

2013 IL App (2d) 120333-U
No. 2-12-0333
Order filed September 17, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	Nos. 09-CM-3948
)	11-CM-328
)	
RICHARD G. PREJNA,)	Honorable
)	John F. McAdams,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

- ¶ 1 *Held:* We reversed defendant's convictions: although the State's complaint was timely, in that a pending prosecution tolled the limitations period, the complaint did not allege the tolling as necessary to survive defendant's pretrial motions to dismiss.
- ¶ 2 Following a bench trial, defendant, Richard G. Prejna, was convicted of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2008)), and he was sentenced to 12 months of conditional discharge. On appeal, he argues that his motions to dismiss the complaint should have been granted, because the complaint was filed outside of the statute of limitations, and nowhere in

the complaint did the State allege that the statute of limitations was tolled. We agree, and, thus, we reverse.

¶ 3 The facts relevant to resolving the issues raised are as follows. On July 2, 2009, defendant's ex-wife, Lisa Wightman, went to defendant's home with the parties' daughter so that the daughter could retrieve some things that she had left there. Wightman saw some items in the garage that could influence her marriage-dissolution case against defendant, so she began taking pictures of what she saw. Defendant, who observed what Wightman was doing, became enraged. According to Wightman, defendant grabbed her elbow, threw her into some bushes, and smashed her cell phone on the ground.

¶ 4 Based on these facts, defendant was charged by complaint on July 6, 2009, with two counts of domestic battery and one count of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2008)). The complaint did not indicate when the incident occurred, and nowhere in the complaint did the State cite to the statutes that outlined the elements of the offenses. The case number assigned to the case was 09-CM-3948.

¶ 5 The State eventually moved to amend the complaint to add the date when the incident happened and citations to the statutes that were allegedly violated. The court granted the motion to amend, and the case was set for trial in January 2011.

¶ 6 On January 21, 2011, the State orally moved for a continuance, because the arresting officer was unavailable to testify. The trial court denied that motion, and the State nol-prossed the charges against defendant.

¶ 7 Ten days later, the State reinstated the charges against defendant. The number given to that case was 11-CM-328. Although the complaint filed in case No. 11-CM-328 provided citations to

the criminal statutes that defendant allegedly violated, the complaint indicated that the domestic batteries occurred on April 30, 2010, and that the criminal damage to property happened on July 2, 2009. Nowhere in the complaint did the State allege that the applicable statute of limitations was tolled in any way.

¶ 8 On April 20, 2011, defendant moved to dismiss case No. 11-CM-328, contending that the charges were not brought within the 18-month statute of limitations (see 720 ILCS 5/3-5(b) (West 2008)). In response, the State claimed that the statute of limitations was tolled, because identical charges were pending against defendant in case No. 09-CM-3948. As a result, the State claimed, the charges brought in case No. 11-CM-328 were timely.

¶ 9 The trial court denied defendant's motion, and defendant filed a second motion to dismiss. In his second motion to dismiss, defendant argued that his right to a speedy trial was denied, and he renewed his claim that the statute of limitations had run. The trial court denied the second motion to dismiss, the State amended the complaint to reflect that the domestic batteries occurred on July 2, 2009, and defendant filed a motion to reconsider the denial of his first and second motions to dismiss. In this motion, defendant argued, among other things, that, because the charges in case No. 09-CM-3948 were nol-prossed, the charges in case No. 11-CM-328 constituted new proceedings. As a result, case No. 09-CM-3948 could not be considered a "pending prosecution" for purposes of case No. 11-CM-328, and, because it was not a "pending prosecution," it could not toll the statute of limitations. The trial court denied defendant's motion to reconsider, and defendant filed a third motion to dismiss, raising claims that, because of the State's vindictiveness, he was denied the right to a speedy trial and to have the charges brought within the statute of limitations. The trial court denied the third motion to dismiss, and the State moved to amend the complaint to modify the

description of the cell phone allegedly damaged and to add the name of the offense at the beginning of each count. Nowhere in the amendment did the State allege that the statute of limitations was tolled in any way. The trial court granted the motion to amend, and the cause proceeded with a bench trial.

