on B.M., S.B., and S.G. were reported to law enforcement within a few months after their commission. CP 126-28, 64, 87-88. The record does not specify when the assault on J.D. was reported.

On September 6, 2002, an information was filed charging the defendant with two counts of second degree rape (for the rapes of B.M. and S.B), one count of second degree child molestation (for the molestation of S.G.), and one count of second degree rape of a child (for the rape of S.G.). Second degree rape has a 10-year statute of limitations if the crime is reported to law enforcement within one year after its commission. RCW 9A.04.080(1)(b)(iii)(A); see Laws of 1993, ch. 214, § 1(b)(iii) (eff. 7/25/93). (If it is not reported to law enforcement, the statute of limitations is three years. RCW 9A.04.080(1)(b)(iii)(B).) Second degree rape of a child and second degree child molestation had a statute of limitations of at least seven years. Laws of 1993, ch. 214, § 1(c)(i). Consequently, all of these charges fell within the statute of limitations.

The parties subsequently agreed to resolve these charges via a stipulated trial. Pursuant to this agreement, on July 14, 2003, the State filed an amended information charging the defendant with third degree rape (for the rapes of B.M. and J.D.) and indecent liberties by forcible compulsion (for the assault on S.B.). CP 41. These crimes are subject to a three-year statute of limitations.

RCW 9A.04.080(1)(h). Consequently, the charges were outside the statute of limitations.

The defendant stipulated that his guilt would be determined on the basis of the affidavit of probable cause. CP 114. The stipulation did not specifically mention the statute of limitations with regard to the charged crimes. It did, however, contain the following provisions:

6. AGREEMENT NOT TO CHALLENGE CONVICTION: The defendant agrees not to challenge the conviction for this crime, whether by moving to withdraw the stipulation, appealing the conviction, filing a personal restraint petition, or in any other way. . .

7. NON-COMPLIANCE WITH AGREEMENT: If the defendant fails to appear for sentencing, or if prior to sentencing the defendant commits any new offense or violates any condition of release, the State may recommend a more severe sentence.

If the defendant violates any other provision of this agreement, the State may either recommend a more severe sentence, file additional or greater charges, or re-file charges that were dismissed. The defendant waives any objection to the filing of additional or greater charges based on pre-charging or pre-trial delay, statutes of limitations, mandatory joinder requirements, or double jeopardy.

CP 117.

On January 28, 2004, the court entered formal findings of guilt. CP 111-12. The same day, the court sentenced the defendant to a total of 90 months' confinement. CP 96-110.

In August, 2011, the defendant filed a personal restraint petition challenging his convictions as barred by the statute of limitations. On February 13, 2012, this court granted the petition, vacated the convictions, and remanded the case for dismissal. CP 92-93; see In re Peltier, no. 67097-21-I. The trial court entered a formal order of dismissal on March 29. CP 84.

The same day, the State filed a second amended information charging four counts. Three of these were the same as charged in the original information: second degree rape of a child against S.G., second degree child molestation of S.G., and second degree rape of S.B. The fourth count was second degree rape of J.D., who was one of the victims charged in the first amended information. CP 89. Under the stipulation agreement, the State had the right to re-file these charges because the defendant had breached the agreement by challenging his convictions. CP 117.

The defendant nonetheless moved to dismiss on the basis of the statute of limitations. CP 65-83. The court considered itself bound by appellate decisions that characterized the statute of

limitations as “jurisdictional.” In view of those decisions, the court concluded that the statute could not be waived. Although the court considered this a “difficult result,” it felt compelled to grant the motion to dismiss. 4/13/12 RP 16-19; CP 31. The State moved for reconsideration, but that motion was denied. CP 25-30, 4-5.

IV. ARGUMENT

A. ALTHOUGH THIS COURT HAS CALLED CRIMINAL STATUTES OF LIMITATIONS “JURISDICTIONAL,” IT HAS ALSO RECOGNIZED THAT THIS WORD CAN HAVE MULTIPLE MEANINGS.

