

IN THE SUPREME COURT OF FLORIDA

**Case No. SC15-233
L.T. No(s): 1D14-179, 2012-CF-1183**

**BRIAN MICHAEL ROBINSON,
Petitioner,**

v.

**THE STATE OF FLORIDA,
Respondent.**

**On Petition for Discretionary Review from the First
District Court of Appeal, Case No. 1D14-179**

PETITIONER'S BRIEF ON JURISDICTION

**ROSS A. KEENE
Florida Bar No. 140686
Ross Keene Law, P.A.
224 East Government Street
Pensacola, FL 32502
Phone: (850) 912-4799
Email: rkeene@rosskeenelaw.com
Attorney for Petitioner**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
THE FIRST DISTRICT’S OPINION IN <i>PEARSON V. STATE</i> AND <i>ROBINSON V. STATE</i> EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT’S OPINIONS IN <i>NETHERLY V. STATE</i> AND <i>PEREZ V. STATE</i> , AND THEREFORE THIS COURT SHOULD ASSUME JURISDICTION TO RESOLVE THE CONFLICT	6
CONCLUSION	12
CERTIFICATE OF SERVICE	13
CERTIFICATE OF FONT SIZE	14
APPENDIX	15

TABLE OF CITATIONS

	<u>Page</u>
<u>Cases</u>	
<i>Brown v. State</i> , 674 So.2d 738 (Fla. 2d DCA 1995)	9
<i>Fleming v. State</i> , 524 So.2d 1146, 1146–47 (Fla. 1st DCA 1988)	1
<i>Netherly v. State</i> , 804 So.2d 433, 436-37 (Fla. 2d DCA 2001)	5,6,7,9,10
<i>Pearson v. State</i> , 867 So.3d 517, 519 (Fla. 1 st DCA 2004)	1,2,4,6,7,8,9
<i>Robinson v. State</i> , 153 So.3d 313 (Fla. 1 st DCA 2014)	1,4,5,6,8
<i>State v. Miller</i> , 581 So.2d 641, 642 (Fla. 2d DCA 1991)	7
<i>State v. Perez</i> , 72 So.3d 306, 308 (Fla. 2d DCA 2011)	2,4,5,6,9,10
<i>Sutton v. State</i> , 784 So.2d 1239 (Fla. 2d DCA 2001)	9
<u>Statutes and Rules</u>	
Art. V, § 3(b)(4), Fla. Const	6
§ 775.15(2)(b), Fla. Stat	1
§ 775.15(4)(b), Fla. Stat	1
§ 775.15(5), Fla. Stat	1,2,4,5,6,7,8,9,11
§ 775.15(6), Fla. Stat.	8,9
§ 812.035(10), Fla. Stat	9
Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)	2,4,6

STATEMENT OF THE CASE AND FACTS

Citing its earlier decision in *Pearson v. State*, 867 So.3d 517, 519 (Fla. 1st DCA 2004), the First District affirmed the trial court's denial of Petitioner Robinson's motion to dismiss that alleged that the statute of limitations barred the State's prosecution. *See Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014). The *Robinson* opinion below provided:

Brian Michael Robinson challenges the denial of his motion to dismiss, arguing that the statute of limitations prohibited the State from proceeding against him. Because the running of the statute of limitations was tolled under section 775.15(5), Florida Statutes (2008), while Robinson was continuously absent from the state, his prosecution was not barred by the statute of limitations. Accordingly, we affirm.

Under section 775.15(2)(b), Florida Statutes (2008), prosecution for second and third degree felonies must be commenced within three years. This limitations period may be tolled, however, for the time during which the defendant is continuously absent from the state. § 775.15(5), Fla. Stat. (2008); *Pearson v. State*, 867 So.2d 517, 519 (Fla. 1st DCA 2004). Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. *Sutton v. State*, 784 So.2d 1239, 1241 (Fla. 2d DCA 2001). Once the jurisdiction of the court is challenged by the raising of the statute of limitations, the State has the burden to establish that the offense is not barred by the statute. *Fleming v. State*, 524 So.2d 1146, 1146–47 (Fla. 1st DCA 1988).

Robinson further provided:

Section 775.15(4)(b) provides that process must be executed without unreasonable delay and:

“In determining what is reasonable, inability to locate the defendant

after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay.”

Section 775.15(5) provides, in pertinent part, that “[t]he period of limitation does not run during any time when the defendant is continuously absent from the state” Here, the State established that Robinson was continuously absent from the state between May 2008 and May 2012.

