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SID J. WHITE
JUL 31 1996
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ARNOLD LEON PRATT,

Respondent.

CASE NO. 87,768

PETITIONER'S REPLY BRIEF AND RESPONDENT'S CROSS-ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

ISSUE II. Procedure. This issue should not be reviewed for five reasons: (1) Pratt did not seek discretionary review on this issue; (2) Pratt could not have obtained discretionary review of this issue because the First District did not consider the issue worthy of mentioning in its opinion; (3) Pratt did not cross appeal this issue in his answer brief; (4) the issue is beyond the scope of the certified question; and (5) the issue is unrelated to the certified question.

Merits. It is without merit because Pratt's prosecution commenced within the requisite time period under the statute of limitations. The time is tolled up to three years when the person is continuously absent from the state. The tolling provision makes no distinction between incarcerated persons and those at liberty.

ARGUMENT

CERTIFIED QUESTION

> WHEN A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE (DEPRAVED MIND) MURDER AND IS CONVICTED BY A JURY OF THE CATEGORY 2 LESSER-INCLUDED OFFENSE OF ATTEMPTED THIRD-DEGREE (FELONY) MURDER, DO *STATE V. GRAY*, 654 SO.2D 552 (FLA. 1995), AND SECTION 924.34, FLORIDA STATUTES (1991), REQUIRE OR PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION, TO ENTER JUDGMENT FOR ATTEMPTED VOLUNTARY MANSLAUGHTER, A CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSE OF THE CRIME CHARGED?
>
> IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR A NEW TRIAL?

Pratt asserts that he cannot be retried. State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996) and Montana v. Hall, 481 U.S. 400 (1987), both of which address convictions for nonexistent crimes, hold otherwise. Wilson holds that the defendant can be retried on "any lesser offense instructed on at trial." Id. Hall holds, at least by implication, that the defendant can also be retried for a crime of the same degree. 481 U.S. at 400-404.

Pratt's reliance on Harris v. Oklahoma, 433 U.S. 682 (1977) is misplaced. Harris was a successive prosecution case, not a case involving retrial after invalidation of the conviction on appeal. Hall recognizes this distinction. 481 U.S. 403-404. In the case

at bar, the State cannot retry Pratt for attempted second-degree murder, because the jury found him not guilty of that offense. It can, however, retry Pratt for any offense of a lesser degree.

Pratt also asserts that he must be discharged because he objected to jury instructions on lesser offenses. (A.B. 6) Aside from the novelty of this proposition (remedy for preserved error is automatic discharge from custody), he did <u>not</u> object to the jury instructions on the ground raised here. (T. 304-306)

Pratt further contends that he must be discharged because he was punished in federal court for this crime. (A.B. 6) To set the record straight, he was punished in federal court for the crimes he committed against federal agents at the crime scene, not for the crimes he committed against a state police officer and owner of the vehicle he tried to steal. Moreover, he was in federal prison less than three years on the 22-year federal sentence that was imposed. (T. 3-4, 7, 31-32)

ARGUMENT

ISSUE II (RESPONDENT'S CROSS-APPEAL)

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN DENYING RESPONDENT'S MOTION TO DISMISS ON THE GROUND THAT THE PROSECUTION WAS BARRED BY THE STATUTE OF LIMITATIONS? (REPHRASED)

Pratt asks the Court to discharge him from custody on the ground that the prosecution was barred by the statute of limitations. The State respectfully disagrees for two reasons, first on a procedural ground and second on the merits.

Procedure. Pratt did not invoke this Court's discretionary jurisdiction to review this issue, and he could not have invoked it because the First District did not consider the issue worthy of mentioning in its opinion, not even after Pratt reargued the merits in a motion for rehearing. Moreover, Pratt did not cross appeal this issue in his answer brief filed in this Court.

Not only did the First District not write on this issue, but the issue is both beyond the scope of the certified question and is completely unrelated to it. The State, therefore, asks the Court to decline to review the issue. See Flanagan v. State, 625 So. 2d 827, 830 n 4 (Fla. 1993) ("We do not address Flanagan's other points on appeal which were not encompassed by the certified question").

Merits. The issue is without merit. The State had until July 29, 1993 to commence prosecution.[1] It met the deadline with room to spare. Pratt was charged with second and third degree felonies arising out of an incident occurring on September 7, 1987. (R. 3-4; T. 104) Pratt was continuously absent from the State of Florida from October 14, 1988 to September 3, 1991 (2 years, 10 months, 19 days) due to his incarceration in federal prison. (R. 26) He was arrested on December 19, 1991,[2] and the

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[1]§ 775.15(2)(b), Fla. Stat. (1987) (prosecutions for felonies less serious than a first-degree felony must be commenced within three years of their commission); § 775.15(4) (time commences to run on the day after the offense is committed); § 775.15(6) ("The period of limitation does not run during any time when the defendant is continuously absent from the state ..., but in no case shall this provision extend the period of limitation otherwise applicable by more than three years).

[2]In his brief, Pratt states that he "was arrested by Okaloosa County sheriff's deputies on September 8, 1987 ... and subsequently released to the United States Air Force." (A.B. 8) That statement is unsupported by the record. Deputy Nelson arrested Pratt's brother, James, on September 7, 1987 (date of crime), but Arnold Pratt "was taken immediately to OSI, Hurlburt Field." (R. 28) Arnold Pratt "was never transported or booked at the Okaloosa County Sheriff's Department." (R. 28) In his brief, Pratt refers to Deputy Nelson's application for an arrest warrant that was filled out on the date of the crime. (R. 29-30) The affidavit alleged that two special investigators for the Air Force were present at the crime scene. (R. 2-3, 29-30, 40-41) The record on appeal does not contain direct testimony or documentary evidence of the date of Pratt's arrest. However, Deputy Nelson, by implication, testified that Pratt was arrested on December 19, 1991 (R. 28-29), and both lawyers, without

information was filed on March 5, 1992 and amended on April 14, 1992. (R. 3-4, 9-10, 23, 28-29, 33-34)

The statute of limitations does not turn on the State's actual knowledge of the defendant's whereabouts or on the State's ability to obtain sufficient evidence to sustain a conviction. It simply sets a deadline, which, if not met, will prevent prosecution. Stated another way, statutes of limitations are bright line rules, and by definition bright line rules do not take into account the aggravating and mitigating factors in any particular case.