The statute of limitations for criminal proceedings is set out in RCW 9A.04.080. “Prosecutions for criminal actions shall not be commenced after the periods prescribed in this section.” RCW 9A.04.080(1). For second degree rape, the relevant period is 10 years if the crime is reported to law enforcement within one year after its commission. RCW 9A.04.080(1)(b)(iii)(A). Under this statute, the charges for the 1993 rapes of B.M. and S.B. were timely when they were originally filed, in September 2002. By the time they were re-filed in March, 2012, the statutory period had expired.

The statute of limitations for second degree child molestation and second degree rape of a child was seven years in 2001, when the crimes were allegedly committed. Laws of 1993, ch. 214, §

1(c)(i). The charges for the rape and molestation of S.G. were therefore timely when they were originally filed in 2002. The seven-year period lapsed in August, 2008. The legislature extended the time period in 2009. Laws of 2009, ch. 61, § 1. That extension, however, does not apply to prosecutions that were already barred when the amendment took effect. State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987). Consequently, these charges as well were beyond the statute of limitations when they were re-filed in 2012.

The trial court's order allows the defendant to accomplish the following: He escaped prosecution for serious charges by stipulating to his guilt of lesser charges. In doing so, he expressly agreed not to challenge his conviction for those charges. He also agreed that if he broke this agreement, the State could re-file the charges that had been dismissed. CP 117.

The defendant then broke his agreement by challenging the conviction on the lesser charges. When the State exercised its right to re-file the original charges, the defendant was allowed to assert the statute of limitations, despite his express waiver of the protections of that statute. By violating his agreement, reversing his

position, and ignoring his waiver, the defendant was allowed to escape prosecution for serious crimes entirely.

The trial court relied on case law stating that the statute of limitations is “jurisdictional.” See, e.g., State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979). When “jurisdiction” is used in the strict sense of subject matter jurisdiction, the consequences are “draconian and absolute.” Cole v. Harveyland, LLC, 163 Wn. App. 199, 205 ¶ 12, 258 P.3d 70 (2011). In particular, a lack of subject matter jurisdiction cannot be waived by litigants. Skagit Surveyors & Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). The word has, however, often been used to mean other things.

As the United States Supreme Court has observed, “jurisdiction” is a word of too many meanings. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Courts have sometimes been “profligate” in the use of the term, producing “unrefined dispositions” that the Court has referred to as “drive-by jurisdictional rulings.” [Arbaugh v. Y & H Corp., 546 U.S. 500, 510–11, 126 S.Ct. 1235, 163 L. Ed. 2d 1097 (2006).] Our Supreme Court has similarly observed that “improvident and inconsistent” use of the term “subject matter jurisdiction” has caused it to be confused with a court’s authority to rule in a particular manner. [Marley v. Dept. of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994).]

Cole, 163 Wn. App. at 208 ¶ 19.

The present case calls on the court to determine whether the statute of limitations restricts the court's subject matter jurisdiction in criminal cases. In particular, the issue is whether a defendant can expressly waive the protections of the statute. This issue has never before been addressed in Washington.

B. COURTS IN OTHER JURISDICTIONS HAVE CONSISTENTLY HELD THAT DEFENDANTS CAN WAIVE THE STATUTE OF LIMITATIONS, EVEN IF IT IS CONSIDERED "JURISDICTIONAL."

In numerous other jurisdictions, courts have considered whether the statute of limitations can be waived by a defendant. They have consistently held that an express waiver is enforceable.

