

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

STEVEN ROBERTS,

Petitioner,

vs.

Appeal No. 12-00034 APANO
UCN 522012AP000034XXXXCR

STATE OF FLORIDA

Respondent.

_____ /

Opinion filed September 4, 2012.

Petition for Issuance of a Writ of Prohibition
Addressing an Order Denying
Motion to Dismiss entered
by the Pinellas County Court,
County Judge Paul A. Levine

Kandice L. Friesen, Esquire
Attorney for Petitioner

Alexandra J. Sevillano, Esquire
Office of the State Attorney
Attorney for Respondent

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Steven Roberts' Petition for Issuance of a Writ of Prohibition. Mr. Roberts was charged by Misdemeanor Information in 1999 but not served with the capias issued on that Information until 2011. Mr. Roberts argues the

prosecution of the present case is barred by the statute of limitation, § 775.15, Fla. Stat. (1997). We agree.

Factual Background and Trial Court Proceedings

On November 8, 1999 a Misdemeanor Information was filed charging the Petitioner, Steven Roberts, with three counts of Unlicensed Residential Contracting. The charged offenses were alleged to have occurred on April 30, 1999. Approximately twelve years later, in 2011, a Consumer Services Investigator began attempting to locate Mr. Roberts. He was subsequently located in Texas. The capias issued on the Information in 1999 was served on the Petitioner on October 17, 2011.

The Petitioner filed a Motion to Dismiss asserting that the prosecution was barred by the statute of limitations. On March 16, 2012 the trial court conducted an evidentiary hearing. In that hearing the victim, Steven Tomko, testified, in part, that he went to Mr. Roberts home and confronted him in 1999. There was a Budget rental truck in the front yard and Mr. Roberts indicated he was moving; he was leaving. Mr. Tomko noted the number of the truck and the license plate number and was able to subsequently determine that the rental truck had to be returned to the rental company in Ohio. The next morning Mr. Tomko returned to Mr. Roberts' house and he was gone. A neighbor confirmed Mr. Roberts had left. Shortly thereafter Mr. Tomko filed his complaint with Pinellas County Justice and Consumer Services concerning Mr. Roberts and informed them that Mr. Roberts had left the state.

The Consumer Services Investigator who worked on the case in 2011 testified that Mr. Roberts told him in a telephone conversation that he had not been back to Florida since 1999. The record before this court contains no evidence of any search for Mr.

Roberts prior to 2011. On June 13, 2012 the trial court entered its written order denying the Motion to Dismiss. Mr. Roberts filed his Petition for Issuance of a Writ of Prohibition asking this court to order the County Court to dismiss the pending charges.

Jurisdiction

“Prohibition is an appropriate method by which a criminal defendant who asserts that [his] prosecution is barred by the statute of limitations may challenge the trial court's jurisdiction to go forward.” *Neal v. State*, 697 So.2d 903, 904 (Fla. 2nd DCA 1997); *Beyer v. State*, 76 So3d 1132,1134 (Fla. 4th DCA 2012).

Standard of Review

In the present case an evidentiary hearing was conducted; there were disputed issues of fact. Therefore the competent substantial evidence standard of review is appropriate. Our review of a trial court's ruling on the present motion to dismiss involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State*, 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State*, 964 So2d 861, 863 (Fla. 2nd DCA 2007).

Statutes of Limitations

“The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to

protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before ‘the principle that criminal limitations statutes are ‘to be liberally interpreted in favor of repose.’” *Toussie v. U.S.*, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860 (1970); *See State v. Hickman*, 189 So.2d 254, 261 (Fla. 2nd DCA 1966). Statutes of limitation are to be liberally construed in favor of the accused. *Reino v. State*, 352 So2d 853, 860 (Fla. 1977), *receded from on other grounds*, *Perez v. State*, 545 So.2d 1357 (Fla.1989); *State v. Perez*, 72 So.3d 306, 308 (Fla. 2nd DCA 2011).

Time limitations upon criminal prosecutions are solely creatures of statute. The statutory period of limitation begins to run on the day after the offense is committed and runs until the prosecution is commenced, unless some intervening act occurs to interrupt it. Generally, the running of a statute of limitations is tolled only for reasons specified in the statute. *Brown v. State*, 674 So2d 738 (Fla. 2nd DCA 1995). “Whether the statute of limitations has run prior to commencement of prosecution requires the computation of two dates: the date the statute of limitations expired and the date prosecution commenced.” *State v. Paulk*, 946 So.2d 1230, 1231 (Fla. 4th DCA 2007).