Robinson asserts that the State may not avail itself of this tolling provision, however, because it failed to demonstrate that it made a diligent search for Robinson or that his absence from the state hindered prosecution. We do not agree. This court has held that, where the defendant is continuously absent from the state, the express language of section 775.15(5) does not require that the State undertake a diligent search or that the defendant's absence hindered the prosecution for the statute of limitations to be tolled. *Pearson*, 867 So.2d at 519. *As we noted in Pearson, id., our reading of section 775.15(5) conflicts with the second district's interpretation of that statute in Netherly v. State, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and State v. Perez, 72 So.3d 306, 308 (Fla. 2d DCA 2011).* Accordingly, since Robinson's continuous absence from the state resulted in the tolling of the statute of limitations, prosecution in this matter was timely commenced.

Robinson, 153 So.3d 313-314 (emphasis added)

On the basis of the recognized conflict between the First District's opinion in *Pearson*, 867 So.2d at 517, and the Second District's opinions in *Netherly v. State*, 804 So.2d at 437, and *State v. Perez*, 72 So.3d at 308, Petitioner Robinson moved the First District to certify conflict pursuant to Fla. R. App. P. 9.330(a). That motion was denied by order dated January 8, 2015.

Petitioner thereafter timely filed his Notice to Invoke Discretionary Jurisdiction

of this Court.

SUMMARY OF ARGUMENT

THE FIRST DISTRICT'S OPINION IN *PEARSON V. STATE* AND *ROBINSON V. STATE* EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S OPINIONS IN *NETHERLY V. STATE* AND *PEREZ V. STATE*, AND THEREFORE THIS COURT SHOULD ASSUME JURISDICTION TO RESOLVE THE CONFLICT.

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Art. V, § 3(b)(4), Fla. Const., this Court has jurisdiction to review a decision of a Florida district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. Citing its earlier decision in *Pearson v. State*, 867 So.3d 517, 519 (Fla. 1st DCA 2004), the First District affirmed the trial court's denial of the Petitioner Robinson's motion to dismiss that alleged that the statute of limitations barred the State's prosecution. *See Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014). There is express and direct conflict between the First District's decisions in *Pearson* and the instant case, and the Second District's opinions in *Netherly v. State*, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011). Accordingly, this Court should exercise its jurisdiction to resolve the uncertainty of the application of the Section 775.15(5), Fla. Stat., tolling provisions.

In *Pearson*, 867 So.2d at 519, the Court interpreted § 775.15(5), Fla. Stat., and

held that the prosecution was timely commenced as the defendant was continuously absent from the state resulting in the tolling of the statute of limitations. In the present case, *Robinson v. State*, the First District also found that pursuant to § 775.15(5) Petitioner Robinson was “continuously absent from the state between May 2008 and May 2012.” *Robinson*, 153 So.3d at 314. The First District specifically held in *Robinson*, however, that its opinion and reading of § 775.15(5) “conflicts with the second district’s interpretation of that statute” in *Netherly v. State*, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011). Although the First District’s decision in the present case conceded conflict with the Second District’s decisions in *Netherly* and *Perez*, it declined to certify conflict in the present case. Because there is express and direct conflict between the First District’s decisions in *Pearson* and the ruling in the instant case, and the Second District’s opinions in *Netherly*, 804 So.2d at 437, and *State v. Perez*, 72 So.3d at 308, this Court should exercise its jurisdiction to remedy the uncertainty of the Section 775.15(5), Fla. Stat., tolling provisions.

ARGUMENT

THE FIRST DISTRICT'S OPINION IN *PEARSON V. STATE* AND *ROBINSON V. STATE* EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S OPINIONS IN *NETHERLY V. STATE* AND *PEREZ V. STATE*, AND THEREFORE THIS COURT SHOULD ASSUME JURISDICTION TO RESOLVE THE CONFLICT.

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Art. V, § 3(b)(4), Fla. Const., this Court has jurisdiction to review a decision of a Florida district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. Citing its earlier decision in *Pearson v. State*, 867 So.3d 517, 519 (Fla. 1st DCA 2004), the First District affirmed the trial court's denial of the Petitioner Robinson's motion to dismiss that alleged that the statute of limitations barred the State's prosecution. *See Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014). There is express and direct conflict between the First District's decisions in *Pearson* and the instant case, and the Second District's opinions in *Netherly v. State*, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011). Accordingly, this Court should exercise its jurisdiction to resolve the uncertainty of the application of the Section 775.15(5), Fla. Stat., tolling provisions.