Most courts have reached this result through a straightforward analysis. They have treated the statute of limitations as an affirmative defense. Because it is a defense, it can be waived like other defenses. *E.g.*, United States v. Wild, 551 F.2d 418, 424-25 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977), State v. Kerby, 141 N.M. 413, 156 P.3d 704 (2007); State v. Timoteo, 87 Haw. 108, 952 P.2d 865 (1997). In the federal courts, "every circuit that has addressed [the issue] has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar." Acevedo-Ramos v. United States, 961 F.2d 305, 307 (1st Cir.),

cert. denied, 113 S. Ct. 299 (1992). A large majority of state courts have reached the same result. See Cowan v. Superior Court, 14 Cal. 4th 367, 389, 58 Cal. Rptr. 2d 458, 472, 926 P.2d 438, 452 (1996) (Brown, J., concurring) (citing cases from 16 states and 10 federal circuits).

A small number of courts have, like Washington, labeled the statute of limitations as “jurisdictional.” Even these courts have held that an express waiver of the statute is enforceable. As the Florida District Court of Appeal has explained:

Generally courts which have found the statute a “jurisdictional” bar to waiver have done so in terms of waiver by the state, not the defendant, and have done so only in the sense that a criminal statute of limitations goes not to the remedy of an action but creates a substantive right which prevents prosecution and conviction of an individual after the statute has run. In this sense “jurisdictional” refers to the legality of the actions of the state in prosecuting an individual for an offense determined legislatively to be stale. A court may not convict a defendant of a crime for which the state has no statutory right to prosecute. Because a prosecutor may not avoid the statute of limitations by charging a higher offense in the expectation of conviction on a lesser-included offense and thereby deprive a defendant of a substantive right, the courts have permitted a defendant who has failed to raise the defense of the statute of limitations by pre-trial motion to raise it at trial, by post-trial motion, or for the first time on appeal.

Tucker v. State, 417 So. 2d 1006, 1012-13 (Fla. App. 1982), aff'd, 459 So. 2d 306 (Fla. 1984).

Decisions in other states are consistent with the Florida court's analysis. For example, the Alaska Supreme Court rejected "the arbitrary jurisdictional-affirmative defense distinction" in favor of "a case-by-case analysis focusing on the language of the applicable statute of limitations and the public policies behind this enactment." Applying this analysis, the court held that the statute can be waived under the following conditions:

- (1) the waiver is knowing, intelligent, and voluntary;
- (2) it is made for the defendant's benefit and after consultation with counsel; and
- (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes.

Padie v. State, 594 P.2d 50, 57 (Alaska 1979).

Similarly in California, the courts have long characterized the statute of limitations as "jurisdictional." The California Supreme Court nonetheless pointed out that its prior decisions "generally involved 'waiver' in the sense of forfeiture, not the intentional relinquishment of a known right, and have not considered whether defendants could expressly waive the statute of limitations for their own benefit." The court adopted the reasoning of Padie: "We think

that this rule is fair and a defendant should be able to waive the statute of limitations at least when those prerequisites have been met.” Cowan, 14 Cal. 4th at 372, 58 Cal. Rptr. 2d at 460-61, 926 P.2d at 440-41. The same rule should be adopted in Washington.

C. WASHINGTON CASES THAT TERMED THE STATUTE OF LIMITATIONS “JURISDICTIONAL” HAVE INVOLVED FORFEITURE, NOT WAIVER.

Washington case law is consistent with the analysis of Tucker, Padie, and Cowan. When cases referred to the statute of limitations as “jurisdictional,” they referred to forfeiture, not deliberate relinquishment. For example, this court has held that the statute of limitations can be raised for the first time on appeal. State v. Dash, 163 Wn. App. 63, 67 ¶ 10, 259 P.3d 319 (2011); State v. Walker, 153 Wn. App. 701, 705 ¶ 9, 224 P.3d 814 (2009); State v. Novotny, 76 Wn. App. 343, 345 n. 1, 884 P.2d 1336 (1994). It has held that a defendant cannot be convicted, over his objection, of a lesser offense as to which the statute has expired. State v. N.S., 98 Wn. App. 910, 914-15, 991 P.2d 133 (2000). It has held that an information cannot be amended to expand the charge after the statute of limitations has expired. State v. Fischer, 40 Wn. App. 506, 510, 699 P.2d 249, review denied, 104 Wn.2d 1004 (1985); State v. Bryce, 41 Wn. App. 802, 807, 707 P.2d 694 (1985); Glover,

25 Wn. App. at 61-62. These holdings all recognize that the statute creates a substantive right that cannot be forfeited by inaction. None of them are inconsistent with a rule allowing deliberate relinquishment of that right.

