Cite as 2013 Ark. 83

SUPREME COURT OF ARKANSAS

No. CR12-243

LOUIS OBERLIN MORRIS
PETITIONER

V.

HONORABLE TIMOTHY W. WEAVER, JUDGE
RESPONDENT

Opinion Delivered FEBRUARY 28, 2013

PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

WRIT DENIED WITHOUT PREJUDICE.

DONALD L. CORBIN, Associate Justice

Petitioner, Louis Oberlin Morris, seeks a writ of certiorari, or in the alternative, a writ of prohibition, issued by this court to the Fulton County Circuit Court on the basis that the circuit court is without jurisdiction to try him for rape because the statute of limitations has expired. Jurisdiction of this petition for extraordinary writ is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(3) (2012). We conclude that, on the record presented, Petitioner has failed to demonstrate that an extraordinary writ is clearly warranted, and we deny the petition without prejudice.

This court has previously considered extraordinary writs in criminal cases when the statute of limitations has expired. *See, e.g.*, *Iberg v. Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985) (denying writ of prohibition where no statute of limitations was applicable to capital offense of first-degree murder); *see also Patrick v. Lineberger*, 265 Ark. 334, 576 S.W.2d 191 (issuing writ of prohibition to preclude trial following denial of motion to dismiss when

statute of limitations for second-degree murder had expired); *see also Grayer v. State*, 234 Ark. 548, 353 S.W.2d 148 (1962) (treating petition for writ of habeas corpus based on statute of limitations as writ of certiorari). The statute of limitations in the criminal code is jurisdictional, unlike some of the civil statutes of limitations that are waived unless pleaded. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993) (citing *Savage v. Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965)); *see also Lineberger*, 265 Ark. 334, 576 S.W.2d 191. The express wording of the limitations statute in the criminal code is a mandatory prohibition on prosecutions outside the limitations period and is therefore a restriction of the court's power to try the case. *Eckl*, 312 Ark. 544, 851 S.W.2d 428. The expiration of the statute of limitations in a criminal case thus leaves a circuit court without jurisdiction to try the case, and therefore presents a jurisdictional issue that can be raised by extraordinary writ. *See Lineberger*, 265 Ark. 334, 576 S.W.2d 191; *see also Grayer*, 234 Ark. 548, 353 S.W.2d 148.

Petitioner was charged by felony information filed on March 4, 2011, with the December 2001 rape of J.L., his then-thirteen-year-old stepdaughter. At the time of the alleged rape in December 2001, the statute of limitations provided that a prosecution for a Class Y felony such as rape must be commenced within six years of the commission of the rape. Ark. Code Ann. § 5-1-109(b)(1) (Supp. 2001). However, pursuant to section 5-1-109(h) (Supp. 2001), which is a savings provision or a limited exception to the general running of the statute of limitations, if the six-year period prescribed in section 5-1-109(b) has expired, a prosecution for rape may nevertheless be commenced:

> [I]f, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) of this section has not expired since the victim has reached the age of eighteen (18).

Ark. Code Ann. § 5-1-109(h). Thus, the effect of the savings provision in effect at the time applicable to this case is to extend the statute of limitations for an unreported rape for up to six years beyond the victim's eighteenth birthday.

Petitioner filed a motion to dismiss the rape charge for lack of jurisdiction. He contended therein that the six-year-limitations period had run and that the savings provision of section 5-1-109(h) was not applicable because a report had been made to a law enforcement agency within the relevant limitations period and no action was taken. Petitioner asserted in his motion that "[t]he state police report disclosed to [Petitioner] indicates that one of [J.L.'s] teachers contacted the child abuse hotline to report the assault when [J.L.] was in high school, which would have been at some point between 2001 and 2005, well within the limitation period." We note that, despite this reference in the motion to a police report, no police report was attached to the motion to dismiss.

Petitioner's motion to dismiss was discussed at a pretrial hearing where the only evidence offered in support of the motion was the testimony of J.L.'s teacher, JoAnna Fulbright. Ms. Fulbright testified that she was a teacher at Ozarka College during the fall of 2005 when J.L. was a student in her class and wrote an essay describing how someone touched her inappropriately and her feelings of discomfort. Ms. Fulbright explained that J.L. did not ask her to report the incident, but that in her capacity as a mandated reporter, she

placed a call to the Child Abuse Hotline and another call to Safe Passage, which she described as an organization that assists victims of domestic battery or child abuse. Ms. Fulbright testified that she identified herself as a teacher in Melbourne, Arkansas, and gave her student's name. This was the full extent of the teacher's testimony.

