2015 IL App (2d) 141093-U
No. 2-14-1093
Order filed December 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DANIEL GRIDLEY, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of McHenry County. Nos. 12-CF-217 14-CF-2 Honorable Gordon E. Graham, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the remaining counts of the indictment as untimely, because they were brought within one year of "the discovery of the offense" under the extended limitations provision of section 3-6(a)(2) of the Code of Criminal Procedure of 1963 (720 ILCS 5/3-6(a)(2) (West 2008)). Therefore, we reversed and remanded.

¶ 2 Defendant, Daniel Gridley, was charged with two counts of theft by deception (720 ILCS 5/16-1(a)(2) (West 2008)) and two counts of unlawful financial exploitation of an elderly person (720 ILCS 5/16-1.3(a) (West 2008)). Defendant subsequently sought to dismiss the charges as time-barred, and the trial court granted defendant's motion. The State appeals the dismissal of

counts I and III of the indictment. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with the offenses on March 14, 2012, and he was charged by indictment on May 2, 2012. The charges alleged that defendant exercised unauthorized control over personal checks belonging to William Morkes.

¶ 5 Specifically, count I alleged that on or about March 16, 2009, defendant committed theft by deception in that he knowingly obtained $10,000 to $100,000 in checks belonging to Morkes and made payable to AHP, defendant's company.

¶ 6 Count II alleged the same crime, except that it was alleged to have occurred between December 1, 1998, and March 16, 2009, and the amount of money was alleged to be over $10,000 but less than $1 million.

¶ 7 Count III alleged that defendant engaged in unlawful financial exploitation of an elderly person on or about March 16, 2009. The count alleged that defendant was in a position of trust and confidence with Morkes, who was 80, and knowingly obtained by deception more than $5,000 of Morkes' personal checks payable to AHP.

¶ 8 Count IV mirrored count III except that it alleged that the offense occurred between December 1, 1998, and March 16, 2009, and that the checks were valued at more than $100,000.

¶ 9 On August 21, 2012, defendant filed a motion to dismiss the indictment for failure to state a cause of action. The trial court denied this motion.

¶ 10 On October 11, 2013, defendant filed a motion to dismiss the indictment as untimely under section 114-1(a)(2) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-1(a)(2) (West 2008)). Defendant noted that a felony prosecution must generally be commenced within three years of the offense's commission (720 ILCS 5/3-5(b) (West 2008)). He argued that

because the bill of indictment was obtained on May 2, 2012, no conduct occurring before May 2, 2009, could be the subject of prosecution, and here all of the indictment's allegations preceded that date.

¶ 11 The State filed an amended bill of indictment on November 6, 2013. The State amended count II to allege that the value of the checks was between $100,000 and $1 million. Also, for all charges, the State cited section 3-6(a)(2) of the Code (720 ILCS 5/3-6(a)(2) (West 2008)), which addresses theft involving a breach of a fiduciary obligation. The statute allows prosecution for such an offense to be brought within one year:

> "after *the discovery of the offense* by an aggrieved person, or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense, and is not himself or herself party to the offense; or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." (Emphasis added.) *Id.*

¶ 12 Defendant filed an amended motion to dismiss the indictment on November 12, 2013, again asserting that no conduct occurring before May 2, 2009, could be the subject of the prosecution. The trial court granted the motion to dismiss on December 18, 2013, stating that the State had the opportunity to refile.

¶ 13 On January 2, 2014, the State filed a third indictment against defendant. It alleged the same offenses but further alleged that Morkes and his children initially reported the theft on June 28, 2011, and did not discover the crime until the police concluded their investigation.