The deadline under the statute of limitations is extended up to three years under two specified circumstances. The first circumstance is the defendant's continuous absence from the State of Florida, which is applicable in the instant case. There is no requirement that the defendant be at liberty, as opposed to incarcerated, during his absence. Neither does this statute require the prosecution to constantly search for fugitives from justice in the jails and prisons of the other forty-nine states and the federal government.

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objection, represented to the trial court that Pratt was arrested on this date (R. 23, 33-34).

Pratt is asking this Court to rewrite § 775.15(6) so that it reads: The period of limitation does not run during any time when the defendant is continuously absent from the state, <u>except when his absence is due to his incarceration in another state.</u> The statute reads "continuously absent," not "continuously available" as Pratt would have it read. (AB. 10) Courts do not rewrite statutes, and in fact this Court has expressly refused to rewrite this particular statute. <u>State v. King</u>, 282 So. 2d 162, 167 (Fla. 1973).

As justification for rewriting the statute, Pratt relies on civil law. The civil and criminal law are not interchangeable because different societal interests are at stake. The government has inherent police power to restrict the conduct of its citizens and to punish them for their improper conduct. At common law, there was no limitation on the time for prosecuting crimes, and there still is no limitation on the time for prosecuting capital or life felonies. Moreover, states do not have a problem with obtaining in personam jurisdiction because the federal constitution requires states to turn over fugitives from justice. Art. IV, § 2, U.S. Const. Obviously the tolling provision would be gutted if it turned on whether the government could obtain jurisdiction over the person. Finally, the 1966

civil case relied on by Pratt (AB. 9-10) and cited in a recent criminal case (AB. 10), was decided before the statute of limitations was substantially reworded, including addition of the very language at issue here: "The period of limitation does not run during any time when the defendant is continuously absent from the state." s. 10, ch. 74-383, Laws of Florida; § 932.465, Fla. Stat. (1973).

Pratt also relies on cases construing the speedy trial rule. What this Court intended in promulgating a rule of procedure is irrelevant to what the legislature intended in enacting the statute of limitations. The rule and statute, nevertheless, are distinguishable. The statute addresses the period before commencement of prosecution and the speedy trial rule after commencement of prosecution. Persons under investigation and those who have been arrested or charged are not similarly situated; only the latter have their freedom restricted.

In passing, the State notes that the speedy trial rule does not apply to prisoners incarcerated in other jurisdictions. Fla.R.Crm.P. 3.191(3). The Interstate Agreement on Detainers does apply to such prisoners, provided a detainer has been lodged with the prison authorities. §§ 941.45 - 941.50, Fla. Stat. The State, however, is not required to lodge a detainer. What this

means in practice is that the prosecutor must file charges within the six-year time period and then within a reasonable period of time thereafter lodge a detainer and obtain temporary custody of the prisoner to bring him to trial. Of course, this presupposes the prosecutor can actually find a defendant who happens to be incarcerated in another jurisdiction. There is no central registry which lists the whereabouts of all incarcerated persons.

Two cases cited by Pratt--Fleming v. State, 524 So. 2d 1146 (Fla. 1st DCA 1988); State v. Miller, 581 So. 2d 641 (Fla. 2d DCA 1991), rev. dismissed, 584 So. 2d 999 (Fla. 1991)--construe paragraph 5, not paragraph 6, of the statute of limitations. These two paragraphs are not interchangeable. Paragraph six applies before the charging document is filed and paragraph five afterwards. Stated another way, paragraph six determines the deadline, and paragraph five determines whether the deadline was met. In addition, the cases are distinguishable. In Miller, the information was filed in 1985, but the defendant was not arrested until four years later in 1989. In Fleming, the information was filed in 1982, but the defendant was not arrested until four years later in 1986. It also appears that the defendant in these two cases was arrested after expiration of the deadline for commencing prosecution. By contrast, in the instant case, both

the charge and the arrest occurred within the deadline, and the arrest preceded the charge by less than three months.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that the certified question be answered in the affirmative and the decision of the First District quashed.

Respectfully submitted,

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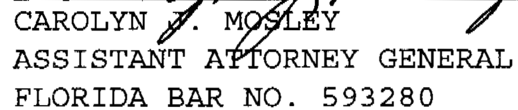

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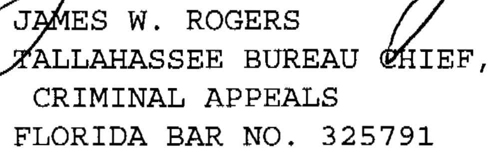

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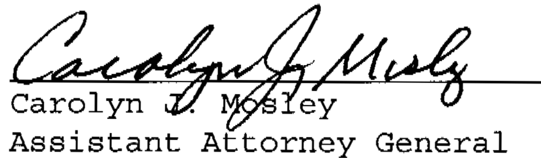
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. mail to Jamie Spivey, Assistant Public Defender, Leon County Courthouse, Suite 401 North, 301 South Monroe Street, Tallahassee, Florida 32301 this 31st day of July, 1996.



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