IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

STATE OF TENNESSEE	**)**
	)
APPELLEE	**)**
	)
VS.	**) C.C.A. NO. 03C01-9807-CR-00233**
	) WASHINGTON COUNTY CRIMINAL COURT
KAI NIELSEN	**) HON. ARDEN L. HILL, JUDGE**
BETTY NIELSEN	**)**
	)
APPELLANTS	**)**

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED
JOE H. WALKER, III, Sp. JUDGE

OPINION

The defendants appeal of right the jury verdict finding them each guilty of theft of property. Each defendant was sentenced to five years suspended, with supervised probation, after Mr. Nielsen served ninety days in jail, and Mrs. Nielsen served thirty days in jail. Both were fined $10,000.00. They were ordered to make restitution to the victims in the amount of $25,000.00.

Appellant cites as issues that

1. The trial court erred in denying defendant's motion to dismiss the indictments.

2. The trial court erred in sentencing defendants..

PROCEDURAL HISTORY

In order to address the issue of whether the court erred by not dismissing the indictment, it is necessary to review the procedural history of this case.

In May, 1995, both defendants were indicted for theft of property over ten thousand dollars by purporting to sell 250(B) shares of Umecan Elevator, Inc. stock to the victims, when they had no authority and no ability to sell or deliver such stock. The defendants were tried by a jury, and found guilty. The trial court granted a new trial pursuant to T.R.Crim.P. 33, finding the weight of the evidence to be against the jury's verdict of guilty.

In July, 1996, the state sought another indictment for theft of property over ten thousand dollars by purporting to sell 250 (B) shares of Umecan Elevator, Inc. stock or by purporting to sell a Umecan Elevator, Inc., dealership to the victims when they had no authority to sell or deliver such stock or to sell such dealership. The defendants filed a motion to dismiss this indictment, and the motion was denied. Defendant sought permission to appeal. The Court of Criminal Appeals denied the application, but suggested the re-indictment was "improperly duplicitous and bad for uncertainty."

Apparently in response to the suggestion by this court that the indictment was defective, the state obtained a third indictment charging theft of property over ten thousand dollars by purporting to sell 250(B) shares of Umecan Elevator, Inc. stock to the victims when they had no authority to sell or deliver such stock. This indictment included a second count for theft of property by purporting to sell a Umecan Elevator, Inc. dealership to the victims when they had no

ability to sell such dealership.

Defendants filed a motion to dismiss this superceding indictment claiming that the statute of limitations had run. The trial court denied the motion and this court denied their application for permission to appeal.

The defendants were tried on the last indictment in 1998, and were found guilty of theft of property by purporting to sell 250(B) shares of Umecan Elevator Stock to the victims, when they had no ability to sell such stock.

MOTION TO DISMISS

Defendants allege the trial court erred in denying the motion to dismiss the indictment, since the alleged crimes occurred more than four years prior to the return of the last indictment.

The indictment alleges a theft in October 1992, of ten thousand dollars, a Class C felony. T.C.A. 40-2-101(b)(3) establishes a four year statute of limitations. The indictment upon which defendants were convicted was returned in January, 1997. However, this was a superseding indictment.

The prosecution of defendants was begun within the statute of limitations. The first indictment was returned during the May, 1995, term. The second indictment was returned during the July, 1996, term, which was within the four year statute for a crime in October, 1992. The third indictment superseded that indictment and was returned in January, 1997. All indictments are in the same case file, and have the same docket number.

The issue is whether a superseding indictment, filed during the pendency of a timely original accusation and after the statute of limitations has run, is barred.

Defendants allege the superseding indictment must contain facts which toll the statute of limitations, relying on State v. Comstock, 205 Tenn. 389, 326 S.W.2d 669 (1959), and State v. Davidson, 866 S.W.2d 316 (1991).

The Tennessee Supreme Court in State v. Messamore, 937 S.W.2d 916 (1996), stated:

> ... In Tennessee, a prosecution is commenced by "finding an indictment or presentment, the issuing of a warrant, binding over of the offender, by the filing of an information . . ., or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense....
>
> Here, the record reflects, and the defendants conceded at oral argument, that prosecution had been timely commenced in each case. Indeed, both Messamore and Powell were bound over to the grand jury well within one year of the commission of the

misdemeanor offenses. Therefore, the only question is whether the State's failure to allege timely commencement renders the indictments issued beyond the limitations period subject to dismissal.

While conceding that some prior opinions of this Court contain language which can be interpreted to allow dismissal of indictments under such circumstances, the State contends that such an interpretation ignores the distinction, drawn in the cases, between facts showing that the statute of limitations has been tolled, "tolling facts," and facts showing that the prosecution actually has been commenced within the statutory period, "commencing facts." ...

[I]n State v. Comstock, 205 Tenn. 389, 326 S.W.2d 669 (1959), a second indictment was brought against the defendant after the statutory limitations period had expired, but while another timely filed indictment was still pending. Later, the initial indictment was quashed and this Court ruled that because the only timely filed indictment had been quashed, the prosecution was barred by the statute of limitations. Id.

Most recently, in State v. Davidson, 816 S.W.2d 316 (Tenn. 1991), prosecution against the defendant was commenced by an indictment issued outside the limitations period. The State relied upon concealment of the crime to toll the running of the statute. While acknowledging that concealment can toll the statute of limitations, this Court reversed the conviction and dismissed the indictment because the State had not pleaded facts in the indictment to establish its reliance on concealment.