¶ 14 On February 18, 2014, defendant filed a motion to dismiss the third indictment under section 114-1(a)(2). He argued that he was charged with having taken hundreds of thousands of dollars from Morkes to buy insurance policies that never benefitted Morkes. He alleged that

Morkes' daughter, Sandra DePaul, learned on March 11, 2011, that life insurance policies had been cashed out and that Morkes did not receive any money. He argued that DePaul then had one year to have authorities file charges, making the May 2, 2012, bill of indictment beyond the section 3-6(a)(2) one-year extension to the limitations period. Defendant analogized this case to *People v. Chenoweth*, 2013 IL App 4th 120334, *rev'd* 2015 IL 116898, where the appellate court held that the victim had discovered the offenses for purposes of the extended statute of limitations when she learned that the defendant had written checks on the victim's account without permission.

¶ 15 On March 14, 2014, the trial court dismissed counts II and IV pursuant to defendant's motion. However, the trial court then granted the State's oral motion to amend those counts, allowing them to stand. The State inserted language indicating that the acts from December 1, 1998, to March 16, 2009, were part of a single intention and design. The trial court stated that it required a hearing to determine whether to dismiss counts I and III, as there were disputed factual issues as to who knew about the theft, what that person knew, and when that person learned the information.

¶ 16 On March 26, 2014, defendant again moved to dismiss counts II and IV, this time arguing that the amendment made on March 14 was substantive and needed to be presented to the grand jury. The trial court granted the motion on May 7, 2014. The State does not contest the dismissal of these counts on appeal.

¶ 17 An evidentiary hearing regarding defendant's motion to dismiss counts I and III took place on July 16, 2014. The parties and the trial court all agreed that "the operative date" for the purposes of the hearing was May 2, 2011, in that:

> "If the Court finds as a matter of law the discovery of the offense occurred before May 2, 2011, the Court should grant the motion to dismiss based on a violation of [the] statute of limitations. If the Court finds that the discovery was after May 2, 2011, this motion should be denied."

¶ 18 DePaul, the only witness, provided the following testimony. In 1991, her parents had documents drafted giving her power of attorney if they were unable to manage their affairs. Morkes, her father, passed away on October 2, 2012. He had used defendant's financial services for about 20 years before that. In 2009, Morkes became very ill and suffered significant memory loss. He later regained much of his memory but still could not understatand complicated matters such as those involving his estate or Medicare. He did know that he had two life insurance policies in his family limited partnership. DePaul would assist him in things like preparing tax returns, though Morkes would be with her at meetings with advisors.

¶ 19 DePaul last had a conversation with defendant on March 7, 2011, when she and Morkes met with him. The family was concerned with how money would flow from the partnership to the beneficiaries, and Morkes had not been receiving copies of annual reports for the insurance policies. They tape-recorded the meeting because they wanted to be able to play it back to fully understand the partnership. Defendant said that Morkes was the general partner and Morkes' seven children were limted partners. He said that the assets were two John Hancock life insurance policies, one for $1 million and one for $2 million, with the family limited partnership as the beneficiary. The trustee for the policies was Capital Administration, defendant's company. DePaul testified that back in 2009, however, defendant sought more premium payments from Morkes for the life insurance policies and said that Capital Administration had

been changed to Advanced Health Partnership, or AHP. Therefore, in 2009 Morkes wrote two premium checks to AHP.

¶ 20 A couple of days after the March 7, 2011, meeting, Morkes and DePaul met with Phil Dowd, an insurance salesman DePaul's sister knew, because they did not feel comfortable with the family limited partnership and had not received documents that defendant kept promising them. Defendant had also been asking for insurance premiums on an erratic schedule and in different amounts, whereas Morkes' other insurance policies had regular premiums.

¶ 21 On March 15, 2011, DePaul wrote defendant a letter asking for documents and information, but he did not respond. On April 20, 2011, she met with David Waggoner, an estate lawyer, because the family was concerned about the partnership's legality. She and Waggoner spoke about life insurance policies because those were the family limited partnership's assets, but, at that time, she did not know that any insurance policies had been sold. DePaul also spoke to Waggoner by phone on April 29, 2011.

¶ 22 Defense exhibit 1 showed computer entries from Coventry First, LLC. A "Tracking Note" dated March 11, 2011, stated:

> "NLR Sandra asked for clarification regarding the 3 policies that were cashed out. She claims that her dad didn't receive any money at the settlement. She is not upset with Coventry per se. I told her that the other designees were no longer in the business or their phones were disconnected. She would appreciate a designee change form."

