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

RESPONDENT'S ANSWER BRIEF

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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 by proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

A search warrant was executed at Petitioner's home on February 29, 2008 stemming from an investigation involving the possession and distribution of child pornography. Petitioner was interviewed by law enforcement on March 8, 2008. Petitioner's computer was sent to the Florida Department of Law Enforcement for forensic analysis which was completed in October of 2008. On January 20, 2009, the Okaloosa Sherriff's Department issued a warrant for Petitioner's arrest. On January 26, 2009, Investigator Easterday of the Fort

Walton Beach Police Department, the case agent, informed Investigator Watkins from the warrants division that Petitioner would self surrender if called. There is nothing in the record to indicate whether or not Petitioner was called by law enforcement because prior to the hearing on Petitioner's motion to dismiss, Investigator Easterday passed away. (II. 181)

Nonetheless, prior to the arrest warrant being issued, Petitioner was transferred from Eglin Air Force Base, in Fort Walton Beach, Florida to Fort Bragg in Erwin, North Carolina on May 9, 2008. On January 11, 2011, Petitioner was transferred from Fort Bragg to Schofield Barracks in Honolulu, Hawaii. From April 8, 2011 to March 25, 2012, Appellant was been deployed to Afghanistan. (I. 113) Later that March, Investigator Watkins initiated extradition proceedings after a review of Investigator Easterday's cases but was informed of Appellant's deployment. On May 2, 2012, Investigator Watkins was informed that Petitioner's unit had returned from deployment. (I. 106-111) Watkins then learned that Petitioner was in Florida visiting his parents, which is where he ultimately made contact with Petitioner, who then turned himself in. On July 19, 2012, the State filed an information charging Petitioner with one count of promoting the sexual performance of a child and nine (9) counts of possession photos, motion pictures etc. which include sexual conduct by a child.

SUMMARY OF ARGUMENT

The First District correctly interpreted the tolling provision of Florida Statutes section 775.15 which states that the period of limitations does not run during any time a defendant is continuously absent from the state. Despite the plain language of the statute, the Second District Court has interpreted the tolling provision to require the State to establish that it conducted a diligent search for the defendant regardless of his absence from the state. However, the language of the statute clearly differentiates between a defendant within the state and a defendant outside of the state. In the former instance, the State is required to show that it diligently searched for the defendant in order to toll the period of limitations when the defendant is residing in the State of Florida. However, the period of limitations does not run during any time when a defendant is continuously absent from the state. Nothing in the language of the statute requires a showing that the defendant's absence hindered the prosecution and the Second District has erroneously added this condition without statutory authority. Accordingly, this Court should reject the Second District's interpretation of the tolling provision of section 775.15 and adopt the correct interpretation as explained by the First District in this case.

ARGUMENT

WHETHER OR NOT THE STATUTE OF LIMITATIONS IS TOLLED WHEN A DEFENDANT IS CONTINUOUSLY ABSENT FROM THE STATE REGARDLESS OF WHETHER OR NOT THE STATE ESTABLISHES DUE DILIGENCE IN LOCATING THE DEFENDANT DURING HIS ABSENCE? (RESTATED)

Standard of Review

Questions of statutory interpretation are subject to de novo review. Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 194 (Fla. 2007). "A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008).

Merits

The issue in this case is whether the statute of limitations is tolled when a defendant is continuously absent from the state regardless of whether or not the state established it used due diligence to locate him during his absence. In this case, a search warrant was executed at Petitioner's home on February 29, 2008 stemming from an investigation involving the possession and distribution of child pornography. Petitioner was interviewed by law enforcement on March 8, 2008. Petitioner's computer was sent to the Florida Department of Law Enforcement for forensic analysis which was completed in October of 2008. On January 20, 2009, the Okaloosa Sherriff's Department issued a warrant for Petitioner's arrest. On January 26, 2009, Investigator Easterday of the Fort Walton Beach Police Department, the case agent, informed Investigator Watkins from the warrants division that Petitioner would self

surrender if called. There is nothing in the record to indicate whether or not Petitioner was called by law enforcement because prior to the hearing on Petitioner's motion to dismiss, Investigator Easterday passed away. (II. 181)

Nonetheless, prior to the arrest warrant being issued, Petitioner was transferred from Eglin Air Force Base, in Fort Walton Beach, Florida to Fort Bragg in Erwin, North Carolina on May 9, 2008. On January 11, 2011, Petitioner was transferred from Fort Bragg to Schofield Barracks in Honolulu, Hawaii. From April 8, 2011 to March 25, 2012, Appellant was deployed to Afghanistan. (I. 113) Later that March, Investigator Watkins initiated extradition proceedings after a review of Investigator Easterday's cases but was informed of Appellant's deployment. On May 2, 2012, Investigator Watkins was informed that Petitioner's unit had returned from deployment. (I. 106-111) Watkins then learned that Petitioner was in Florida visiting his parents, which is where he ultimately made contact with Petitioner, who then turned himself in. On July 19, 2012, the State filed an information charging Petitioner with one count of promoting the sexual performance of a child and nine (9) counts of possession photos, motion pictures etc. which include sexual conduct by a child.

