

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
MARCH 1995 SESSION

FILED
May 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLANT,)
)
)
 v.)
)
)
 JACQUELINE DEANNA ALEXANDER VICKERS)
 and WILLIAM J. BOONE,)
)
 APPELLEES.)

No. 02-C-01-9404-CC-00082
Henderson County
John Franklin Murchison, Judge
(Securities Fraud, Grand Larceny,
and Fraudulent Breach of Trust)

FOR THE APPELLANT:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0494

David M. Himmelreich
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0494

FOR THE APPELLEES:

FOR VICKERS:
Patrick F. Martin
Hardee, Martin & Jaynes
Attorneys at Law
213 East LaFayette Street
Jackson, TN 38301

FOR BOONE:
Henry Haile
Attorney at Law
611 Commerce Street, Suite 2704
Nashville, TN 37203

Carthel L. Smith, Jr.
Attorney at Law
85 East Church Street
Lexington, TN 38351

OPINION FILED: _____

REVERSED AND REMANDED

Joe B. Jones, Judge

OPINION

The appellees, William J. Boone (Boone), and Jacqueline Deanna Alexander Vickers (Vickers), were charged with crimes involving securities fraud. Vickers was also charged with grand larceny and fraudulent breach of trust. Vickers's charges arose out of the same transaction. The trial court initially held that the allegations of concealment contained in Counts II, VI, VII, and VIII were legally sufficient to toll the statute of limitations and avoid dismissal. Later, the trial court conducted an evidentiary hearing prior to trial to determine "whether or not the State has a case sufficient to put to the jury with regard to the statute of limitations concealment issue." The State objected to this procedure. Following the hearing, the court granted Boone's motion to dismiss Count II of the indictment. The court also held that the defense of the statute of limitations was a complete defense to the offenses alleged against Vickers in Counts VI, VII, and VIII. The pivotal question in this case is: if the allegations of concealment contained in an indictment are legally sufficient to toll the statute of limitations for the offense charged in the indictment, may the trial court conduct an evidentiary hearing before trial to determine the sufficiency of the evidence supporting the allegations of concealment, or is the trial court required to submit this issue to the jury for its determination? It is the opinion of this Court that the trial court, having determined the allegations contained in the indictment were legally sufficient to toll the statute of limitations, was required to submit the issue to the jury and permit the jury to determine the sufficiency of the State's proof on the issue of concealment of the crimes.

The Henderson County Grand Jury returned an indictment against Ernest Vickers, III, Jacqueline Deanna Alexander Vickers, and William J. Boone on October 5, 1992. The grand jury returned a superseding indictment, which is now before this Court, on February 1, 1993. The superseding indictment contains eighteen counts. Ernest Vickers is charged in all eighteen counts of the indictment. Boone and Ernest Vickers were charged with securities fraud in Count I of the indictment and conspiracy to commit securities fraud in Count II of the indictment. Ernest Vickers and his wife, Jacqueline Vickers, are charged with the offense of securities fraud in Count VI of the indictment, fraudulent breach of trust

in Count VII of the indictment, and grand larceny in Count VIII of the indictment. These three counts of the indictment are predicated upon a single property transaction. The only counts of the indictment that are before this Court are Count II, VI, VII, and VIII.

Count II of the indictment alleges that the conspiracy occurred on or about January 11, 1988. The statute of limitations for conspiracy was two (2) years. Counts VI, VII, and VIII allege that the offenses occurred on or about April 16, 1987.¹ The statute of limitations for these three offenses was four (4) years. Thus, the statute of limitations had expired for the offenses contained in all four counts. The State was required to allege sufficient facts in all four counts of the indictment to establish that the statute of limitations had been tolled to avoid summary dismissal. The State alleged the following facts in all four counts to establish that the statute of limitations had been tolled:

The statute of limitations for this offense was tolled until September 28, 1990, during which time defendants and their agents and employees concealed the facts of this crime by making material omissions and untrue statements in written and oral communications to the Commissioner of Commerce and Insurance and the commissioner's representatives, by delivering or causing misleading prospectuses to be delivered to investors without informing them of their true intentions and past acts, and by causing their agents to obtain waivers from investors of receipt of prospectuses. The statute of limitations was also tolled from October 5, 1992, until February 1, 1993, while a prior indictment covering this offense was pending against these defendants.

