

No. 1-09-2244

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
APRIL 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 08 CR 4795
BRIAN ROBERTS,)	
)	The Honorable
Defendant-Appellant.)	Robert J. Clifford,
)	Judge Presiding.
)	

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Where defendant did not file a pretrial motion to dismiss challenging the timeliness or sufficiency of the indictment, the State was not required to plead and prove any circumstances that would have extended or tolled the statute of limitations.

Defendant Brian Roberts pleaded guilty to one count of

1-09-2244

aggravated criminal sexual assault, and was sentenced to a nine-year prison term. On appeal, defendant contends that the indictment and the guilty plea were void because the indictment was filed after the expiration of the statute of limitations and the State did not allege any circumstances that would have invoked an extension of time. Codefendant Carlos Crawford is not involved in this appeal.

The crime in this case was committed on March 6, 1998. On February 29, 2008, defendant and codefendant were charged by indictment with 11 counts of aggravated criminal sexual assault for the March 6, 1998, crime. The case had been a "cold case" until 2008, when defendant's DNA was linked to the 1998 crime.

On April 16, 2009, defendant pleaded guilty to count I of the indictment, which charged that he and codefendant anally raped the victim, Bernadette G., at gun point. The other 10 counts of aggravated criminal sexual assault were disposed of by means of *nolle prosequi*. The factual basis for the guilty plea disclosed that the victim was taken to the hospital after the crime, where a rape kit was collected and DNA specimens were recovered from her. Defendant's DNA was found in the victim's March 6, 1998, rape kit.

On June 5, 2009, defendant filed a *pro se* motion to withdraw

1-09-2244

the guilty plea, and a late notice of appeal. Defendant mailed the documents on May 29, 2009, which the State argues violated the 30-day deadline prescribed by Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). This court granted leave to defendant to file a late notice of appeal.

On appeal, defendant contends that the prosecution was time-barred and that the indictment and guilty plea were void.

The State responds that the appeal should be dismissed for lack of jurisdiction because defendant did not file a timely motion to withdraw his guilty plea before he filed a notice of appeal. The State responds further that defendant waived the alleged error by pleading guilty, that there is no legal basis for the claim, or, alternatively, that the indictment notified defendant of the elements of aggravated criminal sexual assault and therefore defendant cannot show prejudice. The State also contends that, due to legislative amendments, there is no statute of limitations for a rape suspect whose DNA was profiled and placed in a DNA database within 10 years of the crime, because the legislative amendments which extended the statute of limitations first to 10 years and then to any time took effect during the original five-year statute of limitations. The State also maintains that there is an extended provision that applies

1-09-2244

to defendant. The State asserts that the failure to allege a tolling period for a statute of limitations is a formal defect that the State could have cured by means of an amendment to the indictment, but defendant did not file a timely motion challenging the indictment and instead raised the issue for the first time on appeal. Finally, the State maintains that defendant was not prejudiced in the preparation of his defense.

Defendant replies as follows. The extension was an element of the offense, and its absence from the indictment rendered it void and deprived the circuit court of jurisdiction to enter judgment on it. The guilty plea did not serve to waive the issue. The void indictment prejudiced defendant, and his conviction and sentence should be vacated.

Pursuant to section 3-5(b) of the Criminal Code of 1961 (Code), a felony generally must be prosecuted within three years after the crime was committed. 720 ILCS 5/3-5(b) (West 2008). Section 3-6(i) of the Code provides for an extended limitations period. 720 ILCS 5/3-6(i) (West 2008). Pursuant to section 3-6(i), a prosecution for aggravated criminal sexual assault "may be commenced within 10 years of the commission of the offense if the victim reported the offense to law enforcement authorities within 3 years after the commission of the offense." 720 ILCS

1-09-2244

5/3-6(i) (West 2008). Section 3-5(a) of the Code provides for an even longer limitations period under the circumstances of the present case. Pursuant to section 3-5(a), a prosecution for "any offense involving sexual conduct or sexual penetration *** in which the DNA profile of the offender is obtained and entered into a DNA database within 10 years after the commission of the offense, may be commenced at any time. [This] applies if either: (i) the victim reported the offense to law enforcement authorities within 3 years after the commission of the offense ***." 720 ILCS 5/3-5(a)(2)(i) (West 2008).

The legislature can extend the statute of limitations for crimes that occurred before the effective date of the change (without risking the enactment of an *ex post facto* law) as long as the extended period does not apply to any case in which the defendant has a right to acquittal from the expiration of the original statute of limitations. *People v. Anderson*, 53 Ill. 2d 437, 440 (1973); *People v. Stone*, 374 Ill. App. 3d 980, 986 (2007).

However, if the face of an indictment discloses that the crime was not committed during the applicable statute of limitations, the State must plead and prove an exception to the statute of limitations as an element of its case. *People v.*

1-09-2244

Morris, 135 Ill. 2d 540, 546 (1990); *Stone*, 374 Ill. App. 3d at 987.

In *Morris*, 135 Ill. 2d at 542, the defendant filed two timely pretrial motions to dismiss the indictment; he did not wait until appeal to challenge the sufficiency of the indictment. This fact was stressed in a case that interpreted *Morris*:

"The State has the burden of pleading and proving any element extending or tolling the limitation period *if the defendant challenges the timeliness of the charges in a pretrial motion to dismiss.*" (Emphasis added.) *People v. Gray*, 396 Ill. App. 3d 216, 226 (2009); see also *People v. Wasson*, 211 Ill. App. 3d 264, 275 (1991).

Here, defendant did not challenge the timeliness or sufficiency of the indictment in a pretrial motion to dismiss. Pursuant to *Gray* and *Wasson*, the State consequently did not have the burden to plead and prove any element that extended or tolled the statute of limitations. See *Gray*, 396 Ill. App. 3d at 226-27; *Wasson*, 211 Ill. App. 3d at 275.

The cases cited by defendant are distinguishable. For example, in *People v. Nash*, 173 Ill. 2d 423, 425 (1996), the

1-09-2244

statute at issue was a section of the mob action statute that had been ruled unconstitutional in 1968. There was no issue concerning the statute of limitations. In *People v. Heard*, 47 Ill. 2d 501, 504-05 (1970), a charging instrument was confusing and void where it vaguely charged the defendants in the disjunctive with the disparate and alternative acts of setting up a policy game or promoting a policy game or selling tickets. The case did not involve an issue concerning the statute of limitations. In *People v. Baldwin*, 199 Ill. 2d 1, 15-16 (2002), the defendant was charged with home invasion, but he was convicted of aggravated unlawful restraint, which the Illinois Supreme Court reversed because the charging instrument was not worded to identify aggravated unlawful restraint as a lesser included offense of home invasion. As we observed earlier, in *Morris*, 135 Ill. 2d at 542, the defendant filed two timely pretrial motions to dismiss the indictment; unlike defendant here, he did not wait until appeal to challenge the sufficiency of the indictment.

We conclude that the State was not required to invoke an exception to the statute of limitations under the circumstances of this case, where defendant did not move to dismiss or launch any other pretrial challenge to the indictment, did not complain

1-09-2244

about any limitations issue, did not place the State on notice of any statute of limitations problem, did not allow the State an opportunity to correct the alleged defect, and instead pleaded guilty to one of the multiple counts in the indictment.

The judgment of the circuit court is affirmed.

Affirmed.