

64386-0

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S&D

No. 64386-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EMORY BERUBE,

Appellant.

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FILED IN COURT OF APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The statute of limitations barred prosecution of the bail jumping charge, where the charge was filed more than three years after the crime allegedly occurred.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the statute of limitations barred prosecution of the bail jumping charge, where the charge was brought more than three years after the crime allegedly occurred?

C. STATEMENT OF THE CASE

On June 17, 2005, the State charged Mr. Berube with one count of possession of cocaine with intent to deliver (RCW 69.50.401(1), (2)(a)). CP 1. The crime allegedly occurred on June 14, 2005. CP 1.

On September 9, 2005, the court entered an order scheduling the omnibus hearing for October 28, 2005. 4/01/09RP 179. Mr. Berube failed to appear at the omnibus hearing despite being ordered to appear. 4/01/09RP 165-67, 186-87. A bench warrant was issued for his arrest. 4/01/09RP 186-87.

On March 30, 2009, the State filed an amended information adding one count of bail jumping (RCW 9A.76.170). CP 20-21. The State alleged the bail jumping occurred more than three years

earlier, on October 28, 2005, when Mr. Berube failed to appear at the omnibus hearing. CP 20-21; see also CP 44 ("to-convict" jury instruction); 4/02/09RP 22 (prosecutor's closing argument).

After a trial, the jury found Mr. Berube guilty of one count of possession of cocaine with intent to deliver and one count of bail jumping as charged. CP 37-38.

D. ARGUMENT

THE THREE-YEAR STATUTE OF LIMITATIONS BARRED PROSECUTION OF THE BAIL JUMPING CHARGE

1. The statute of limitations in a criminal case creates an absolute bar to prosecution and a charge brought beyond the limitations period may be challenged for the first time on appeal. A criminal statute of limitations is a "limitation upon the power of the sovereign to act against the accused." State v. Glover, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979) (quoting State v. Fogel, 16 Ariz. App. 246, 248, 492 P.2d 742 (1972)). Unlike in the civil law, "in the criminal law, such statutes [of limitation] create an absolute bar to prosecution." State v. Eppens, 30 Wn. App. 119, 124, 633 P.2d 92 (1981). This Court has consistently held "[t]he statute of limitations in a criminal case is jurisdictional." State v. Walker, 153 Wn. App. 701, 705, 224 P.3d 814 (2009); see also, e.g., State v. Ansell, 36 Wn. App. 492, 496, 675 P.2d 614 (1984). Accordingly, a statute of

limitations challenge may be raised for the first time on appeal.

Walker, 153 Wn. App. at 705 (citing RAP 2.5(a)(1) (lack of trial court jurisdiction may be raised for first time on appeal); State v. Novotny, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994)).

An information that appears to charge a crime that is barred by the statute of limitations "fails to state a public offense" and is void on its face. Glover, 25 Wn. App. at 61-62; Ansell, 36 Wn. App. at 496. Where the charge is brought beyond the statute of limitations period, the information must affirmatively allege facts sufficient to show the limitation period is tolled. Ansell, 36 Wn. App. at 496. If the State does not allege and prove the necessary tolling facts, the charge must be dismissed. In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 354-55, 5 P.3d 1240 (2000); Walker, 153 Wn. App. at 707-08; Novotny, 76 Wn. App. at 346-47.

2. The bail jumping charge is void on its face because it appears to charge a crime that is barred by the statute of limitations. The statute of limitations for the crime of bail jumping is three years. RCW 9A.04.080(1)(h); Walker, 153 Wn. App. at 705.

Here, the State filed an amended information on March 30, 2009, adding an additional count of bail jumping to the original information. CP 20-21. The State alleged the bail jumping offense

occurred on October 28, 2005, more than three years before the charge was filed. CP 20-21; CP 44 ("to-convict" jury instruction); 4/02/09RP 22 (prosecutor's closing argument). The information does not allege any facts purporting to toll the statute of limitations. CP 20-21. Therefore, under the authority cited above, the charge is void on its face and subject to dismissal.

The relevant date for determining whether the statute of limitations has run on the bail jumping charge is the date of the filing of the amended information, not the original information. Where the State files an amended information, the new charge may "relate back" to the date of the filing of the original charge only under certain limited circumstances not present here. The "relation back" doctrine is embodied in CR 15(c) and is applicable to criminal cases. Eppens, 30 Wn. App. at 123. "Under this rule, an amended pleading relates back to the filing date of its predecessor so long as the claim in the pleading 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" Id. (quoting CR 15(c)). The new charge does not "relate back" to the filing date of the original charge if it broadens the original charge. Eppens, 30 Wn. App. at 125.