Boone and Vickers moved separately to dismiss the counts of the indictment that charged them with a criminal offense. The trial court found that the aforementioned allegations were legally sufficient to toll the statute of limitations. The court denied the motions. The trial court said in this regard:

On the issue of the tolling of the statute or whatever, I think the indictment is sufficient, together with the Bill of Particulars, to show the basis of the concealment. That's one thing that was brought out. How the Defendants concealed things. I think the indictments, together with the Bill of Particulars, is sufficient in that regard.

Later, defense counsel asked the trial court to reconsider its ruling. The court said: "I ruled

¹Count VI alleges the crime occurred on "diverse days" between April 14, 1987 and May 14, 1987.

on the sufficiency of the indictment and I'm going to stand on it."

When counsel and the trial court met to determine what procedure should be followed, defense counsel requested that the trial court conduct a hearing to determine the sufficiency of the evidence on the concealment allegation. The trial court referred to the procedure as being similar to a Morgan hearing and a procedure "like a directed verdict in a civil case." The court also stated that defense counsel were asking, "for lack of a better term, sort of a summary judgment type of ruling." Finally, the trial court referred to it as "a preliminary hearing before the Court to determine whether or not there is sufficient evidence on the concealing to go to the jury," and similar to "pre-trial hearings on suppression." The trial court granted the requested hearing for the following reasons:

[G]iven what we're looking at, the jury trial, the length of the jury trial, the expense of the jury trial, I think that we should try to do what we can without a jury to narrow this case down. And that would be basically to get these concealment things laid to rest or partially to rest, so that when we impanel the jury, we'll be ready to go.

The hearing was also granted based on the trial court's concern "about a serious problem about the statute of limitations for these two Defendants [Boone and Vickers]." The trial court also stated:

And to say to them [Boone and Vickers] with this serious question being that we're going to put you through this trial along with 18 counts against Mr. Vickers, entitles them to a preliminary hearing on that, in fairness to them, not only -- And also again, I don't want to have to be interrupting the trial constantly when we've got jurors for a long -- which will be long jury-out hearings.

* * * *

I think they are entitled to a preliminary hearing on the matter, evidentiary hearing, whether they go through this 18-count indictment trial with Mr. Vickers.

* * * *

[I]n deference to those two Defendants [Boone and Vickers], in fairness to them, in considering the legal expenses and things like that, plus, again, going back to this, as having to -- I'm trying also to avoid having to -- while we've got a jury impaneled, a jury on hold during the Christmas holidays, saying we're going to have to take a couple of days off and have a jury-out hearing, and then we've got to go back, if I rule for the State, and repeat that proof.

The State objected to this procedure. It required the State to introduce evidence on the question of concealment so that the trial court could "make a determination as to whether or not the State has a case sufficient to put to the jury with regard to the statute of limitations concealment issue."

The pre-trial hearing was conducted on the date this case was set for trial. As previously stated, the trial court granted Boone's motion to dismiss Count II. As to Vickers, the court held that the statute of limitations was a complete bar to a conviction in Counts VI, VII, and VIII.

I.