The Supreme Court had declined to label the statute of limitations as “jurisdictional.” It has held however, that the statute limits the authority of sentencing courts. As a result, the court held that a guilty plea does not waive the statute of limitations. In re Stoudmire, 141 Wn.2d 342, 354-55, 5 P.3d 1240 (2000). In that case, however, there was no express reference in the plea documents to any waiver of the statute of limitations. Once again, this case involved a forfeiture, not deliberate waiver.

This court has considered only one case that involved an express waiver: State v. Phelps, 113 Wn. App. 347, 57 P.3d 624 (2002). In that case, the parties entered into a plea agreement under which the State dismissed one of the charges. The plea agreement allowed the State to re-file that charge if the defendant violated certain provisions of the sentence. As part of this agreement, the defendant agreed to waive the statute of limitations. In sentencing the defendant, the court included a notation that the defendant had agreed to waive the statute of limitations for 7 years.

The defendant appealed from this sentence. This court held that this notation was invalid:

Assuming that the notation is part of the judgment and sentence, the State has not been able to demonstrate any statutory authority allowing the sentencing court to extend the statute of limitations. As the court's sentencing authority is limited to that expressly provided for by statute, the extension of the statute of limitations for seven years on [the dismissed] count is void and cannot stand. Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.

Id. at 357 (citations omitted).

Phelps did not involve the enforceability of a defendant's waiver of the statute of limitations. At the time of the appeal, the State had not yet attempted to enforce that provision. Rather, the case involves the court's ability to *sentence* a defendant to waiver of the statute of limitations. Since no statute confers such sentencing authority, the court cannot exercise it, regardless of the defendant's consent. That holding, however, says nothing about a defendant's ability to waive the protection of the statute when he concludes that doing so is in his best interest.

D. ALLOWING DEFENDANTS TO WAIVE STATUTES OF LIMITATIONS BENEFITS THEM, THE STATE, AND THE COURTS.

There are several situations in which defendants may derive great benefit from waiving the statute of limitations. The present case illustrates one of them. The defendant was charged with serious crimes that were within the statute of limitations. He wished to plead guilty to lesser crimes that were outside the statute of limitations. If a defendant can waive the statute of limitations, such a plea agreement is permissible. If he cannot, it is not. The only alternative may be a lengthy and expensive trial that is emotionally wrenching to the victims. The result of the trial will necessarily be drastic: conviction on serious charges or outright acquittal, with no possibility of an intermediate result. Such an outcome may be considered unjust by both parties and the court, but there may be no other options. In this situation, precluding waiver of the statute of limitations harms the State, the defendant, victims, and the courts, while benefiting no one. This situation led the California Supreme Court to allow waiver of that state's "jurisdictional" statute of limitations. Cowan, 14 Cal. 4th at 375, 58 Cal. Rptr. 2d at 462; 9216 P.2d at 442.

Allowing waiver of the statute of limitations can also aid defendants at trial. This can occur when the defendant is charged with a crime within the statute of limitations, but the crime has lesser offenses that are beyond the statute. In many cases, the defendant may find it tactically advantageous to have the jury instructed on a lesser offense. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). In other cases, the defendants may prefer to require the jury to make an "all or nothing" choice between conviction as charged and outright acquittal. State v. Grier, 171 Wn.2d 17, 42-43 ¶ 65, 246 P.3d 1260 (2011).

