

IN THE SUPREME COURT OF FLORIDA

BRIAN MICHAEL ROBINSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-233

ON DISCRETIONARY REVIEW FROM

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, BRIAN MICHAEL ROBINSON, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, *Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014), which is attached, but can also be found at 39 Fla. L. Weekly D2449.

SUMMARY OF ARGUMENT

In *Robinson v. State* 153 So.3d 313 (Fla. 1st DCA 2014), the First District Court of Appeal found its precedent in *Pearson v. State*, 867 So.2d 517 (Fla. 1st DCA 2004) to be controlling and noted that its reading of Section 775.15(5), Fla. Stat. conflicts with the Second District's interpretation of the statute in *Netherly v. State*, 804 So.2d 433 (Fla. 2^d DCA 2001). However, the State would urge this Court to decline jurisdiction of the instant case as it is not the appropriate case to review in order to determine the application of Section 77.5.15(5), Fla. Stat., tolling provisions.

ARGUMENT

ISSUE I: ALTHOUGH THE FIRST DISTRICT COURT OF APPEAL ACKNOWLEDGED CONFLICT BETWEEN THE INSTANT CASE AND NETHERLY V. STATE, 804 SO.2D 433 (FLA. 2ND DCA 2001), THE INSTANT CASE IS NOT THE APPROPRIATE CASE FOR THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW (RESTATED)

A. *This Court should not exercise its discretionary jurisdiction in this case.*

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

In its written opinion, the First District Court of Appeal found its precedent in *Pearson v. State*, 867 So.2d 517 (Fla. 1st DCA 2004) to be controlling and noted that its reading of Section 775.15(5), Fla. Stat. conflicts with the Second District's interpretation of the statute in *Netherly v. State*, 804 So.2d 433 (Fla. 2d DCA 2001). (Slip. Op. 2)

2. The instant case is not the proper case for this Court to exercise its discretionary jurisdiction.

In *Netherly v. State*, the Second District emphasized the fact that:

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 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.

Id. at 437.

The Second District clearly emphasized the fact that although the State was well aware of the Netherlys' location during the tolling period, they did not take steps to initiate prosecution.

While the Respondent acknowledges that it would be improper to consider facts outside the First District's written opinion, it should be noted that in this case, the record does not indicate that the State was continuous in contact with Petitioner nor whether law enforcement was aware of his whereabouts. The record does indicate that original lead detective passed away prior to the filing of Appellant's motion to dismiss and was therefore unable to give evidence regarding what efforts were made to locate Petitioner prior to his death. Additionally, the record indicates that Petitioner was transferred several times during the tolling period, making it significantly more difficult to ascertain his current location.

Although the State concedes that this Court has jurisdiction based a conflict between the First District's interpretation of 775.15(5) and the Second District's interpretation as expressed in *Netherly v. State*, 804 So.2d 433 (Fla. 2d DCA 2001), this is not the proper case for this Court to

exercise its discretionary review.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it should not exercise its discretionary review.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on April 7, 2015: Ross A. Keene, Esq., 224 East Government Street, Pensacola, Florida, 32502, rkeene@rosskeenelaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

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INDEX TO APPENDIX

A. *Robinson v. State*, 153 So.3d 313 (Fla. 1st DCA 2014)

153 So.3d 313
District Court of Appeal of Florida,
First District.

Brian Michael ROBINSON, Appellant,
v.
STATE of Florida, Appellee.

No. 1D14-0179. | Nov. 24, 2014.

Synopsis

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 (3)

[1] **Criminal Law**
⇔ Constitutional and statutory provisions
Statutes of limitations on criminal offenses must be liberally construed in favor of the accused.

Cases that cite this headnote

[2] **Criminal Law**
⇔ Particular facts
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.

Cases that cite this headnote

[3] **Criminal Law**
⇔ Absence, nonresidence, or concealment of accused

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).

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

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.

[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.

Parallel Citations

39 Fla. L. Weekly D2449