When the General Assembly enacted the statute of limitations applicable to these crimes, it declared that the State of Tennessee will not prosecute a citizen for a criminal offense after the expiration of the applicable time constraint.² Concomitantly, a substantive right was created which prohibits the State of Tennessee from prosecuting a citizen for a crime that is barred by the applicable statute of limitations.³ This right constitutes a complete bar to a prosecution that is instituted after the expiration of the applicable time constraint unless (a) the State of Tennessee can allege "sufficiently definite" facts in the indictment that tolled the statute of limitations and prove those facts during the trial⁴ or (b) the accused waives the statute of limitations defense.⁵

A statute of limitations serves two related purposes. First, it prevents the use of stale evidence to convict a citizen who has been accused of a criminal offense.⁶ Second, it provides the impetus for quick action by law enforcement officers who investigate criminal

²State v. Seagraves, 837 S.W.2d 615, 620 (Tenn. Crim. App.), per. app. denied (Tenn. 1992).

³Seagraves, 837 S.W.2d at 620.

⁴State v. Davidson, 816 S.W.2d 316, 318 (Tenn. 1991).

⁵State v. Pearson, 858 S.W.2d 879, 886 (Tenn. 1993).

⁶Pearson, 852 S.W.2d at 886.

offenses and those individuals charged with prosecuting criminal offenses.⁷ In Toussie v. United States,⁸ the United States Supreme Court said:

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.⁹

Since statutes of limitations were created for the protection of the citizen accused of crime, such statutes should be liberally construed in favor of the citizen.¹⁰ Also, the grounds that will permit the tolling of the statute of limitations should be strictly construed against the State of Tennessee.¹¹

II.

There are recognized exceptions that will result in the tolling of the statute of limitations. If the time for the filing of a particular criminal offense has expired before an accused has been arrested or an indictment or presentment has been returned, the State must allege "sufficiently definite" facts in the indictment which will toll the statute of limitations.¹² As our Supreme Court said in Davidson:

⁷Pearson, 858 S.W.2d at 886.

⁸397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970).

⁹397 U.S. at 114-15, 90 S.Ct. at 860, 25 L.Ed.2d at 161.

¹⁰State v. Henry, 834 S.W.2d 273, 276 (Tenn. 1992).

¹¹Henry, 834 S.W.2d at 276.

¹²Davidson, 816 S.W.2d at 318; see State v. Comstock, 205 Tenn. 389, 393, 326 S.W.2d 669, 671 (1959); Morgan v. State, 847 S.W.2d 538, 542 (Tenn. Crim. App.), per. app. denied (Tenn. 1992); State v. Tidwell, 775 S.W.2d 379, 389 (Tenn. Crim. App.), per. app. denied (Tenn. 1989); see also Seagraves, 837 S.W.2d at 620; State v. Hix, 696 S.W.2d 22, 25 (Tenn. Crim. App. 1984); State v. Thorpe, 614 S.W.2d 60, 65 (Tenn. Crim. App. 1980).

Where there is a statute of limitations that bars prosecution of the offense charged, there should be a sufficiently definite averment of time [in the indictment or presentment] to show that the offense was committed within the statutory limit. . . . [W]here the indictment is brought after the period of limitations has expired, it must be pleaded and proved that certain specific facts tolled the statute of limitations. . . .¹³

Otherwise, when an indictment which shows on its face that the prosecution is barred by the statute of limitations, the trial court may summarily dismiss the indictment prior to trial.¹⁴

The common law rule contemplates that if the allegations contained in the indictment are sufficient on its face to establish that the statute of limitations was tolled, the State of Tennessee must prove the allegations during the trial of the case on its merits.¹⁵ However, this Court must determine whether Rule 12(b)(1) or (2), Tennessee Rules of Criminal Procedure, has changed the common law rule.

¹³Davidson, 816 S.W.2d at 318 (citations omitted; emphasis in original).

¹⁴See State v. Henry, 834 S.W.2d 273 (Tenn. 1992)(trial court properly dismissed indictment prior to trial because the allegations contained in the indictment established that the prosecution was barred by the statute of limitations).

