

[Cite as *State v. Mason*, 2015-Ohio-3034.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102343

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DERRICK MASON

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588827-A

BEFORE: S. Gallagher, J., Jones, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: July 30, 2015

ATTORNEYS FOR APPELLANT

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Denise J. Salerno
Daniel T. Van
Assistant Prosecuting Attorneys
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender
By: Jeffrey Gamso
Mary C. Tylee
Assistant Public Defenders
Courthouse Square Suite 200
310 Lakeside Avenue
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Appellant state of Ohio appeals the judgment of the trial court that dismissed the case. Upon review, we affirm.

{¶2} On September 3, 2014, appellee Derrick Mason was indicted on five counts stemming from the home invasion and rape of the victim on March 11, 1993. Mason filed a motion to dismiss the indictment, claiming the state had failed to prosecute the case within the applicable 20-year statute of limitations under R.C. 2901.13(A)(3)(a). The state opposed the motion, asserting that the limitations period was tolled for a total of 947 days. After a hearing, the trial court granted the motion and dismissed the case. The state timely filed this appeal.

{¶3} Under its sole assignment of error, the state claims “[t]he trial court erred in dismissing the indictment because the statute of limitations was effectively tolled.”

{¶4} The charged offenses were subject to the 20-year statute of limitations set forth under R.C. 2901.13(A)(3)(a). At the time the indictment was filed, more than 21 years had elapsed from the date of the offense. However, the state claims the limitations period was tolled by R.C. 2901.13(G), which provides as follows:

The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused departed this state or concealed the accused’s identity or whereabouts is prima-facie evidence of the accused’s purpose to avoid prosecution.

{¶5} The state bears the burden of proving that the prosecution was commenced within the applicable statute of limitations. *State v. Martin*, 8th Dist. Cuyahoga No. 100753, 2015-Ohio-761, ¶ 13, citing *State v. King*, 103 Ohio App.3d 210, 212, 658 N.E.2d 1138 (10th Dist.1995). This burden includes proving whether R.C. 2901.13(G) is applicable under the facts of the case. *State v. Gallant*, 174 Ohio App.3d 264, 268, 2007-Ohio-6714, 881 N.E.2d 907 (3d Dist.).

{¶6} “R.C. 2901.13(G) tolls the statute of limitations for *all* offenses committed by an accused during the time when the accused purposely avoids prosecution for any offense, regardless of whether an indictment has been returned or whether underlying criminal activity has been discovered.” *State v. Bess*, 126 Ohio St.3d 350, 357, 2010-Ohio-3292, 933 N.E.2d 1076. In *Bess*, upon becoming aware of a sexual-abuse investigation being conducted against him, Bess began making plans to change his identity and leave town. *Id.* at 351. He sold his home, purchased a van, loaded his belongings, and left town. *Id.* The court recognized:

The context in which the word “prosecution” is used in R.C. 2901.13(G) reveals that the word refers to the more general process by which an accused is tried and punished for alleged criminal activity, not a specific proceeding against an accused, and the statute of limitations is tolled when an accused acts to purposely avoid being prosecuted for any offense.

Id. at 354.

{¶7} Here, the state asserts that the limitations period was tolled as a result of certain municipal court cases. In one case, a capias had been issued because Mason missed a court date for a speeding and a seatbelt violation. Mason did come in and pay a

waiver fee for these charges. In two other cases, involving jaywalking and hitchhiking, a time-to-pay capias was issued because Mason left court after entering no-contest pleas without paying his fines and costs. He ultimately paid these violations. In two civil cases for unpaid taxes, summonses were returned as undeliverable because of a wrong address and Mason had appeared in the same court in another case. The state claims these events should toll the statute of limitations in this case for a total of 947 days.

{¶8} The prosecution relies on the conclusion in *Bess* that all offenses the accused committed (and not simply for those offenses for which an indictment has been returned or underlying criminal activity has been discovered before the accused absconds) are applicable to the tolling provision of the statute. There are several problems with this reliance.

{¶9} First, there is no evidence that Mason was attempting to abscond, change his identity, or otherwise purposely avoid prosecution in the municipal cases relied upon by the state. Unlike in *Bess*, there is no evidence in this case that Mason ever left the jurisdiction or indicated in any way that he was avoiding prosecution for these crimes. Second, Mason did in fact subject himself to prosecution in municipal court by appearing and paying a waiver fee in one case and pleading and subsequently resolving fines in two other cases. While he did have capiases out for his nonpayment of certain fines, there is no evidence this was done to avoid prosecution. He could only be subject to a fine by having been prosecuted. The trial court found as follows: “Without any additional

information or proof in the matter, I think a speeding, a jaywalking, and a hitchhiking that were time-to-pay cases are not sufficient to toll any statute of limitations.”

{¶10} “[T]he manifest purpose of R.C. 2901.13(G) is to prevent the accused from benefitting from the statute of limitations when he or she has purposely acted to avoid being prosecuted, thereby causing the state to fail to commence a timely prosecution.” *Bess* at 355. Our review of the record reflects that the state failed to sustain its burden of showing that Mason “purposely avoided” prosecution so as to toll the statute of limitations in this action. Because the statute of limitations had expired in this case, the trial court did not err in dismissing the action. The state’s sole assignment of error is overruled.

{¶11} We are conscious of the fact that the purported victim is denied justice in this case because of an arbitrarily defined time limitation. Regrettably, we must apply the statute as written, but feel the legislature may need to take yet another look at the statute of limitations.¹

{¶12} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The
court finds there were reasonable grounds for this appeal.

¹At the time of this writing, the Ohio legislature is considering extending the statute of limitations for rape from 20 years to 25 years. *See generally* H.B. 6 and S.B. 13. Although such a change (if in effect) would have provided relief for the purported victim in this case, it would not help purported victims whose cases are beyond the proposed 25-year end date. The only complete remedy for dealing with John or Jane Doe defendants is to treat rape offenses in the same manner as aggravated murder or murder where no statute of limitations applies. *See proposed* H.B. 234.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN T. GALLAGHER, J., CONCUR