In each of the preceding cases, the State was claiming an exception to the bar of the statute of limitations, tolling, for commencing the prosecution outside the statutory period. This Court refused to allow the State to rely upon an exception without a specific averment in the indictment....

In the cases under consideration, the State did not rely upon tolling or any other exception to the statute of limitations. Indeed, all agree that the prosecutions against Messamore and Powell were timely commenced... Tolling of the statute of limitations was not required....

We hold that an indictment issued beyond the statutory limitations period need not allege commencing facts to establish that the prosecution was timely initiated within the applicable limitations period by another method.

In this case, the prosecution was begun against defendants within the statute. The indictment was superseded by another indictment in the same case, and therefore “commencing facts” showing that the prosecution actually had commenced within the statutory period were not required to be set out in the superseding indictment.

Some guidance can also be found in other jurisdictions, which have found that a superseding indictment brought after the statute of limitations has run is valid as long as (i) the original indictment is still pending, (ii) the original indictment was timely, and (iii) the superseding indictment does not broaden or substantially amend the original charges. United States v. Italiano, 894 F.2d 1280, 1282 (11th Cir.1990); United States v. Phillips, 843 F.2d 438, 442 fn. 2 (11th Cir. 1988); United States v. Elliott, 849 F.2d 554, 561(10) (11th Cir.1988); Benitez v. State, 111 Nev. 1363, 904 P2d 1036, 1037 (Nev.1995). Wooten v.State, 1999 WL 1006358 (Ga.App. 1999).

The court finds that the defendants were indicted during the statutory period, that the

timely indictment was pending, and the superseding indictment did not broaden or substantially amend the original charges.

This issue is without merit.

SENTENCING

Defendants contend that they should not have been sentenced for a Class C felony of theft, and that the trial court erred by requiring they pay restitution in the amount of $25,000.00.

A. Sentence for a Class C felony

The defendants contend that when the jury returned a verdict of "guilty of count one," that they made no specific finding of the value of the property stolen by defendants, and therefore the defendant should not be sentenced for a Class C felony.

The jury was charged as to each defendant they had three choices: guilty of count one, or guilty of count two, or not guilty.

The jury was charged with regard to the value of the property, and charged that they could fix value within one of four ranges: less than $500.00, more than $500.00 but less than $1,000.00, or more than $1,000.00 but less than $10,000.00, or $10,000.00 or more.

The jury was then charged with regard to the fine that they could impose in each range. They were charged, in part, that if they find the amount of theft was $10,000.00 or more, they could fix a fine in some amount not to exceed $10,000.00.

The jury returned a separate verdict for each defendant. With regard to each defendant they announced that they had found that defendant "guilty in count one," and they fixed a fine of $10,000.00 for each defendant. This is the maximum fine for a class C felony. This is a clear indication that the jury's intent was to find each defendant guilty of a Class C felony. The trial court offered to poll the jury with regard to the verdict, and both the state and the defendant declined.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and

circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The trial judge has the right and duty to mold a judgment in accordance with the final verdict returned by the jury. State v. Jefferson, 938 S.W.2d 1 (Ct. Crim. App. 1996). In this case the jury's intent was to convict each defendant of the offense set out in count one, and by the fine it was clear that the jury intended the grade of the offense to be a class C offense. The defendant was given the opportunity to poll the jury if there was a question as to the grade of the offense that the jury found the defendant guilty of, and the jury was not polled.

This issue is without merit.

B. Restitution

The court fixed restitution in the amount of twenty five thousand dollars ($25,000.00), and ruled that both defendants were jointly and severally liable for payment.

Defendants contend that they should not be required to pay restitution since the jury did not ascertain the value or amount of property stolen by defendants. T.C.A. 40-20-116, provides that whenever a felon is convicted of stealing or defrauding another, the jury shall ascertain the value of such property and the court shall order restitution of the property.

In cases involving theft, where the trial court orders restitution and the defendant challenges the amount of that restitution on appeal, this court shall conduct the de novo review with the presumption that the determination made by the trial court is correct. Additionally, in reviewing orders of restitution, this court has held that our restitution law does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case. State v. Cowart, 1996 Tenn.Crim.App. LEXIS 732 (Ct.Crim.App.1996).

The victims testified that they paid defendants twenty five thousand dollars on a promise of receiving stock. The twenty five thousand dollars was borrowed from two lending institutions, and the victims indicated they lost the automobile that was put up for collateral, almost lost their house, and their credit has been ruined.

The jury returned a verdict of guilt as to count one, which was the C felony of theft. The court heard ample proof to make a determination that the amount initially paid for the stock was twenty five thousand dollars. The court ordered that amount as restitution, and did not include additional interest or damages. A trial judge may direct the payment of restitution to the victim as a condition of probation, pursuant to T.C.A. 40-35-304. This court has held that when

restitution is ordered as a condition of probation, the authority to determine the appropriateness and the amount of restitution lies solely with the trial court. State v. McKinney, 1994, Tenn.Crim.App. LEXIS 723 (Ct.Crim.App. 1994). The defendants were placed on probation in this cause, and restitution was ordered as a condition of probation. The jury was not required to fix the amount of restitution.

This issue is without merit.

The judgment of the trial court is affirmed.

_____
JOE H. WALKER

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
ALAN E. GLENN, JUDGE

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JUDGMENT

Came the appellants, Kai Nielsen and Betty Nielsen, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Washington County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is AFFIRMED, and the case is remanded to the Criminal Court of Washington County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

PER CURIAM

DAVID G. HAYES, JUDGE
ALAN E. GLENN, JUDGE
JOE H. WALKER, III, Sp. JUDGE