¹⁵Tidwell, 775 S.W.2d at 389 ("[T]he State failed to establish during the trial that the defendant concealed the offenses."); see Davidson, 816 S.W.2d at 318 ("[I]t must be pleaded and proved that certain specific facts toll the statute of limitations."); Comstock, 205 Tenn. at 393, 326 S.W.2d at 671 (The State must plead and prove that certain specific facts tolled the statute of limitations.); Morgan, 847 S.W.2d at 542 ("[I]f the state fails to prove sufficient facts to toll the statute of limitations at trial, the accused cannot be convicted of the offense."); Hix, 696 S.W.2d at 25 ("[T]he specific acts which toll the statute of limitations must be pleaded and proved.").

III.

The State of Tennessee, like the accused, is entitled to a jury trial.¹⁶ Unlike the accused, the State's right to jury trial is not rooted in the constitution.¹⁷

The Tennessee Rules of Criminal Procedure preserve the State's right to a jury trial. Rule 5(c)(1) provides that the accused may submit to the jurisdiction of the general sessions court in misdemeanor cases "if the district attorney general or the district attorney general's representative does not then object." Thus, if the State of Tennessee wants to handle a particular misdemeanor in the criminal court and have a jury trial on the issue of the accused's guilt, the State can prevent the accused from circumventing this right.¹⁸ Rule 23 provides that the accused must have the consent of the district attorney general and the approval of the trial court before the accused can waive the right to trial by jury.¹⁹

When a party has a right to a jury trial, the party is entitled to have all disputed issues of fact decided by the jury.²⁰ This includes having the jury resolve issues involving a mixture of facts and law, if the factual allegations are disputed.²¹ Whether the State has established the tolling of the statute of limitations is an issue containing a mixture of facts and law.

The burden of proving that the statute of limitations was tolled rests upon the shoulders of the State of Tennessee. Since these issues are not elements of the offense

¹⁶See the Advisory Commission Comments accompanying Rule 5(c)(1), Tennessee Rules of Criminal Procedure; State v. Brackett, 869 S.W.2d 936, 939 (Tenn. Crim. App.), per. app. denied (Tenn. 1993). In Brackett, this Court said: "The Advisory Commission Comments note that Rule 5 has the effect of granting the state a right to a trial by jury. That, in our view, is an equally meritorious basis for the rule. Rule 5 must be given its ordinary and natural construction. For many of the reasons the defendant is guaranteed the right to trial by jury in the criminal case, there exists a basis for the state, on behalf of its people, to exercise the same entitlement." 869 S.W.2d at 939.

¹⁷See Advisory Commission Comment accompanying Rule 23, Tenn. R. Crim. P.

¹⁸Brackett, 869 S.W.2d at 939.

¹⁹See State v. Sluder, 493 S.W.2d 467, 469-70 (Tenn.), cert. denied, 414 U.S. 876, 94 S.Ct. 85, 38 L.Ed.2d 121 (1973)("[T]he State was within its rights in excepting to a waiver of the jury for fixing punishment on Sluder's plea of guilty.").

²⁰See McCormic v. Smith, 668 S.W.2d 304, 306 (Tenn. Ct. App.), per. app. denied (Tenn. 1984).

²¹State ex rel. Moretz v. City of Johnson City, 581 S.W.2d 628, 631 (Tenn. 1979).

for which the accused is being tried, the State must establish that the statute of limitations was sufficiently tolled by a preponderance of the evidence.

Where there are disputed facts on the issue of whether or not the statute of limitations has run, the trial judge may not prevent the state from having a jury determine the issue. Concern for the parties expenses, the possible damaging effect that being tried with a co-defendant might have, or that it is easier to dispose of these issues without the intervention of a jury "provides absolutely no basis on which to deny a party the . . . right to a trial by jury."²²

IV.