The trial court denied Petitioner's motion to dismiss and Petitioner entered a plea reserving his right to appeal the denial of his motion. The First District Court affirmed Petitioner's judgment and sentence and relied on its prior ruling in Pearson v. State, 867 So.2d 517 (Fla. 1st DCA 2004) which strictly construed the tolling provision of section 775.15 which states that "the period of limitation does not run during any time when the defendant is

continuously absent from the state." §775.15(5), Fla. Stat. The First District explained that the State established that Robinson was continuously absent from the state between May 2008 and May 2012. They further explained:

> 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.

Id.

The First District correctly interpreted the statute. The 2007 version of Section 775.15, which was applicable at the time that Petitioner was arrested and mirrors the current version of the statute, states:

> (4)(b) A prosecution on a charge on which the defendant has not previously been arrested or served with a summons 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. 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.
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> ...
>
> (5) The period of limitation does not run during any time when the defendant is continuously absent from the state **or** has no reasonably ascertainable place of abode or work within the state. This provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or

> other charging document and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state.

Id. (emphasis added)

"Before resorting to the rules of statutory interpretation, courts must first look to the actual language of the statute itself." Koile v. State, 934 So. 2d 1226, 1230 (Fla. 2006)(citing Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)). This Court has explained:

> When the statute is **clear and unambiguous, courts will not look behind the statute's plain language** for legislative intent or resort to rules of statutory construction to ascertain intent. In such instances, **the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result** or a result clearly contrary to legislative intent. When the statutory language is clear, "courts have no occasion to resort to rules of construction -- they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power."

Id. (internal citations omitted)(emphasis added). Thus, the case law set forth by this Court supports the reasoning and conclusion reached by the First District in Robinson.

A plain reading of the statute leads to the conclusion that in drafting the tolling provision, the legislature clearly used the disjunctive "or" to differentiate two separate situations. The language in subsection 4(b) reads, "inability to locate the defendant after a diligent search **or** the defendant's absence from the state." The language prior to the disjunctive refers to a defendant who is within the state of Florida and the language following the disjunctive refers to a defendant who is outside the state. The language reads in subsection (5) reads, "[t]he period of limitation does not run during any time when the defendant is continuously absent from the state **or** has no

reasonably ascertainable place of abode or work within the state." Again the disjunctive makes the distinction between when the defendant is continuously absent from the state and when the defendant is within the state but of a transient nature making him or her more difficult to locate even after a diligent search.

In 1997, the Florida Legislature amended then subsections (5) and (6) of section 775.15, Fla. Stat. The legislature added the language "[t]he 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" to subsection 5. Subsection 6, was amended to read:

> This provision shall not extend the period of limitation otherwise applicable by more than 3 years, **but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging document and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state.** (emphasis added to amendment)

After the 1997 amendments, it is clear that the Legislature did not intend for the statute to run for a defendant who was continuously absent from this state. Again, these amendments definitively show that the legislature intended to make the distinction between a defendant who was in the state and one who was outside the state.

The First District correctly followed the plain meaning of the statute in Pearson. In Pearson, the defendant robbed a bank on November 9, 1994, however the crime went unsolved until November 3, 1999. The State filed an information charging Pearson with robbery with a deadly weapon and grand theft

of over $100,000 on November 4, 1999. In deciding that the information was timely filed, First District found that "the statute of limitations was tolled due to the appellant's continuous absence from the state, pursuant to section 775.15(6), Florida Statutes (1993)." The First District expressed its disapproval of the Second District's interpretation of §775.15(5) and (6)[1] stating:

> 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. 2nd 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. 2nd 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. 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.

Id. at 519.

The Second District has interpreted the tolling provision to require the

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[1] Subsections (5) and (6) are (4) and (5) in the 2007 version of §775.15, respectively.

State to establish that it diligently searched for a defendant in order for the statute to be tolled. The Second District has also added the requirement that the State establish that the defendant's absence hindered the prosecution. In Netherly, the Second District explained that it 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. 2nd DCA 2001); Brown v. State, 674 So. 2d 738 (Fla. 2nd DCA 1995); State v. Miller, 581 So. 2d 641 (Fla. 2nd DCA 1991). This was an incorrect interpretation of the tolling provision and its reasoning relies on a misinterpretation of its own cases.