In *Pearson*, 867 So.2d at 519, the Court interpreted § 775.15(5), Fla. Stat., and

held that the prosecution was timely commenced as the defendant was continuously absent from the state resulting in the tolling of the statute of limitations. The *Pearson* Court adopted the case of *State v. Miller*, 581 So.2d 641, 642 (Fla. 2d DCA 1991), which found that the dispositive issue pursuant to Section 775.15(5) is whether, in considering the reasonableness of the delay in prosecution, “the defendant’s absence from the state hindered the prosecution.” *Id.* at 519. The *Pearson* Court found:

Neither subsection requires that the defendant's absence from the state must have hindered the state from proceeding with the prosecution. Instead, case law from the second district added this requirement first to Section 775.15(5), and later to Section 775.15(6). *See State v. Miller*, 581 So.2d 641, 642 (Fla. 2d DCA 1991)(holding where the defendant's absence from the state is not the fault of defendant and does not hinder prosecution, the statute of limitations is not tolled pursuant to Section 775.15(5), Florida Statutes); *Netherly v. State*, 804 So.2d 433, 436-37 (Fla. 2d DCA 2001) (holding where the state is unable to demonstrate that the defendant's absence from the state delayed prosecution, the statute of limitations is not tolled pursuant to section 775.15(6), Florida Statutes). The second district's holding in *Miller* appears to be proper because the dispositive issue under section 775.15(5) is whether the state's delay in prosecution is reasonable. Thus, in considering the reasonableness of the delay, it is appropriate to look to whether the defendant's absence from the state hindered the prosecution.

Pearson, 867 So.2d at 518.

For purposes of distinguishing the ultimate holding in *Pearson* from the present case, the defendant in *Pearson* was actually absent from the State of Florida continuously from the date of the crime until approximately five years later when he was found in Chicago; it was also evident in *Pearson* that law enforcement had no information

about where the accused was or how he could be located. *Id.* at 518. *Pearson* further found:

However, we disagree with the second district's holding in *Netherly* because section 775.15(6) does not require that the delay in prosecution be reasonable in order for the statute of limitations to be tolled. Therefore, we reject the holding in *Netherly* and apply section 775.15(6) as written. Based on the express language of section 775.15(6), prosecution in this matter was timely commenced, as the appellant was continuously absent from the state and his absence resulted in the tolling of the statute of limitations. Thus, the appellant's first claim of ineffective assistance of counsel must fail as being without merit.

Pearson, 867 So.2d at 517.

In the present case, the First District also found that pursuant to § 775.15(5) Petitioner Robinson was “continuously absent from the state between May 2008 and May 2012.” *Robinson*, 153 So.3d at 314. The First District rejected Petitioner Robinson’s assertion that the State could not avail itself of the § 775.15(5) tolling provision because the State failed to demonstrate it made a diligent search for Petitioner Robinson or that his absence from the state hindered prosecution. Relying on the “continuous absence” prong of § 775.15(5), the First District held that the express language of § 775.15(5) did not require the State to undertake a diligent search or that it be established that the defendant’s absence from the State hindered the prosecution for the statute of limitations to be tolled. *Robinson*, 153 So.3d at 314. The First District specifically held in the instant Opinion that its reading of §

775.15(5), as noted in *Pearson*, 867 So.2d at 519, “*conflicts with the second district’s interpretation of that statute*” in *Netherly v. State*, 804 So.2d 433, 437 (Fla. 2d DCA 2001), and *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011).¹ (emphasis added)

In *Netherly*, 804 So.2d at 433, the defendant moved to dismiss a fraud count arguing that the statute of limitations had run on the offense. The trial court denied the motion after finding that the statute of limitations was tolled during his absence from the state. The Netherly court found:

Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. *Sutton v. State*, 784 So.2d 1239 (Fla. 2d DCA 2001). Once a defendant has raised the statute of limitations defense, the burden is on the prosecution to establish that the offense is not barred by the statute. *Id.* at 1241. The State established that Mr. Netherly was absent from the state between October 1992 and September 1995. However, merely demonstrating his absence was not enough to toll the statute. In order to avail themselves of the three-year tolling provision of section 775.15, the State must have shown that his absence prevented or delayed his prosecution for this offense. ***This court has repeatedly held that the statute of limitations will not be tolled pursuant to section 775.15(6) in cases where the State is unable to demonstrate that prosecution was delayed due to the defendant's absence from the state. See, e.g., Sutton v. State, 784 So.2d 1239, 1242 (Fla. 2d DCA 2001); Brown v. State, 674 So.2d 738 (Fla. 2d DCA 1995); State v. Miller, 581 So.2d 641 (Fla. 2d DCA 1991).***

