OA 3-3-87

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE FIELDS,

Respondent.

CASE NO. 69,211

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellee in the District Court of Appeal, Fourth District, and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The Petitioner was the Appellant in the Fourth District and the prosecution in trial court.

In this brief, the parties will be referred to as they appeal before this Honorable Court.

The symbol "R" denotes record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following clarifications and additions.

During the hearing, on Respondent's Motion to Dismiss, Respondent's trial counsel stated:

> My position is, Judge, Mr. Fields has testified under oath, he lived at the same address. He has not moved or changed his name or done anything to evade the service in this case. Finally, Judge, some three and a half years after the offense occurred, Mr. Fields was served with a capias when he came to court on a traffic summons. I think there is no justifiable reason. The statute of limitations had run early in 1985. For that reason, we are asking the Court to discharge at this time.
>
> R4

At bar, the trial judge made the following findings in his written order granting Respondent's Motion to Dismiss:

> 1. That the alleged offense occurred on January 4, 1982.
>
> 2. That the charge of Aggravated Assault was filed on January 20, 1982 and a capias for the defendant's arrest was issued on that date.
>
> 3. That the defendant has resided at the same address for the past five years.
>
> 4. That the state knew of the defendant's address.
>
> 5. That no attempt was made to execute the capias on the defendant until August 7, 1985.
>
> 6. That over 3 1/2 years elapsed from the time of the offense until the defendant was served with a capias.

7. That the prosecution of this case was not commenced within the Statute of Limitations because of the unreasonable delay in executing the capias.

R 23

SUMMARY OF ARGUMENT

The trial judge granted Respondent's motion to dismiss on the ground that the prosecution of this case was not commenced within the statute of limitations because of the unreasonable delay in executing the capias. The applicable and present statute of limitations, section 775.15(2), F.S. (1981) includes an express condition that a prosecution commences when an information is filed "provided the capias, summons, or other process issued in such indictment or information is executed without unreasonable delay." The crime giving rise to the appeal in Sturdivan v. State, 419 So.2d 300 (Fla. 1982) occurred at a time when a previous statute of limitations, section 932.465, Florida Statutes (1971) was in effect. The predecessor statute, quite unlike the current statute does not contain the language now expressed in section 775.15(5) regarding execution of a warrant without unreasonable delay. Hence the decision of the Fourth District Court of Appeal should be affirmed.

ARGUMENT

POINT

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR DISCHARGE ON THE GROUND THAT THE PROSECUTION OF THE CASE WAS NOT COMMENCED WITHIN THE STATUTE OF LIMITATIONS BECAUSE OF THE UNREASONABLE DELAY IN EXECUTING THE CAPIAS

Under Florida law, generally the criminal statute of limitations in effect when a crime is committed controls. State v. Wadsworth, 293 So.2d 345, 347 (Fla. 1974); Andrews v. State, 392 So.2d 270 (Fla. 2d DCA 1980). Prior to the adoption of the "Florida Criminal Code," Sections 775.011 et seq., Florida Statutes (Ch. 74-383, Laws of Florida, eff. Oct. 1, 1975) the periods of limitation for prosecuting non-death punishable criminal actions were set forth in sections 932.465(2), Florida Statutes (1973) as follows:

> (2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period had elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

In the instant case, the offense was alleged to have occurred on January 4, 1982. An arrest warrant was issued on January 20, 1982. The State filed an information charging Respondent with the offense on January 30, 1982. However, the

capias was not served on Respondent until August 7, 1985, some three and one-half years later.

Section 775.15(2), the applicable and present statute of limitation, Florida Statutes (1981) provides that any non-first degree felony should be commenced within three years after it is committed. Section 775.15(5), Florida Statutes (1981) provides:

> (5) A prosecution is commenced when either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered.
>
> (e.s.)

In examining the present and predecessor statute of limitations statutes, it is quite apparent that the present statute, 775.15(5) includes an express condition that a prosecution commences when an indictment is filed "provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay." The predecessor statute unlike the current statute does not contain this language.

In construing a statute words of common usage when used in an enactment should be construed in their plain and ordinary sense. State v. Cormier, 375 So.2d 852 (Fla. 1979); Graham v. State, 362 So.2d 924 (Fla. 1978). Since the legislature is

presumed to know the meaning of the words it utilizes and to convey it intent by use of specific terms, courts must apply the plain meaning of those words, if they are unambiguous. Caloosa Property Owners Ass'n, Inc. v. Palm Beach County Bd. of County Commissioners, 429 So.2d 1260 (Fla. 1st DCA 1983). The term "executed" as used in this statute is not ambiguous. It must be given its plain and ordinary meaning. Petitioner's suggestion in its brief that "the legislature still intends that the filing of an indictment or information commences the prosecution," totally ignores the plain and ordinary meaning of the statute. (See Petitioner's Brief on the Merits p. 12).

