

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**STATE OF FLORIDA,
Appellant,**

v.

**JENNIFER APGAR REVERDES,
Appellee.**

**UCN: 512019AP000081APAXWS
Appeal No.: 19-AP-81
L.T. Case No.: 18-MM-6545**

_____/

On appeal from Pasco County Court,
Honorable Debra Roberts

Stephen Josephik,
Assistant State Attorney
for Appellant.

Hannah G. Brannan, Esq.,
Office of Criminal Conflict and
Civil Regional Counsel,
for Appellee.

ORDER AND OPINION

The trial court applied the incorrect statute of limitations when it granted Appellee's motion to dismiss. However, because Appellant did not preserve its argument for appellate review, this Court is unable to accept Appellee's concession of error and the order of the trial court must be affirmed.

STATEMENT OF THE CASE AND FACTS

On December 11, 2018, Appellee was charged by Information with Petit Theft, a second-degree misdemeanor, in violation of section 812.014(3)(a), Florida Statutes (2017). An amended Information adding a second count of the same offense was filed on September 23, 2019. Both informations alleged dates of offense in October of 2017.

Appellee moved to dismiss the amended Information, arguing that the one-year statute of limitations for second-degree misdemeanors had been violated because the

amended Information had been filed nearly two years after the alleged date of the offenses. See § 775.15(2)(d), Fla. Stat. (2017) (providing that a prosecution for a second-degree misdemeanor must be commenced within one year of the date of offense).

During the hearing, Appellant argued that the relevant date for statute of limitations purposes was the filing date of the original Information as the amended Information merely referred back to the original. Appellee countered that even using the filing date of the original Information, the statute of limitations was violated because the original Information had been filed more than a year after the alleged date of the offenses. Appellant did not refute the merits of that argument and instead countered that Appellee should not be allowed to make the argument because the written motion to dismiss did not reference the original Information.

The trial court correctly noted that it was the non-movant Appellant that raised the issue of the original Information during the hearing. Appellant eventually conceded that the original Information was filed more than a year after the alleged date of the offenses. Because both informations were filed after the one-year statute of limitations under section 775.15(2)(d) had run, the trial court granted the motion to dismiss. Appellant timely-appealed.

STANDARD OF REVIEW

Where the applicability of the statute of limitations involves a pure question of law, the trial court's order is subject to de novo review. See *Robinson v. State*, 205 So. 3d 584, 590 (Fla. 2016).

LAW AND ANALYSIS

Appellant's Initial Brief correctly argues that the trial court erred because it applied the incorrect statute of limitations. Where the charged offense is petit theft, the applicable statute of limitations is not section 775.15(2)(d). See § 812.035(10), Fla. Stat. (2017) ("Notwithstanding any other provision of law, a criminal. . . action or proceeding under ss. 812.012-812.037 or s. 812.081 may be commenced at any time within 5 years after the cause of action accrues"); *State v. Telesz*, 873 So. 2d 1236, 1237 (Fla. 2d DCA 2004) (reversing an order granting a motion to dismiss where the trial court applied the general two-year statute of limitations for first-degree misdemeanor petit theft instead of the five-year statute of limitations in section 812.035(10)).

Appellee concedes the error. Unfortunately, the Court cannot accept the concession. Where an error was not preserved for appellate review, an appellate court cannot accept a concession of error unless the error was fundamental. See *Elmer v. State*, 140 So. 3d 1132, 1134-35 (Fla. 5th DCA 2014) (affirming a restitution order even though the State conceded error because the error was not preserved and not fundamental). See also *Mapp v. State*, 18 So. 3d 33, 34-36 (Fla. 2d DCA 2009) (refusing to accept the State's concession that it had failed to provide the defendant notice of intent to seek a habitual offender sentence because the defendant had not preserved the issue by timely-raising it before the trial court), *reversed on other grounds*, 71 So. 3d 776 (Fla. 2011) (holding that the issue was properly preserved in a Rule 3.800(b) motion). Errors involving the statute of limitations are not fundamental. *State v. Smith*, 241 So. 3d 53, 54-55 (Fla. 2018).

While Appellant's statute of limitations argument is correct, Appellant failed to raise the argument before the trial court. Therefore the error was not preserved for appellate review. Because the error was not fundamental, this Court's hands are tied. The Court cannot accept Appellee's concession of error and the order of the trial court must be affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida
this ____ day of _____, 2020.

Original Order entered on September 30, 2020, by Circuit Judges Daniel D. Diskey, Kimberly Sharpe Byrd, and Lauralee G. Westine.

Copies to:
Honorable Debra Roberts
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Staff Attorney