

Supreme Court No. 84036-9
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 Number: 08-1-00182-8
The Honorable Judge Craddock Verser

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent ,The State of Washington, respectfully requests this court to deny the Petition for Review of the Court of Appeals, Division I, decision referred to in Section II below.

II. COURT OF APPEALS DECISION

On November 2, 2009, the Court of Appeals entered a judgment reversing the trial court's dismissal of a case against Mr. Willingham.

III. ISSUE PRESENTED FOR REVIEW

Is the statute of limitation tolled by an accused person's absence from the state.

IV. STATEMENT OF THE CASE

PROCEDURAL HISTORY

On August 14, 2008, the State filed an information charging Mr. Willingham with two counts of Indecent Liberties in violation of RCW 9A.44.100(1)(c) occurring on or about July 1, 2005, and on or about August 1, 2005.

Mr. Willingham filed a Motion to Dismiss on October 10, 2008, based on the limitation of actions, RCW 9A.04.080(h), in that the three-year limitation for crimes charged had expired.

On October 16, 2008, the State filed an Amended Information alleging only one count, Indecent Liberties on or about August 1, 2005, and that Mr. Willingham was "not usually and publicly resident within this state" from June 2, 2008, through June 16, 2008.

Hearings on the issue of whether the statute of limitations was tolled by Mr. Willingham's absence from the state were held on October 24, 2008, and October 31, 2008. On November 4, 2008, the trial court ruled the statute of limitations was not tolled by Mr. Willingham's absence from the state.

The State moved for discretionary review, which was granted by the Court of Appeals. Oral argument was held in Division I on September 8, 2009. The Court of Appeals reversed the trial court's ruling in an opinion published on November 2, 2009.

Mr. Willingham timely filed a Petition for Review with this court.

FACTS

On March 2, 2007, a Jefferson County Sheriff's Detective interviewed Mr. Willingham about an alleged sexual assault by Mr. Willingham on his 17-year old, foster daughter, A.R. A.R. was determined to have mild mental retardation and developmental delays on or about July 1, 2005.

Based on Mr. Willingham's statement admitting sexual contact with A.R. on or about July 1, 2005, and August 1, 2005, Mr. Willingham was charged with two counts of Indecent Liberties. The information was filed on August 14, 2008.

On October 16, 2008, the State filed an amended information charging only one count of Indecent Liberty occurring on August 1, 2005. As part of that amended motion the State also included fourteen documents showing Mr. Willingham was out of the state from June 2, 2008, through June 16, 2008. These included a Driver Job application, Request for Release of Past Employment Information, Ten Year Driving Experience, Conditional Offer of Employment, Employment Eligibility Verification form, Federal Drug Testing Custody and Control form, Wage Assignment and Agreement for Payroll Deduction, Eagle Atlantic Financial Services, Inc, Loan Policies, Pre-Trip Vehicle Inspection, Road

Test, Seven Day Prior form, Employee, Driver, Independent Contractor Sign-Off Sheet, Utah Temporary Commercial License, and C.R. England & Sons, Inc. Apprentice Record; all completed and signed between June 2, 2008, and June 16, 2008. CP 17-34. The Trial court's Findings of Fact number 7 said: "On June 16, 2008, the defendant was issued Temporary Utah Commercial License# 177541094 which showed an address of 4701 W. 400 St., West Valley, Utah 84120 which is the defendant's employer." CP 50-52.

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Supreme Court should decline review and continue to hold that the statute of limitations is tolled whenever the accused leaves the state. This interpretation has been the law in Washington for 26 years and is not an issue of any public interest. RAP 13.4(b)(4).

Any absence from the state tolls the statute of limitations.

The statute of limitations on a crime is tolled for any period of time during which the defendant is not "usually and publicly resident within this state." RCW 9A.04.080(2).

RCW 9A.04.080(2) unambiguously tolls the statute of limitations for a crime while a defendant is absent from Washington, regardless of whether the defendant has concealed himself or

herself from Washington authorities. *State v. Israel*, 113 Wn.App. 243, 293, 54 P.3d 1218 (2002) quoting *State v. McDonald*, 100 Wn.App. 828, 832, 1 P.3d 1176 (2000), *cert. denied*, 534 U.S. 820, 122 S.Ct. 52, 151 L.Ed.2d 22 (2001).

Defendant's mere absence from state was sufficient to toll statute of limitations for filing charges against him on basis that defendant was "not usually and publicly resident within this state," though defendant's address within other state was known to authorities and defendant was living openly and was available for prosecution at all times. *State v. Ansell*, 36 Wn.App. 492, 496, 675 P.2d 614, *review denied by* 101 Wn.2d 1006.

The *Ansell* court explained: "The statute of limitations, RCW 9A.04.080, is tolled during the time the person charged is "not usually and publicly resident within this State. No Washington case addresses the meaning of this tolling provision. We therefore look to other jurisdictions." *Ansell* at 494.

The *Ansell* court then examined tolling interpretations in other jurisdictions and concluded, "We believe the majority rule is the better reasoned rule. *Ansell's* mere absence *from* Washington was enough to toll the statute." *Ansell* at 496.

Moreover, the legislature is presumed to be familiar with past judicial interpretations of statutes, including appellate court decisions. See *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wash.2d 488, 496-97, 825 P.2d 300 (1992)); *State v. Calderon*, 102 Wash.2d 348, 351, 684 P.2d 1293 (1984); *State v. Fenter*, 89 Wash.2d 57, 62, 569 P.2d 67 (1977). Indeed, legislative inaction following a judicial decision interpreting a statute is often deemed to indicate legislative acquiescence in or acceptance of the decision. *Soproni v. Polygon Apartment Partners*, 137 Wash.2d 319, 327 n. 3, 971 P.2d 500 (1999); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 789, 719 P.2d 531 (1986). “[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl*, 152 Wash.2d at 147, 94 P.3d 930.

The Court of Appeals decision conforms to the fabric of Washington law for the past 26 years. This interpretation gives defendants, prosecutors, attorneys and courts a simple, bright line rule: an accused’s “mere absence *from* Washington was enough to

toll the statute." The legislature has not acted to change the statute and should be deemed to accept the interpretation.

There is no evidence of any public interest in this issue.

The Petition should be denied.

CONCLUSION

This court should deny the Petition for Review because the consistency of the law for 26 years and acceptance by the legislature show there is no public interest in change.

Respectfully submitted this 3rd day of February, 2010

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