¶ 10 After defendant was found guilty of two counts of domestic battery and not guilty of criminal damage to property, the trial court merged the domestic battery counts and sentenced defendant. Defendant moved for a new trial, arguing, among other things, that the charges should have been dismissed because they were not brought within the statute of limitations. The trial court denied the motion, and defendant timely appealed.

¶ 11 At issue in this appeal is whether the charges brought against defendant in case No. 11-CM-328 should have been dismissed. More specifically, defendant argues that, pursuant to section 3-5(b) of the Criminal Code of 1961 (Code) (720 ILCS 5/3-5(b) (West 2008)), the State was required to bring the charges against him within 18 months after the incident occurred. Thus, because the incident happened on July 2, 2009, the State had to charge defendant by January 2, 2011. Although the State charged defendant in case No. 09-CM-3948 within days after July 2, 2009, defendant claims that, even assuming that those charges could be considered a “pending prosecution” pursuant to section 3-7(c) of the Code (720 ILCS 5/3-7(c) (West 2008)), the State was required to allege in case No. 11-CM-328 facts establishing how the statute of limitations was tolled. Because the State never made any such allegation, defendant contends that this court must reverse his convictions.

¶ 12 Initially, we observe that the State contends that, because defendant never challenged in the trial court the timeliness of the complaint in case No. 11-CM-328, defendant must establish that he was prejudiced by the fact that the complaint was brought after the statute of limitations had run.

See, e.g., *People v. Benitez*, 169 Ill. 2d 245, 257 (1996) (when a defendant claims for the first time on appeal that the case should have been dismissed because the charges were not filed within the applicable statute of limitations, the defendant must establish that the failure to charge the defendant within the statute of limitations prejudiced the defendant). We fail to see how the State could think that defendant never moved in the trial court to dismiss the complaint because it was not brought within the statute of limitations. The record reflects that defendant advanced such an argument four times before trial, *i.e.*, in three motions to dismiss and in the motion to reconsider the denial of the first and second motions to dismiss. Thus, defendant does not need to establish that he was prejudiced by the fact that he was not timely charged. *Id.* at 258. Instead, defendant is entitled to a reversal of his convictions if indeed the statute of limitations had run. *Id.* at 258-59. Because whether the statute of limitations had run presents a question of law, our review is *de novo*. See *People v. Mann*, 341 Ill. App. 3d 832, 836 (2003) (“Because the trial court’s dismissal of the indictment on statute of limitations grounds in this case raises a purely legal issue, we review *de novo* the trial court’s rulings.”).

¶ 13 Turning to the merits, a defendant may bring a pretrial motion to dismiss a complaint as barred by the statute of limitations. 725 ILCS 5/114-1(a)(2) (West 2008). Section 3-5(b) of the Code outlines the statute of limitations that applies to various cases. Specifically, it provides:

“Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor.” 720 ILCS 5/3-5(b) (West 2008).

¶ 14 Here, defendant was charged with three misdemeanors. See 720 ILCS 5/12-3.2(b) (West 2008) (providing that, unless certain factors not present here apply, domestic battery is a Class A misdemeanor); 720 ILCS 5/21-1(1)(a), (2) (West 2008) (noting that, under the facts presented here, criminal damage to property is a Class A misdemeanor). Thus, the State had to charge defendant within 18 months after the incident occurred. The complaint in case No. 11-CM-328 was filed on January 31, 2011, over four weeks after the statute of limitations had run.