An entry marked two months later, on May 18, 2011, stated that a designee change letter was sent to the insured.

¶ 23 DePaul testified that the conversation about the policies being cashed out did not occur on March 11. Rather, her first conversation with Conventry was within one week of when she

received the May 18 letter. If the conversation had occurred on March 11, she would not have written defendant the March 15 letter asking for more information, and she would have asked Waggoner about the policies' sale. She initially thought Coventry was a servicing arm of John Hancock but later learned that Conventry managed policies for the new owner. The Coventry designee forms had names she had never heard of, and her father's signature appeared forged.

¶ 24 DePaul did not go to the police before May 18, 2011, because she did not yet know that a fraud had occurred. She spoke to Waggoner on June 20, 2011, and he gave her information about defendant's criminal past. She then obtained copies of checks for the insurance premiums as evidence, and she went to the police department on June 28, 2011. DePaul agreed that in personal notes that she typed on July 11, 2014, she indicated that she knew that the insurance policies had been sold on April 20, 2011.

¶ 25 DePaul also agreed that she had sent defendant letters years before, on June 15, 2009, and July 5, 2009, asking about the John Hancock insurance policies. The family was still trying to get answers to the same questions in 2011.

¶ 26 The trial court issued a written memorandum on August 28, 2014, stating as follows in relevant part. The victims were concerned about the insurance policies since at least 2009. Of particular import were the Coventry records indicating that on March 11, 2011, the victims were aware that the insurance policies had been cashed out and that they had not received any proceeds from the sale. The evidence did not indicate that Morkes was unable to attend to his affairs. In fact, at some point in August 2011, he was still corresponding with and submitting information to the insurance company. "Much of this case [was] controlled by" *Chenoweth*. Using that case as guidance, March 11, 2011, was the date as to when there was clear knowledge that an offense had occurred. "The victim[s] in this instance when they were aware of that, they

contacted an attorney for a review of matters and within a month were clearly certain that certain things had taken place and were aware of the sale of the policy where they did not receive the proceeds." Since a criminal action was not begun within one year of that date, it was barred by the statute of limitations, and the trial court dismissed the remaining charges in the indictment.

¶ 27 The State filed a motion to reconsider on September 10, 2014, which the trial court denied on October 8, 2014. In denying the motion, the trial court stated that it was "struck" by DePaul's testimony that on April 20, 2011, she knew that the money was gone. It further stated that DePaul's testimony sometimes conflicted with the documentary evidence, but it resolved those inconsistencies based on credibility.

¶ 28 The State timely appealed.

¶ 29 II. ANALYSIS

¶ 30 The State appeals from the trial court's dismissal of counts I and III of the indictment. We review the dismissal of an indictment on statute of limitations grounds *de novo*. *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 36. However, to the extent our analysis requires us to review the trial court's factual findings, we use a manifest-weight-of-the-evidence standard. *People v. Marion*, 2015 IL App (1st) 131011, ¶ 25.

¶ 31 The general limitations period for felonies is within three years after the commission of the offense. 720 ILCS 5/3-5(b) (West 2008). Extended limitations periods apply in various circumstances. 720 ILCS 5/3-6 (West 2008). As relevant here, section 3-6(a) of the Code states:

> "A prosecution for theft involving a breach of a fiduciary obligation to the aggrieved person may be commenced ***
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> ***

(2) *** within one year after *the discovery of the offense* by an aggrieved person, or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense, and is not himself or herself party to the offense; or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." (Emphasis added.) 720 ILCS 5/3-6(a) (West 2008).

¶ 32 At the evidentiary hearing, the trial court and parties agreed that the prosecution began on May 2, 2012, when the indictment was filed, so we accept that date for purposes of this appeal. But *cf. People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 40 (the date the indictment is found or the information is filed marks the beginning of the felony prosecution and stops the running of the statute of limitations). Counts I and III alleged that the offense occurred on or about March 16, 2009, so the indictment was filed outside the general three-year limitations period for felonies in section 3-5(b). Therefore, the issue is whether the prosecution was brought within the one-year extended limitations period of section 3-6(a)(2).