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. § 775.15 (4)(b) Fla. Stat. (1997) (emphasis added). The word "executed" means completion of service on the defendant. *State v. Fields*, 505 So.2d 1336 (Fla. 1987). If a delay in service of the *capias* was reasonable, then the action might be commenced after the statute of limitations had run. *Brown v. State*, 674 So.2d 738 (Fla. 2nd DCA 1995); *State v. Picklesimer*, 606 So.2d 473 (Fla. 4th DCA 1992); *Sherley v. State*, 538 So.2d 148 (Fla. 5th DCA 1989). An unexcused delay in serving appropriate process until after the statute of limitations has run bars prosecution for the offenses charged. *Norris v. State*, 784 So.2d 1188, 1189 (Fla. 2nd DCA 2001); *Neal v. State*, 697 So.2d 903, 905 (Fla. 2nd DCA 1997); *State v. Miller*, 581 So.2d 641 (Fla. 2nd DCA 1991). Once the jurisdiction of a court is challenged by raising the statute of limitations, the burden is on the State to establish that the offense is not barred by the statute. *State v. Miller*, 581 So.2d 641 (Fla. 2nd DCA 1991).

The Statute of Limitation in the Present Case

The applicable Statute of Limitation is that which was in effect at the time of the incident giving rise to the criminal charge. *State v. Mack*, 637 So.2d 18, 19 (Fla. 4th DCA 1994). In the present case the prosecution must be commenced within two years of the commission of the crime. § 775.15(2)(c), Fla. Stat. (1997). Florida Statute 775.15 provided, in part:

(5)(a) Prosecution on a charge on which the defendant has previously been arrested or served with a summons is commenced by the filing of an indictment, information, or other charging document.

(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.

(6) 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.*

§ 775.15, Fla. Stat. (1997) (emphasis added). The 1997 version of section 775.15 does not relieve the State from having to conduct a diligent search to locate a charged person. *State v. Perez*, 952 So.2d 611, 613 (Fla. 2nd DCA 2007) (FN 1); *see also Cunnell v. State*, 920 So2d 810, 813 (Fla. 2nd DCA 2006). A diligent search to ascertain the whereabouts of the charged person must be conducted during the applicable limitations period irrespective of that person's absence from the State of Florida. *Perez*, 72 So3d 306, 308-309 (Fla. 2nd DCA 2011); *See Robinson v. State*, 773 So2d 1266, 1267 (Fla. 5th DCA 2000). In the recent *Perez* case, the court stated:

Moreover, the trial court considered the State's delay in executing the capias. The trial court concluded that the State did not act diligently in trying to locate Ms. Perez, irrespective of her absence from Florida. ... Ms. Perez raised the statute of limitations issue. The State had the burden to establish that the offense was not time barred. ... The statute of limitations must be liberally construed in favor of the accused. ... The trial court found that the State had not attempted to ascertain Ms. Perez's whereabouts at all during the applicable limitations period. The record supports that finding.

Perez, 72 So.3d at 308 -309 (internal citations omitted). Pursuant to Florida Statute § 775.15 (1997), Law enforcement authorities cannot simply do no search and wait for a

charged person to be located years after the limitations period has expired and then attempt to establish and argue that prosecution is timely because it turns out that the person had been absent from Florida.

To satisfy its obligation to conduct a diligent search to locate the defendant, the State must check obvious sources of information and follow up on any leads. *Cunnell*, 920 So.2d at 813.

The Present Case

The Misdemeanor Information charging Mr. Roberts, with three counts of Unlicensed Residential Contracting was filed on November 8, 1999. That Information alleged the charged offenses occurred on April 30, 1999. When Mr. Tomko filed his complaint with Pinellas County Justice and Consumer Services in 1999 he informed them that Mr. Roberts had left the state. The record before this court contains no evidence of any search for Mr. Roberts prior to 2011; law enforcement authorities made no attempt to timely locate Mr. Roberts. No search was even attempted until approximately twelve years after the alleged offenses were committed. The Statute of Limitations required the prosecution commence within two years; that two years expired on April 29, 2001. There was no *diligent search* during the limitation period; the present prosecution is barred. The Petitioner's Motion to Dismiss should have been granted.

Conclusion

A Writ of Prohibition is appropriate in the present circumstances. The present prosecution is barred by the applicable Statute of limitations, § 775.15, Fla. Stat. (1997).

IT IS THEREFORE ORDERED that the Petition for Issuance of a Writ of Prohibition is granted. The trial court is ordered to dismiss the Misdemeanor Information filed in this case.

ORDERED at Clearwater, Florida this 4th day of September 2012.

Original order entered on September 4, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

Copies furnished to:

Honorable Paul A. Levine
Kandice L. Friesen, Esquire
Office of the State Attorney