In Sutton v. State, the basis for holding that the statute was not tolled was that the State's evidence of Sutton's absence from Florida was insufficient. Additionally the Second held that there was also a lack of evidence of a diligent search given Sutton's assertions that that he remained continuously in the state of Florida. Sutton at 1242. Brown v. State was superseded by the 1997 amendments which provide that failure to execute process on or extradite a defendant in custody in another state does not contribute to an unreasonable delay in serving process. State v. Miller was also decided prior to the 1997 amendments. Therefore, the Second District's reliance on cases that are either factually inapplicable or superseded by statute has been misguided.

As the First District noted in Pearson, nothing in section 775.15 requires a showing that the defendant's absence hindered prosecution. This requirement

was erroneously added by the Second District. Accordingly, the First District was correct in rejecting the ruling in Netherly.

The First District also found that its reading of section 775.15(5) conflicted with the Second District's decision in State v. Perez, 72 So. 3d 306 (Fla. 2nd DCA 2011). In Perez, the State urged the court to "bootstrap the general provisions of section 775.15(4)(b) and (6) on to the specific provisions of section 812.035(10)[2] to toll the limitations period automatically and indefinitely due to Ms. Perez's out-of-state status." Id. at 308. The Second District rejected the State's argument and noted that based on its precedent, the trial court was correct in concluding that "the State did not act diligently in trying to locate Ms. Perez, irrespective of her absence from Florida." Id. at 308. Again this ruling is based on an incorrect interpretation of the tolling provision of section 775.15.

Petitioner argues that the First District's interpretation of section 775.15(5) "does 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." This statement is only partially accurate. The First District's rulings in Pearson and Robinson were based on the express language of section 775.15 which allows for a tolling of the statute of limitations while the defendant is continuously absent from the state. Neither case

[2] §812.035(10) provides that a criminal or civil action or proceeding under ss.812.012-812.037 or 812.081 may be conmmendced at any time within 5 years after the cause of action accrues

involved the need for a diligent search because the defendant was continuously absent from the state. As stated above, the statute clearly differentiates between a defendant within the state and a defendant outside of the state. When a defendant is residing in the state, the statute does require a finding of due diligence on the part of law enforcement and the First District has never held to the contrary. However, when a defendant has absented himself from the state, the First District's decision does not require a showing of due diligence, this is because this requirement does not appear in section 775.15. Rather, this requirement was created by the Second District because the Second District relied on prior case law without consideration of the fact that the prior cases were construing a different portion of the statute or the statute as it existed prior to the 1997 amendments.

This condition is illogical based on the actual language of the statute. The statute specifically provides that "prosecution on a charge on which the defendant has not previously been arrested or served with a summons 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." It goes on to explain that "in determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered." If prosecution does not commence until the defendant is formally charged and served with a summons "without unreasonable delay," and if failure to serve the defendant due to his absence from the state can be considered a "reasonable delay" then it stands to reason that a defendant's absence from

the state would invariably hinder prosecution if the defendant is continuously absent from the state. For example, in the case at bar, the State established that Petitioner was continuously absent from the state between May of 2008 and May of 2012. Petitioner was not arrested prior to his departure from the state in 2008 and in fact, the arrest warrant was not issued until January 20, 2009. Petitioner was arrested on June 5, 2012. (I. 3, 15) Having established that Petitioner was continuously absent from the state at the time the arrest warrant was issued, the State established that he was unavailable for service of the warrant, which in turn prevented the state from commencing prosecution.

Petitioner argues that the record does not convincingly establish that he was continuously absent from the state because he maintained a permanent address in the state of Florida and because he was "continuously a member of the U.S. Army with easily identifiable duty stations that could have been determined simply by contacting his command." (IB. 21-22) Petitioner avers that the term "absence" has not been specifically defined by any of the cases addressing section 775.15. However, taken in context with the rest of the statute, the term "absence" is clearly used to describe a lack of physical presence. The fact that Petitioner maintained a mailing address in the state of Florida is inconsequential to the determination of whether or not he could be physically served with an arrest warrant. Thus, the State would maintain that there is no ambiguity in the language of the statute regarding what is meant by "absence."

The First District correctly interpreted the tolling provision of section 775.15, Fla. Stat. The language of the statute clearly differentiates between

a defendant within the state and a defendant outside of the state. In the former instance, the State is required to show that it diligently searched for the defendant in order to toll the period of limitations. However, the period of limitations does not run during any time when the defendant is continuously absent from the state. Nothing in the language of the statute requires a showing that the defendant's absence hindered the prosecution and the Second District has erroneously added this condition. Accordingly, this Court should reject the Second District's interpretation of the tolling provision of section 775.15 and adopt the correct interpretation as explained by the First District in this case.

CONCLUSION

Based on the foregoing, the State respectfully submits the conflict between the First and Second District Courts of Appeal should be resolved in favor of the First District's interpretation of the tolling provision of Florida Statutes section 775.15.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on September 25, 2015: Ross A. Keene, Esq., Ross Keene law, P.A., rkeene@rosskeenelaw.com.

CERTIFICATE OF COMPLIANCE

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

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