¶ 33 Central to our analysis are *Chenoweth*, 2013 IL App 4th 120334, and our supreme court's reversal of that case (*Chenoweth*, 2015 IL 116898), which occurred after the trial court's ruling. In *Chenoweth*, the defendant was the stepdaughter of the victim, Ella Stathakis. *Id.* ¶ 3. After Ella's husband died, she granted property power of attorney to the defendant. Ella later moved into a nursing home, and, at her direction, the defendant sold Ella's house in March 2005. *Id.* In September 2008, Ella granted property power of attorney to an agency, which shortly thereafter contacted the police, stating that money from the sale of Ella's house was missing. *Id.* The police obtained bank records, and on December 5, 2008, asked Ella about various suspicious payments. Ella said that she had not given the defendant permission to use the money for those purposes. *Id.* ¶¶ 7-8. On December 21, 2009, the State filed a three-count indictment for

financial exploitation of an elderly person. *Id.* ¶ 13. The counts alleged that the defendant committed the offense between December 2004 and July 2005, and each count alleged that a different amount of money had been misappropriated. *Id.*

¶ 34 The defendant moved to dismiss the indictment alleging, as in this case, that the State did not begin prosecution within the standard three-year statute of limitations and that the indictment did not allege any circumstance making the one-year extended limitation period under section 3-6(a)(2) applicable. *Id.* ¶ 14. The State obtained permission to file an information addressing this issue, and there it additionally alleged that the extended limitations period had not expired because the defendant was indicted within one year of January 22, 2009, when the Adams County State's Attorney received the investigative file and became aware of the offense. *Id.* The defendant moved to dismiss the information as untimely, and the trial court denied the motion. After a bench trial, the defendant was found guilty of financial exploitation of an elderly person. *Id.* ¶ 15.

¶ 35 On appeal, the appellate court, with one judge dissenting, agreed with the defendant's argument that her conviction must be vacated because the charges were time-barred. *Id.* ¶ 17. It reasoned that Ella discovered the offense, for purposes of section 3-6(a)(2), on December 5, 2008, when she learned from the police that the defendant had written unauthorized checks from her account. *Id.* ¶ 25. The appellate court stated that the State had one year from that date, until December 5, 2009, to charge the defendant, making the December 21, 2009, indictment untimely. *Id.*

¶ 36 Our supreme court disagreed. It stated that section 3-6(a)(2)'s phrase "discovery of the offense" clearly and unambiguously meant "gaining knowledge or finding out that a criminal statute has been violated." The supreme court stated that the defendant's reasoning was faulty

because she equated suspicion or knowledge that a loss had occurred with awareness or knowledge of a violation of a penal statute. *Id.* ¶ 28. The court stated: "A suspicion of a crime may lead to further investigation, but it does not of itself constitute " 'discovery of the offense.' " *Id.*

¶ 37 Our supreme court noted the appellate court's position that Ella discovered that a crime had been committed on December 5, 2008, when she learned that the defendant had misappropriated her money. *Id.* ¶ 29. The supreme court stated that the record contradicted this logic, as Ella had given the defendant unrestricted property power of attorney, so unauthorized checks did not automatically equal misappropriation. *Id.* ¶ 32. The supreme court stated that the defendant could be liable only for a negligent exercise of a duty of care, so, at most, Ella suspected, but did not know, that the defendant had committed a crime. *Id.* ¶ 34.