If a defendant can waive the statute of limitations, this tactical choice is squarely within his control. If he wants the jury instructed on a lesser offense, he can obtain that instruction by waiving the statute of limitations. If he does not want the jury so instructed, he can prevent it by refusing to waive the statute of limitations. If, however, the statute cannot be waived, the defendant has no choice. Regardless of his wishes, the case will be submitted to the jury on an "all or nothing" basis.

Allowing defendants to waive the statute of limitations places no significant burden on them. The protection of the statute remains fully available for them to assert whenever doing so is to their benefit. In some situations, however, a defendant may determine that the statute is not to his benefit. Just as a defendant can choose to waive other rights, he should be able to waive this right. Once he has done so, he should not be allowed to re-assert the right that he has relinquished.

This rule is consistent with the holdings of this court. It is also consistent with the analysis of every other court that has considered the issue – including some that have termed the statute of limitations “jurisdictional.” The rule should be adopted by this court.

E. SINCE THE CONSTITUTION GRANTS SUPERIOR COURTS JURISDICTION IN FELONY CASES, THE LEGISLATURE CANNOT RESTRICT THAT JURISDICTION.

If this court were to decide that the statute of limitations affects subject matter jurisdiction, that holding would create serious constitutional problems. The jurisdiction of Superior Courts is established by Const., art. IV, § 6. That constitutional provision gives those courts “original jurisdiction ... in all criminal cases amounting to felony.” It also gives them courts original jurisdiction

“in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court..”

The effect of this constitutional provision was addressed in Young v. Clark, 148 Wn.2d 130, 65 P.3d 1192 (2003). That case involved the constitutional validity of RCW 4.12.020, which specifies the counties in which certain suits could be brought. Previous cases had characterized that statute as jurisdictional. Aydelotte v. Audette, 140 Wn.2d 249, 750 P.2d 1276 (1988). The Supreme Court nonetheless held that this construction of the statute was constitutionally impermissible.

On its face, article IV, section 6 allows the legislature to limit the superior court's jurisdiction in certain matters, provided it vests authority over such matters *in some other court*, presumably a court of limited jurisdiction. Our previous interpretation of RCW 4.12.020 construed the statute to limit subject matter jurisdiction as among superior courts. So understood, the statute violates article IV, section 6 of the state constitution.

Bearing in mind our obligation to construe statutes consistently with the constitution, we overrule Aydelotte and hold the filing restrictions of RCW 4.12.020(3) relate only to the venue in which such actions may be tried.

Young, 149 Wn.2d at 133-34 (court's emphasis, citations and footnote omitted).

The same analysis applies to the criminal statute of limitations. Article IV, § 6 gives the Superior Court jurisdiction over felonies. The legislature can, of course, regulate the manner in which such jurisdiction will be exercised. The legislature cannot, however, remove any part of that jurisdiction from the Superior Court. Any statute on this subject must be construed as procedural, not jurisdictional.

Almost all of the cases characterizing the statute of limitations as “jurisdictional” predate Young. The only exceptions are Dash (decided in 2011) and Walker (decided in 2009). Both of those cases simply cited prior authority without further analysis. Dash, 163 Wn. App. at 67 ¶ 10; Walker, 153 Wn. App. at 705 ¶ 9. Neither of them re-considered that authority in light of Young.

Under Young, the correct rule is clear. Procedural limitations on the Superior Courts do not affect the jurisdiction of those courts, if such jurisdiction is granted by the constitution. This is true even if such limitations were previously considered “jurisdictional.” Under this rule, the criminal statute of limitations cannot be considered “jurisdictional” in the strict sense. It is simply a procedural restriction. Like other such restrictions, it can be waived if the

defendant makes a deliberate choice to do so. In this case, the defendant made such a choice. That decision should be enforced.

V. CONCLUSION

The order of dismissal should be reversed. The case should be remanded for pre-trial proceedings and trial on the second amended information.

Respectfully submitted on February 6, 2013.

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