¹ While the First District’s opinion in *Robinson* also references conflict with the Second District in *State v. Perez*, 72 So.3d 306, 308 (Fla. 2d DCA 2011), a component of the *Perez* case addresses a specific limitations provision in Section 812.035(10), Fla. Stat., that Petitioner Robinson believes distinguishes its direct relevance to this conflict consideration. Moreover, the facts in *Perez* do not provide enough detail for purposes of highlighting conflict with *Pearson* and *Robinson*.

804 So.2d at 437 (emphasis added)

The defendant in *Netherly* maintained the limitations period should not have been tolled because the State was aware that he had relocated to Tennessee; the *Netherly* court held:

We agree. The record indicates that the Netherlys were, at all times, available to be charged after they moved to Tennessee. There were no charges pending against the Netherlys which would have prohibited them from leaving Florida. It is clear from the record that they did not move to Tennessee to elude authorities. The Netherlys cooperated during several investigations related to Premiere's closing and were in continuous contact with state and federal officials after they moved to Tennessee. Moreover, during this period, Mr. Netherly participated in a pretrial diversion program for bad check charges and sent checks to the Pinellas County State Attorney's office which were drawn on a Tennessee bank.

Because Mr. Netherly's absence from the state did not delay his prosecution for this offense, the trial court erred in denying his motion to dismiss this charge. Mr. Netherly's conviction as to count 1 is therefore reversed.

Netherly, 804 So.2d at 437.

Although the First District's decision in the present case conceded conflict with the Second District's decisions in *Netherly* and *Perez*, it declined to certify conflict in the present case. Because there is express and direct conflict between the First District's decisions in *Pearson* and the ruling in the instant case, and the Second District's opinions in *Netherly*, 804 So.2d at 437, and *State v. Perez*, 72 So.3d at 308, this Court should exercise its jurisdiction to remedy the uncertainty of the Section

775.15(5), Fla. Stat., tolling provisions.

CONCLUSION

Based on the foregoing, the Petitioner respectfully moves this Court to invoke its jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), for purposes of resolving the conflict between the First and Second District Courts of Appeal.

Respectfully submitted,

/s/ Ross A. Keene

ROSS A. KEENE

Florida Bar No. 140686

Ross Keene Law, P.A.

224 East Government Street

Pensacola, Florida 32502

(850) 912-4799

rkeene@rosskeenelaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail and U.S. Mail to Lauren L. Brudnicki, Assistant Attorney General, PL-01, The Capitol, Tallhassee, Florida, 32399-1050, on February 19, 2015.

/s/ Ross A. Keene

ROSS A. KEENE

Florida Bar No. 140686

Ross Keene Law, P.A.

224 East Government Street

Pensacola, Florida 32502

(850) 912-4799

rkeene@rosskeenelaw.com

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a), undersigned counsel hereby certifies that this brief complies with the font requirements the Rule, and is formatted in Times New Roman 14-point font.

/s/ Ross A. Keene

ROSS A. KEENE

Florida Bar No. 140686

Ross Keene Law, P.A.

224 East Government Street

Pensacola, Florida 32502

(850) 912-4799

rkeene@rosskeenelaw.com

Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

Case No. SC15-233

L.T. No(s): 1D14-179, 2012-CF-1183

BRIAN MICHAEL ROBINSON,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

**On Petition for Discretionary Review from the First
District Court of Appeal, Case No. 1D14-179**

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

<u>Description</u>	<u>Tab</u>
<i>Robinson v. State</i> , 153 So.3d 313 (Fla. 1 st DCA 2014)	A

153 So.3d 313, 39 Fla. L. Weekly D2449

(Cite as: 153 So.3d 313)

H

District Court of Appeal of Florida,
 First District.
 Brian Michael **ROBINSON**, Appellant,
 v.
 STATE of Florida, Appellee.
 No. 1D14-0179.

Nov. 24, 2014.