¶ 15 That said, section 3-7(c) of the Code (720 ILCS 5/3-7(c) (West 2008)) outlines periods that are excluded when calculating whether the statute of limitations has run. That section indicates:

“The period within which a prosecution must be commenced does not include any period in which:

* * *

(c) A prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or are reversed on appeal[.]” *Id.*

¶ 16 Accordingly, if the nol-prossed charges in case No. 09-CM-3948 constituted a “pending prosecution” for purposes of section 3-7(c) of the Code, the charges in case No. 11-CM-328 were timely. We addressed this type of issue in *Mann*.

¶ 17 There, the State timely charged the defendant by complaint with various traffic violations. *Mann*, 341 Ill. App. 3d at 834. One of those violations was for driving while his license was revoked. *Id.* Almost five years later, the State nol-prossed the complaint, and the defendant was indicted for aggravated driving while his license was revoked. *Id.* The basis for the indictment was the same as the basis for the complaint, and, in the indictment, the State alleged that the complaint

was a pending prosecution for purposes of section 3-7(c) of the Code. *Id.* Nevertheless, because the indictment was filed after the applicable statute of limitations had run, the defendant moved to dismiss the indictment. *Id.* The trial court granted the motion, and the State appealed. *Id.* at 835.

¶ 18 On appeal, we concluded that the misdemeanor complaint constituted a pending prosecution for purposes of section 3-7(c) of the Code, and, as such, the defendant was timely charged by indictment with driving while his license was revoked. *Id.* at 837-38. Certainly, if a misdemeanor complaint that is subsequently nol- prossed constitutes a pending prosecution for purposes of tolling the statute of limitations to bring an indictment, a misdemeanor complaint that is subsequently nol-prossed is likewise a pending prosecution that tolls the statute of limitations for purposes of filing a misdemeanor complaint based on precisely the same conduct.

¶ 19 However, the fact that the charges were timely brought does not end our inquiry into whether case No. 11-CM-328 should have been dismissed. Specifically, we now must consider whether facts supporting the tolling of the statute of limitations constitute an element of the offenses that the State had to allege in the complaint. Instructive on this issue is *People v. Morris*, 135 Ill. 2d 540 (1990).

¶ 20 There, the defendant was charged in a six-count indictment, and, prior to trial, the defendant brought two motions to dismiss. *Id.* at 542. One motion sought the dismissal of count I on the basis that the statute the defendant was alleged to have violated had been repealed prior to the alleged commission of the offense. *Id.* The second motion sought the dismissal of counts II through VI on the ground that they were barred by the statute of limitations. *Id.* The trial court dismissed count I, but it denied the motion as to counts II through VI. *Id.*

¶ 21 On appeal to our supreme court, the State argued that count I alleged facts that demonstrated that counts II through VI were brought within the statute of limitations. *Id.* at 543-44. In

determining that the language of count I was not specific enough to invoke an exclusion to the statute of limitations, our supreme court stated:

“Where an indictment on its face shows that an offense was not committed within the applicable limitation period, it becomes an element of the State’s case to allege and prove the existence of facts which invoke an exception to the limitation period.” *Id.* at 546.

¶ 22 Here, the complaint in case No. 11-CM-328 was filed on January 31, 2011. In that complaint, the State asserted that defendant committed domestic battery and criminal damage to property on July 2, 2009. The complaint shows on its face that the offense was not committed within the 18-month statute of limitations. Thus, as in *Morris*, the State was required to allege and prove facts that would invoke an exclusion to that 18-month statute of limitations. The State did not include in the complaint any allegation that any exclusion applied and it never sought leave to amend the complaint to include any such exclusion. Because the State never made such an allegation, this court must reverse defendant’s convictions of two counts of domestic battery. See *id.* at 548 (when a defendant argues pretrial that the charges against him must be dismissed because they were brought after the statute of limitations had run, and the State fails to allege facts indicating that an exclusion applies, a reviewing court must reverse the defendant’s conviction that was based on those untimely charges).

¶ 23 For these reasons, the judgment of the circuit court of Kane County is reversed.

¶ 24 Reversed.