¶ 38 The supreme court went on to say that the situation before it was the type in which the legislature intended to provide a remedy through section 3-6. *Id.* ¶ 35. According to committee comments, the legislature enacted section 3-6 " 'to permit increases in the general time limitations with respect to certain offenses which are capable of being readily concealed by the offender, from both the victims and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.' " *Id.*, quoting Ill. Ann. Stat., ch. 38, ¶ 3-6, Committee Comments—1961, at 176 (Smith-Hurd 1989). The supreme court stated that section 3-6(a) was designed to address offenders who had successfully avoided detection of their breach of fiduciary obligation for the general limitations period. *Id.*

¶ 39 The supreme court concluded that in the case before it, section 3-6(a)(2)'s one-year extended limitations period began to run on January 22, 2009, when the Adams County State's Attorney received the police investigation file and became aware of the offense. *Id.* ¶ 36. The

supreme court held that since the defendant was indicted within one-year of that date, the prosecution was timely. *Id.*

¶ 40 The State notes that the trial court here stated it was following the appellate court decision in *Chenoweth*, which focused on when the victims learned of potential wrongdoing, but that our supreme court has since reversed the appellate court's decision. The State argues that DePaul testified that she did not know that the insurance policies had been sold until May 2011, but even accepting the March 11, 2011, date listed in Coventry's records, this knowledge did not indicate that DePaul also knew that a crime had taken place. The State argues that defendant was in a position of trust and authority and could have taken the position that he reinvested the money to help the estate. The State argues that based on our supreme court's decision in *Chenoweth*, the date of discovery for the one-year extended limitation period began on June 28, 2011, when DePaul met with the police.

¶ 41 Defendant points out that the trial court found that the State did not present any evidence to establish that Morkes was incapable of handling his financial affairs in March 2009. Still, defendant states that regardless of Morkes' mental capacity at the time of the alleged offense, DePaul was also an "aggrieved person" under the statute because she was a limited partner of the family partnership. He argues that this case is distinguishable from *Chenoweth* because there the victim granted the defendant an expansive power of attorney, whereas here defendant was in a more limited trustee relationship.

¶ 42 We agree with the State that, while the trial court's decision was consistent with the appellate court's decision in *Chenoweth*, our supreme court's reasoning in its subsequent reversal of that case on appeal also requires that we reverse the trial court's ruling here. That is, the appellate court interpreted section 3-6(a)(2)'s phrase "the discovery of the offense" to mean the

time that the victim learned that the defendant had written checks that she did not authorize. *Chenoweth*, 2013 IL App (4th) 120334, ¶ 27. Likewise, here the trial court focused on the time that DePaul learned that the insurance policies had been sold without Morkes or the family receiving the proceeds, which it found was March 11, 2011. However, our supreme court stated that "the discovery of the offense" did not mean simple knowledge of a loss, because that differed from knowledge that a penal statute had been violated. *Chenoweth*, 2015 IL 116898, ¶ 28. In particular, the *Chenoweth* defendant had property power of attorney, so just because the checks in that case were unauthorized did not mean that the money was misappropriated. *Id.* ¶ 29. Here, defendant acknowledges that he was in the role of trustee for the family limited partnership. Just as a power of attorney creates a fiduciary relationship between the grantor and grantee (*Davies ex rel. Harris v. Pasamba*, 2014 IL App (1st) 133551, ¶ 49), a trustee has a fiduciary duty to a trust's beneficiaries and must carry out the trust according to its terms and act with the highest degree of fidelity and good faith (*Hawkins v. Voss*, 2015 IL App (5th) 140001, ¶ 31). As the State points out, after discovering that the insurance policies had been sold, DePaul had only a suspicion that a crime had been committed, as she did not know what defendant had done with the money; defendant could have reinvested the proceeds for the family limited partnership's benefit. Rather, as in our supreme court's analysis, it was not until the state's attorney received the police investigation file and became aware of the offense that section 3-6(a)(2)'s limitations period began to run. See *Chenoweth*, 2015 IL 116898, ¶ 36. Here, DePaul's testimony revealed that she went to the police on June 28, 2011, so the state's attorney necessarily learned of the offense after that date, making the May 2, 2012, indictment timely. Accordingly, the trial court erred in granting defendant's motion to dismiss counts I and III of the indictment.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we reverse the decision of the McHenry County circuit court and remand the cause for further proceedings.

¶ 45 Reversed and remanded.