Here, the relation back doctrine does not apply, because the bail jumping charge did not arise "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." CR 15(c). The original pleading, filed on June 17, 2005, charged Mr. Berube with one count of possession of cocaine with intent to deliver, alleging the offense occurred on June 14, 2005. CP 1. The amended information, filed almost four years later, added an additional charge for bail jumping, alleging the new offense occurred on October 28, 2005. CP 20-21. The new charge arose out of alleged conduct, i.e., the knowing failure to attend an omnibus hearing, that was completely unrelated to the alleged conduct underlying the original charge, i.e., the possession of cocaine, with an intent to deliver, on a date several months earlier.

Moreover, the relation back doctrine *cannot* apply in a case such as this, where the original pleading was filed *before* the alleged conduct underlying the new charge even took place. Therefore, the date of the filing of the amended information, not the original information, is the relevant date for determining whether the bail jumping charge was brought within the statute of limitations. Because the charge was brought more than three years after the alleged offense occurred, it was barred by the statute of limitations.

Finally, the information is void on its face because it does not allege any facts purporting to toll the statute of limitations. See Ansell, 36 Wn. App. at 496. In Washington, the statute of limitations is tolled "during any time when the person charged is not usually and publicly resident within this state." RCW 9A.04.080(2). "The language of the tolling statute ('not usually and publicly resident within this state') has consistently been interpreted to mean that time is tolled only when the accused is living, whether voluntarily or involuntarily, outside Washington." Walker, 153 Wn. App. at 707 (and cases cited therein).

Here, the amended information alleges no facts pertaining to whether Mr. Berube was "not usually and publicly resident within this state," RCW 9A.04.080(2), during the relevant time period. The information is therefore void on its face.

In addition, the record contains absolutely no evidence that Mr. Berube was ever outside the State of Washington at any time during the relevant time period. Where a charge is brought beyond the statute of limitations period, it is the State's burden to prove the statute of limitations did not in fact expire because the accused was out of the state for a sufficient length of time. Stoudmire, 141 Wn.2d at 354; Walker, 153 Wn. App. at 707. The State presented

no evidence to show the statute of limitations did not expire. As a result, the statute of limitations barred prosecution on the bail jumping charge.

3. The remedy is reversal of the conviction and dismissal of the charge, or, alternatively, remand to allow the State an opportunity to allege and prove any relevant tolling facts. In Stoudmire, 141 Wn.2d 342, the information charging Stoudmire with two counts of indecent liberties was filed beyond the three-year statute of limitations period. The court acknowledged that the State was entitled to offer evidence to show that the statute of limitations did not in fact expire because Stoudmire was out of the state for a sufficient length of time. Id. at 354 (citing RCW 9A.04.080(3)). But, because the State conceded that the prosecution on the charges exceeded the statute of limitations, the court vacated the convictions and dismissed the charges on those counts. Stoudmire, 141 Wn.2d at 355.

In Walker, the State filed bail jumping charges beyond the three-year statute of limitations and did not allege any tolling facts. State v. Walker, 153 Wn. App. 701. But there was evidence in the record that Walker had to be extradited from Oklahoma at some point, possibly within the relevant time period. Id. at 707. The court

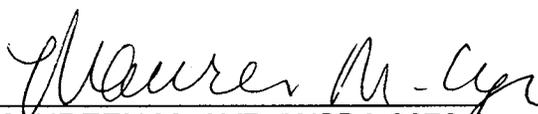
therefore remanded to the superior court to allow the State an opportunity to present evidence, and the trial court an opportunity to make factual findings, on the tolling issue. Id. at 709.

Here, as stated, the record contains absolutely no facts to suggest Mr. Berube was ever outside the State of Washington during the relevant time period. Therefore, reversal of the conviction and dismissal of the charge is an appropriate remedy. Alternatively, this Court should remand the case to the superior court to provide the State an opportunity to allege and prove facts sufficient to show the statute of limitations was tolled for a sufficient length of time.

E. CONCLUSION

The three-year statute of limitations barred prosecution of the bail jumping charge. The conviction should be reversed and the charge dismissed. Alternatively, the case should be remanded to provide the State an opportunity to plead and prove any facts sufficient to show the statute of limitations was tolled.

Respectfully submitted this 27th day of April 2010.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 64386-0-I
v.)	
)	
EMORY BERUBE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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APPELLATE UNIT
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516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
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763880
WASHINGTON STATE PENITENTIARY
1313 N 13 TH AVE
WALLA WALLA, WA 99362 | (X)
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X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710