Judge Letts writing for the Fourth District Court of Appeal in this cause State v. Fields, 11 F.L.W. 1769 (Fla. 4th DCA July 23, 1986) explained the meaning of the term "executed" as contained in the statute as follows:

> True, "to execute" can also mean "to sign," but we do not think that this was the intended meaning in the above quoted statute. If execution simply referred to a signing and/or delivery to a sheriff, the additional language in the statute regarding a defendant's absence would not be necessary. The statute speaks to unreasonable delay and also points out that delay in execution due to a defendant's absence from the state would not be unreasonable. "Execution" therefore obviously requires the presence of the defendant, not simply a magistrate's signature on the warrant or delivery of the warrant to a sheriff.
>
> 11 F.L.W. at 1770

Petitioner relies on this Honorable Court's decision in Sturdivan v. State, 419 So.2d 300 (Fla. 1982) in support of its position. However, the defendant in Sturdivan was charged with committing an offense in 1971. This was prior to the enactment of the present statute of limitations provision 775.15(2), Florida Statutes (1981). Clearly this Honorable Court was referring to the predecessor statute. The crime giving rise to the appeal occurred at a time when a previous statute of limitations, section 932.465, F.S. (1971) was in effect. This Honorable Court stated:

> "It is settled law in Florida that for the purposes of the Statute of Limitations, prosecution has commenced when a warrant has been issued and placed in the hands of the proper official for execution. Dobbs v. Lehman, 100 Fla. 799, 130So.2d 36 (1930); Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965)."

Id. at 301

Judge Letts writing for the Fourth District in Fields articulated as follows the basis for the Court's ruling that the Sturdivan case was inapplicable:

> Yet it appears to us that the Sturdivan court did not purport to be interpreting section 775.15(5), and never alluded to it. Moreover, in the Sturdivan decision, the holding of the case did not address itself to the timeliness of the execution of the arrest warrant, but rather to the effect of a late filed indictment. Further, the court in Sturdivan relied on Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965), as authority for its statement that prosecution is commenced when a warrant has been issued and placed in the hands of a proper official for execution. The court in Rosengarten, however, was interpreting section

> 932.05, Florida Statutes (1965) a predecessor statute to section 775.15 when it propounded the above-stated general rule. The predecessor statute, quite unlike the current statute in many respects, does not contain the language now expressed in section 775.15(5) regarding execution of a warrant without unreasonable delay. We therefore conclude that the rule enunciated in Sturdivan and Rosengarten is not applicable to the present case.
>
> 11 F.L.W. at 1770

In State ex rel. Welch v. Parnham, 487 So.2d 65 (Fla. 1st DCA 1986), the crime charged occurred on September 8, 1977. The First District held:

> In Sturdivan, however the crime giving rise to the appeal occurred at a time when a previous statute of limitations, section 932.465, Fla. Stat. (1971), was in effect. Section 932.465 did not include a definition of the term "commencement" and under that statute, the court held that prosecution could be commenced by the issuance of a warrant. However, due to the express and unambiguous definition of the term "commencement" in the current statute, the rationale of Sturdivan is not applicable to prosecutions for crimes committed after the effective date of section 775.15.

Hence the Sturdivan and Rosengarten decision are inapplicable to the situation at bar.

In Warren v. Wainwright, 483 So.2d 820 (Fla. 3d DCA 1986), cited by Petitioner, the petitioner therein filed a writ of habeas corpus alleging the incompetency of his appellate counsel. The Third District cited Sturdivan for authority on the statute of limitations issue. However the court does not indicate when the crime occurred or which statute of limitations applied to the situation.

In State v. Chacon, 479 So.2d 229 (Fla. 3d DCA 1985) the defendant was charged with grand theft. The Third District held that the applicable statute of limitations for the crime charged was five not three years. Thus, the five year period had not expired when the defendant filed his pre-mature motion to dismiss in the lower tribunal. Since a five year limitation applied to the crime charged, the court's reference to the "commencement" of the prosecution was not essential to the holding. It is clearly obiter dictum. And further that dicta which apparently discusses the "commencement issue" is erroneous in light of the express provisions of section 775.15(5), F.S. (1981). And finally neither of these decisions from the Third District cited or appears to consider the impact of section 775.15(5), Florida Statutes.

Sub judice, the trial judge in his written order granting Respondent's Motion to Dismiss found "[t]hat the prosecution of this case was not commenced within the statute of limitations because of the unreasonable delay in executing the capias." R 23. This ruling of the trial court comes to this Honorable Court clothed in the presumption of correctness. DeConigh v. State, 433 So.2d 501 (Fla. 1983), cert. den., 104 S.Ct. 995 (1984). It is incumbent upon the Petitioner to demonstrate error. This Petitioner has failed to do. On this ground alone this Honorable Court should affirm the decision of the Fourth District Court of Appeal.

In any event, Petitioner has presented this Court in its Brief with various hypothetical situations that may or may not result from application of the present statute of limitations section 775.15(5), Florida Statutes. However the prevention of such circumstances alluded to by Petitioner in its brief is best left within the realm of the legislature and not the judiciary. Courts are law-interpreting and not lawmaking bodies. Ervin v. Collins, 85 So.2d 852 (Fla. 1956). Hence the ruling of the Circuit Court and the Fourth District Court of Appeal should be affirmed.

CONCLUSION

Based on the record at bar and authorities cited herein Respondent respectfully requests this Honorable Court to affirm the decisions of the Fourth District Court of Appeal and the trial court.

Respectfully submitted,

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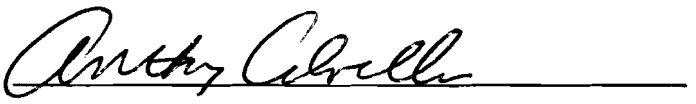
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 25th day of November, 1986.



Of Counsel