Although Ms. Fulbright's testimony at the hearing was the only evidence offered in support of Petitioner's motion, Petitioner's counsel did argue in support of the motion that, according to the statutes creating the Child Abuse Hotline, the hotline is an extension of the Arkansas State Police and is designated as the point of contact for the mandated reporters. Counsel therefore contended that the Child Abuse Hotline is a law enforcement agency such that Ms. Fulbright's call thereto would prevent the savings statute from extending the limitations period for the December 2001 rape with which he was charged.

The circuit court considered the statutes cited by Petitioner's counsel, although it is not entirely clear on the record whether the current version of the statutes was being discussed or the version in effect at the time the teacher placed the call in 2005. The circuit court noted that under section "12-18-301," the Child Abuse Hotline is a unit established within the Department of Human Services and that the Arkansas State Police is given authority to administer the Child Abuse Hotline under section "12-8-106." The circuit court then observed that there was no proof on the record before the court that the Child Abuse Hotline had referred Ms. Fulbright's call to any law enforcement agency.

The circuit court ruled from the bench and denied the motion to dismiss. The circuit court reasoned that, according to statute, the Child Abuse Hotline is a unit established by the

Department of Human Services, and there was no proof before the court that this teacher's call was transmitted to a law enforcement agency.

The day after the hearing the circuit court entered a written order denying the motion to dismiss for the same reasons stated from the bench. In the order, the circuit court found that "[a]s a mandated reporter, Ms. Fulbright called the Child Abuse Hotline, in the Fall of 2005, and reported suspected sexual abuse of her student, [J.L.], and communicated the name, age, and location of the student." The order also stated that "[t]he Court finds there was no proof presented to establish that the Child Abuse Hotline is a 'law enforcement agency,' as contemplated by the statute [section 5-1-109(h)], and therefore, denies the motion." The circuit court also entered a separate order staying further proceedings to allow Petitioner to file a petition for writ of prohibition or certiorari with this court.

The very next day, Petitioner filed both a notice of appeal from the order denying his motion to dismiss, as well as the instant petition for extraordinary writ. We took the petition as a case, and then granted the State's motion to supplement the record with the transcript of the hearing on the motion to dismiss. After ordering a supplemental abstract of the hearing, *Morris v. Weaver*, 2013 Ark. 33, ___ S.W.3d ___ (per curiam), supplemental briefing from both parties is now complete, and we turn to the petition.

The jurisdictional question of whether the statute of limitations has expired in this particular case turns on the applicability of the savings statute and specifically whether the teacher's call to the Child Abuse Hotline constituted a report to a law enforcement agency so as to preclude application of the savings statute. As noted, the circuit court specifically

found that there was no proof presented to establish that the Child Abuse Hotline is a law enforcement agency as contemplated in the savings statute or that the teacher's call to the hotline was referred to a law enforcement agency, and therefore denied the motion to dismiss. It is clear here that the circuit court's ruling in this regard was based on a failure of proof, and we agree with the circuit court that Petitioner's proof in support of his motion did not establish the facts necessary to answer the question of statutory interpretation presented.

The State agrees, and responds that we need not decide whether the Child Abuse Hotline constitutes a law enforcement agency for purposes of section 5-1-109(h), as neither the pleadings themselves nor the evidence presented at the hearing on the motion to dismiss are sufficient to demonstrate the facts needed to make such a determination. The State responds further that neither a writ of certiorari nor a writ of prohibition is appropriate relief for such a fact-bound question.

We cannot interpret the savings statute due to the missing factual information, and the failure of proof of the material facts renders neither writ appropriate. "Part and parcel of either writ is the prerequisite that it should not be used when facts are in dispute." *Sturd v. Cir. Ct. of Lonoke Cnty.*, 2010 Ark. 355, at 11, 370 S.W.3d 235, 240. We agree with the circuit court that there was indeed a failure of proof of the facts necessary to determine whether Ms. Fulbright's call constituted a report to a law enforcement agency. The teacher's testimony established only that she made the call to the hotline and that she gave her student's name and identified herself as a teacher. This is simply inadequate for the circuit court or this court to determine that, for purposes of a savings provision, the teacher's call to the Child

Abuse Hotline amounted to a report to a law enforcement agency of the specific rape charged against Petitioner in this case. We conclude that Petitioner has not demonstrated that he is clearly entitled to either a writ of prohibition or a writ of certiorari, and we are convinced that an extraordinary writ should not issue in this case. Accordingly, we deny the petition without prejudice.

Writ denied without prejudice.

HART, J., not participating.

Murphy, Thompson, Arnold, Skinner & Castleberry, by: *Tom Thompson* and *Casey Castleberry*; *L. Gray Dellinger*; and *Jeremy B. Lowrey*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.