Boone and Vickers contend that the trial court has the authority to conduct a hearing for the purpose of determining whether or not the State can sufficiently prove concealment. Boone relies upon Rule 12(b)(1), Tennessee Rules of Criminal Procedure, and this Court's opinion in State v. Thorpe.²³ He argues that "[e]videntiary hearings on Rule 12 motions are routine. Consideration of matters outside the indictment in ruling on a motion to dismiss on statute of limitations grounds was approved in State v. Thorpe." Vickers relies upon the Supreme Court's opinions in State v. Davidson²⁴ and State v. Randolph.²⁵ She argues that "[a]s long as the trial court does not cross to a purely factual determination of the sufficiency of the proof towards guilt or innocence [the trial court] can determine facts for its conclusions of law."

In the case of State v. Landis,²⁶ the indictment alleged that the accused had lived in Michigan for three years following the commission of the crime and the accused concealed the commission of the crime. The accused filed a motion to dismiss the

²²Caudill v. Mrs. Grissom's Salads, Inc., 541 S.W.2d 101, 106 (Tenn. 1976).

²³614 S.W.2d 60 (Tenn. Crim. App. 1980).

²⁴816 S.W.2d 316 (Tenn. 1991).

²⁵676 S.W.2d 943 (Tenn. 1984).

²⁶177 Tenn. 304, 145 S.W.2d 1032 (1941).

indictment because the crime charged was barred by the statute of limitations. The trial court conducted an evidentiary hearing on the statute of limitations issue. The court concluded that the motion should be sustained and dismissed the indictment. The State appealed as of right from this judgment, alleging that the trial court erred in having a hearing and deciding issues of fact as to the statute of limitations issue. In reversing the judgment of the trial court, our Supreme Court said that “such a practice has never prevailed in this jurisdiction, and the court was without the authority to hear the case by piecemeal; but the statute of limitations . . . should have been submitted to the jury at one time.”²⁷

The procedure set forth in Landis prevails today. When a motion to dismiss the indictment is filed by an accused, and the indictment contains allegations that the statute of limitations is tolled, the role of the trial court is limited in scope to a determination of whether the allegations are legally sufficient. If the allegations are found to be legally sufficient, the question of whether the evidence introduced in support of the allegations sufficiently establishes the tolling of the statute of limitations by a preponderance of the evidence is a question for the jury. Of course, if the evidence introduced by the State, as a matter of law, will not support the allegations or the tolling of the statute of limitations, the trial court may intervene and take the issue from the jury. The same rules that apply to the granting of a judgment of acquittal, save the quantum of proof, must be applied by the trial court in determining whether the evidence is insufficient as a matter of law.

Vickers’s reliance on Randolph is misplaced. First, the only issue raised in Randolph was whether the sale of heroin to a customer who died from a self-administered overdose constituted murder in the second degree or a lesser included offense, involuntary manslaughter. It did not involve a statute of limitations issue. Second, the accused simply filed a motion to dismiss the indictment on the ground that it did not charge a criminal offense. Third, the assistant district attorney general filed several documents and tangible evidence in response to the motion. Here, the State opposed the pre-trial hearing conducted by the trial court. Fourth, the assistant district attorney general introduced most of the evidence by agreement with defense counsel at the hearing on the motion. Here,

²⁷177 Tenn. at 307, 145 S.W.2d at 1033.

the court held an adversary hearing. Fifth, "[i]t was agreed that all of the material could be considered in disposing of the motion to dismiss."²⁸ There was no such agreement in this case.

Vickers's reliance on Davidson is equally misplaced. In Davidson the State made allegations regarding the tolling of the statute of limitations. The matter was then tried and the accused was convicted. The Supreme Court held that the allegation contained in the indictment was insufficient, as a matter of law, to support the tolling of the statute of limitations.²⁹ Tidwell is a case quite similar to Davidson. In Tidwell, the State made an allegation that the accused had concealed the crimes until a date certain. The case was tried before a jury. The accused was convicted of several sex crimes. On appeal, this Court held that the allegations contained in the indictment, if true, would toll the statute of limitations. However, this Court held the State had failed to prove that the accused concealed the offenses.³⁰ Several counts were dismissed as being barred by the statute of limitations. In summary, the question of whether the statute of limitations was tolled was submitted to the jury.