Background: Criminal defendant filed motion to dismiss, alleging that the statute of limitations barred the State from proceeding against him. The Circuit Court, Okaloosa County, William F. Stone, J., denied the motion. Defendant appealed.

Holding: The District Court of Appeal, Van Nortwick, J., held that statute of limitations was tolled during the time that defendant was continuously absent from the state.

Affirmed.

West Headnotes

[1] Criminal Law 110 ↪146

110 Criminal Law

110X Limitation of Prosecutions

110k146 k. Constitutional and statutory provisions.

Most Cited Cases

Statutes of limitations on criminal offenses must be liberally construed in favor of the accused.

[2] Criminal Law 110 ↪335

110 Criminal Law

110XVII Evidence

110XVII(C) Burden of Proof

110k326 Burden of Proof

110k335 k. Particular facts. **Most Cited**

Cases

Once the jurisdiction of the court is challenged by the raising of the statute of limitations, the State has the burden to establish that the offense is not barred by the statute.

[3] Criminal Law 110 ↪152

110 Criminal Law

110X Limitation of Prosecutions

110k151 Exceptions and Suspension

110k152 k. Absence, nonresidence, or concealment of accused. **Most Cited Cases**

Three-year statute of limitations on prosecution for second and third degree felonies was tolled during the time that defendant was continuously absent from the state, even if prosecution failed to demonstrate that it made a diligent search for defendant or that defendant's absence from the state hindered his prosecution; express language of tolling provision did not require a diligent search for defendant or that defendant's absence hinder the prosecution in order for the statute of limitations to be tolled. West's F.S.A. § 775.15(2)(b), (4)(b), (5).

*314 Ross A. Keene of Beroset & Keene, Pensacola, for Appellant.

Pamela Jo Bondi, Attorney General, and Lauren L. Brudnicki, Assistant Attorney General, Tallahassee, for Appellee.

VAN NORTWICK, J.

Brian Michael Robinson challenges the denial of his motion to dismiss, arguing that the statute of limitations prohibited the State from proceeding against him. Because the running of the statute of limitations was tolled under section 775.15(5), Florida Statutes (2008), while Robinson was continuously absent from the state, his prosecution was not barred by the statute of limitations. Accordingly, we affirm.

153 So.3d 313, 39 Fla. L. Weekly D2449

(Cite as: 153 So.3d 313)

[1][2] Under section 775.15(2)(b), Florida Statutes (2008), prosecution for second and third degree felonies must be commenced within three years. This limitations period may be tolled, however, for the time during which the defendant is continuously absent from the state. § 775.15(5), Fla. Stat. (2008); Pearson v. State, 867 So.2d 517, 519 (Fla. 1st DCA 2004). Statutes of limitations on criminal offenses must be liberally construed in favor of the accused. Sutton v. State, 784 So.2d 1239, 1241 (Fla. 2d DCA 2001). Once the jurisdiction of the court is challenged by the raising of the statute of limitations, the State has the burden to establish that the offense is not barred by the statute. Fleming v. State, 524 So.2d 1146, 1146-47 (Fla. 1st DCA 1988).

Section 775.15(4)(b) provides that process must be executed without unreasonable delay and:

In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay.

[3] Section 775.15(5) provides, in pertinent part, that “[t]he period of limitation does not run during any time when the defendant is continuously absent from the state....” Here, the State established that Robinson was continuously absent from the state between May 2008 and May 2012.

Robinson asserts that the State may not avail itself of this tolling provision, however, because it failed to demonstrate that it made a diligent search for Robinson or that his absence from the state hindered prosecution. We do not agree. This court has held that, where the defendant is continuously absent from the state, the express language of section 775.15(5) does not require that the State undertake a diligent search or that the defendant's absence hindered the prosecution for the statute of limitations to be tolled. Pearson, 867 So.2d at 519. As we noted in Pearson, id., our reading of section 775.15(5) conflicts with the second district's interpretation of that statute in Netherly v. State, 804 So.2d 433, 437 (Fla. 2d DCA

2001), and State v. Perez, 72 So.3d 306, 308 (Fla. 2d DCA 2011). Accordingly, since Robinson's continuous absence from the state resulted in the tolling of the statute of limitations, prosecution in this matter was timely commenced.

AFFIRMED.

OSTERHAUS, J., and FENSOM, JAMES B., Associate Judge, concur.

Fla.App. 1 Dist., 2014.

Robinson v. State
153 So.3d 313, 39 Fla. L. Weekly D2449
END OF DOCUMENT