Boone's reliance upon Thorpe is also misplaced. In Thorpe, the parties entered into a two-part stipulation. Each party prepared a statement of the evidence that the party expected to introduce at the trial. The case is silent as to whether the assistant district attorney general objected to this format. Here, there was no stipulation and the deputy attorney general objected to the procedure orally and in writing. In Thorpe, the State did not make any allegation in the three counts of the indictment regarding the tolling of the statute of limitations. Here, the State has an extensive paragraph regarding the tolling of the statute of limitation included in all four counts. The only question in Thorpe was the last date the accused had committed an act. The presentment stated that the offense occurred "on diverse days beginning January 19, 1978, and the date of the finding of this Presentment." The presentment was returned by the grand jury on June 11, 1979. The trial court, relying on the stipulation of the parties, found that "the last act committed by the

²⁸Randolph, 676 S.W.2d at 944.

²⁹Davidson, 816 S.W.2d at 321.

³⁰Tidwell, 775 S.W.2d at 389.

Defendant in regard to this matter occurred in May of 1978." Since the indictment was returned more than a year after that date, the trial court held the prosecution for the two misdemeanor counts was barred by the statute of limitations. Here, the trial court required the State to introduce its evidence concerning the tolling of the statute of limitations, and the trial court made a determination regarding the sufficiency of the evidence to support these allegations.

This Court envisions Rule 12(b)(2), Tennessee Rules of Criminal Procedure, as the primary remedy for challenging charging instruments that are facially defective or predicated upon a statute that is unconstitutional. This rule states:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following may be raised prior to trial:

* * * *

(2) Defenses and objections based on defects in the indictment, presentment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings). (Emphasis added).

This remedy may also be used to challenge the allegations pertaining to the tolling of the statute of limitations. Such a motion does not require an evidentiary hearing or a finding of facts. It is pure and simple a question of law that should be determined by the trial court. Whether the State can prove the allegations that the statute of limitations was tolled is not "capable of determination without the trial of the general issue." As previously stated, the latter issue is a mixture of facts and law, and the resolution of the factual portion of the issue is to be decided by the jury subject to the exception that the trial court can withdraw the issue from the jury if the evidence presented is inadequate, as a matter of law, to support the tolling of the statute of limitations.

While it is true that Thorpe states the hearing was permitted by Rule 12, the panel of this Court deciding Thorpe did not mention or allude to the restriction that the issue raised prior to trial is "capable of determination without the trial of the general issue." This provision was not relevant to the inquiry in Thorpe.

This Court concludes that the trial court effectively denied the State of Tennessee its right to have the jury resolve the issue regarding the tolling of the statute of limitations. Moreover, the trial court's reasons for conducting the hearing did not justify the denial of the State's right to a jury trial on this issue and the guilt of Boone and Vickers in the same proceeding. Therefore, this Court sets aside the judgment of the trial court dismissing Count II of the indictment as well as the judgment finding that the statute of limitations barred the State's right to try Vickers in Counts VI, VII, and VIII. This case is remanded to the trial court for trial on the issues hereinabove set forth.

Boone was apparently tried for the offense alleged in Count I after the appeal in this case was perfected. He contends that Count II is now moot due to his acquittal of the offense alleged in Count I³¹ and that a retrial is barred by the double jeopardy provisions contained in the United States Constitution and Tennessee Constitution. He also contends that Count II of the indictment does not allege an offense. Since the trial court has not ruled on these issues, this Court will not address them. The trial court should be given the opportunity to decide these issues.

JOE B. JONES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN K. BYERS, SENIOR JUDGE

³¹Count I charged Boone with securities fraud while Count II charged Boone with conspiracy to commit securities fraud.